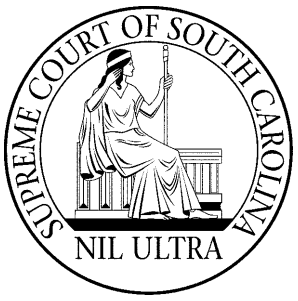

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 16, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Edward Delane Rosemond, Respondent.

Appellate Case Nos. 2022-000248 and 2022-000249

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, 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 accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts 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 account(s) 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 Peyre T. Lumpkin, 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 Peyre T. Lumpkin, 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 Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
March 10, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald and Carlee Simmons, Respondents,

v.

Benson Hyundai, LLC, Appellant.

Appellate Case No. 2019-000344

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5900
Heard December 9, 2021 – Filed March 16, 2022

AFFIRMED AS MODIFIED

Bradford Neal Martin and Laura Wilcox Howle Teer, both of Bradford Neal Martin & Associates, PA, of Greenville, for Appellant.

E. Warren Moise, of Grimball & Cabaniss, LLC, of Charleston, for Respondents.

HILL, J.: This appeal of an order denying Benson Hyundai, LLC's motion to compel arbitration turns on whether Benson and Respondents Donald and Carlee Simmons agreed to arbitrate their dispute over the sale of a car. Respondents sought to buy a car from Benson and finance part of the cost. Benson had Respondents execute a series of documents: a retail buyer's order worksheet, two retail buyer's orders, a special delivery agreement, a retail installment sales contract (RISC), and

Benson's Arbitration Policies and Procedures (BAPP). The RISC and the BAPP contained differing arbitration provisions. Respondents gave Benson a down payment and other monies, traded their old car in, and left in the new one. When Benson realized the final sales price was some $7,000 less than that listed on the worksheet, it called Respondents and attempted to reform the sale based on the mistake. When Respondents refused, Benson claims it agreed to honor the lower price. After Benson was not able to assign the RISC to a suitable lender, it took the position that the documents made clear Respondents would have to return the car if the financing fell through. Respondents refused to return the car, and their monthly payments based on the RISC were returned. There is no evidence Benson returned the trade-in or the up-front monies Respondents tendered. When Respondents sued Benson in circuit court over the sale, Benson moved to compel arbitration. The trial court denied Benson's motion, concluding the arbitration provisions of the RISC and the BAPP were so conflicting no meeting of the minds occurred, and therefore, Benson and Respondents never formed an agreement to arbitrate, and even if they did, the agreement was unconscionable. The trial court also found any contract was illusory as Benson retained the discretion to approve the financing. Benson now appeals. We affirm, finding the parties never formed an agreement to arbitrate but for different reasons than the trial court.

I. Standard of Review

We review a trial court's ruling on a motion to compel arbitration de novo, but we will not reverse factual findings of the trial court that are reasonably supported by the record. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et. seq. (2018), commands that arbitration agreements be treated the same as all other contracts—no more, no less. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). Our supreme court has recently returned the legal cliché that the law "favors" arbitration to its proper context, reminding that "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).

II.

A. The FAA and Arbitration Agreement Formation

The FAA provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The parties agree if they have an arbitration agreement, the FAA applies to it. What they disagree about is whether they agreed to arbitrate. Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Arbitration may not be compelled unless the court is satisfied "the making of the agreement for arbitration . . . is not in issue." 9 U.S.C § 4. The "making" or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the arbitrator. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (noting it is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide"); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 257–58 (4th Cir. 2021). An arbitration agreement cannot prove itself, so a court necessarily must determine if an agreement has been made according to law, for only then does the jurisdiction of the FAA emerge and allow a court to stay the court action pursuant to § 3 and compel arbitration pursuant to § 4. *See* Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1, 5 (2003) (observing that "one must enter into the [FAA] system *somewhere*" and the idea that an arbitration clause can confirm itself—"'the product, apparently, of some curious process of autogenesis'—is completely alien to our jurisprudence") (footnote omitted); *see also* Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 647 & n.101 (2020).

In the FAA world, the issue of the formation of the arbitration agreement is quite different from the issue of the validity of a concluded agreement, i.e. whether an arbitration agreement that was formed is nevertheless invalid because of fraud,

duress, unconscionability, or some other defense to the enforcement of a contract. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010) ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded . . . .'" (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006))). The United States Supreme Court has held "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Granite Rock Co.*, 561 U.S. at 299.

