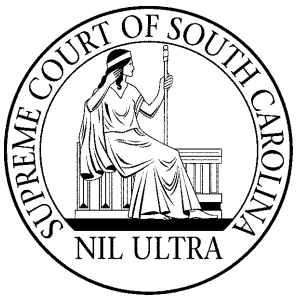

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39

October 11, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William M. Yates, Jr., Respondent.

Opinion No. 25877
Submitted July 27, 2004 – Filed October 11, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, Assistant Deputy Attorney General J. Emory Smith, Jr., and Assistant Deputy Attorney General Robert E. Bogan, all of Columbia, for Office of Disciplinary Counsel.

William R. Bauer, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was the physician and family friend of M.C., an eighteen year old woman. On April 16, 1996, respondent prescribed an anti-

depressant for M.C.; she took the medication throughout the time of the incident pertinent to this matter.

On May 3, 1996, respondent accompanied M.C. to dinner, a nightclub, and his home and he consumed alcoholic beverages at each location. M.C. drank a portion of a light beer at respondent's home. At his home, respondent began to kiss and fondle M.C. M.C. expressed her desire to end the episode and called friends to pick her up from respondent's home.

On May 31, 1999, the State Board of Medical Examiners issued an order publicly reprimanding respondent, fining him $10,000, and indefinitely suspending his license to practice medicine pending successful completion of an acceptable psychological and behavioral assessment program.[1] By order dated February 17, 2002, the State Board of Medical Examiners reinstated respondent's medical license in a probationary status until respondent's compliance with specified terms and conditions.

Respondent agrees to comply with the February 17, 2002 Supplemental Order of the State Board of Medical Examiners and to notify ODC of any change in the status of his license to practice medicine. ODC reserves the right to take further action as to this matter based on any change in the status of respondent's license to practice medicine.

LAW

Respondent admits that he has committed a criminal act (simple assault) and that this misconduct violates Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR. See Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act which reflects adversely upon his honesty, trustworthiness, and fitness as a lawyer in other respects). In addition, respondent admits he has violated Rule 8.4(a) of the Rules of Professional Conduct. See Rule 8.4(a) (it is professional misconduct for a

[1] On April 19, 2000, respondent was placed on interim suspension. In the Matter of Yates, 340 S.C. 80, 531 S.E.2d 287 (2000).

lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.[2]

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[2] In light of the final determination made in this matter, respondent's interim suspension is hereby lifted. See Rule 17(b), RLDE, Rule 413, SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Scratch Golf Company, Respondent,

v.

Dunes West Residential Golf Properties, Inc.; Dunes West Property Owners Association, Inc.; Allan Feker, A/K/A Ali Daghighfekr; Melinda McDonald; Julian Michael Murrin; Larry Schultz; Wilbur "Bill" Upson; Kathy Merritt; William "Bill" Fellers; Charles V. Cuddeback; and John Does and Jane Does, as past and current directors and officers of Dunes West Property Owners Association, Inc., Defendants,

of whom Dunes West Residential Golf Properties, Inc., and Allan Feker, A/K/A Ali Daghighfekr, are Appellants.

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 25878
Heard May 25, 2004 - Filed October 11, 2004

REVERSED AND REMANDED

John A. Massalon, of Wills and Massalon, of Charleston, for Appellants.

H. Brewton Hagood and Richard S. Rosen, both of Rosen, Rosen, and Hagood, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Dunes West Residential Golf Properties (Developer) asserts that the Master-in-Equity erred in granting a preliminary injunction in favor of Scratch Golf Company (Scratch Golf). The action arose after the Dunes West Golf Course was damaged by the alleged saltwater infiltration of various irrigation ponds that were supposed to be maintained by the Developer. The Master granted a preliminary injunction in favor of Scratch Golf, ordering the Developer to place $4.5 million into an escrow account to provide a fund for the damages arising out of Scratch Golf's pending civil action for breach of contract and negligence against the Developer. We find that the Master erred in granting the preliminary injunction because Scratch Golf did not present sufficient evidence to establish that injunctive relief was appropriate.

FACTUAL/PROCEDURAL BACKGROUND

The Dunes West subdivision in Mount Pleasant, South Carolina, began as a joint venture between Wild Dunes Associates and Georgia-Pacific Investment Corporation (Joint Venture). In 1991, Scratch Golf purchased Dunes West Golf Club and now owns and operates the golf course and its facilities. In 1998, Allan Feker (Feker) purchased all of the undeveloped property in the community from the Joint Venture and immediately assigned his rights to a shell corporation, Dunes West Residential Golf Properties (Developer). The Developer assumed all of the Joint Venture's rights and obligations, including its obligation under section 7.2(w) of the Sale and Purchase Agreement with Scratch Golf to maintain the water quality of the subdivision's lagoon system.

