The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF MARK R. CALHOUN, PETITIONER

Mark R. Calhoun, who was definitely suspended from the practice of law on December 3, 2001, for a period of eighteen (18) months, retroactive to December 7, 2000, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 6, 2002, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
August 1, 2002

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF JOHN EARL DUNCAN, PETITIONER

John Earl Duncan, who was indefinitely suspended from the practice of law on June 12, 2000, retroactive to July 30, 1999, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 6, 2002, beginning at 10:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
August 1, 2002

The Supreme Court of South Carolina

In the Matter of Edward
I. Markendorff, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Markendorff and the interests of Mr. Markendorff's clients.

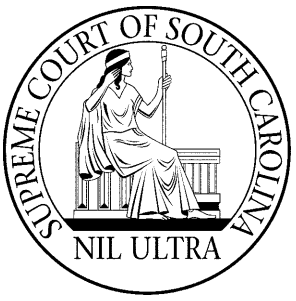
IT IS ORDERED that Emma Ruth Brittain, Esquire, is hereby appointed to assume responsibility for Mr. Markendorff's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Markendorff may have maintained. Ms. Brittain shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Markendorff's clients and may make disbursements from Mr. Markendorff's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Edward I. Markendorff, Esquire, shall serve as notice to the bank or other financial institution that Emma Ruth Brittain, 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 Emma Ruth Brittain, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Markendorff's mail and the authority to direct that Mr. Markendorff's mail be delivered to Ms. Brittain's office.

James E. Moore A.C.J.
FOR THE COURT

Columbia, South Carolina
July 30, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 5, 2002

ADVANCE SHEET NO. 27

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Alias, Petitioner,

v.

Charles M. Condon,
Attorney General for the
State of South Carolina, Respondent.

IN THE ORIGINAL JURISDICTION

Opinion No. 25508
Heard May 16, 2002 - Filed August 5, 2002

David A. Wilson, of Horton, Drawdy, Ward & Black, of Greenville, for petitioner.

Attorney General Charles M. Condon, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for respondent.

JUSTICE BURNETT: John Doe ("Doe"), a lawyer, petitioned this Court in its original jurisdiction to determine whether his business association with a lender bank ("Lender") and a title insurance company

("Title Company") constitutes the unauthorized practice of law in violation of Rule 5.5 (b), SCACR.[1] This Court granted the petition to provide declaratory judgment and appointed the Honorable Edward B. Cottingham as referee. We conclude Doe's business association, when conducted as herein below prescribed, is proper.

FACTS

The parties have stipulated Lender contacted Doe to supervise the execution and recordation of loan documents under the following scenario:

> 1. Borrower contracts with Lender to **refinance** an existing first mortgage loan previously obtained from the same Lender.
>
> 2. Lender notifies Title Insurance Company of refinance transaction and provides relevant Borrower information.
>
> 3. Out of state office of Title Insurance Company licensed to do business in South Carolina orders title search from an independent contractor of its choosing.
>
> 4. Upon receipt of title search, Title Insurance Company prepares a title commitment for the benefit of the Lender.
>
> 5. Title Insurance Company orders pay-off of existing mortgage.
>
> 6. Title Insurance Company orders endorsement for Borrower's existing homeowners insurance policy, if requested by Lender.
>
> 7. Lender prepares loan documents including a set of

---

[1] Rule 5.5 (b), SCACR prohibits an attorney from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

instructions, a note and mortgage, Truth-in-Lending Statement, HUD-1 settlement statement, miscellaneous affidavits regarding employment and other forms and forwards to Attorney.

8. Attorney reviews loan documents and title commitment and performs any necessary curative work on the loan documents or regarding the title, if needed.

9. Attorney meets with Borrower to explain legal ramifications of loan documents and answer any questions Borrower may have regarding the documents or the refinancing process.

10. Attorney supervises execution of loan documents.

11. Attorney forwards properly executed loan documents to Title Insurance Company with specific instructions regarding how, when and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable. Attorney also authorizes the disbursement of funds if the Borrower does not rescind during the three day period set forth in the Truth-In-Lending Act, 15 U.S.C. §§ 1601, et seq. (1997).

12. In accordance with the Attorney's instructions, Title Insurance Company satisfies the existing first mortgage and transmits for recording the new mortgage and any assignments, if applicable, and disburses funds pursuant to the HUD-1 settlement statement.

13. The Lender or, in accordance with the Attorney's instructions, the Title Insurance Company transmits documents evidencing the satisfaction of the paid-off mortgage to the appropriate Register of Deeds for recording.

14. Title Insurance Company issues final title insurance policy to Lender.

15. For representing the Borrower, Attorney receives a fee consistent with the fee typically charged in a South Carolina refinance transaction.

DISCUSSION

The issue of unauthorized practice of law in the area of real estate closings is a prolonged legal issue assuming growing national prominence.[2] The South Carolina Constitution provides the Supreme Court with the duty to regulate the practice of law in the state. See S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992); see also S.C. Code Ann. § 40-5-10 (1986).

"The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and

---

[2] Disputes between attorneys and real estate service providers consistently appear in cases since 1917. See, e.g., Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280 (N.Y. Sup. Ct. 1917); see generally Joyce Palomar, The War Between Attorneys and Lay Conveyancers–Empirical Evidence Says "Cease Fire!", 31 Conn. L. Rev. 423, 471-74 (1999). The issue is attracting attention from the Federal Trade Commission and the Anti-Trust Division of the United States Department of Justice. The FTC and USDOJ have taken a greater interest in the monopolistic affects of state's unauthorized practice of law rules in the real estate context. See John Gibeaut, Real Estate Closing Tussle in Tarheel State, 1 No. 3 ABA J. E-Report 7 (2002). However, state limitations in the area are exempt from federal antitrust liability under the Sherman Act's state action exception. See Lender's Serv., Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429, 434-41 (S.D. Ohio 1991). Further, this Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers. See In re Unauthorized Practice of Law Rules, supra.

proceedings on behalf of clients before judges and courts.'" State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. In re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating "it is neither practicable nor wise" to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

This Court last addressed the unauthorized practice of law in the context of real estate closings in State v. Buyers Service Co., Inc., supra. Buyers Service divided the purchase of residential real estate into four steps: 1) title search; 2) preparation of loan documents; 3) closing; and 4) recording title and mortgage.