Our first step, then, is to decide whether Benson and Respondents formed an agreement to arbitrate. If we conclude they did not, the first step would also be the last because the FAA cannot make parties arbitrate when they have not agreed to do so. But if we conclude they did form an agreement to arbitrate, we would take the second step: deciding whether the concluded arbitration agreement survives Respondents' validity challenge (their claim the arbitration agreement is unconscionable), assuming the parties have not delegated that issue to the arbitrator. It is only at this second step that we apply the "separability" doctrine of *Prima Paint*. 388 U.S. at 403–04 (holding a court deciding motion to compel arbitration may only consider validity challenges that are specific to the concluded arbitration agreement, and in doing so, must separate the arbitration agreement from remainder of contract; if court is satisfied arbitration agreement is valid, § 4 requires that any challenges to the validity of the underlying, broader contract in which the arbitration clause is contained must be heard by arbitrator).

The two-step sequence can be summarized as follows: (1) resolution of any challenge to the formation of the arbitration agreement, consistent with *Granite Rock*, and (2) determining whether any subsequent challenges are to the entire agreement or to the arbitration clause specifically, consistent with *Prima Paint. See Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 990 (11th Cir. 2012) (describing two-step process and explaining that "*Granite Rock*'s threshold inquiry of whether a contract was formed necessarily precedes" the "determination of whether any subsequent challenges are to the entire agreement, or to the arbitration clause specifically" under the severability principle); *see also In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879–80 (6th Cir. 2021) (adopting similar two-step process and noting that "even where a delegation provision purports to require arbitration of formation issues, the severability principle does not apply and courts must decide challenges to the formation or 'existence of an agreement in the first

instance ("whether it was in fact agreed to" or "was ever concluded")'" (quoting *VIP, Inc. v. KYB Corp. (In re Auto. Parts Antitrust Litig.)*, 951 F.3d 377, 386 (6th Cir. 2020))); *accord MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 400–02 (3d Cir. 2020) (collecting cases).

Having settled the ground rules, we now proceed to the first step: deciding if the parties have an agreement to arbitrate, which we decide applying South Carolina contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under South Carolina law, a contract cannot be formed without a meeting of the minds between the parties as to all essential and material terms. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). The parties must also "manifest a mutual intent to be bound." *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984).

B. The Parties' Transaction

Benson presses several sophisticated arguments as to why it has an agreement to arbitrate with Respondents. The condensed version is that Benson believes only the BAPP arbitration provision is binding, and therefore the trial court erred in finding a conflict between the arbitration provisions of the RISC and the BAPP. According to Benson, the arbitration provision contained in the RISC was never effective because Benson never signed the RISC and the RISC was conditioned on its being assigned to a third party financier. Alternatively, Benson argues the BAPP was the last document signed, and due to the doctrines of contract modification and merger, the arbitration provision of the RISC was discharged and the BAPP became the only surviving arbitration agreement.

We do not need to test all these angles, for this appeal may be decided on a straighter plane of basic contract formation. *See* Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record). The special delivery agreement states Benson will attempt to assign the RISC on terms satisfactory to Benson, and if the assignment is successful, "the [RISC] (and all other documents executed by Buyer) shall be deemed delivered and fully binding." Because the assignment never occurred, the parties never became bound by any of the other documents, including the arbitration provisions of the RISC and the BAPP. *See Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975) ("There can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations."); 1 *Williston on Contracts* § 3:5 (4th ed. 2021) ("[I]f the parties to an agreement specifically provide that no legal obligation is thereby created, that

provision will be respected by the law, to the same degree that any other term of their agreement would be . . . ."). The Montana supreme court reached the same conclusion in the context of a motion to compel arbitration involving very similar documents. *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 340 (Mont. 2008) (holding buyer's order and RISC in transaction for sale of car that stated no binding contract was created until obtaining satisfactory financing was condition precedent to formation of contract, including arbitration provisions). We must enforce the special delivery agreement as written, "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

We have held car transactions like the one structured by the documents here—whereby the consumer accepts conditional delivery of the car but the entire deal is expressly conditioned on the dealer's satisfactory assignment of the financing—do not amount to enforceable contracts if the assignment fails. *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 451, 613 S.E.2d 802, 806 (Ct. App. 2005). The special delivery agreement declared the parties' intent to not be bound if the assignment of the financing failed. When it failed, so did the formation of the parties' arbitration agreement. *Brewer* permits a dealer to draft transaction documents in such a way as to hedge its bets. 364 S.C. at 451-52, S.E.2d at 807. As long as the conditional nature of the contract is explained openly and transparently (and the covenant of good faith and fair dealing complied with), these deals are not considered the type of "yo-yo sales" forbidden by *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 381–82, 595 S.E.2d 461, 467–68 (2004). This transparency also allows a court to see, as we do here, that while it may seem everyone to the transaction was nodding about arbitration, in the end no one agreed to it. Because no agreement to arbitrate was formed, we have no need to proceed to the second step of the analysis.