Various freshwater lagoons surround the Dunes West Golf Course and provide a source of water that Scratch Golf uses to irrigate the golf course. The lagoons collect rainwater, and if the water level rises too high, the excess water will flow into adjacent saltwater creeks through an outflow pipe. The pipe system is only supposed to allow the fresh water to flow out, but in some lagoons -- most notably the lagoon located next to the 17th hole -- the saltwater flows in through the pipes and infiltrates the freshwater lagoons.[1] Because the saltwater contamination of the lagoons has allegedly damaged the golf course, Scratch Golf filed a cause of action for breach of contract and negligence against the Developer and the Dunes West Property Owners Association.

Meanwhile, based on its concern that it would be unable to collect on a judgment entered against the Developer, Scratch Golf argued before the Master that he should grant a preliminary injunction in order to capture some of the Developer's assets before the undeveloped Dunes West property was sold to John Weiland Homes. Scratch Golf asserted that the total damages caused by the saltwater contamination were $6 million, which represents the cost of rebuilding much of the golf course. The Developer, however, asserted that the damages amount to $600,000.[2]

The Master granted Scratch Golf's motion for a preliminary injunction and set an escrow amount at $4.5 million. In addition, pursuant to Rule 65, SCRCP, the Master held that Scratch Golf would purchase a $1 million bond as security in the event the Developer was wrongfully enjoined. The Developer has appealed the Master's ruling, and pursuant to Rule 204(b), SCACR, this Court certified the case from the court of appeals.

The Developer raises the following issues on appeal:

---

[1] The saltwater inflow occurs during an above-average high tide.

[2] This amount comes from the affidavit of the Director of Golf Course Management at Kiawah Island Club, Tommy Witt, who is not an expert in engineering or plant and soil science. These damage figures only cover replacing dead grass and not replacing contaminated soil.

I. Did the Master have the authority to issue the preliminary injunction?

II. Did the Master err in finding that Scratch Golf presented sufficient evidence to justify an injunction?

III. Did the Master err in setting the amount of Scratch Golf's bond at $1 million?

STANDARD OF REVIEW

Upon review of an action in equity, this Court may make factual findings based on its own view of the preponderance of the evidence. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. Authority to Issue an Injunction

The Developer asserts that the Master did not have the authority to issue the preliminary injunction that poured $4.5 million of the Developer's assets into an escrow account. We disagree.

The Developer relies on a United States Supreme Court decision, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961 (1999), which held that a U.S. District Court was not authorized to issue a preliminary injunction -- absent a prior attachment of a money judgment -- because the remedy was historically unavailable in a federal court of equity. This decision limiting a federal court's equitable powers is not dispositive of whether a state court judge may restrain a defendant's assets prior to the attachment of a money judgment. There is no federal question here that would cause the *Grupo* decision to be binding in this state court proceeding. Thus we decline to apply the *Grupo* analysis to this matter.

II. Appropriateness of the Preliminary Injunction

The Developer asserts that the Master erred in granting the preliminary injunction because Scratch Golf did not present sufficient evidence to establish that injunctive relief was appropriate. We agree.

An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Flanagan, *S.C. Civil Procedure*, 507 (2d ed. 1996). For a preliminary injunction to be granted, the plaintiff must establish hat (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *County of Richland v. Simkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

Although Scratch Golf may be able to satisfy elements 1 and 2, it cannot satisfy element 3 because there was an alternative remedy at law available for Scratch Golf: the statutory remedy of attachment. Therefore, an injunction was not the appropriate remedy.

At the preliminary injunction hearings, Scratch Golf argued that if an injunction were not granted, it would suffer irreparable harm having no adequate legal remedy to recover the proceeds from the sale of Dunes West in order to satisfy the potential judgment it would have against the Developer. Scratch Golf feared that the Developer's $1 million umbrella insurance policy, the Property Owner's Association $1 million umbrella insurance policy, or any leftover proceeds from the sale of the development would not be available to satisfy a judgment. Scratch Golf further argued that even if there were leftover proceeds from the sale, the Developer would take the proceeds out of the state to invest elsewhere, making it difficult for Scratch Golf to recover its judgment interest from those proceeds.

This argument that Scratch Golf asserted -- that once it receives a money judgment from its contract and tort action, it may have difficulty *collecting* from the Developer because the Developer may "take its assets and run" out of the state -- is not proper justification for why a preliminary injunction should be issued but rather is justification for the statutory remedy

of attachment. S.C. Code Ann. § 15-19-10 (2003), the attachment statute, provides:

> In any action:
>
> (8) When any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of or secreted or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;
>
> The plaintiff at the time of issuing the summons or any time afterwards may have the property of such defendant or corporation attached, in the manner prescribed in this chapter, as a security for the satisfaction of such judgment as the plaintiff may recover.