Initially, Doe suggests the present case is different from Buyers Service because the buyer and Lender are attempting to refinance an existing mortgage and not to purchase new property. This distinction is without significance.

In refinancing a real estate mortgage the four steps in the initial purchase situations still exist. A title examination is conducted to determine the current status of the title and any new encumbrances; new loan documents and instruments must be crafted to ensure buyer obtains funds to pay off an existing mortgage and Lender receives a mortgage to protect its interest; buyer and Lender must close on the loan; and the settlement of the old mortgage and recordation of the new mortgage must be perfected. In sum, refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law.

A. Title Search

The title search portion of the present case encompasses stipulated facts 2 through 6. Doe asserts Title Company has a right to furnish title because it is incidental to its business.

In Buyers Service, this Court addressed a commercial title company's preparation of title abstracts for persons other than attorneys or themselves. The State in the case argued the buyer relies on the title search to determine if he receives good, marketable title. We agreed and rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business. Instead, we found the title search company could conduct title examinations only under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and the search affected the rights of buyers. Id. at 432, 357 S.E.2d at 18.

According to the stipulated facts it appears Title Company conducts a title search and prepares a commitment, for the benefit of the Lender, without supervision by a licensed attorney. While Doe notes the Title Company is licensed to do business in South Carolina, we rejected the incidental-to-business approach in Buyers Service.

Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

B. Preparation of Loan Documents

Stipulated facts 7 and 8 concern Lender's preparation of loan documents as well as the attorney's review of the documents and subsequent

curative work, if needed. Doe argues the preparation of real estate documents constitutes the practice of law, but Lender has a *pro se* right to prepare documents where it is a party. We disagree.

South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. See S.C. Code Ann. § 40-5-80 (1976). Corporations, which are artificial creatures of state law, do not have a right to appear *pro se* in all instances. See S.C. Code Ann. § 40-5-320 (1986). We granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. See In re Unauthorized Practice of Law, supra. We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999).

The right of a corporation to practice law by completing real estate loan documents is not co-extensive with an individual's right. Doe's citation to this Court's previous holdings to suggest otherwise is misplaced.[3] In Buyers Service we specifically held the preparation of real estate instruments by lay persons constituted the unauthorized practice of law. See Buyers Service, 292 S.C. at 430-31, 357 S.E.2d at 17-18. Without the

---

[3] Doe cites to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law). Doe argues these cases imply a corporation engages in unauthorized practice of law **only** where it seeks to act on behalf of others and not solely itself. We disagree.

In re Easler and State v. Despain concerned an individual attempting to provide legal advice or services to other individuals. The fact-specific holdings involved individuals providing legal services to others for a fee, therefore, the individual was not acting within the *pro se* exception. As previously stated, the *pro se* exception for corporations is strictly limited.

presence of Doe, acting as an independent supervising attorney, Lender could not prepare such instruments.

Doe correctly differentiates this case from Buyers Service because an independent attorney will review the documents and correct them, if needed. Lender may prepare legal documents for use in refinancing a loan for real property as long as an independent attorney reviews and corrects, if needed, the documents to ensure their compliance with law.

C. Closing

Stipulated facts 9 and 10 describe the closing process. We held in Buyers Service "real estate and mortgage loan closings should be conducted only under the supervision of attorneys." Id. at 434, 357 S.E.2d at 19.

Doe differentiates the present case from Buyers Service because an attorney is actively involved in the closing and answers any questions the buyer may have. The purchaser in Buyers Service never spoke with an attorney and any questions were answered by non-attorney employees of the title company. Additionally, in Buyers Service the title company employed attorneys to review the closing documents. Yet, we concluded the presence of attorneys, acting as employees, did not save the company from unauthorized practice of law. This Court cited to an Arizona case[4] and approved its rationale that "adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party." Id. at 431-32, 357 S.E.2d at 18.

Here Lender employs Doe as an attorney to supervise its preparation of legal documents, then supervise the loan's closing and provide

[4] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1, reheard, 91 Ariz. 293, 371 P.2d 1020 (1962).

legal advice to the buyer. Doe is an independent attorney unlike the attorneys in Buyers Service who were employees of the title company. Doe's activities may still pose an ethical dilemma, however, because a lawyer may not represent a client whose interests may be adverse to another client unless the lawyer believes the representation will not adversely affect the relationship with the other client and the client consents after consultation. See Rule 407, SCACR (Rule 1.7 Conflict of Interest).

Under the stipulated facts Lender retains Doe to supervise its own legal work as well as provide advice to the buyer at closing. Although the Lender and Buyer have adverse interests, there is no consultation with the buyer to waive any potential conflict. Because real estate closings present a unique situation regarding dual representation we do not believe it to be in the public's interest to create a *per se* rule barring an attorney under the stipulated facts from representing Lender and borrower. Instead, Doe may participate in the closing after giving full disclosure of his role to both parties and obtaining consent from both parties to continue.

D. Recording Instruments

The final phase of the real estate loan process is recordation of the new mortgage and related documents, shown in stipulated facts 11through 13. Buyers Service clarified the mailing of documents to the courthouse occurs as part of a real estate transfer, which is an aspect of conveyancing affecting legal rights, is the practice of law. We held "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney." Buyers Service, 292 S.C. at 434, 357 S.E.2d at 19.

The recordation process in the stipulation of facts establishes attorney supervision of the process. As such, Doe's supervisory activities do not constitute the unauthorized practice of law.

CONCLUSION

We conclude Doe's association as discussed is not violative of the proscription against the unauthorized practice of law, as long as the association is conducted as herein prescribed.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Total Environmental Solutions, Inc., Respondent,

v.

South Carolina Public Service Commission, Foxwood Hills Property Owners Association, Steven W. Hamm, Consumer Advocate for the State of South Carolina, and Ernest Campbell,

of whom

South Carolina Public Service Commission is Respondent,

and

Foxwood Hills Property Owners Association, Inc. is Appellant.