Nor do we need to consider, as an additional sustaining ground, the trial court's finding that the entire contractual arrangement was illusory. We do point out, though, that the illusion question is properly framed as asking whether a contract fails because at least one side's promise to perform was illusory, negating the mutual intent to be bound. The classic example involves a situation where both parties' promises are illusory and was given over four centuries ago by John Selden (who John Milton thought the most learned man of his age):

> Lady Kent articled with Sir Edward Herbert that he should come to her when she sent for him, and stay with her as

> long as she would have liked him, to which he set his hand; then he articled with her that he should go away when he pleased and stay away as long as he pleased, to which she set her hand.

1 *Corbin on Contracts* § 1.17 (rev. ed. 2018) (quoting John Selden, *Table Talk*).

The ruling of the distinguished trial court denying Benson's motion to compel arbitration is therefore

AFFIRMED AS MODIFIED.

KONDUROS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allen Lee Jacobs, Meghan Jacobs, Donald L. Jacobs, and Tamila D. Jacobs, Plaintiffs,

v.

Ashley Nicole Zarcone, David Zarcone, Joseph Rose, April Rose and South Carolina Department of Social Services, Defendants,

Of whom Ashley Nicole Zarcone is the Appellant,

and

Meghan Jacobs, Donald L. Jacobs, and Tamila D. Jacobs are the Respondents.

Appellate Case No. 2018-000488

Appeal From Greenville County
Alex Kinlaw, Jr., Family Court Judge

Opinion No. 5901
Heard September 14, 2021 – Filed March 16, 2022

AFFIRMED IN PART, VACATED IN PART

Bruce A. Byrholdt and Sarah Ganss Drawdy, both of Byrholdt Drawdy, LLC, of Anderson, and Jeffrey Alton Phillips, of Phillips Law Firm, P.A., of Travelers Rest, all for Appellant.

Bruce Wyche Bannister and Luke Anthony Burke, both of Bannister, Wyatt & Stalvey, LLC, of Greenville, and James D. Calmes, III, of James D. Calmes, III Law Firm, of Greenville, all for Respondent Meghan Jacobs.

Amanda Morris Gallivan, of Christophillis & Gallivan, P.A., of Greenville, and Robert Steve Ingram, III, of Holliday Ingram LLC, of Greenville, both for Respondent Donald L. Jacobs and Respondent Tamila D. Jacobs.

MCDONALD, J.: Allen Jacobs (Father) died while seeking sole custody of his two minor children, D.J. and M.J. (Children).[1] Following a multi-week trial, the family court awarded custody of the Children to Father's wife, Meghan Jacobs (Stepmother), with supervised visitation granted to the Children's Mother, Ashley Zarcone. Father's parents, Donald Jacobs and Tamila Jacobs (Paternal Grandparents), intervened and were awarded visitation rights. Mother challenges both the custody and visitation awards, arguing the family court erred in declaring her unfit and finding Stepmother was the Children's de facto custodian and psychological parent. We affirm in part and vacate in part.

Facts and Procedural History

The facts of this case are complex and tragic. Mother and Father married in 2006 and separated in 2011. They had two sons, D.J. in 2009 and M.J. in 2010. In 2013, the family court granted Mother and Father a divorce and awarded them joint custody of the Children, with Mother having primary placement and Father having "liberal visitation." The family court noted either party could request in writing that certain standard visitation guidelines be applied.

[1] Father, a police officer with the Greenville Police Department, was killed in the line of duty.

In late May or early June 2013, Mother met David Zarcone—the couple married the following September. Mother and David had one child together in 2014, L.Z., and David had visitation with one child from a previous relationship.

On August 8, 2014, Father filed an action seeking modification of visitation and child support. By order dated February 3, 2015, the family court approved an agreement between Mother and Father establishing joint custody, with Mother having primary placement and Father having visitation on alternating weekends, along with overnight Wednesday visits during the weeks he did not have weekend visitation. The agreement also addressed summer visitation and prevented any stepparent from administering corporal punishment. The family court's order included the parties' agreement that "Linda Hutton, MSW, shall be used to counsel the minor sons and provide family counseling to the extent Ms. Hutton deems appropriate."