As this Court has stated, "[t]he purpose of attachment generally is to take a defendant's property into legal custody so that it may be applied to the plaintiff's debt, when established." *John Deere Plow Co. of St. Louis v. L.D. Jennings, Inc.*, 203 S.C. 426, 27 S.E.2d 571, 572 (1952). "[A]n attachment is merely a provisional remedy in aid of an action, and hence, to make it available, an action must be commenced in regular form." *Williamson v. Eastern Bldg. Ass'n.*, 54 S.C. 582, 32 S.E. 765, 770 (1899) (citation omitted).

We find Scratch Golf's argument that a preliminary injunction was necessary to protect its pre-judgment interest in the Developer's property should have been an argument justifying the necessity of an attachment. Due to the confusing and unusual posture of this case, we remand this matter to the Master so that the parties may argue the merits of whether an attachment -- not an injunction -- may be litigated pursuant to the attachment statute.

CONCLUSION

We remand the matter to the Master for further proceedings to evaluate the attachment issue. We preserve the status quo, both the escrow of $4.5 million and the $1 million surety bond, until the Master issues an order resolving the attachment question.

REVERSED AND REMANDED.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of H. Ray Ham, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has consented to being placed on interim suspension.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS FURTHER ORDERED that Judith Callison Fisher, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Fisher shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Fisher may make disbursements from respondent's trust account(s), escrow

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Judith Callison Fisher, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Judith Callison Fisher, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Fisher's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

October 4, 2004

The Supreme Court of South Carolina

RE: Amendment to Rule 420(b)(3).

O R D E R

Rule 420(b)(3), SCACR, regarding the membership on the Chief Justice's Commission on the Profession is amended to read:

> (3) Law School Faculty: Two members of the faculty of a South Carolina Law School.

This amendment shall be effective immediately

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 6, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Hall Cannon, Appellant,

v.

South Carolina Department of Probation, Parole and Pardon Services, Respondent.

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 3871
Heard September 15, 2004 – Filed October 11, 2004

AFFIRMED

Richard A. Harpootlian and M. David Scott, both of Columbia, for Appellant.

Teresa A. Knox, Deputy Director of Legal Services, Tommy Evans, Jr., Legal Counsel and Legal Counsel J. Benjamin Aplin, all of Columbia, for Respondent.

SHORT, J.: John Cannon appeals from an order requiring him to submit a DNA sample as a condition of his parole. Cannon argues the statute was amended to exclude him from the DNA requirement and forcing him to provide a sample violates the ex post facto clauses of the United States and South Carolina Constitutions. We affirm.

FACTS

Cannon was convicted of murder in April 1972 and was sentenced to life imprisonment. He subsequently pled guilty to two additional counts of murder and received concurrent life sentences for those two counts. All three murder counts arose out of the same occurrence.

On October 12, 1983, the South Carolina Department of Probation, Parole and Pardon Services (the "Department") released Cannon from prison. He was to remain under the Department's supervision for the remainder of his life and was required to "carry out all instructions [his parole agent] gives," but was not required to submit a blood sample as a condition of his release. Twelve years later, South Carolina enacted the State Deoxyribonucleic Acid Identification Record Database Act (the "DNA Act"), found in sections 23-3-600 to 700 of the South Carolina Code (Supp. 2003), which require a person "currently paroled and remaining under supervision of the State" to provide a DNA sample as a condition of his or her parole. S.C. Code Ann. § 23-3-620(C) (Supp. 1995); Act No. 497, 1994 S.C. Acts 5816-5817. In July 2000, the DNA Act was amended to require a DNA sample from a person "convicted or adjudicated delinquent before July 1, 2000, who is serving a probated sentence or is paroled on or after July 1, 2000." S.C. Code Ann. § 23-3-620(E) (Supp. 2003). In February 2001, the Department notified Cannon that he was required by law to provide a DNA sample as a condition of his parole and failure to do so would be considered a violation of his parole.

In March 2002, Cannon instituted a declaratory judgment action, seeking a determination whether the DNA Act requires, as a condition of his parole, that he submit a DNA sample for inclusion in the DNA database. Cannon also sought and was granted a temporary restraining order precluding

the Department from requiring him to submit a DNA sample while the case was pending in court.

A non-jury trial was convened on May 27, 2003. On August 1, 2003, Judge Barber signed an order finding the DNA Act applied to Cannon and required him to submit a DNA sample as a condition of his parole. Judge Barber also determined the DNA Act did not violate the ex post facto clause of the United States Constitution. On August 19, 2003, Cannon filed a motion to alter or amend the judgment pursuant to Rule 52 and Rule 59(e), SCRCP, which was denied on September 10, 2003. Cannon appeals.

STANDARD OF REVIEW

"We have held that where a law case is tried by a judge without a jury, his findings of fact have the force and effect of a jury verdict upon the issues, and are conclusive upon appeal when supported by competent evidence." Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975).

LAW/ANALYSIS

I. Statutory Construction

Cannon claims the DNA Act does not require him to submit a DNA sample as a condition of his parole because he was released on parole prior to July 1, 2000. We disagree.

