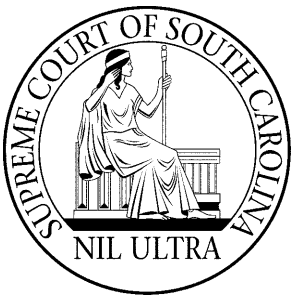

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 5, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2014-UP-098-Janneth Sanders v. Launeil Sanders

2014-UP-099-Amanda Lake v. Jonathan Lake

PETITIONS FOR REHEARING

5185-Hector G. Fragosa v. Kade Construction	Pending
5186-Andreal Holland v. Morbark Inc.	Pending
5190-Morris Antonio Sullivan v. State	Pending
5191-Jacqueline Carter v. Verizon Wireless Southeast	Pending
5192-Larry E. Kinard v. Douglas S. Richardson	Pending
5193-Israel Wilds v. State	Pending
5194-Gerald Smith v. State	Pending
5195-Laura Riley v. Ford Motor Company	Pending
5196-State v. James Anderson	Pending
5197-Gladys Sims v. Amisub	Pending
5198-State v. Julia Gorman	Pending
2013-UP-296-Parsons v. John Wieland Homes	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2014-UP-013-Roderick Bradley v. State	Denied 02/27/14
2014-UP-028-Randy Beverly v. Bucksville Farms	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-042-State v. Charles M. Deveaux	Pending

2014-UP-047-State v. Sam Harold Smith Pending

2014-UP-054-SCDSS v. Selentia O. Pending

2014-UP-055-Jamesetta Washington v. Edmund Rhett, M.D. Pending

2014-UP-056-In the matter of the care and treatment of Patrick Guess Pending

2014-UP-057-State v. Shawn Reaves Pending

2014-UP-058-James Clark, Jr., v. Pyramid Masonry Contractors Pending

2014-UP-062-Stoneledge at Lake Keowee v. IMK Development Pending

2014-UP-064-Antonio Lazaro v. Burris Electrical Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4832-Crystal Pines v. Phillips Pending

4888-Pope v. Heritage Communities Pending

4895-King v. International Knife Pending

4909-North American Rescue v. Richardson Pending

4956-State v. Diamon D. Fripp Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4973-Byrd v. Livingston Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

4992-Gregory Ford v. Beaufort County Assessor Pending

4995-Keeter v. Alpine Towers International and Sexton Pending

4997-Allegro v. Emmett J. Scully	Pending
5008-Willie H. Stephens v. CSX Transportation	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5033-State v. Derrick McDonald	Granted in part Denied in part 02/21/14
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Denied 02/21/14
5041-Carolina First Bank v. BADD	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending

5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending

5111-State v. Alonza Dennis	Pending	
5112-Roger Walker v. Catherine Brooks	Pending	
5113-Regions Bank v. Williams Owens	Pending	
5116-Charles A. Hawkins v. Angela D. Hawkins	Pending	
5117-Loida Colonna v. Marlboro Park (2)	Pending	
5118-Gregory Smith v. D.R. Horton	Pending	
5119-State v. Brian Spears	Pending	
5121-State v. Jo Pradubsri	Pending	
5122-Ammie McNeil v. SCDC	Granted	02/21/14
5125-State v. Anthony Marquese Martin	Pending	
5126-A. Chakrabarti v. City of Orangeburg	Pending	
5127-Jenean Gibson v. Christopher C. Wright, M.D.	Pending	
5130-Brian Pulliam v. Travelers Indemnity	Pending	
5131-Lauren Proctor v. Whitlark & Whitlark	Pending	
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending	
5137-Ritter and Associates v. Buchanan Volkswagen	Pending	
5139-H&H Johnson, LLC v. Old Republic National Title	Pending	
5140-Bank of America v. Todd Draper	Pending	
5144-Emma Hamilton v.Martin Color Fi	Pending	
5148-State v. Henry Jermaine Dukes	Pending	
5151-Daisy Simpson v. William Simpson	Pending	

5152-Effie Turpin v. E. Lowther	Pending
5154-Edward Trimmier v. SCDLLR	Pending
5156-State v. Manuel Marin	Pending
5157-State v. Lexie Dial	Pending
5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending
5161-State v. Lance Williams	Pending
5164-State v. Darren Scott	Pending
5165-Bonnie L. McKinney v. Frank J. Pedery	Pending
5166-Scott F. Lawing v. Univar USA Inc.	Pending
5171-Carolyn M. Nicholson v. SCDSS and State Accident Fund	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. SCDOT	Pending
2011-UP-108-Dippel v. Horry County	Denied 02/21/14
2011-UP-109-Dippel v. Fowler	Denied 02/21/14
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending

2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Denied 02/21/14
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King v. Margie B. King	Denied 02/21/14
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending

2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-526-State v. Christopher Ryan Whitehead	Granted in part Denied in part 02/21/14
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-580-State v. Kendrick Dennis	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending

2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending

2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending
2013-UP-125-Caroline LeGrande v. SCE&G	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-189-Thomas J. Torrence v. SCDC	Pending
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-224-Katheryna Mulholland-Mertz v. Corie Crest	Denied 02/21/14
2013-UP-232-Theresa Brown v. Janet Butcher	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending

2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-304-State v. Johnnie Walker Gaskins	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-317-State v. Antwan McMillan	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-326-State v. Gregory Wright	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Pending
2013-UP-380-Regina Taylor v. William Taylor	Pending
2013-UP-381-L. G. Elrod v. Berkeley County	Pending
2013-UP-389-Harold Mosley v. SCDC	Pending
2013-UP-393-State v. Robert Mondriques Jones	Pending
2013-UP-403-State v. Kerwin Parker	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending

2013-UP-428-State v. Oran Smith	Pending
2013-UP-459-Shelby King v. Amy Bennett	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2013-UP-495-Lashanda Ravenel v. Equivest Financial, LLC	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Philip Earle Williams, Respondent

Appellate Case No. 2014-000060

Opinion No. 27361
Submitted January 27, 2014 – Filed March 5, 2014

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III, of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions as set forth hereafter. He requests the disbarment be made retroactive to March 15, 2013, the date of his interim suspension. In the Matter of Williams, 403 S.C. 362, 743 S.E.2d 733 (2013). We accept the Agreement and disbar respondent from the practice of law in this state. We deny respondent's request to impose the disbarment retroactively to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent drafted a will for Client A. When the will was executed, Client A was in the hospital and unable to speak or sign his name. Respondent named himself as personal representative in the will, entitling him to receive a 5% statutory commission. Respondent served as both a witness and the notary to the execution of the will.