A few days after the family court issued the February 2015 order, four-year-old D.J. sustained injuries in Mother's bathroom while Mother was at work and David was the only adult at home. Mother testified David called her at work and told her D.J. woke him up and told him he needed to use the bathroom:

> David said, okay, go to the bathroom. David rolled over to go back to sleep. And then he heard [D.J.] crying. [D.J.] came and woke him back up and said, I just fell going to the bathroom.
>
> He—I got on the phone with [D.J.], asked him if he was okay. Calmed him down. He stopped crying. He said he was fine. I got back on the phone with David and David said that he [saw] where he thought there was going to be a knot on his forehead right there where he had hit the tub and that he was going to put some ice on it or put a cold rag on it and that he would stay up and monitor it until I got home.

However, the Children reported to others that David pushed D.J. down in the tub. Mother does not believe David caused D.J.'s bruising that night; she claims D.J. told her he slipped on some clothes on the bathroom floor. Mother did not tell Father about the bathroom incident when they next exchanged custody.

On February 12, 2015, when Stepmother picked the Children up from school for Father's long weekend visitation, she noticed yellowish bruising on D.J.'s face. She described this at trial as "excessive bruising." After Father examined D.J.'s face, Stepmother dropped the Children off to spend the night with Paternal Grandparents because Father had to work and Stepmother had a night class. Although Stepmother told Paternal Grandparents that D.J. had fallen and hit his head in the bathtub, Paternal Grandmother became alarmed during D.J.'s bath time when she found the bruising was not just to the child's face or head, but on his back and on one arm as well. Grandmother explained,

> I discovered he had all these circle marks on his back. And then right around here on one of his arms. I think it was his left arm. But he had these marks there that looked like three finger marks that someone had grabbed him. And so it wasn't just his head, but then there was these marks all over his back and on his arms.

The next morning, Father, Stepmother, and Paternal Grandmother took D.J. to the emergency room at Greenville Memorial Hospital. Dr. Elizabeth Foxworth, a pediatric emergency room physician, treated D.J. and observed bruising on his arms, face, and back, and behind his ears. Dr. Foxworth testified, "I saw lots of bruises on him in unusual locations." When asked what she meant by "unusual locations," Dr. Foxworth explained, "You rarely get bruises on your back or in particular he had one behind his ear. It was just really unusual places that are suggestive of child abuse."[2] Dr. Foxworth ordered lab work to rule out a medical condition as the cause of the bruising and subsequently diagnosed D.J. with bruising consistent with child abuse. Dr. Foxworth then referred D.J. to the Julie Valentine Center[3] for an evaluation.

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[2] At trial, Dr. Foxworth identified a drawing she made of D.J.'s bruising during her medical examination and noted she did not typically illustrate a patient's injuries—only having done three or four such drawings in her twenty-one-year career. Dr. Foxworth documented the locations of D.J.'s bruises because she was concerned he was being abused and these bruises "were just not where kids typically get bruises."

[3] The Julie Valentine Center is a child abuse recovery center in Greenville County.

South Carolina Department of Social Services (DSS) Investigator Bailey Thomas responded to Greenville Memorial Hospital after DSS received the report of suspected child abuse. Thomas observed D.J. had an "excessive" number of bruises, which she believed were inconsistent with a fall. During her investigation, Investigator Thomas met with D.J. and M.J. separately. Because of what she learned during these interviews, Thomas opened an investigation.

On February 19, 2015, Mother, David, and Father entered a DSS Safety Plan, which also covered L.Z (Mother and David's child). The safety plan listed Mother as protector for the three children and specified that Children would not be alone with David. The expected end date for the Safety Plan was set at "no later than ninety days."[4]

On March 30, 2015, DSS indicated a case against David for "physical abuse and substantial risk of physical abuse." The DSS Determination Fact Sheet reported "[D.J.] was observed to have faint bruising on his back, ribs, scalp and a linear bruise on his face. Bruising appears to be at least a week old." The Fact Sheet further reported "[D.J.] states that he was pushed by David and hit his face on the bathtub. Minor children report being afraid to be alone with David Zarcone because he hurts them." In the "Family Story" portion of the Family Assessment, DSS noted:

> Ashley [Mother] states that she divorced Allen Jacobs [Father] due to his controlling behaviors. Ashley stated that she [remarried] and has a baby with her current husband David Zarcone. Ashley stated that [Father] is upset that their children [M.J.] and [D.J.] started calling David dad and [Father] doesn't want them to. Ashley stated that she noticed this is when DSS started getting called on her. Ashley stated that [Father] called DSS on her saying that [M.J.] was being abused by David first now it's [D.J.]. Ashley stated that she knows that [Father] is telling the kids to say that David is abusing them but she knows that he is not. David Zarcone denies

[4] Ninety days after February 19, 2015, would have been May 20, 2015.