Cannon argues the trial court erred by determining the word "paroled" is synonymous with the phrase "remaining on parole on or after July 1, 2000" because the legislature excluded the phrase "remaining under supervision" from the amended statute. Cannon asserts the 2000 amendments to the statute materially changed the DNA Act by substituting language that requires DNA samples from only those persons convicted of the specified offenses who are "paroled on or after July 1, 2000." S.C. Code Ann. § 23-3-620(E) (Supp. 2003). Cannon concludes the legislature intended a departure

from the original law by excluding those offenders paroled prior to the effective date of the amendment, and therefore he is not required to provide a DNA sample under the amended act because he was paroled prior to July 1, 2000.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). While the "words used [in a statute] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation[, t]he language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366.

The stated purpose of the DNA Act is to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and non-law enforcement purposes." S.C. Code Ann. § 23-3-610 (Supp. 2003). Section 23-3-620 of the South Carolina Code (Supp. 2003) lists the classes of offenders who are required by the act to provide a DNA sample for the DNA database and states when the samples are to be taken. In particular, the revised statute's section (C) pertains to an individual who is in prison and has not been released on parole, and section (E) pertains to an individual who has already been released on parole.

While the revised statute's meaning is not clear on its face, when section 23-3-620(C)(1) and (E)(1) of the South Carolina Code (Supp. 2003)

are read in tandem, it becomes apparent that the legislature intended to require individuals who were placed on parole prior to July 1, 2000 and who are still on parole after July 1, 2000 to provide a DNA sample as a condition of their parole.

Section 23-3-620(C)(1) requires an individual who is serving a term of confinement on or after July 1, 2000 to submit a DNA sample as a prerequisite of his or her parole, should they be released on parole in the future. Section 23-3-620(E)(1) requires that an individual who is paroled on July 1, 2000 or later also submit a DNA sample as a condition of their parole. Therefore, Cannon's interpretation of the statute, which would only require a sample from individuals granted parole after July 1, 2000, renders section 23-3-620(E)(1) duplicative of section (C) because under section (C) those same individuals would have already given a sample before being released.

Thus, when read as a whole, section 23-3-620 appears to have been intended to cover all individuals who commit the enumerated crimes, including those already in prison or out on parole. Construing the statute in light of its intended purpose, there is no logical reason why Cannon and other similarly situated individuals should be excluded from the statute's requirements. To do so would result in the exclusion of a large number of individuals and would frustrate the purpose of the legislation, which is to create an extensive DNA database.

Because such an exception does not appear to have been intended by the legislature and there is evidence to support the trial court's findings of fact, the trial court was correct in concluding that individuals who were placed on parole prior to July 1, 2000, and who are still on parole after July 1, 2000, are required by section 23-3-620 of the South Carolina Code (Supp. 2003) to provide a DNA sample for the State DNA Database.

II. Ex Post Facto Clause

Cannon also claims extending his term of incarceration solely because of his failure to provide a DNA sample violates the ex post facto clauses of the United States and South Carolina Constitutions. We disagree.

While both the United States and South Carolina Constitutions specifically prohibit ex post facto laws, two critical elements must be present for a law to fall within the prohibition: (1) the law must apply to events that occurred before its enactment, and (2) the offender of the law must be disadvantaged by the law. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002). Additionally, "[f]or the ex post facto clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature." Id.

The DNA Act meets the two elements of the ex post facto prohibition because the act applies to individuals who were placed on parole prior to the July 1, 2000 amendment, and Cannon has been disadvantaged because his parole will be revoked if he fails to provide a DNA sample; however, the ex post facto clause is not applicable because the act's purpose and nature is not criminal or penal.

"[T]he determination whether a statute is civil or criminal is primarily a question of statutory construction, which must begin by reference to the act's text and legislative history." In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001). "Where the legislature has manifested its intent that the legislation is civil in nature, the party challenging that classification must provide 'the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the [legislature's] intention.'" Id. (quoting Seling v. Young, 531 U.S. 250 (2001)).

Section 23-3-610 of the South Carolina Code (Supp. 2003) states the DNA Act's purpose is to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and non-law enforcement purposes, as provided for in Section 23-3-640(B)." Section 23-3-640(B) lists seven uses for a DNA sample collected under the DNA Act:

> (1) to develop a convicted offender database to identify suspects in otherwise nonsuspect cases;
> (2) to develop a population database when personal identifying information is removed;

(3) to support identification research and protocol development of forensic DNA analysis methods;
(4) to generate investigative leads in criminal investigations;
(5) for quality control or quality assurance purposes, or both;
(6) to assist in the recovery and identification of human remains from mass disasters;
(7) for other humanitarian purposes including identification of missing persons.

S.C. Code Ann. § 23-3-640 (Supp. 2003). Thus, the legislature's intent was to create a statute that is civil in nature, and Cannon must prove the DNA Act is so punitive in either purpose or effect as to negate the legislature's intention.