Total Environmental Solutions, Inc., Respondent,

v.

Foxwood Hills Property Owners Association, the South Carolina Department of Consumer Affairs, Ernest Campbell, and South Carolina Public Service Commission,

of whom

Foxwood Hills Property Owners Association is Appellant,

and

South Carolina Public Service Commission is Respondent.

Foxwood Hills Property Owners Association, Appellant,

v.

South Carolina Public Service Commission, Total Environmental Solutions, Inc., and Steven W. Hamm, Consumer Advocate for South Carolina,

of whom

South Carolina Public
Service Commission

and

Total Environmental
Solutions, Inc. are Respondents.

Appeal From Oconee County
James R. Barber, III, Circuit Court Judge

Opinion No. 25509
Heard May 30, 2002 - Filed August 5, 2002

AFFIRMED

Henry Asby Fulmer, III, of Fulmer Law Firm, of Summerville, for Appellant.

Fred David Butler, of Columbia, for Respondent South Carolina Public Service Commission.

John F. Beach and John J. Pringle, Jr., of Beach Law Firm, of Columbia, for Respondent Total Environmental Solutions, Inc.

JUSTICE BURNETT: This case is before the Court on cross-appeals from consolidated cases arising from the circuit court's final order denying a utility company's appeal from the South Carolina Public Service Commission's ("Commission") Order. We affirm.

FACTS

Mountain Bay Estates Utility Company, Inc., ("Mountain Bay") a company providing water and sewer services to the Foxwood Hills resort community in Oconee County, applied for a rate increase with the Commission in January 1994. Mountain Bay was established as a private utility to serve Mountain Bay Estates, later Foxwood Hills, a private residential subdivision located on Lake Hartwell. Foxwood Corporation ("Foxwood"), the subdivision developer, owned 100% of Mountain Bay's stock.[1]

At the rate hearing, Mountain Bay articulated three reasons for the increase: 1) rising cost of environmental regulatory compliance since Mountain Bay's last rate request in 1977; 2) general increase in inflation since 1977; and 3) Mountain Bay charged a rate not reflective of the true market rate in order to spur development of Foxwood, an interest it no longer had since being sold to Johnson Properties, Inc. ("Johnson"). Most of the testimony at the hearing centered upon the third reason, particularly whether lot availability fees should be counted by the Commission as operating revenue to Mountain Bay because of the relationship between the utility and Foxwood.

In 1977, the Commission approved Mountain Bays' request to

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[1] Respondent Total Environmental Solutions, Inc., ("TESI") purchased all of the assets of Mountain Bay as part of a resolution of bankruptcy proceedings involving Mountain Bay's subsequent parent company, Johnson Properties, Inc. This Court substituted TESI for Mountain Bay as Respondent.

charge a rate up to $8 per month for water and sewer services. As Mountain Bay was a subsidiary of Foxwood, it never charged more than $5 per month in order to increase development of the subdivision. As a result, the utility operated at a $137,568.59 loss for the test year ending June 30, 1993.

Foxwood charged each purchaser of a lot in the subdivision a yearly "availability fee" of $60 payable to the developer until the purchaser became a customer and connected to Mountain Bay. The fee was designed to reimburse Foxwood for its capital costs of building the initial water and sewer infrastructure. Once the purchaser connected to Mountain Bay's utility system and became a utility customer, the purchaser was no longer required to pay the availability fee. Under the terms of the purchasing agreement, Foxwood, not Mountain Bay, would bill and collect the fee. The amount of the availability fees totaled $171,947.04 for the test year.

While Foxwood mistakenly placed the availability fees on Mountain Bay's books for accounting purposes, the evidence presented at the hearing showed the lot owners were contractually obligated to pay the fees to Foxwood, and the fees were not used for utility purposes. The Commission's accountant testified he did not recognize the availability fee as revenue to Mountain Bay because it was not received directly by the utility and was not being collected for utility purposes. The Commission's accountant found the availability fees were not "ongoing revenues of the utility." The accountant testified if Mountain Bay did collect the availability fees, they should not be treated as operating revenue, but as a deduction from the rate base, the accounting equivalent to contributions in aid of construction.

Johnson purchased all Mountain Bay's stock in July 1993, a month after the test year ended. The stock purchase was not approved by the Commission. In the stock purchase agreement, Foxwood promised to assign the availability fees to Johnson within two years of the closing date or July 1995. Foxwood retained the right under its sole discretion to modify or terminate the availability fees on a case-by-case basis until that date.

Further, Foxwood had no obligation to include availability fees in

any future lot sales agreements. The availability fees assigned to Johnson were not required to be used to benefit Mountain Bay, but could be used by Johnson as income for any purpose. If Johnson sold Mountain Bay's stock to another entity, it was not required to transfer the availability fees or assign its rights to the other entity.

After the hearing, the Commission denied the rate increase. Central to the Commission's denial was Commission's treatment of the availability fees as operating revenue to Mountain Bay. Additionally, the Commission concluded Johnson Properties would not have bought Mountain Bay unless it "either continued to have the use of the availability fees and/or it received a rate increase. Clearly, availability fees were used as consideration in the sale of the utility's stock." The Commission further concluded Mountain Bay was not required to obtain Commission approval prior to the transfer of its capital stock.

Mountain Bay appealed the denial of the rate increase because the Commission improperly attributed the availability fee as operating revenue to the utility. The Foxwood Hills Property Owners Association, Inc. ("POA") also appealed claiming the Commission erred in concluding Mountain Bay did not need permission to transfer 100% of its capital stock.

The circuit court concluded the Commission erred in attributing the availability fees to Mountain Bay, and the Commission was not required to approve the stock transfer.[2]

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[2] Following its decision the circuit court remanded the case to the Commission to again consider Mountain Bay's rate request based on the existing record and excluding the availability fees as operating revenue.

On remand Commission approved rates for Mountain Bay which provided a 3.86% operating margin. The circuit court upheld the Commission's determination.

ISSUES

I. Did the South Carolina Public Service Commission err in ruling lot availability fees should be treated as Mountain Bay operating revenue?