> pushing stepson [D.J.] causing [him] to fall and hit his face on the tub. David stated that the only thing he does as far as punishment is timeout and they have a chair that they make the kids use. David stated that one time he did spank the boys but used his hand to spank them on their bottoms and only did this one time. David stated that he is the father figure inside the home and does feel that the boys need to listen to him when they are with him alone. Minor children [M.J. and D.J.] report being afraid to be alone with David Zarcone. Both stated that he is mean to them and slams them down on their backs and when they tell him to stop he says they better not tell their mother or they will have to go to timeout. [D.J.] stated that David was in the bathroom with him and pushed him down causing him to hit his head on the tub.

On March 31, 2015, DSS performed a home visit and entered a new safety plan with Mother. This revised plan specified, "Mother will ensure there is no contact between David Zarcone and the minor children [M.J. and D.J.]." Investigator Thomas and her supervisor, Jacquelynn Brawner, determined the safety plan needed a revision to prohibit all contact between the Children and David based on their review of the Children's interviews from the Julie Valentine Center and D.J.'s medical records. Thomas emphasized the March 31 safety plan prohibited David from having any contact with the Children, including holidays, and any change in the safety plan "would need to be in writing." This safety plan was set to end not later than ninety days, or by June 29, 2015. In Thomas's case dictation from this home visit with Mother, Thomas noted, "DSS is worried about David's contact with the children. [Mother] is worried about David having to leave the home."

Despite the March 31 safety plan's specific "no contact" provision, Mother, the Children, L.Z., David, David's child from a previous relationship, and Mother's parents (Maternal Grandparents) celebrated Easter together just five days later. That same day, Mother took D.J. to the hospital after he fell down the stairs. Mother testified David was in a different room (possibly the kitchen) when D.J. fell on the stairs; however, she acknowledged that the Children allege David pushed D.J. down the stairs.[5] Mother does not believe this was an emergency but

[5] David testified he was in the kitchen when D.J. slipped and fell down the stairs.

claimed she took D.J. to the hospital as a precaution because DSS supervisor Brawner told her if anything happened to D.J. during the investigation "to just take him to the hospital and get it on the record as to what happened." When asked about the Easter violation of the safety plan, Mother testified that Brawner told her it was fine for the family to attend Easter church together, so long as David was not alone with the Children. However, Brawner denied authorizing this holiday contact. She further noted such would be nonsensical because she had just revised the safety plan to "make it strict that there's no contact." Moreover, no such change would be made without staffing the case and receiving input from the caseworker.

On Father's Day weekend in June 2015, again prior to the expiration of the safety plan, Mother's family, including the Children and David, took a trip Florida to visit Mother's brother. David admitted he knew the safety plan was still in place at the time of the trip and that it prohibited him from having any contact with the Children. However, like Mother, David claimed someone at DSS had given Mother permission for David to go on the trip.

On June 29, 2015, Mother and David got into a disagreement at a Travelers Rest Walmart in the presence of M.J., D.J., and L.Z. David became angry when the Children "started running around and acting like kids" and Mother did not discipline them. Mother told David she did not want him yelling around the Children, and he grabbed her wrist and tried to remove her wedding ring. Mother attempted to avoid David for the rest of the day, but after the Children went to bed, he resumed yelling at her for not disciplining or spanking the Children.

The next day, Mother and David were involved in another altercation, which resulted in David's arrest for criminal domestic violence (CDV). Mother testified David became agitated after speaking with his ex-wife, who was denying David visitation with his son. David left to buy cigarettes and "basically cool off"; however, he was even more upset upon his return. When Mother went upstairs to get L.Z. to take him to Maternal Grandparents' house, David "got really mad." He followed Mother upstairs, prevented her from going into L.Z.'s room, backed her into their bedroom, waved his finger in her face, and stated she "wasn't going to take his son away from him." David told Mother she "wasn't going to leave him" and flicked some cigarette ashes on her while backing her into a closet. At trial, Mother claimed she bent down to pick up the cigarette butt after David dropped it, but stood up at the same time David was closing a door, and the door "smacked

[her] on the arm." David then followed Mother down the stairs and out the door, continuing to yell at her and initially refusing to allow her to leave.

Eventually, Mother was able to leave the home and call her parents (Maternal Grandparents) to meet her at the police department. Mother claimed she spoke with a police officer because she wanted an officer to escort her home to get L.Z., but the police asked her to give a statement. Mother's father met her at the station and went with the police to get L.Z., and the "next thing [she] knew, David was arrested and in the back of the car and they charged him with criminal domestic violence." Although Mother denied at trial that David struck her, her signed statement to law enforcement reflects her statements that David grabbed her, pushed her into a closet, and struck her while slamming a car door. David completed pretrial intervention for the CDV arrest, Mother and David participated in anger management and domestic violence counseling, and David completed a twenty-six week Family Violence Intervention Program.