While this is an issue of first impression in South Carolina, it is not unique in terms of litigation concerning DNA acts across the nation.[1] Inmates who were required to provide a DNA sample under Virginia's DNA act attacked the constitutionality of the state statute on ex post facto grounds. Jones v. Murray, 962 F.2d 302, 308 (4th Cir. 1992). The court held that Virginia's requirement that inmates provide a DNA sample is not punitive in nature and the testing itself did not violate the ex post facto clause. Id. Additionally, the court held that the statute's possible effect of "authorizing prison punishment, the denial of good-time credits, or consideration by the parole board in granting discretionary parole to compel the inmate to provide a sample, [does not violate the ex post facto clause] because it does not thereby alter any prisoner's sentence for past conduct." Id. at 310.

Because the South Carolina legislature's intent appears to have been to protect the public, and not to punish those individuals who commit or have

[1] The courts in the following cases determined DNA database statutes are not penal in nature and do not violate the ex post facto clauses: Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995); Rise v. State of Oregon, 59 F.3d 1556 (9th Cir. 1995); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Kruger v. Erickson, 875 F. Supp. 583 (D. Minn. 1995).

committed the specified crimes, South Carolina's DNA Act is non-punitive and does not constitute a criminal penalty. Cf. Walls, 348 S.C. at 31, 558 S.E.2d at 526 (holding the sex offender registry was intended to protect the public from sex offenders who may re-offend and to aid law enforcement, not to punish offenders). Also, Cannon has failed to provide any evidence that the DNA Act is so punitive in effect as to negate the legislature's intent to create a civil statute.

Accordingly, the trial judge was correct in determining the DNA Act does not violate the ex post facto clauses of the United States or South Carolina Constitutions.

AFFIRMED.

STILWELL, and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Don Reno Walton, Appellant.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 3872
Submitted September 14, 2004 – Filed October 11, 2004

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

GOOLSBY, J.: Don Reno Walton pled guilty to charges of distribution of crack cocaine and distribution of crack cocaine within

proximity of a school. He appeals, arguing the circuit court did not have subject matter jurisdiction to accept his guilty plea to distribution within proximity of a school. We affirm.[1]

At the plea proceeding, Walton waived presentment in writing and pled guilty to both of the above charges. The charges stemmed from his alleged sale of crack cocaine to a confidential informant on or about April 3, 2001 in York County. Walton was sentenced to time served and ordered to pay a $10,000 fine for the distribution charge. On the proximity charge, Walton was sentenced to ten years in prison, suspended upon time served and three years probation, and fined $10,000. The court ordered the sentences to run consecutively.

On appeal, Walton contends for the first time that the circuit court lacked subject matter jurisdiction to accept his guilty plea to distribution of crack cocaine within proximity of a school because the indictment described the nearby school as the "York Adult Education Center." Walton asserts the center is not a type of school specifically included in the applicable statute.

A circuit court has subject matter jurisdiction to convict a defendant of a criminal offense if (1) there has been an indictment that sufficiently states the offense, (2) there has been a written waiver of presentment, or (3) the charge is a lesser-included offense of the crime charged in the indictment. Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003). The lack of subject-matter jurisdiction may be raised at any time and can be raised sua sponte by the court. State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002).

Section 44-53-445 provides that it shall be unlawful to distribute a controlled substance "within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a

[1] Because oral argument would not aid the Court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

public or private college or university." S.C. Code Ann. § 44-53-445(A) (2002).

In this case, the indictment for the proximity charge alleged Walton distributed "a controlled substance, to wit: crack cocaine, within a one-half mile radius of the grounds of York Adult Education Center, a public school located in the city of York, South Carolina, . . . in violation of Section 44-53-445, Code of Laws of South Carolina (1976), as amended." [Emphasis added.]

Walton argues the indictment is fatally flawed because the York Adult Education Center is not specifically included among the types of qualifying schools listed in the statute, citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). In Brown, the indictment alleged that the distribution occurred within proximity of a day-care center. Our supreme court found the circuit court lacked subject matter jurisdiction to accept the defendant's guilty plea because day-care centers were not specifically included among the types of schools listed in the statute.

In the current appeal, the indictment alleges the distribution of crack cocaine occurred within a half-mile radius of a public school in violation of section 44-53-445, and names the institution, "York Adult Education Center."

Although the indictment alleges the institution is a "public school," it does not otherwise specify whether it is a secondary school or a vocational, trade, or technical school, all of which are qualifying institutions under the statute. See Brown, 343 S.C. at 349, 540 S.E.2d at 850 (stating "section 44-53-445 does not simply criminalize distribution within proximity of a 'school,' but instead *very specifically* lists the types of schools covered"). In State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), however, our supreme court held that "[w]hile the better practice is to set forth the elements of the crime in the indictment rather than referring to the statutory section alleged to have been violated," an indictment was sufficient to provide the defendant with notice of the elements of the offense where it referenced the appropriate statute. Id. at 649, 552 S.E.2d at 751. The indictment against Walton clearly

alleges the distribution occurred within a half-mile radius of a public school in violation of section 44-53-445; thus, we find the indictment sufficiently gave Watkins notice that the distribution allegedly occurred at a public school that was within the terms of the statute.