II. Did the South Carolina Public Service Commission err in ruling it was not required to approve the July 1993 stock transfer between Foxwood Corporation and Johnson Properties?

DISCUSSION

This Court is deferential in reviewing decisions by the Commission and will affirm those decisions supported by substantial evidence. Heater of Seabrook, Inc. v. Public Serv. Comm'n of South Carolina, 324 S.C. 56, 478 S.E.2d 826 (1996). This Court refrains from substituting its judgment for that of the Commission's where there is room for difference of intelligent opinion. Id. The Commission's findings are presumptively correct requiring the party challenging the Commission's order to bear the burden of showing the decision is "clearly erroneous in view of the substantial evidence on the whole record." Id. at 60, 478 S.E.2d at 828 (quoting Patton v. South Carolina Pub. Serv. Comm'n, 280 S.C. 288, 290-91, 312 S.E.2d 257, 259 (1984)).

I

Availability Fees

The Commission decision to include availability fees as operating revenue for Mountain Bay is based on the relationship between the utility company and the developer, Foxwood. The Commission acknowledges availability fees "are normally the result of a contract between the lot owner and the developer," but insists " where the developer and the utility are the same entity or closely related entities, the Commission may

choose to apply the fees to the utility in some manner, especially when such fees appear on the utility's books."

The Commission avers Mountain Bay historically undercharged customers to benefit the developer, Foxwood, which, in turn, supported the utility "if not through availability fees, then through other funding from the developer." The Commission argues that rationale combined with the fact Johnson Properties was not required to use availability fees to benefit Mountain Bay, required it to find the proposed rate increase was not a function of increased operating costs but of new ownership and accounting treatment of the availability fees. The Commission further concluded the availability fees were used as consideration in the sale of Mountain Bay's stock, "and that by arranging the terms of the contract in such a way as to limit the utility's access to revenues, the developer and Johnson Properties utilized the stock transaction to the benefit of Johnson Properties and to the disadvantage of Mountain Bay's ratepayers."

The Commission allocated availability fees to Mountain Bay as operating revenue because it considered current customers and lot owners inequitably treated. We disagree.

In Heater of Seabrook, supra, we reviewed a similar decision by the Commission to deviate from past practices and treat availability fees as operating revenues. In that case, Heater applied for a rate increase although it received annual availability fees of $66,640. We wrote: "We do not hold that availability fees can never be included as operating revenues . . . [i]n this particular case, however, there was no substantial evidence supporting Commission's decision regarding treatment of availability fees." Id. at 63, 478 S.E.2d at 829.

The present case is factually dissimilar from Heater of Seabrook because the utility in Heater of Seabrook directly received the availability fee from customers while Mountain Bay does not. The Commission may only regulate a "rate" which:

> means and includes every compensation, charge, toll, rental, classification, or **availability fee**, or any of them, including tap fee, or other non-recurring charges **demanded, observed, charged, or collected by any utility** for any service offered by it to the public, and any rules, regulations, practices, or contracts affecting any such compensation, charge, toll, rental, classification, or availability fee.

S.C. Reg. 103-502.10 (emphasis added); see also S.C. Reg. 103-702.13.

While the term "availability fee" does appear in the regulation, it is modified by the phrase "demanded, observed, charged, or collected by any utility." See S.C. Reg. 103-502.10. Availability fees may be regulated as "rates" in cases such as Heater of Seabrook where the utility itself collected the fees. However, in the present case, availability fees were charged, collected and used by Foxwood, the developer, and not Mountain Bay, the utility.

The Commission asserts the distinction is without a difference because Foxwood used the availability fees to subsidize Mountain Bay. The evidence does not support this rationale. Mountain Bay testified Foxwood did not provide availability fees to it. The Commission's own staff concluded attributing the fees to Mountain Bay as operating revenue was improper and not supported by the evidence. The Commission, therefore, lacks jurisdiction to regulate availability fees where no evidence exists Mountain Bay collected or directly benefitted from them.

The Commission next argues it has jurisdiction over the fees in the present case because Foxwood used those fees to indirectly benefit Mountain Bay. The Commission relies on the commercial relationship between the two companies to argue Foxwood necessarily transferred the availability fees to Mountain Bay in exchange for the utility maintaining lower than necessary utility rates.

While the record demonstrates Mountain Bay undercharged its

customers to help development, testimony by both Mountain Bay and the Commission's staff indicate the availability fees were not operating revenue to the utility. The staff report removed the fees as operating revenue for Mountain Bay because the fees did not benefit the utility. Additionally, a Commission staffer testified that **if** the fees were going to the utility, the fees should be recorded as additions to Mountain Bay's rate base, and deducted from any future utility plant additions.

There is no substantial evidence showing Foxwood used availability fees to subsidize Mountain Bay. The Commission lacks jurisdiction to regulate availability fees in such instances.

Assuming *arguendo* the Commission is correct in concluding Foxwood subsidized Mountain Bay through transferring availability fees, the Commission's rationale is no longer applicable in light of Johnson Properties' purchase of Mountain Bay's stock. Pursuant to the stock sale contract, Foxwood assigned to Johnson its right to receive any availability fees being paid through July 1995, two years after the sale. Even after July 1995, the fees would inure directly to Johnson to be used for any purpose designated by Johnson, not Mountain Bay.

The Commission believed Mountain Bay would benefit from the fees through Johnson Property after assuming the fees served as consideration in the Foxwood to Johnson sale. No evidence supports the Commission's finding.

Therefore, the circuit court correctly held the Commission erred in attributing the availability fees to Mountain Bay.[3]

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[3] Although the facts of this case do not support Commission's attributing availability fees to the utility, "[w]e do not hold that availability fees can never be included as operating revenues." Heater of Seabrook, 324 S.C. at 63, 478 S.E.2d at 829.

II

Stock Sale

POA argues Foxwood should have received Commission approval before selling 100% of Mountain Bay's stock to Johnson. We disagree.

Commission Regulations 103-504 and 103-704, at the time of the Foxwood to Johnson sale, provided: "No existing public utility . . . shall hereafter sell . . . any utility system . . . without first obtaining from the Commission a certificate that the sale or acquisition is in the public interest." S.C. Reg. 103-504 and S.C. Reg. 103-704.