On July 7, 2015, DSS issued a new safety plan, transferring custody of the Children to Father and Stepmother. This plan continued the prohibition of all contact between David and the Children, permitted supervised contact with Mother, and listed Father and Stepmother as the Children's protectors. [6] This safety plan was expected to end on October 7, 2015.

On August 21, 2015, DSS indicated a case against Mother and David, referencing a substantial risk of physical abuse to M.J., D.J, and L.Z. The Determination Fact Sheet reported Mother and David "engaged in domestic violence in the presence of their minor children. David Zarcone was arrested on 6/30/15 and has pending charges of [CDV]. The minor children report being afraid of the parents arguing and fighting in the home." In a subsequent affidavit, DSS Investigator Jamie Dill reported, "Ashley Zarcone is not protective of the children, and her children have disclosed that this is not the first domestic violence incident in the home."

On September 3, 2015, Father filed a motion for temporary relief, seeking sole custody of the Children and a restraining order to prevent David from having contact with them. The family court heard Father's motion on October 8, 2015; Mother was not present. In an October 12, 2015 order, the family court awarded

[6] Father and Stepmother married in August 2015.

Father temporary custody—finding he had demonstrated a substantial change in circumstances—and granted a temporary restraining order prohibiting David from having any contact with the Children. Mother timely moved to reconsider, which the family court denied by supplemental temporary order on November 10, 2015. In this supplemental order, the family court appointed Lisa Mobley as guardian ad litem (GAL) for the Children and dismissed DSS as a party.

On January 15, 2016, the GAL requested a hearing to address Mother's visitation with the Children. By second temporary order dated March 1, 2016, the family court continued temporary custody of the Children with Father and provided Mother two hours of weekend visitation with the Children. The GAL requested that both stepparents be added as parties to facilitate any necessary restraining orders, parenting guidelines, and co-parenting counseling recommended by Hutton. The family court concurred and reiterated that no party was to allow David Zarcone "to have any contact with the minor children of this action pending investigation and trial."

On January 29, 2016, DSS closed its case against Mother and David. DSS caseworker Janice Jamison testified she felt comfortable closing the case based on the "no contact" condition ordered by the family court in Father's action. Jamison explained, "DSS knew that the kids were with their father. Custody had been given to him. So the need to stay [involved,] there was no need for that."

On March 18, 2016, Father was killed in the line of duty. On March 28, 2016, Mother requested an emergency hearing and sought custody of the Children. Mother argued "[t]he safety of the children was not a consideration of DSS" since custody of L.Z. was not affected by the DSS action. She further noted she and David had completed "every single requirement DSS placed" on them. Paternal Grandparents filed a motion to intervene, to join DSS as an indispensable party, and to request "permanent joint custody of the minor children together" with Stepmother. Stepmother sought joinder and likewise requested custody of the Children.

By third temporary order dated May 2, 2016, the family court awarded temporary custody of the Children to Stepmother. The family court granted Mother alternating weekend visitation to be supervised by either of her parents, with increased visitation during the summer. The family court again prohibited any party from allowing David "to have any direct or indirect contact with the minor

children of this action pending further Order of this Court." The family court granted Paternal Grandparents' motion to intervene and added DSS as a party "for the limited purpose of monitoring visitation and placement" of the Children during the pendency of the current case.

On October 14, 2016, Stepmother moved for temporary relief, seeking an order to prohibit Mother's brother from having contact with the Children and to relieve Maternal Grandparents from the requirement that they supervise Mother's visitation.[7] By pretrial order, the family court trial judge granted Stepmother's "no contact" motion as to Mother's brother during the pendency of the litigation and ordered that the motion to relieve Maternal Grandparents of the supervision requirement be served upon them prior to a December pretrial hearing.

On January 19, 2017, Stepmother and Paternal Grandparents moved to present the Children's out of court statements and other communicative behavior as summarized in reports and trauma narratives from their therapist Natasha Patino.[8] The motion asserted the Children "have made consistent and credible statements within the comfort of therapy sessions that disclose abuse and safety issues" pertinent to the court's consideration of their best interests.