We also hold Watkins waived any argument about whether the indictment sufficiently stated the offense to confer jurisdiction on the court since he signed a written waiver of presentment. In Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003), our supreme court noted as follows:

> Two exceptions apply to the general rule that an indictment must sufficiently state the offense to confer jurisdiction on a court. The first applies if the defendant waives presentment. The second applies where the charge to which the defendant pleads guilty is a lesser-included offense of the crime charged in the indictment.

Id. at 51 n.2, 577 S.E.2d at 213 n.2 (emphasis added).

AFFIRMED.[2]

ANDERSON and WILLIAMS, JJ., concur.

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[2] Although our supreme court has had several cases raising the issue of subject-matter jurisdiction in this context, we note that, in a case involving the issue of a directed verdict, this court inferred that the question whether or not the York Adult Education Center fell within the scope of the statute was a question of fact for a jury to determine. State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003), cert. denied (Apr. 8, 2004), and overruled on other grounds by State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004). The question of whether or not the indictment conveyed subject-matter jurisdiction was not addressed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Michael Truitt, Sandra Ivester, John Doe, Defendants,

of whom Michael Truitt and Sandra Ivester are Appellants.

In the Interest of: Gabriel Truitt (DOB: 11-2-99), Elijah Truitt (DOB: 11-2-99), and Alexis Truitt (DOB: 12/11/00), Minors Under the Age of 18.

Appeal From Greenville County
Timothy L. Brown, Family Court Judge

Opinion No. 3873
Heard September 14, 2004 – Filed October 11, 2004

AFFIRMED

Katherine H. Tiffany and Tracy Welsh Tiddy, both of Greenville, for Appellants.

Rebecca Rush Wray, of Greenville, for Respondent.

Carol Anne Simpson, of Greenville, for Guardian Ad Litem.

WILLIAMS, J.: Michael Truitt and Sandra Ivester appeal the termination of their parental rights. We affirm.

FACTS

Sandra Ivester and Michael Truitt are the parents of three children—Gabriel, Elijah, and Alexis. Although the two have been romantically involved for eight years, they never married. When this action commenced, Gabriel and Elijah were eighteen months old and Alexis was six months old.

On June 10, 2001, Sandra took the children to have Sunday dinner at Michael's parents' house. After dinner, while Sandra and her children were napping, Michael borrowed Sandra's car and went to visit friends. Later, he returned to the house and asked Sandra to accompany him as he dropped off his friends. Sandra agreed to go, left her children with their grandparents, and told them she would be back in approximately fifteen minutes.[1]

Sandra and Michael did not return home in fifteen minutes. In fact, they had not returned by the next morning. Because Michael's mother had to work and his father suffered from medical difficulties, neither was able to care for the children.[2] Having tried to contact

[1] Michael's mother, Sally Truitt, testified that she told the children's parents she had an engagement later that night, and both said they "would be back."

[2] Sandra testified that she was aware of the circumstances and knew Michael's parents were unable to care for the children for an extended period of time.

Sandra and Michael numerous times, the grandparents were left with no option but to call the Department of Social Services ("DSS"). Corporal Miller, of the Mauldin Police Department, testified that when he arrived at the Truitt's home on Monday he made further attempts to locate the children's parents, but was unsuccessful. Lacking proper supervision, the children were taken into emergency protective custody.

After Sandra and Michael left his parent's house on Sunday, Michael allowed a couple of "friends" to borrow Sandra's car in exchange for $100.00 of crack cocaine. While the car was gone, both parents smoked the crack at another friend's apartment. Neither parent attempted to contact the grandparents until after DSS took custody of the children. When they finally did call Monday afternoon, they were informed that DSS removed the children.

Sandra testified she did not return on Sunday to pick up the children because Michael's friends never brought back the car. She also testified she did not call the grandparents because there was no telephone in the apartment where they were staying. Sandra explained that a number of Mauldin police officers lived in the area, and she was afraid if she left the apartment to find a telephone then she would be picked up on outstanding warrants.

Even though both were fully aware DSS had their children, for the next two months Sandra and Michael spent their time living in motel rooms and smoking crack every other day. They called Michael's parents from time to time to ask for money and talk about the children, but otherwise did not attempt to contact their children or DSS despite testimony that they knew the name of their caseworker. The authorities did not locate Sandra and Michael until they were arrested, living in a hotel, on August 14, 2001.

Following their arrest, Sandra did not request visitation with her children until the first week of October 2001. She cancelled the first scheduled visitation and did not actually meet with the children until October 25, 2001, more than four months after the children were left with their grandparents. Michael never contacted DSS to seek

visitation or to check on the children's welfare. Thus, DSS initiated this termination of parental rights ("TPR") action on July 26, 2001.