Although respondent engaged in a business transaction with Client A by drafting the will and naming himself personal representative, respondent did not explain to Client A in writing that he would collect a fee or commission for serving as the personal representative, did not tell Client A in writing of the advisability of seeking independent legal counsel, and did not provide Client A with a reasonable opportunity to seek independent legal counsel.

Client A died shortly after the execution of the will and, in accordance with the will, respondent was appointed as the estate's personal representative. The will provided that a named church (Church) was to receive $100,000 and that four members of a family (Beneficiaries) were to share equally in the residuary of the estate.

The estate had $1,253,960.86 in liquid assets. Respondent placed the bulk of the estate's funds into a dedicated trust account and, except for paying himself $26,000, his handling of the funds in that account is not at issue. However, his handling of the first $300,000 he received in estate funds was largely improper.

In August of 2010, respondent deposited the $300,000 into a trust account he had with Branch Bank and Trust (BB&T). Before the deposit, the account balance was $821.90; respondent did not provide records to ODC sufficient to identify the owner(s) of this money. After the $300,000 deposit and before making any further deposits, respondent issued: 1) 73 checks to himself and one check made payable to cash, totaling $227,073.50; 2) a $4,448.00 check to his relative; 3) two checks totaling $10,119.19 to an individual in connection with an unrelated estate; 4) a $5,630.40 check to a bank for reasons not related to the Estate of Client A; 5) two checks totaling $15,000.00 to an individual for reasons unrelated to the Estate of

Client A; 6) a $500.00 check to a beneficiary of the Estate of Client D;[1] 7) two checks totaling $5,663.49 to John Doe, one of the residuary devisees of the Estate of Client D; and 8) a $325.00 check for an expense of the Estate of Client B.[2]

Respondent also disbursed $32,444.96 for legitimate expenses of the Estate of Client A from the trust account. By the end of January 2012, the balance in the BB&T trust account fell to $16,499.04.

On February 1, 2012, respondent deposited $126,493.30 belonging to the Estate of Client B into the BB&T trust account. This was the first deposit since the $300,000 deposit belonging to the Estate of Client A. Respondent continued to make improper payments, most to himself, without regard to proper handling or accounting of the funds of either estate.

During the investigation of this matter, respondent attempted to justify his removal of funds belonging to the Estate of Client A by claiming that one or more of the Beneficiaries had agreed to pay him a legal fee of 15% of the liquid assets of the estate. Respondent had no such fee agreement. In fact, after he had proposed this fee to the Beneficiaries, the Beneficiaries complained to the probate court and hired counsel. A 15% fee would have been approximately $188,000, an unreasonable amount in light of the factors in Rule 1.5, Rule 407, RPC, and far less than the sum respondent had already removed from the estate.

Because of respondent's failure to make disbursements and close the estate, the probate court held a hearing on October 19, 2012. At the hearing, the probate court addressed respondent's proposed 15% fee and respondent agreed to accept the 5% statutory commission as his total compensation for his work on the estate. At the hearing, the Beneficiaries' attorney demanded a full accounting of all estate funds and respondent agreed to file an interim accounting.

On October 24, 2012, respondent filed two interim accountings with the probate court, one for each of the bank accounts. The interim accounting for the dedicated trust account correctly reflected disbursements to date, including the $26,000 paid to respondent in legal fees. The interim accounting for the funds in the BB&T

[1] See Matter IV.

[2] See Matter II.

trust account, however, was largely inaccurate and misleading. Respondent correctly reported the estate funds deposited into the account and the legitimate expense paid from the account, but did not report any of the disbursements he made to himself from the account. Moreover, respondent falsely reported that he held $267,555.04 in the BB&T trust account for the estate when the true balance was $50,394.86, the majority of which belonged to the Estate of Client B. Respondent did not provide an accounting of all disbursements as demanded by the Beneficiaries' attorney.

As a result of his interim accounting and proposed distribution, the probate court directed respondent to make disbursements to the devisees. Respondent was specifically ordered to pay Church the $100,000 it was due within two business days. Because of his improper removal of funds from the account, however, there was not enough money to make the full distributions under his proposal.

After considerable delay and a deposit into his BB&T trust account of funds belonging to another client,[3] respondent paid three of the Beneficiaries but made no payment to Church and shorted one of the Beneficiaries $125,478.12. Respondent sent the partial payment to this beneficiary with a letter of apology seeking the beneficiary's "confidentiality" and "mercy."

Thereafter, the probate court removed respondent for failure to obey court orders. Both the probate court and the Beneficiaries' attorney filed complaints against respondent.

ODC subpoenaed respondent's file for the Estate of Client A and the records for respondent's trust accounts since the date of Client A's death. In response to the subpoena, respondent produced bank statements for his BB&T trust account; he did not produce receipt and disbursement journals, client ledgers, or reconciliation reports for that account and produced no records for his real estate trust account. Respondent did not produce his file for the Estate of Client A.

During an interview with ODC, respondent falsely testified that the two deposits made into his trust account after the $300,000 deposit for the Estate of Client A were earned legal fees for the Estate of Client B and another client C rather than assets of the two clients. During the interview, respondent testified the account

[3] See Matter III.

contained $95,000, almost enough to pay Church, and contended he had protected the funds due Church despite clear evidence that most, if not all, of the $95,000 came from the two intervening deposits. Respondent also admitted it was common practice for him to serve as both attorney and personal representative for estates and his standard fee for his work on such estates was 15% of the estate's liquid assets.

Following the interview, respondent paid Church $90,000 from his trust account, $10,000 less than Church was to receive under the will but far more than the funds on deposit for the Estate of Client A. Respondent also provided ODC with copies of bank statements for his real estate trust account, but did not provide any other records for the account despite having testified during the interview that he maintained proper records for the account.

Matter II

In September of 2006, respondent drafted a will, power of attorney, and health care power of attorney for Client B. At the time, Client B was in a nursing home and respondent named himself Client B's attorney-in-fact as well as personal representative of Client B's estate. The handling of Client B's finances between September 2006 and Client B's death in 2011 have been questioned, but records are unavailable and respondent has no records of any accountings to Client B.