In a series of pretrial orders, the family court addressed several issues raised by the parties, including Stepmother's motion to introduce evidence and testimony about events alleged to have occurred prior to Father's filing of the 2015 custody action. The family court denied the introduction of any pre-2015 matters, but accepted the parties' agreement on the § 19-1-180 motion to present the Children's out of court testimony.[9] Pursuant to this agreement, the family court found the Children

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[7] Mother's brother pled guilty to a juvenile offense involving the sexual molestation of a child unrelated to this action.

[8] *See* S.C. Code Ann. § 19-1-180 (2014) (providing a process for the admission of out of court statements by children under twelve years of age).

[9] The family court also denied Paternal Grandparents' motion to alter or amend its order barring the presentation of pre-2015 evidence, finding all evidence related to child custody and visitation prior to February 3, 2015 had been heard and litigated on several occasions.

unavailable to testify at the final hearing due to their "incompetency, inability to communicate about the offense, and/or the substantial likelihood that the children would suffer severe emotional trauma" from testifying. Thus, therapist Patino would testify as to the children's statements and behaviors during their counseling sessions, and present "information as summarized in the reports and handwritten trauma narratives." Specifically—and in accordance with the agreement—the family court ordered, "The statements and other communicated behavior of the minor children as testified to by Natasha Patino, MA, LPC, are admissible to prove the truth of the matters asserted pursuant to S.C. Code Ann. § 19-1-180(C)."[10]

The case was tried April 17–21, October 9–10, October 12, and December 13–14, 2017.[11] Between trial dates, the family court denied Mother's motion to prevent Stepmother from taking the Children to further therapy sessions with Patino and noted the GAL would assist with resolving such issues that might arise among the parties.

In a detailed February 21, 2018 order, the family court awarded sole custody of the Children to Stepmother. The family court found Mother unfit due to her inability to protect the Children's physical, mental, and emotional well-being and emphasized its concern regarding Mother's refusal to believe the Children's allegations that David was physically abusive, despite the evidence from experts and DSS caseworkers. The family court held Stepmother was the Children's psychological parent and de facto custodian and determined it was in the Children's best interests to remain in Stepmother's sole custody. The family court's order included no contact provisions for David Zarcone and Mother's brother, awarded Mother supervised visitation from Friday through Sunday on alternating weekends, and provided Paternal Grandparents visitation to be coordinated with Stepmother. Mother has appealed not only the award of sole custody to Stepmother and the

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[10] Initially, the Children met with Hutton for grief counseling, but after Stepmother expressed concerns, Patino began counseling the Children in September 2016. Patino was qualified without objection as an expert in counseling, with a specialty in trauma. At the time of her testimony, Patino had conducted twenty-three trauma-focused cognitive behavioral therapy sessions with the Children.

[11] Prior to trial, DSS moved to be dismissed as a party. Upon the family court's inquiry on the record, no party objected to DSS's dismissal so long as any necessary DSS witnesses were made available for trial.

requirement that her visitation with the Children be supervised, but the visitation awarded to Paternal Grandparents as well.

Standard of Review

On appeal from the family court, the appellate court reviews factual and legal issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Thus, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 392, 709 S.E.2d 650, 651, 655 (2011). However, this broad scope of review does not require the appellate court to disregard the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id.* at 385, 392, 709 S.E.2d at 651–52, 655. Therefore, the appellant bears the burden of convincing the appellate court that the family court committed error or that the preponderance of the evidence is against the family court's findings. *Id*. at 392, 709 S.E.2d at 655.

Law and Analysis

I. Mother's Fitness

Mother argues the family court erred in finding her unfit based on the February 2015 bathtub incident, the March 2015 Easter incident, the June 2015 CDV and Walmart incidents, and Patino's testimony. Based on our de novo review of the record, the parties' briefing, and oral argument, we affirm the family court's finding.[12]

To determine whether a parent is fit, the court considers "the quality of the home the natural parent can provide as well as the parent's employment stability." *Urban v. Kerscher*, 423 S.C. 615, 625, 817 S.E.2d 130, 135 (Ct. App. 2018). At the time of trial, Mother was employed with a law firm. Mother admitted she and David had past financial issues, but her accounts were current at the time of trial. Although it had not yet been used, Mother had a room ready for the Children at her home. Further, it appears Mother attempted to be involved with the Children's education as much as she was permitted as the non-custodial parent. The record

[12] Mother did not appeal the family court's finding that awarding custody of the Children to Stepmother was in the Children's best interests.

does not reflect that there has ever been an attempt to remove L.Z. from Mother's custody. Following her visit to Mother's home, the GAL had no concerns about the safety of the home itself, and a DSS caseworker noted the environment was "appropriate." Thomas observed the home was clean, there was sufficient food, and Mother had bunk beds ready for the Children.