At the time of the hearing, Sandra was released from jail and working in a family catering business. Although Michael was still incarcerated, he expected to be released from custody at the end of 2003. The children were placed with a foster family who expressed interest in adopting all three children.

Significantly, this was not the first time DSS became involved in the children's lives. In October 2000, Michael left Gabriel and Elijah—then eleven months old—home alone while he went to purchase illegal drugs. Sandra was incarcerated at the time and unable to watch the children. Accordingly, Gabriel and Elijah were taken into emergency protective custody. DSS filed an action concerning this incident and an Order was issued on February 21, 2001, which made a "finding of threat of harm of physical neglect" against Michael and ordered treatment plans for both parents. The order granted custody to Sandra, but only granted Michael supervised visitation. Although Sandra completed the treatment plans outlined in the order, Michael did not. The third child, Alexis, was born in December 2000; therefore, the previous court order did not address custody or visitation rights as they pertained to her.

STANDARD OF REVIEW

"In a termination of parental rights (TPR) case, the best interests of the children are the paramount consideration." Doe v. Baby Boy Roe, 353 S.C. 576, 579, 578 S.E.2d 733, 735 (Ct. App. 2003) (citing South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000)). Before a parent's rights may be terminated, the alleged grounds for termination must be proven by clear and convincing evidence. Dep't of Soc. Servs. v. Mrs. H, 346 S.C. 329, 333, 550 S.E.2d 898, 901 (Ct. App. 2001).

On appeal, this court may review the record and make its own determination of whether the grounds for termination are supported by

clear and convincing evidence. Id.; see also South Carolina Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001). However, despite this broad scope of review, this court is not required to disregard the findings of the family court nor ignore the fact that the trial judge was in a better position to evaluate the credibility of the witnesses and assign weight to their testimony. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). This is especially true in cases involving the welfare of children. Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991).

LAW/ANALYSIS

Under South Carolina's termination of parental rights statute, "[t]he family court may order the termination of parental rights upon a finding of one or more of the [listed] grounds and a finding that termination is in the best interest of the child." S.C. Code Ann. § 20-7-1572 (Supp. 2003).[3] If the family court finds a statutory ground for termination has been proven, it must then find the best interests of the children would be served by termination. Id. Significantly, as our supreme court has noted and the TPR statute provides: "TPR statutes 'must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent[-]child relationship.'" Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 108, 536 S.E.2d 372, 375 (2000) (quoting S.C. Code Ann. § 20-7-1578 (Supp. 1999)).

In the current case, the family court determined that Michael and Sandra abandoned their three children. See S.C. Code Ann. § 20-7-1572(7) (Supp. 2003). As an alternative ground, the court ruled that Michael's rights should also be terminated because of harm inflicted on

[3] Section 20-7-1572 was recently amended to include an additional ground for termination; however, this amendment has no applicability in the current case. See Act No. 181, 2004 S.C. Acts 1829.

the children pursuant to S.C. Code Ann. § 20-7-1572(1) (Supp. 2003).[4] After finding statutory grounds for termination, the family court determined it would be in the children's best interest for Sandra and Michael's parental rights to be terminated.

1. Abandonment

The family court found that Michael and Sandra abandoned their three children. We agree.

Section 20-7-1572(7) of the South Carolina Code (Supp. 2003) provides in pertinent part, that a family court may order the termination of parental rights upon a finding of abandonment. Section 20-7-490(19) defines abandonment as occurring when "a parent or guardian wilfully deserts a child or wilfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child." S.C. Code Ann. § 20-7-490 (Supp. 2003). The willful standard for termination has been explained as "a question of intent to be determined from the facts and circumstances of each individual case." South Carolina Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 610, 582 S.E.2d 419, 423 (2003). Furthermore, parental conduct "which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium

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[4] Section 20-7-1572(1) of the South Carolina Code provides that a family court may terminate parental rights when:

> The child or another child in the home has been harmed as defined in Section 20-7-490, and because of the severity or repetition of the abuse or neglect, it is not reasonably likely that the home can be made safe within twelve months. In determining the likelihood that the home can be made safe, the parent's previous abuse or neglect of the child or another child in the home may be considered[.]"

S.C. Code Ann. § 20-7-1572(1) (Supp. 2003).

from the parent." South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992).

We do not think the family court erred in deciding that Michael and Sandra's actions constituted a willful intent to abandon. As noted previously, both Michael and Sandra were aware the grandparents were unable to care for the children for extended periods of time. Michael's mother specifically told them she was leaving Sunday evening for an engagement, both knew she had to work the next day, and both knew that Mr. Truitt was unable to care for the children. Despite this knowledge, neither made an effort to return to the Truitts' and resume care of their children. Although the parents assert they did not have access to a car, both must admit it was their decision to trade the use of the car for drugs. The fact that the car's borrowers did not promptly return the car does not serve to mitigate the parents' failure to find a way home to their children.