After Client B's death, respondent was entrusted with $126,493.30 belonging to the estate. Respondent placed these funds into his trust account. Although he paid some legitimate estate expenses from these funds, he used the majority of the funds for his own purposes. Respondent later received $2,000 in estate funds that he did not deposit into his trust account, use for estate expenses, or preserve for the estate's beneficiaries.

Client B's will provided a $100 gift to each of his five children with the remainder of his estate to be shared equally by his grandchildren. Respondent made no distributions to Client B's children or grandchildren. The probate court requested an accounting and proof of payment to the beneficiaries, but respondent produced neither.

Unaware of respondent's failure to safeguard the estate's funds, Client B's daughter filed a complaint alleging respondent had not worked diligently on her father's

estate and had not communicated well with the beneficiaries. Respondent failed to report Client B's ownership of a small amount of stock and a parcel of real estate on the inventory and appraisement, failed to pay taxes on the property, and did not redeem the property until five months after it was sold at a tax sale. He also failed to timely close an unneeded storage unit, causing the estate to incur additional expenses.

Matter III

In November of 2012, Client C, the personal representative of an estate, entrusted respondent with $82,488.29 of estate funds which respondent placed into his BB&T trust account. Although respondent paid some legitimate expenses of the estate with these funds, the majority of the funds were disbursed improperly. Respondent also received rent money on behalf of the estate which he did not place into any account or otherwise safeguard and for which he cannot account. Respondent owes the estate $77,451.02.

Matter IV

Respondent drafted a will for Client D and named himself as the successor personal representative. In addition to specific gifts of real and personal property, the will provided for a $1,000 devise and four devises of $500 each. Client D left the residuary of his estate to two relatives, John Doe and Jane Doe.

Upon Client D's death, respondent was appointed personal representative. Respondent deposited $9,563.86 into the account he opened for the estate. He paid $285 in legitimate estate expenses from the estate account, but did not pay any of the devisees from this account or the sole approved estate creditor from the account. Instead, respondent used the remainder of the money for his own purposes, writing himself checks and receiving the balance in the account when the account closed.

Respondent paid residuary beneficiary John Doe $5,663.49 and one beneficiary $500, but made these payments from his BB&T trust account which held no funds for this estate. Respondent failed to distribute four of the five bequests as instructed in the will.

Although respondent did not pay the four bequests, he told the probate court in a letter that he was trying to obtain receipts and releases from three of the beneficiaries. He provided the probate court with a receipt and release from the fourth beneficiary, a community center. The court rejected this receipt and release because it indicated the community center had received a donation from Client D prior to his death rather than a cash bequest under the will. Further, when he applied to settle the estate, respondent indicated he had only paid himself $500 from the estate's funds. He also incorrectly reported to the probate court the sum he had paid to John Doe. In addition to the devisees who received no funds, respondent owes John and Jane Doe an additional $115.37.

Matter V

On March 15, 2013, respondent was placed on interim suspension by this Court and Stephen G. Potts, Esquire, was appointed as Attorney to Protect Clients' Interests. Id. On the day of his interim suspension, respondent received a telephone call from the office of the Clerk of this Court advising of his suspension and instructing him to cease practicing law.

In spite of this notice and instruction, for approximately two weeks thereafter, respondent answered and returned telephone calls from his law office telephone and kept or attempted to keep existing appointments with active clients. Respondent acknowledges his action was improper because he did not clearly communicate his suspended status to callers and clients and attempted to continue to provide legal counsel instead of restricting communication to historical information for the purpose of assisting clients in finding successor counsel.

After his interim suspension, respondent met with one client and presented the client with a document instructing an insurance company how to disburse the client's large settlement. Respondent had backdated the document to the date of his interim suspension and, after the client executed the document, offered to mail it for the client. Respondent attempted to negotiate a higher fee with the client during the meeting and, after the meeting, confirmed he had mailed the document.

Respondent also accepted paperwork and an earnest money check for a residential real estate closing from a realtor. When Mr. Potts emailed respondent and asked about the closing, respondent returned the papers and check to the realtor rather than surrendering them to Mr. Potts.

Respondent did not fully cooperate with Mr. Potts. Among other responsibilities, Mr. Potts was charged with taking control of respondent's trust and other office accounts and disbursing the files to active clients. Respondent did not surrender all of his active files to Mr. Potts in a timely fashion, choosing to hold onto problem files or place them with inactive files. Although he did provide some financial records to Mr. Potts, he did not initially surrender all of his records.

Nearly three months after he was placed on interim suspension, respondent appeared at the drive-thru window of Community First Bank where he maintained several firm accounts and personal accounts. Respondent asked the teller to transfer funds from one of his law firm accounts to a personal account. Before he identified the firm account or provided the amount he wished to transfer, the teller advised he could not make any transactions out of the law firm accounts without Mr. Potts' authorization. Respondent told the teller he was keeping Mr. Potts informed of all of his activities, but acquiesced to the teller's refusal. He then presented the teller with a deposit slip for a personal account and a $350 check made payable to himself. Only later did the bank staff realize the $350 check was drawn on respondent's trust account with First Citizens Bank. After learning that First Citizens would not honor the check, bank staff called respondent and told him the deposit would not be honored. Respondent had not notified Mr. Potts or ODC of the existence of the First Citizens trust account and had not surrendered the checks, bank statements, or other records to Mr. Potts.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not charge or collect unreasonable fee); Rule 1.8(a) (lawyer shall not enter into a business transaction with client unless specified safeguards are followed); Rule 1.15 (lawyer shall safeguard funds of clients and third parties); Rule 3.3 (lawyer shall not make false statement of material fact to tribunal); Rule 3.4(a) (lawyer shall not obstruct party's access to evidence or conceal document of evidentiary value); Rule 3.4(c) (lawyer shall not knowingly disobey obligation under rule of tribunal); Rule 5.5 (lawyer shall not engage in unauthorized practice of law); Rule 5.7 (lawyer is subject to Rules of Professional Conduct when providing law related services in circumstances that are not distinct from lawyer's legal services); Rule 8.1(a) (lawyer shall not make false statement of material fact to disciplinary

authority); Rule 8.1(b) (lawyer shall not knowingly fail to respond to disciplinary authority's inquiries or requests); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits he violated Rule 417, SCACR.