The circuit court found the "public utility" is Mountain Bay, a South Carolina corporation which has continuously provided utility service since the 1970's. Both the circuit court and Commission read the regulation to require Commission approval only in cases where the public utility sells its assets or utility system to another, not for the transfer of stock.

POA argues the Commission should have read the regulation to require its approval where stock transactions result in a change in control of the utility. Both the Commission and the circuit court refused to read the "change of control" requirement into the regulation.

The Commission's reading is supported by the wording of the regulation. See Byerly Hosp. v. South Carolina State Health and Human Servs. Fin. Comm'n, 319 S.C. 225, 460 S.E.2d 383 (1995) (great deference is given to an agency's interpretation of regulations where it has particular expertise). Adopting POA's interpretation would undermine the operations of utilities who have effectuated stock sales without Commission approval, negatively affecting Commission-approved rate increases/decreases.

We agree with the Commission's and circuit court's reading of

the regulation.[4]

CONCLUSION

For the foregoing reasons we **AFFIRM** the order of the court below.

MOORE, A.C.J., WALLER and PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

[4] The Commission has since amended both regulations, with the approval of the Legislature, to specifically grant itself the authority to approve the transfer of water/sewer utilities stock. See S.C. Reg. 103-504 (2001) and S.C. Reg. 103-704 (2001).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William Lewis, Respondent,

v.

Premium Investment Corporation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 25510
Heard February 7, 2002 – Filed August 5, 2002

AFFIRMED AS MODIFIED

Linda Weeks Gangi, of The Thompson Law Firm, of Conway, for petitioner.

William Paul Young, of North Myrtle Beach, for respondent.

JUSTICE BURNETT: The Court granted a writ of certiorari to review the Court of Appeals' decision in Lewis v. Premium Investment Corp., 341 S.C. 539, 535 S.E.2d 139 (Ct. App. 2000). We affirm as modified.

FACTS

On October 29, 1976, Respondent William Lewis (Purchaser) entered into an installment sales contract to purchase real estate in North Myrtle Beach from Petitioner Premium Investment Corporation (Seller). The contract contains the following default provision:

> In the event the Purchaser should fail to make any due installment, and such default shall continue for a period of thirty (30) days, the Seller shall have the right to declare this contract terminated and all amounts previously paid by the Purchaser will be retained by the Seller as rent.

Four months after executing the contract, Purchaser placed a mobile home on the lot and his family moved in. Purchaser made all payments through July 1988.[1] After July 1988, no further payments were made.

In October 1989, one year after Purchaser's default, Seller mailed Purchaser a notice canceling the contract. The notice was returned "unclaimed" to Seller. Although sent by certified mail to the correct address, Purchaser asserts he did not receive the notice.

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[1]The contract price was $7,500 plus interest. Purchaser paid $75.00 as a down payment. Monthly payments were $75.00.

In 1992, Purchaser's wife contacted Seller's representative to determine if he would allow her to assume the payments. The representative passed away without making a commitment.

On August 27, 1996, Purchaser's attorney forwarded Seller a check for $2,451.34. Seller refused to accept the check.

At the time of default (August 1988), Purchaser had made 141 of the approximately 182 monthly payments and owed $2,440.14. The balance as of August 31, 1998, was $7,726.33.

Purchaser brought this action for breach of contract and specific performance. In its amended answer and counterclaim, Seller alleged Purchaser was in default and sought an order terminating the contract. Alternatively, Seller sought judgment in the amount of $7,443, reasonable attorney's fees, and foreclosure of any equitable interest Purchaser may have obtained as a result of the transaction.[2]

The master-in-equity determined Purchaser was in default of the agreement and Seller had the right to terminate the agreement pursuant to its terms. The Court of Appeals reversed, holding Purchaser had an equitable interest in the property and, therefore, Seller's right to seek forfeiture or to foreclose was subject to Purchaser's right of redemption which could not have been waived by the agreement. Id.

ISSUE

Did the Court of Appeals err by declining to apply the forfeiture provision of the installment land contract, instead determining Purchaser has an equitable interest in the property which includes

[2]The parties agree this is an action in equity. Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964) (specific performance lies in equity); Wilder Corp. v. Wilke, 324 S.C. 570, 479 S.E.2d 510 (Ct. App. 1996) (actions for foreclosure or cancellation of instruments are in equity).

a right of redemption upon default?

DISCUSSION

Whether an equitable right of redemption exists in spite of a strict forfeiture provision in an installment land contract has not been specifically decided by this Court. In deciding the answer to this question, we must determine whether equitable principles may alter the clear and unambiguous terms of the parties' contract.

Installment Land Contracts

> Real property is often sold under contracts that provide for the payment of the purchase price in a series of installments. These contracts, usually termed installment land contracts, are drafted in many ways. Typically, the vendor retains legal title to the property until all of the purchase price has been paid . . . Also typically, the purchaser is entitled to immediate possession . . . Installment contracts almost always contain forfeiture clauses. When enforced, these clauses enable the vendor to terminate the contract, recover the property, and retain all installments paid when the purchaser defaults.

15 RICHARD R. POWELL, REAL PROPERTY ' 84D.01 at 3 (2000); Ellis v. Butterfield, 570 P.2d 1334, 1336 (Idaho 1977) (installment land contract is "frequently called a 'poor man's mortgage' because the vendor, as with a mortgage, finances the purchaser's acquisition of the property by accepting installment payments on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the rights of mortgagors.").[3] Contrary to existing mortgage protections, a

[3]An installment land contract does have advantages for buyers. In addition to immediate possession, installment land contracts offer the benefits of a low down payment and easy credit requirements. Buyers do not have to procure expensive and, sometimes unavailable, traditional mortgage financing. Closing costs are often minimal and, since there is no outside

seller may typically avoid foreclosure procedures by including a forfeiture remedy in the installment land contract. See Matthew Cole Bormuth, note, *Real Estate B The Wyoming Installment Land Contract: A Mortgage in Sheep's Clothing? Or What You See Isn't What You Get*, 28 LAND AND WATER LAW REVIEW 309 (1993); Juliet M. Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contracts and Mortgages under the Bankruptcy Code*, 100 DICK. L. R. 733 (1996) (forfeiture remedy makes installment land contract more favorable to vendor than seller-financed mortgage).