The parents also argue that they did not call to check on their children or ask the grandparents for a ride home because the apartment they were staying in did not have a telephone and they feared being arrested if they left the apartment. The mother appears to be saying that by not taking the risk of being arrested on outstanding warrants she was watching out for her children's best interest. This argument, however, is incomprehensible. She knew the grandparents could not provide for her children for an extended period of time and she promised to be back in fifteen minutes for this reason. Clearly, Sandra broke this promise by embarking on a course of illegal behavior that would necessarily take longer than fifteen minutes.

When the parents finally did call and were told the children had been taken into emergency protective custody, neither made an effort to contact DSS in an attempt to regain custody or at the very least to check on their children's welfare. Instead, the parents proceeded to spend the next two months living in hotel rooms and using crack cocaine every other day. In fact, the only thing that prevented the parents from continuing this course of behavior was their arrest on

August 14, 2001. Prior to the arrest, the parents' concern with their children was limited to an occasional call to the grandparents.

Michael argues that because a previous court order granted legal custody of two of their children to Sandra, it was not possible for him to abandon them. We are unconvinced by this argument. Michael did have access to the children and he testified that he saw them everyday. While Michael did not have legal custody of the children, he did have the right to supervised visitation even though he did not pursue this right. In fact, he did not make any effort whatsoever to contact his children from the time they were abandoned on June 10, 2001, until his rights were terminated on November 28, 2001. Furthermore, this absence was the result of his decisions, which placed his desires and needs above those of his children. See Dep't of Soc. Servs. v. Henry, 296 S.C. 507, 509, 374 S.E.2d 298, 299-300 (1988) (finding "voluntary pursuit of a course of lawlessness resulting in imprisonment, coupled with [the parent's] flagrant indifference towards the children during intervening periods of freedom, manifest[ed] . . . abandonment"). In addition to removing himself from his children's lives, he encouraged Sandra to abandon them as well. Michael's actions do not show concern and attention for his children's welfare; rather, they reflect a conscious indifference to the same.

Although the family court also found Michael's parental rights should be terminated pursuant to section 20-7-1572(1) of the South Carolina Code, (Supp. 2003), because we find the trial court was correct in concluding the children were abandoned, we need not address this aspect of the court's ruling. See Rule 220 (c), SCACR; Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

2. Best Interests of the Children

In addition to finding Michael and Sandra abandoned their children, the family court concluded that termination of their parental rights would be in the children's best interest. We agree.

Governmental intervention in a parent-child relationship is of great moment and concern. The United States Supreme Court has held that "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). Society's fundamental relational basis is the family, and a government is wise that respects its importance. See M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (citation omitted). However, the primary goal must be to protect the children's best interests. Hooper v. Rockwell, 334 S.C. 281, 295, 513 S.E.2d 358, 366 (1999).

In this case, reversing the family court would return the children to a father who repeatedly deserted his children to fulfill his drug addiction, failed to fulfill his obligations under a previous court order, and encouraged the mother to desert her children. It would also return the children to a mother who deserted her children for more than four months, and has a drug addiction, a criminal history, and remained in a relationship with a father who previously neglected their children. To affirm the decision is to free the children from the bonds of foster care and allow them the opportunity to be adopted into a stable and nurturing home.

Although the preference of the law is to return children to their parents, the presumption that a natural parent is a fit parent must be balanced against reality. See Troxel v. Granville, 530 U.S. 57, 69 (2000) (noting the traditional presumption that a fit parent will act in the best interests of a child) (emphasis added). The United States Supreme Court has stated that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the

State to inject itself into the private realm of the family . . . ." Id. at 68 (citation omitted). In this case, Sandra and Michael failed to care for their children. The reality we confront today is of a mother and father who have demonstrated a gross indifference to the welfare of their children. See South Carolina Dep't of Soc. Servs. v. Ledford, 357 S.C. 371, 377, 593 S.E.2d 175, 177 (Ct. App. 2004) ("a parent's responsibility extends beyond making initial arrangements for his or her child while the parent is away; the statute requires that the parent make adequate arrangements for the child's continuing care."). As such, we find it is in the children's best interest to terminate Michael and Sandra's parental rights.

CONCLUSION

Accordingly, we find the family court did not err in ruling Michael and Sandra abandoned the children. We also agree with the family court that termination of their parental rights is in the children's best interest.

AFFIRMED.[5]

GOOLSBY and ANDERSON, JJ., concur.

[5] This court would also like to acknowledge and commend defense counsel for the thorough and zealous representation of their court appointed clients. As the late Judge Bell once noted, such representation is "in the best tradition of the legal profession." Leone v. Dilullo, 294 S.C. 410, 414, 365 S.E.2d 39, 41 (Ct. App. 1988).