Respondent also admits his conduct is grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or other rules regarding professional conduct of lawyer); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law); and Rule 7(a) (7) (it shall be ground for discipline for lawyer to willfully violate valid court order issued by a court of this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state.[4] In addition, we impose the following conditions as set forth in the Agreement:

1) within thirty (30) days of the date of this opinion, respondent shall enter into a restitution plan with the Commission on Lawyer Conduct (the Commission) to pay restitution totaling $344,037.81 to the nine individuals and entities as stated in the Agreement for Discipline by Consent and the costs incurred by ODC and Commission in the investigation and prosecution of this matter;[5] respondent shall not apply for readmission until he has fully reimbursed each of these individuals and entities;

---

[4] As noted above, the Court denies respondent's request to impose the disbarment retroactively to the date of his interim suspension.

[5] The amount which shall be paid to the Estate of Client B may be reduced by the amount of any legitimate expense respondent proves was made on behalf of the estate.

2) respondent shall not apply for readmission until he has fully reimbursed the Lawyers' Fund for Client Protection for all disbursements made on his behalf; and

3) respondent shall not apply for readmission until he has taken the following steps to identify all injured parties and has made full restitution to all injured parties:

    i.) respondent shall hire a certified public accountant to perform a six-year forensic accounting and audit of all trust accounts, operating accounts, and estate accounts over which respondent had control; and

    ii.) the certified public accountant issues a report which identifies all accounts reviewed and the dates of the records reviewed, identifies all injured parties and the total loss for each, and provides reasonable assurance that all injured parties have been identified.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Stubbs, Appellant,

v.

South Carolina Department of Employment and Workforce and JSE, LLC, Respondents.

Appellate Case No. 2012-212280

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5202
Heard October 8, 2013 – Filed March 5, 2014

VACATED AND REMANDED

Kirby Rakes Mitchell, of Greenville, and Jack E. Cohoon, of Columbia, both of S.C. Legal Services, for Appellant.

Maura Dawson Baker, of the South Carolina Department of Employment and Workforce, of Columbia, for Respondent.

FEW, C.J.: Charles Stubbs appeals an order from the Administrative Law Court (ALC) affirming the South Carolina Department of Employment and Workforce's dismissal of Stubbs' appeal as untimely. We find the ALC improperly made its

own factual findings in violation of its standard of review. Therefore, we vacate the ALC's order and remand.

I. Appeals from the Department of Employment and Workforce

Section 41-35-610 of the South Carolina Code (Supp. 2013) provides that "a claim for [unemployment] benefits must be made pursuant to regulations the department promulgates." According to those regulations, the department's initial determination regarding unemployment benefits is made by a claims adjudicator. S.C. Code Ann. Regs. 47-51 (2011). A party aggrieved by the adjudicator's decision may appeal to the department's "appeal tribunal," which conducts a de novo hearing at which the parties may present testimony to the tribunal. *Id*. The next level for appeal is the department's "appellate panel," which decides the appeal based solely on the evidence in the record before the appeal tribunal. S.C. Code Ann. Regs. 47-52 (2011). The appellate panel's decision may then be appealed to the ALC. S.C. Code Ann. § 41-35-750 (Supp. 2013). Finally, a party may appeal the decision of the ALC to the court of appeals. *See id.* ("An appeal may be taken from the decision of the [ALC] pursuant to the . . . Appellate Court Rules and Section 1-23-610."); S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2013) ("For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the . . . Appellate Court Rules.").

II. Facts and Procedural History

Stubbs applied for unemployment benefits with the department following a car accident that left him unable to continue working for JSE, LLC. The department's adjudicator made an initial determination that Stubbs was eligible for benefits. JSE appealed to the department's appeal tribunal.

On June 14, 2011, the appeal tribunal held a hearing in which Stubbs and a witness for JSE appeared. The appeal tribunal reversed the adjudicator's determination and found Stubbs was disqualified from receiving unemployment benefits because he quit his employment with JSE voluntarily and without good cause. On June 17, 2011, the department mailed the appeal tribunal's decision to Stubbs. The decision notified Stubbs that he may "file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten . . . calendar days," and that his "appeal

may be filed in person at any Workforce Center, or by mail, addressed to Appellate Panel, Post Office box 995, Columbia, South Carolina, 29202."

Stubbs filed an appeal by mail. The envelope containing his appeal arrived at the department bearing a postmark of June 29, 2011, which was twelve days after the department mailed the decision.
In a letter dated August 3, 2011, the appellate panel informed Stubbs it was dismissing his appeal as untimely because he did not file it within ten days. However, the appellate panel advised Stubbs of his right to request that the appellate panel reconsider its decision by "setting forth the reasons for the untimeliness of your appeal."

Stubbs then submitted a handwritten letter asserting he mailed his appeal on June 25, 2011, which was only eight days after the date the department mailed the decision. The appellate panel remanded the case to the appeal tribunal to conduct an evidentiary hearing regarding the timeliness of Stubbs' appeal, stating, "Once this testimony has been received, the record will be reviewed by the [appellate panel]."[1]

At the hearing, Stubbs testified he received the June 17 decision "probably around the 20th" of June. Stubbs asserted he placed his appeal in the outgoing mail slot at his apartment complex the next day, Tuesday, June 21. When asked how he mailed the appeal, Stubbs stated: "I mailed this at my house. [My apartment complex has] a box where the mailman comes, and . . . you got little slots where you can [put] outgoing mail." Stubbs further explained he placed the appeal "in my box . . . it's not a US postal box, it's a box . . . I guess it is. Well, I guess it is because . . . it's a box that's used by the apartment complex . . . for delivering . . . or picking up mail." Stubbs could not explain the June 29 postmark on his appeal.

Based on the evidence and testimony presented at the appeal tribunal's hearing, the appellate panel ruled Stubbs' appeal was properly dismissed as untimely. The appellate panel concluded:

---

[1] The department's regulations provide that the appellate panel may direct the appeal tribunal to take additional evidence. The appellate panel may then issue its own decision based on the additional evidence heard by the appeal tribunal. *See* S.C. Code Ann. Regs. 47-52(C)(3) (2011).

> Although [Stubbs] asserts he mailed the appeal June 21, 2011, it was not postmarked until June 29, 2011, which was eight (8) days later. [Stubbs] was aware he was mailing a time-sensitive document, and it was his responsibility to ensure that the appeal was timely filed. [Stubbs] filed an untimely appeal due to his own error or neglect. Therefore the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

Stubbs appealed to the ALC, arguing the appellate panel erred because "[t]he uncontradicted evidence of record is that [Stubbs] placed his appeal in the mail within the ten-day time frame of [section] 41-35-680, and that, through no fault of his own, the appeal was delayed in its transmission to [the department]."