South Carolina Law

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988). It is not the function of the court to rewrite contracts for parties. See Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983).

Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance. Tate v. Le Master, 231 S.C. 429, 99 S.E.2d 39 (1957). Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty. Id.; Kirkland Distributing Co. of Columbia, S.C. v. United States, 276 F.2d 138 (4th Cir. 1960). Equity will not enforce a penalty for breach of contract. South Carolina Dep't of Health and Envtl. Control v. Kennedy, 289 S.C. 73, 344 S.E.2d 859 (Ct. App. 1986).

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lender, there are no loan origination fees. Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures,* 1988 DUKE L.J. 609.

"Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." Lane v. New York Life Ins. Co., 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) citing Bangert v. John L. Roper Lumber Co., 86 S. E. 516, 517 (N.C. 1915).

The above-stated principles of contract law are consistent with the conclusion that a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty. In those circumstances, as in other contractual instances where a stipulated sum amounts to a penalty, we conclude it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price.

Our conclusion is supported by authority from other jurisdictions. In numerous other states, courts claim an equitable power to "deny or delay forfeiture when fairness demands." Freyfogle, supra 620; see Hatfield v. Mixon Realty Co., 601 S.W.2d 894 (Ark. Ct. App. 1980); Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc., 919 P.2d 879 (Col. Ct. App. 1996); Ellis v. Butterfield, supra; Nelson v. Robinson, 336 P.2d 415 (Kan. 1959); Perkins v. Penney, 387 A.2d 205 (Me. 1978); Rothenberg v. Follman, 172 N.W.2d 845 (Mich. Ct. App. 1969); O'Meara v. Olson, 414 N.W.2d 563 (Minn. Ct. App. 1987); Beck v. Strong, 572 S.W.2d 484 (Mo. Ct. App. 1978); Sharp v. Holthusen, 616 P.2d 374 (Mont. 1980); Martinez v. Martinez, 678 P.2d 1163 (N.M. 1984); Lamberth v. McDaniel, 506 S.E.2d 295 (N.C. App. 1998); Straub v. Lessman, 403 N.W.2d 5 (N.D. 1987); T-Anchor Corp. v. Travarillo Assocs., 529 S.W.2d 622 (Tex. Civ. App. 1975); Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah 1977); Bailey v. Savage, 236 S.E.2d 203 (W.Va. 1977); see also 4 Richard R. Powell, REAL PROPERTY § 37.21[1][c] at 132 (2001) ("[t]he main problem with the forfeiture remedy is that it often puts the seller in too favorable a position and, therefore, is subject to attacks based on equitable considerations of unfairness and unconscionablilty."). In fact, the authoritative treatise on real property law provides, "no state today is likely to condone a purchaser forfeiture that greatly exceeds the vendor's loss." 15 Powell, REAL

PROPERTY § 84D.01[4] at 12.

As discussed at length in Bartles v. Livingston, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984), the common law recognized an equitable right of redemption in the context of mortgages well before any statutory right was granted. The mortgagor was given an equitable right to redeem the property irrespective of the terms of the mortgage and this right to redeem was considered an equitable interest in the land. For years, in an executory contract for the sale of land our Court has equated the vendor with the mortgagee and the vendee with the mortgagor. Dempsey v. Huskey, 224 S.C. 536, 80 S.E.2d 119 (1954).[4] There is no equitable reason why the right of redemption should not likewise be afforded to vendees in an installment land contract in appropriate circumstances.

For the above reasons, we hold courts of equity can relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands.[5] Accordingly, this matter is remanded to the master-in-equity to

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[4]The Court of Appeals has specifically held that in an installment land contract, the vendee in possession of the land is considered the owner of an equitable interest in the property. Southern Pole Bldgs., Inc., v. Williams, 289 S.C. 521, 347 S.E.2d 121 (Ct. App. 1986).

We note the right of redemption is distinguishable from an equitable estate which may pass to the purchaser under the theory of equitable conversion. Unlike the equitable right of redemption, the theory of equitable conversion does not apply if the parties provide to the contrary by contract. Brook v. Council of Co-Owners of Stones Throw Horiz. Prop. Regime I, 315 S.C. 474, 445 S.E.2d 630 (1994). In this case, the contract provides that, upon default, all amounts previously paid will be retained by Seller as rent. Although this provision may prevent Purchaser from claiming an equitable estate in the property for the amount of the payments made, it cannot defeat his equitable right of redemption.

[5]A variety of case-specific factors should be considered to determine if

determine whether Purchaser has an equitable right of redemption.

The decision of the Court of Appeals is **AFFIRMED AS MODIFIED.**

TOAL, C.J., MOORE, PLEICONE, JJ., and Acting Justice George T. Gregory, Jr., concurs.

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redemption is equitable under the circumstances. See Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc., supra (the amount of the purchaser's equity, the length of the default period and the number of defaults, the amount of monthly payments in relation to rental value, the value of improvements to the property, the adequacy of the property's maintenance); Rothenberg v. Follman, 172 N.W.2d 845 (Mich. Ct. App. 1996) (whether forfeiture is unreasonable depends upon amount and length of default, amount of forfeiture, reason for delay in payment, and speed in which equity is sought); 4 Powell, REAL PROPERTY § 37.21[1] at 135 ("In determining whether the attempted forfeiture should be set aside, courts consider the amount of default, the reason for the purchaser's default, the amount of money the purchaser would forfeit compared to the purchase price, and the relationship of the monthly payments to the fair rental value of the property.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elaine (Nutting) Greene,

Appellant,

v.

Jackson Edward Greene, individually; and Jackson Edward Greene, Jr., and Walter Allan Greene, both individually and as Trustees of the Jackson Edward Greene, Sr., Irrevocable Trust,

Respondents.