The ALC affirmed the appellate panel's decision. The ALC, like the appellate panel, acknowledged Stubbs' assertion that he deposited his appeal in the outgoing mail slot at his apartment complex on June 21, 2011. However, the ALC stated:

> [Stubbs] testified that the mail slot where he placed the envelope was not a U.S. Postal Box, authorized by the United States Postmaster General for receipt and delivery of mail. . . . In essence, [Stubbs] merely gave his notice of appeal to a third party, rather than to [the department] or the United States Postal Service. . . . In this case [Stubbs'] actions did not constitute timely or proper service of his Notice of Appeal upon the Department.

Stubbs now appeals to this court, claiming the ALC improperly made its own factual findings and based its decision on those findings.

III. Law/Analysis

The ALC reviews final agency decisions—such as the department's unemployment benefits determination in this case—in its appellate capacity "as prescribed in [South Carolina Code] Section 1-23-380 [(Supp. 2013)]." S.C. Code Ann. § 1-23-600(E) (Supp. 2013). Subsection 1-23-380(5) provides the reviewing court "may affirm the decision of the agency," "remand the case for further proceedings," or

"reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . (d) affected by [an] error of law; [or] (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." The ALC "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." *Id.*; *see also* § 41-35-750 (stating "the findings of the department regarding facts, if supported by evidence . . . , must be conclusive and the jurisdiction of the [ALC] must be confined to questions of law"). Accordingly, the ALC, sitting in its appellate capacity, may not make its own factual findings. *See Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) (stating the standard set forth in section 1-23-380 "does not allow judicial fact-finding" by the reviewing court).

As we read the appellate panel's findings, Stubbs did not act timely in mailing the appeal of the appellate tribunal's decision to the appellate panel. The appellate panel's decision, therefore, appears to be based on Stubbs' untimely placement of the document in the mailbox. The ALC, on the other hand, did not base its decision on the timeliness of Stubbs' actions, but made its own finding that Stubbs did not place the appeal in a United States Postal Service mailbox. Thus, the appellate panel's decision is based on Stubbs' untimely action of depositing the appeal in the mailbox, but the ALC affirmed based on Stubbs' action of depositing the appeal in an improper mailbox. The ALC did not review the finding made by the appellate panel, but instead affirmed based on its own finding, which was not made by the appellate panel. This violates the ALC's standard of review. Therefore, we vacate the ALC's order.

On remand, the ALC shall review the department's factual findings in accordance with section 1-23-380. If the ALC determines the department's findings are not sufficiently detailed to enable review, it may remand to the appellate panel. *See Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (vacating and remanding where the agency's findings of fact were insufficient to allow for a review of the agency decision, and stating, "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings."). If the ALC determines the factual findings of the department are sufficient, it must review those findings within its standard of review, and it may not make factual findings of its own.

IV. Conclusion

The ALC's order is **VACATED** and the case is **REMANDED** to the ALC.

KONDUROS, J., concurs.

PIEPER, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Arthur Teeter, III, Appellant,

v.

Debra M. Teeter, Respondent.

Appellate Case No. 2012-212565

Appeal From Lexington County
Deborah Neese, Family Court Judge

Opinion No. 5203
Heard December 11, 2013 – Filed March 5, 2014

AFFIRMED AS MODIFIED

Jean P. Derrick, of Lexington, for Appellant.

C. Vance Stricklin, Jr., of Moore, Taylor & Thomas, P.A., of West Columbia, and Katherine Carruth Goode, of Winnsboro for Respondent.

KONDUROS, J.: James Arthur Teeter, III (Husband) appeals the family court's rulings regarding the valuation and classification of property in this divorce action. He also argues the family court erred in excluding information obtained from the email account of Debra Teeter (Wife) regarding her relationship with another man. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in November 1996.[1] At that time, Husband was employed as a stock broker for Prudential Securities. He owned several parcels of real estate including his residence, the Indian Creek property, and three rental properties. During the marriage, Husband changed employers and went to work for Legg Mason as a stock broker. He eventually founded his own investment firm, Apex Investment Advisors, LLC, in 2003. Wife became a certified fraud examiner during the marriage. At the time of the temporary hearing in May 2009, Husband claimed gross annual income of $71,000 and Wife claimed $78,756. At the time of the final hearing, in 2011, Husband claimed gross annual income of $116,000 and Wife claimed $97,000.[2] Husband and Wife always maintained separate checking accounts, and Husband put all his regular income, rental income, and proceeds from real estate transactions into his single account.

In 1998, Husband sold the Indian Creek property, and the parties bought their dream home (Bob White property). Husband generally made the mortgage payment on the property and paid for utilities and repairs, while Wife bought groceries and paid for childcare and other miscellaneous expenses. During the marriage, Husband purchased additional rental properties. The division of some of those properties is at issue on appeal, and the details of those transactions are set forth below. Generally, Husband claims he sold or mortgaged nonmarital rental properties for a portion of the newly acquired properties and borrowed the rest in the form of a mortgage on the properties, which were self-supporting.

The parties agreed that after the birth of their second child in 2001, they began to grow apart. After the parties separated in 2008, Husband suspected Wife was involved with another man. He testified he saw Wife's email password written on a sheet of paper that was lying on top of her open purse while he was visiting the marital home to see the children. Husband also testified he installed spyware on Wife's computer but indicated it did not produce any relevant information, only a couple of "garbled" screen shots. Husband read some of Wife's emails, which revealed she had been in contact with a former colleague. In one series of emails

---

[1] Two children were born to Husband and Wife but all issues related to the children have been settled by agreement.

[2] Wife waived alimony prior to the final hearing.

from 2009, Wife attempted to convince the man to meet her in Myrtle Beach. Additionally, Wife admitted at trial she had lied to Husband about attending a class reunion in Nashville and instead went to see the former colleague in Arizona in 2010. Wife never admitted to committing adultery. Husband admitted to committing post-separation adultery.

The family court had previously granted the parties' divorce based on one year's continuous separation. With respect to equitable apportionment, the family court determined the division of marital assets should be 55%/45% in Husband's favor. The family court excluded evidence of Wife's emails and the evidence flowing therefrom on the basis that their interception violated the Electronic Communications Privacy Act. However, the family court emphasized that Wife's alleged adultery had no impact on its division of assets.

The family court determined the Glenn Street properties, rental properties purchased by Husband during the marriage, were marital property. The court further determined Husband's business was marital property and assigned it a value of $74,775.32 based upon a balance sheet prepared by Husband in 2011. The family court assigned equity of $12,600 to the Garner Lane property acquired by an LLC Husband created during the marriage to lease the property to Apex Investors. As part of the division of assets, the parties were to sell the Bob White property, where Wife had been living with the children since the parties separated. Wife was to pay 45% of the mortgage and Husband was to pay 55% until the property sold. Finally, the family court awarded Wife $15,000 in attorney's fees, reasoning Husband's dispute over the Glenn Street properties and his activities concerning Wife's emails had generated a large portion of Wife's attorney's fees. Husband's request for attorney's fees and private detective's fees was denied. This appeal followed.

STANDARD OF REVIEW

"In reviewing the decision of the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 333-34, 741 S.E.2d 739, 744 (2013). "While this [c]ourt retains its authority to make its own findings of fact, we recognize the superior position of the family court in making credibility determinations." *Id.* at 334, 741 S.E.2d at 744. "Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his

burden to demonstrate error in the family court's findings of fact." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Therefore, "the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (internal quotation marks omitted).

LAW/ANALYSIS

I. Exclusion of Emails

Husband contends the family court erred in concluding he violated the Electronic Communications Privacy Act, 18 U.S.C.A. § 2515 (2000), based on a lack of credibility in his testimony that he accessed Wife's emails by means other than spyware.[3] He further maintains the family court erred by interpreting the statute to preclude all the evidence of Wife's alleged adultery except the actual emails. We disagree.

The family court did not find Husband's testimony that he stumbled onto Wife's password to be credible. Husband admitted he installed spyware on Wife's computer for the purpose of monitoring her emails. The determination of credibility lies largely within the province of the family court. The record supports the family court's factual finding in light of Wife's testimony that she had not written down her password and would have left it in her planner at work had she done so. The only way Husband knew to investigate Wife's out-of-town trip was by accessing her email account. Without further argument or testimony that Husband's installation of the spyware did not violate the Act, Husband has not demonstrated the family court erred by excluding all the evidence related to Wife's relationship with her former colleague. *See Rickenbaker v. Rickenbaker*, 290 N.C. 373, 381-82, 226 S.E.2d 347, 352-53 (N.C. 1976) (holding all evidence regarding the wife's adulterous conduct derived by the husband's interception of her phone calls inadmissible under the Act).

[3] 18 U.S.C.A. § 2515 provides "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . ."

Even if the family court erred in excluding evidence of the relationship, the court explicitly stated in its order that neither Wife's conduct nor Husband's post-separation adultery were considered in the equitable division of assets.[4] The court determined Husband and Wife grew apart as a consequence of not communicating after the birth of their second child. While Wife's post-separation contact with her former colleague was not completely irrelevant, the family court determined it did not impact the break-up of the marriage nor deplete the marital assets. That is a finding well-within the family court's purview, and Husband has not met his burden of proving the family court erred.

II. Glenn Street Properties

Husband argues the family court erred in determining the Glenn Street properties, purchased or created during the marriage, were marital assets. We disagree.

Husband purchased 951 Glenn Street in 1998 for approximately $60,000. He testified he used $11,726 in proceeds from the sale of the Indian Creek property as a down payment. HUD statements support that Husband sold the Indian Creek property, received approximately $34,000 in proceeds, and purchased 951 Glenn Street two weeks later with an $11,726 down payment. Husband financed the remainder of the purchase price with a mortgage on the property, and the record shows 951 Glenn Street generated enough rent to cover the mortgage payments. Wife testified she did not know the source of the funding to buy 951 Glenn Street.

In March 2001, Husband mortgaged a nonmarital property (the Wellington property) and netted $29,524. Husband testified that in November 2001, he used those funds to subdivide 951 Glenn Street into two additional lots, 947 and 955, and make improvements to them. Husband made total improvements of $87,543 to the two new lots utilizing personal credit lines to pay for the remainder of the improvements. When the work was completed, Husband mortgaged 947 Glenn Street and 955 Glenn Street for $111,800. He paid off the credit lines with the mortgage loan and the rent generated covered the mortgage payments.

Generally, property acquired during a marriage is considered marital property regardless of how title is held. S.C. Code Ann. § 20-3-630(A) (Supp. 2012). Two

---

[4] *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

exceptions to this general rule include property acquired before the marriage or property acquired in exchange for nonmarital property. *Id.* "The burden to establish an exemption under section [20-3-630] is upon the one claiming that the property is not marital property." 13 S.C. Jur. *Divorce* § 57 (1992).

> The nonmarital character of . . . property may be lost if "the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property."

Myers v. Myers, 391 S.C. 308, 319, 705 S.E.2d 86, 92 (Ct. App. 2011) (quoting *Hussey v. Hussey*, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984)). "The phrase 'so commingled as to be untraceable' is important because the mere commingling of funds does not automatically make them marital funds." *Id.* (quoting *Wannamaker v. Wannamaker*, 305 S.C. 36, 40, 406 S.E.2d 180, 182 (Ct. App. 1991)).

"For purposes of equitable distribution, a marital debt is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable." *Schultze v. Schultze*, 403 S.C. 1, 8, 741 S.E.2d 593, 597 (Ct. App. 2013) (quoting *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005)). "There is a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is marital and must be factored in the totality of equitable apportionment." *Id.*

In this case, because the Glenn Street properties were purchased or created during the marriage, Husband bears the burden of establishing the properties were nonmarital. The family court concluded Husband failed to meet this burden because the nonmarital funds used to purchase and improve the properties were so commingled into Husband's checking account as to be untraceable. Furthermore, the family court noted the properties were primarily acquired with debt incurred during the marriage.

We conclude the family court correctly determined 951 Glenn Street was a marital asset. Husband testified he used $11,726 from the sale of the nonmarital Indian Creek property as a down payment. The remainder of 951 Glenn Street was

acquired through a mortgage on the property. While the record demonstrates the property generated enough income to cover the mortgage payment, the debt was incurred during the marriage and the rental income from the property was used to benefit both parties. Husband testified excess rental proceeds were used in support of the marriage, and the rental payments were always deposited into Husband's general checking account. Therefore, we affirm the family court's determination that 951 Glenn Street constituted marital property.