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 3540
Heard June 4, 2002 – Filed August 5, 2002

AFFIRMED IN PART, MODIFIED IN PART, REVERSED & REMANDED IN PART

Timothy E. Madden, of Greenville, for appellant.

Thomas W. Traxler and Katherine H. Tiffany, of Greenville, for respondents.

HEARN, C.J.: In this divorce action, Elaine (Nutting) Greene (Wife) appeals several aspects of the family court's order of equitable distribution. We affirm in part, reverse in part, modify in part, and remand.

FACTS

Wife and Jackson Edward Greene (Husband) were married on December 23, 1988 and separated on March 17, 1998. At the time of the marriage, Husband was retired and owned substantial property, including a home situated on a 17-acre tract where the parties lived during the marriage and a separate 135-acre tract. Wife's premarital property consisted of $16,000 in proceeds from the sale of her former home.

During the marriage, the parties operated a farm and horse business on the 17 acres surrounding the home. Both parties participated in giving riding lessons and boarding, breeding, training, buying, selling, and leasing horses. Proceeds derived from the business were maintained in a joint bank account and applied toward the expenses associated with the business. The business, however, operated at a loss, and Husband occasionally contributed personal funds to cover company expenses.

Throughout the marriage, the parties maintained separate bank accounts. Husband's accounts were funded primarily with his premarital retirement and Social Security income, and proceeds from the sale of his premarital real estate. Husband used his retirement income to pay most of the parties' living expenses, and used other funds to pay for utilities, real estate taxes, insurance premiums, and home repairs. Wife's separate accounts were funded with the proceeds from the sale of her home and income from her employment as a teacher. She used money from her accounts to acquire numerous investment accounts and four parcels of real estate.

Early in the marriage, the parties began repairing and improving the home. Wife cleaned the home and performed minor repair work. In 1996, a fire

destroyed much of the home. The insurance proceeds, approximately $171,000, were deposited into Husband's account and used to pay for restoration and renovations on the marital residence.

At some point during the marriage, Wife became romantically involved with a neighbor. She instituted this action against Husband seeking an order of separate support and maintenance and ancillary relief. Husband answered and counterclaimed, seeking, among other things, a divorce on the ground of adultery and equitable distribution of marital property.

The family court awarded Husband a divorce on the ground of adultery; identified, valued and equally apportioned the parties' marital property; awarded Wife a special equity in the home; and awarded Husband $12,195 in attorney fees and costs.

DISCUSSION

In appeals from the family court, this court has the authority to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

I. Identification of Marital Property

A. Property Titled to Wife

Wife first asserts the family court erred in identifying two parcels of property, 22 North Acres and 4 Kestrel Court, as marital property. We agree.

The family court found that both parcels of real estate were marital

because (1) the parties stipulated the properties were marital in nature; (2) Wife used marital funds to acquire a contractual interest in the properties prior to the date of filing; and (3) Wife used other marital funds to close on the purchase of the properties. Accordingly, the family court assigned equity values to the properties and charged the full amount against Wife's share of the marital estate.

The family court determined that the parties stipulated to the marital nature of the properties based on Wife's inclusion of the properties on the marital assets addendum of her financial declaration submitted to the family court. Our supreme court has defined a stipulation as:

> an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them. A stipulation is an agreement, an understanding. The court must construe it like a contract, i.e., interpret it in a manner consistent with the parties' intentions.

Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998) (internal citations and quotations omitted). The purpose of a stipulation is to "obviate need for proof or to narrow [the] range of litigable issues." Black's Law Dictionary 1415 (6th ed. 1990).

Our reading of the record does not convince us Wife intended to stipulate that the properties were marital simply because she included them on the marital property addendum of her financial declaration. Rather, we accept Wife's explanation that she included them simply to disclose their existence to the court. This explanation is consistent with Wife's position throughout her testimony that this was her separate property.

Furthermore, we find the date of acquisition of these properties significant to our determination that they are nonmarital. Marital property is generally defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or

commencement of marital litigation . . . ." S.C. Code Ann. § 20-7-473 (Supp. 2001). Although Wife used $2,000 in marital funds to pay earnest money deposits on the property prior to the date of filing, legal title to the properties did not vest until after the date marital litigation was commenced. Because Wife had no ownership interest in the properties until after the date of filing, we find the disputed properties were improperly classified as marital. Accordingly, we reverse the family court's finding that 22 North Acres and 4 Kestrel Court were marital property.

Moreover, we modify the family court's order to reflect the $10,000 loan from Wife's father for the down payment for 4 Kestrel Court. Although the family court "recognized a contribution on Mrs. Greene's behalf in the amount of $10,000 in the overall equitable division of the marital estate," the family court nonetheless included the full equitable value of 4 Kestrel Court in valuing the marital estate for equitable distribution. This was error. We find the $10,000 Wife borrowed from her father for the down payment on 4 Kestrel Court was her separate property. Accordingly, we modify the family court's order to subtract $10,000 from the assigned value of the Kestrel Court property for purposes of equitable distribution.

Husband may, however, be entitled to a special equity in 22 North Acres. Although nonmarital property is not subject to equitable distribution as such, if one spouse uses marital funds to purchase property after the commencement of marital litigation, the family court may properly award the other spouse a special equity in the property. Cannon v. Cannon, 321 S.C. 44, 50-51, 467 S.E.2d 132, 136 (Ct. App. 1996). Wife testified she used $8,000 from her checking account to make a down payment on this property. This was clearly marital money, as the checking account was funded with income she earned teaching during the marriage. Thus, Husband would be entitled to a special equity in the property. However, Wife claims Husband's "Division of Assets" exhibit presented at trial listed the equitable value of the property at $8,000 without subtracting this amount from Wife's checking account. The family court accepted Husband's valuation of the checking account, which would have the effect of counting the $8,000 twice for purposes of equitable distribution. Because we cannot discern whether the $8,000 was subtracted

from the checking account prior to Husband's listing of the value of that account on his "Division of Assets" list, we remand this issue to the family court to make that determination.