However, applying our *de novo* standard of review, we find Husband was able to establish that nonmarital funds contributed to the initial purchase of 951 Glenn Street. His down payment of $11,726 was sufficiently traceable to the sale of the Indian Creek property. Wife did not dispute Husband's testimony regarding his use of the Indian Creek funds, and the HUD statements from the closing of the Indian Creek sale and Glenn Street purchase support Husband's testimony.[5] Additionally, the sale of the Indian Creek property and the purchase of Glenn Street occurred only two weeks apart. *See Myers*, 391 S.C. at 319-20, 705 S.E.2d at 92-93 (finding Husband's truck was nonmarital property when he inherited $60,000, deposited the funds into a joint account holding his general income, wrote a check for the truck the following day, and Wife could not dispute that the inheritance was the source of funds for the truck).

Although Husband is entitled to recognition of this nonmarital contribution, we decline to modify the family court's equitable division ratio of the marital estate. Husband is not entitled to a "refund" of his down payment contribution.[6] That contribution is merely to be considered a factor in the overall equitable distribution between the parties. The family court acknowledged that Husband had made a larger direct financial contribution to the acquisition of marital assets — 65%. Husband's down payment contribution is not significant enough to warrant modification of the family court's otherwise well-reasoned equitable distribution of 55% of the marital assets to Husband and 45% to Wife.

---

[5] Wife did not contend at trial the Indian Creek property had been transmuted.

[6] *See Barrow v. Barrow*, 394 S.C. 603, 614, 716 S.E.2d 302, 308 (Ct. App. 2011) ("[A]ny special equity . . . in the marital home was not to be apportioned separately but was to be considered as a factor in equitable distribution." (citing *Dawkins v. Dawkins*, 386 S.C. 169, 173-74, 687 S.E.2d 52, 54 (2010) *abrogated on other grounds by Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011))).

With respect to the division and improvements that created 947 and 955 Glenn Street, we agree with the family court that Husband's contribution from the Wellington property was not sufficiently traceable. The Wellington mortgage was secured six months prior to the expenditures on the Glenn Street lots and the funds were routed through Husband's single checking account. Furthermore, the remainder of the improvements was ultimately paid for with a mortgage on the properties themselves. Accordingly, we affirm the family court's determination that all of the Glenn Street properties were marital property.

III. Valuation of Garner Lane Property

Next, Husband maintains the family court erred in determining the value of and equity in the Garner Lane property. We disagree.

The Garner Lane property is a commercial space purchased by JJ&M, LLC, an entity formed by Husband for the purpose of purchasing the property. Husband's business, Apex Investors, leases it for office space. JJ&M purchased the property for $129,900 in 2005. Wife testified she believed the current fair market value of the property at the time of the final hearing was $130,000. Husband testified the value of the property had gone down based on the declining real estate market and valued the property at $108,000. Neither party had the property appraised for trial because of the expense. We affirm the family court's valuation of the Garner Lane property as it was within the range of values presented at trial. *See Reiss v. Reiss*, 392 S.C. 198, 205, 708 S.E.2d 799, 802 (Ct. App. 2011) (holding the family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented).

Furthermore, the family court found $12,600 in equity in the property. The parties do not dispute that rental payments from Apex Investors to JJ&M are what reduced the mortgage and created any equity in the property. However, Husband contends because his business was the tenant, he should be credited with the creation of that equity. This argument is without merit, and we affirm the family court's ruling.

IV. Valuation of Husband's Business

Husband contends the family court erred in valuing his investment business closer in time to the final hearing than the dating of filing. We agree.

"In South Carolina, marital property subject to equitable distribution is generally valued at the divorce filing date. However, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after a separation but before divorce." *Burch v. Burch*, 395 S.C. 318, 325, 717 S.E.2d 757, 761 (2011) (citations omitted); S.C. Code Ann. § 20-3-630(A). The party seeking a deviation from the statutory filing date bears the burden of proof. *Burch*, 395 S.C. at 329, 717 S.E.2d at 763. "Passive appreciation refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. [A]ctive appreciation, on the other hand, refers to financial or managerial contributions of one of the spouses." *Id.* at 325-26, 717 S.E.2d at 761 (citations and internal quotation marks omitted).

> It is fairer to value a passive asset at or near the time of the final hearing, because both parties are equally deserving to share in any increase or decrease . . . . [On the other hand,] active assets should be valued at the time of commencement [or filing] of the marital litigation, to enable the person who causes the change in value to receive the benefits of his or her labor and skills or, conversely, to prevent the person who controls the assets from manipulating the value downward during litigation.

Id. at 326, 717 S.E.2d at 761 (alterations in *Burch*) (quoting Roy T. Stuckey, *Marital Litigation in South Carolina* 310 (3rd ed., 2001)).

Burch had not been published at the time of the final hearing in this action. However, the passive/active analysis generally applied by our courts prior to *Burch* and specifically adopted therein is the proper approach for valuing Husband's business. The family court valued Apex Investors at $74,775.32 based upon a balance sheet prepared by Husband in 2011. Husband argues the correct valuation

would have been reflected on the balance sheet he prepared at the time of filing in 2008, which showed a value of negative $784.56.[7, 8]

In determining whether using the 2011 figure was appropriate, we must consider whether the change in value of the business was passive appreciation or active appreciation based upon Husband's efforts. The change was, according to Husband's own testimony, a reflection of the changing stock market. Although the business is not a publicly owned company, the fact that it is an investment company means the stock market will affect the transactions clients make and the commission or profit generated for Apex Investors. In that sense, the business could be positively affected by a change in the stock market. However, Husband's expertise and efforts were required to take advantage of these changes to benefit Apex Investors. Had Husband not advised clients to make certain transactions at certain times, any benefit of the change in the market would not have been realized within the business. Based on the record before us, we cannot conclude Wife met her burden of establishing the change in the value of Apex Investors was passive appreciation. Therefore, the family court erred in valuing it based on the 2011 balance sheet and should have valued it based on the 2008 balance sheet. After calculating the difference this valuation makes in the overall marital estate, we conclude Wife owes Husband $31,751.95 in order to effectuate the family court's 55%/45% distribution.

V. Credit for Occupying Marital Residence

Husband contends the family court abused its discretion in not crediting him with the value of Wife's use and possession of the Bob White property. We disagree.

Prior to the family court's final order, the parties had agreed Husband would pay $700 and Wife would pay $1,400 of the $2,100 monthly mortgage. At the final hearing, the family court determined the parties should pay the mortgage in the ratio of their equitable distribution. The parties agreed Wife would remain in the marital home. She pays the utilities and is responsible for making any

---

[7] Neither Husband nor Wife presented expert testimony at trial as to the value of Husband's business.

[8] In his brief, Husband acknowledges the existence of a $5,000 note payable to shareholder that should be included in the 2008 value of the business. Therefore, the valuation of the business in 2008 would be $4,215.44.

improvements or changes recommended by the realtor to assist in selling the property. Additionally, Wife must maintain and make the home available for showings. Husband has substantially more income-generating assets than Wife and will be entitled to a larger equity in the proceeds from the sale of the home based on the 55%/45% distribution. Furthermore, Husband cites no authority to support his argument, rendering anything other than a general fairness argument abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when appellant fails to provide arguments or supporting authority for his assertion). We find no error in the family court's ruling and affirm.

VI. Attorney's and Detective's Fees

Husband asserts the family court abused its discretion in awarding Wife $15,000 in attorney's fees and in denying Husband's request for attorney's and detective's fees. We disagree.

"The decision to award attorney's fees is within the family court's sound discretion, and although appellate review of such an award is de novo, the appellant still has the burden of showing error in the family court's findings of fact." *Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012). In deciding whether to award attorney's fees and costs, the court should consider the following factors: (1) the ability of the party to pay the fees; (2) beneficial results obtained; (3) the financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

The family court thoroughly addressed each factor in determining whether to award attorney's fees. The record supports that Husband has the greater ability to pay attorney's fees and absorb that cost into his standard of living. Wife successfully established the Glenn Street properties were marital in nature and prevented Husband from introducing evidence related to her alleged adulterous relationship. On appeal, Husband established the family court erred in valuing Apex Investors. However, this determination does not render the beneficial results between the parties so much in Husband's favor that the decision on attorney's fees should be disturbed. Accordingly, the family court did not abuse its discretion in awarding Wife a portion of her attorney's fees and denying Husband's request.

CONCLUSION

Based on our review of the record, we affirm the family court's decision to exclude evidence of Wife's alleged adultery and the determination that all three Glenn Street properties are marital in nature. Furthermore, we affirm the family court's determinations as to the equity in the Garner Lane property, Husband's entitlement to a credit for Wife's occupation of the marital home, and attorney's fees. We modify the family court's ruling as to the value of Husband's business and order Wife to pay Husband $31,751.95 to effectuate the 55%/45% equitable distribution between the parties.

AFFIRMED AS MODIFIED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nicholas Jerel Brannon, Appellant.

Appellate Case No. 2011-184266

Appeal From Spartanburg County
Gordon G. Cooper, Special Circuit Court Judge

Opinion No. 5204
Heard December 16, 2013 – Filed March 5, 2014

REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Legal Counsel Tommy Evans, Jr., of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Respondent.

THOMAS, J.: Nicholas Jerel Brannon appeals an order revoking his probation and requiring him to serve five months of his original sentence. Brannon's appellate counsel initially filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and moved to be relieved from further representation; however, this court denied the motion and directed the parties to submit briefs on the questions

of whether the circuit court erred in allowing Brannon to waive any challenge to his probation revocation and to waive legal representation without holding a hearing on the voluntariness of these waivers. We remand this matter to the circuit court for specific findings of fact regarding the validity of Brannon's waivers of a hearing on the revocation of his probation and of his right to counsel.[1]

Brannon pled guilty to a charge of assault and battery of a high and aggravated nature and received a sentence of eighteen months, suspended to time served and probation for eighteen months. Several months later, a probation violation citation was issued against Brannon, alleging failures on his part to report, pay supervision fees, comply with the public service condition of his probation, and follow his probation agent's advice. Subsequently, Brannon signed a pre-printed waiver form generated by the Department of Probation, Parole and Pardon Services in which he purportedly indicated his decision to proceed without counsel and waived the right to appear before the circuit court or a probation hearing officer. The same day Brannon signed the form, the circuit court issued an order revoking Brannon's probation and requiring him to serve five months' imprisonment. Brannon appealed. After the notice of appeal was filed, Brannon's appellate counsel attempted to order a transcript of the proceedings, but was informed by the court reporter and the Public Defender's Office in Spartanburg County that no hearing on Brannon's probation revocation had taken place.

'"[A] probationer is entitled to a hearing on the question of revocation.'" *Martin v. State*, 338 S.C. 401, 405, 526 S.E.2d 713, 715 (2000) (quoting *Lovell v. State*, 223 S.C. 112, 117, 74 S.E.2d 570, 571 (1953)). Nevertheless, such a hearing is not a jurisdictional requirement; rather, it has been recognized as a due process right that can be waived by the probationer. *Id.* at 406, 526 S.E.2d at 716. Such a waiver must be knowing and voluntary. *See Moore v. State*, 399 S.C. 641, 647, 732 S.E.2d 871, 873 (2012) ("A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court

---

[1] We have reviewed the record as required by *Anders v. California*, 386 U.S. 738 (1967), and *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991), and find no other directly appealable issues of arguable merit.

and defendant's counsel, or both." (citing *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000))). Although it is not essential that the waiver appear "on-the-record," *Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994), we are troubled by the absence of any finding whatsoever in the appealed order that Brannon knowingly and voluntarily relinquished his right to a hearing. To the contrary, pre-printed language in the form order revoking Brannon's probation states the circuit court found Brannon violated various conditions of his probation "[a]fter hearing the evidence and being duly advised" in Brannon's absence. We therefore remand this matter to the circuit court to determine whether, based on the complete record of this case, Brannon knowingly and voluntarily waived his right to a probation revocation hearing.

Similarly, the appealed order included no findings about the validity of Brannon's purported waiver of counsel; therefore, we remand the matter to the circuit court for findings on this issue. *See* Rule 602, SCACR (requiring "every person charged with the violation of a probationary sentence" to be informed by "the presiding judge of the court in which the matter is to be determined" about the right to counsel and the right have counsel appointed by the court if the person is financially unable to employ counsel); *Turner v. State*, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (recognizing that "a probationer does not have a Sixth Amendment right to counsel," but further stating that "[i]n South Carolina, . . . all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law"); *id.* (indicating a probationer's right to counsel when charged with violating the probation terms arises pursuant to the Due Process Clause under the Fifth and Fourteenth Amendments); *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) ("[T]he terms of Supreme Court Rule 51 [now Rule 602, SCACR] require that: (1) *all* persons charged with probation violations be advised of their right to counsel, and (2) *indigent* persons be advised of their right to court appointed counsel.").

REMANDED.

SHORT and WILLIAMS, JJ., concur.