Furthermore, we hold Wife's share in the marital estate must be reduced by $2,000 in order to account for the expenditure of marital funds to pay the earnest money deposits on both properties. On remand, the family court is directed to reapportion the marital estate to account for this partial modification, and make a determination as to whether the $8,000 from Wife's checking account for 22 North Acres has been counted twice in the equitable distribution.

B. Property Titled in Husband's Name

Wife argues the marital home and surrounding acreage were transmuted into marital property and should have been subject to equitable distribution, or alternatively, that she is entitled to a greater than ten percent special equity in the home and surrounding seventeen acres. We disagree.

Generally, property acquired by either party prior to the marriage is nonmarital property. S.C. Code Ann. § 20-7-473(2) (Supp. 2001). In certain circumstances, nonmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. Pool v. Pool, 321 S.C. 84, 88, 467 S.E.2d 753, 756 (Ct. App. 1996), aff'd as modified, 329 S.C. 324, 494 S.E.2d 820 (1998). Transmutation is, however, a matter of intent to be gleaned from the facts of each case. The spouse claiming transmutation bears the burden of producing objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage. Id. The mere use of separate property to support the marriage, without some additional evidence of intent to treat the property as marital, is not sufficient to establish transmutation. Id.

Here, there is no question that the parties used Husband's premarital

home and surrounding property in support of the marriage. They lived in the home and operated a horse business and farm on the surrounding property. However, the record clearly indicates Husband deliberately kept his premarital property separate and distinct from their marital property. Husband maintained a joint account with Wife and separate accounts funded with his separate property; he used money from his separate accounts to maintain the home and pay the homeowner's insurance premiums. He also subsidized the horse business and farm with money from his separate accounts. In our view, these efforts are evidence of Husband's intent to treat his premarital home and other premarital properties as nonmarital property. Therefore, we find the family court properly determined that these properties were nonmarital and not subject to equitable distribution.

We also reject Wife's argument that she is entitled to a greater special equity in the marital home and surrounding seventeen acres. Although Husband maintained there was no increase in the value of his home and farm acreage during the marriage, the family court found Wife's indirect contributions resulted in a ten percent increase in value of the property and awarded Wife $28,200. To the extent Wife advanced a contrary position at trial, we find the family court acted within its discretion in assigning more weight to Husband's testimony, particularly in light of the family court's express determination that Husband was a more credible witness than Wife. See Bragg v. Bragg, 347 S.C. 16, 21-22, 553 S.E.2d 251, 254 (Ct. App. 2001) (stating this court is not required to ignore the trial judge who saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony).

II. Post-filing Rental Income

Wife next contends the family court erred in reducing her share in the marital estate by the amount of rental income she received and disposed of after the date marital litigation was commenced. We agree.

The family court found that during the course of litigation, Wife received approximately $37,525 in rental income, including the North Acres

property. In charging this income against Wife's share in the marital estate, the family court reduced the amount of income by the amount of income taxes associated with the property, and ultimately determined Wife's share should be reduced by $24,391.

The family court properly reduced Wife's share in the marital estate by one-half of the amount of post-filing rental income derived from the parties' marital property; however, rental income derived from nonmarital property is nonmarital in nature. Murray v. Murray, 312 S.C. 154, 161, 439 S.E.2d 312, 317 (Ct. App. 1994). In light of our holding regarding the nonmarital nature of the North Acres property, and in the absence of any evidence that Husband directly or indirectly contributed to the acquisition of the rental income, Husband is not entitled to any credit for post-filing rental income attributable to this property.[1] On remand, the family court is directed to reduce the amount of the charge against Wife's share in the marital estate for post-filing rental income by the amount of rental income attributable to the North Acres property.

III. Equitable Apportionment

Wife argues the family court erred in failing to award her a greater share in the marital estate. We disagree.

The apportionment of marital property will not be disturbed on appeal absent an abuse of discretion. Bungener v. Bungener, 291 S.C. 247, 251, 353 S.E.2d 147, 150 (Ct. App. 1987). South Carolina Code Ann. § 20-7-472 (Supp. 2001) lists fifteen factors for the family court to consider in equitably apportioning a marital estate. The statute grants the family court discretion to decide what weight to assign various factors. On appeal, this court looks to the overall fairness of the apportionment and it is irrelevant that this court might

[1] Wife testified that Husband failed to contribute to the acquisition of these properties and Husband did not contradict the testimony. As noted above, Husband is entitled to a special equity in the value of the property due to Wife's use of marital funds to purchase the property. Accord Cannon, 321 S.C. at 50-51, 467 S.E.2d at 136.

have weighed specific factors differently than the family court. Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988).

Here, the family court expressly considered the factors relevant to making an award of equitable apportionment. We find the facts and circumstances of this case, including but in no way limited to Wife's marital misconduct, render the equal division of marital assets fair and reasonable. Therefore, we find no error.

IV. Scheme of Equitable Distribution

Finally, Wife asserts the family court erred in awarding Husband a particular piece of marital property at a value reduced by the amount of her contribution of nonmarital funds for the purchase of the property. We agree.

The family court has wide discretion in determining how marital property is to be distributed. Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41-42 (1995). In so doing, it "may use any reasonable means to divide the property equitably . . . ." Id. Accordingly, the court's apportionment of marital property will not be disturbed absent an abuse of discretion. Id.

The family court found that the parties' Rose Garden property had an equitable value of $50,500 and further found that $20,000 of the equity was attributable to Wife's contribution of premarital funds as a down payment on the property. Accordingly, the family court assigned the property a value of $30,500 for purposes of equitable distribution. However, the court awarded the Rose Garden property to Husband with a value of $30,500, giving Wife the option of retaining the property by paying Husband $30,500 within 30 days of the final order. We find this was error. Wife was entitled to a $20,000 credit for her nonmarital contribution toward the acquisition of the property. However, by awarding the property to Husband at the reduced value and requiring Wife to purchase it from him, the family court effectively gave Husband the full benefit of a credit intended to benefit Wife. As such, we remand this issue to the family court to revalue and/or redistribute the Rose Garden property in a manner which properly accounts for Wife's contribution of nonmarital assets to its acquisition.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, MODIFIED IN PART, REVERSED & REMANDED IN PART.

HUFF and HOWARD, JJ., concur.