Nevertheless, like the family court, we have serious concerns about Mother's ability to protect the children from David given her repeated violations of the "no contact" provision in the second DSS safety plan, her continuing refusal to believe David injured D.J., and her minimization of other incidents. *See, e.g.*, *Baker v. Wolfe,* 333 S.C. 605, 610, 510 S.E.2d 726, 729 (Ct. App. 1998) ("That the Mother has allowed her children to be physically abused by the Stepfather indicates that the Mother is either unable to or uninterested in properly protecting the children, and again supports the conclusion that the Mother is not fit to parent her children."). Even though the Children were clearly afraid of David, Mother did not believe their abuse allegations, instead choosing to believe David's accounts of the events. Mother testified she would defer to the recommendations of the counselors regarding the Children's exposure to David in the future but clarified, "I believe that we should sit down and look at all the facts." She explained, the counselor "should know every—both sides of the story from the beginning to the end so they can adequately sit down and decide what the boys really need and how it would be best to achieve that." Statements like this demonstrate Mother's continuing denial that David ever abused and frightened the Children.

Although DSS closed its case in January 2016, DSS caseworker Janice Jamison did not believe Mother and David had made behavioral changes. Jamison testified Mother continued to minimize the situation, which was concerning due to the CDV police report and the Children's recounting of events that occurred. As noted above, Jamison felt comfortable closing the case because she believed the "no contact" conditions regarding David imposed by the family court in the custody case would remain.

Mother repeatedly violated the "no contact with David" provision of the DSS safety plan. Mother disputes whether the March 2015 safety plan was still in place at the time of the Walmart incident and claims that in June 2015, she was no longer bound by it. However, it is clear that Mother violated the March safety plan by allowing the Children to be around David both at Easter—when D.J. was again injured—and in early June during the Florida family trip.

Additionally, although Mother maintains David did not push D.J. down the stairs on Easter, the testimony presented at trial was inconsistent. Mother, David, and Maternal Grandmother all provided conflicting testimony as to where David was when D.J. was injured and whether anyone actually saw D.J. fall. Maternal Grandmother's statement to hospital doctors indicated he fell down a flight of stairs, but she testified at trial he only fell down a couple of stairs. Even though these witnesses and parties minimized the incident at trial, they were concerned enough to take D.J. to the emergency room, and he wore a neck brace for a period of time following the fall. Significantly, the DSS safety plan in place at this time clearly prohibited *any* contact between David and the Children, and despite Mother's claim on this point, the overwhelming testimony from the DSS employees at trial demonstrates no caseworker or supervisor would have orally modified the plan to allow such unauthorized contact.

In support of reversal, Mother argues Patino was "one-sided" and suggests Patino exaggerated the Children's fears about David. Yet we note Patino was qualified as an expert without objection, and her testimony regarding the Children's trauma narratives and statements was admitted by agreement of the parties. After meeting with the Children twenty-three times, Patino believed their behavior was consistent with "some kind of trauma happening." During their sessions, Patino observed D.J. would "shut down a lot" when discussing sensitive topics, including David, and M.J. became very tense and afraid when David was mentioned, at times not wanting to say David's name. Patino testified the Children consistently reported Stepmother was someone they could trust and they felt safe with her, whereas the Children believed Mother was someone they needed to protect.

Patino conducted a joint therapy session with Mother and Stepmother and explained "in length the fear the boys had" of David. Patino was concerned Mother's minimization of the situation could put the Children at risk in the future, whether Mother was with David or different partner, because she did not appreciate how serious the issue was for the Children. Patino did not believe further counseling would assist reunification of David and the Children due to Mother's minimization of these risks and failure to grasp what happened.

The GAL was also concerned about the Children returning to Mother's custody without specific parameters set for David. The GAL noted Mother never acknowledged the safety risk David posed to the Children; DSS, Patino, and

Hutton shared these concerns. The GAL admitted Hutton agreed to conduct reunification counseling if there were adequate participation by the parties. Mother and David also believed a "controlled" reunification process would be necessary to reintroduce David to the Children, and David claimed he would continue to participate in counseling if necessary.

We, too are troubled by Mother's refusal to believe the Children's allegations, her minimization of David's conduct, and her pattern of failing to comply with the no contact provisions of the safety plan. Thus, we agree with the family court that the evidence presented at trial established Mother was not a fit parent due to her inability to care for the Children's well-being.[13]

II. *Moore* factors

Mother argues the family court erred in applying the factors of *Moore v. Moore*, 300 S.C. 75, 79–80, 386 S.E.2d 456, 458–59 (1989), in its custody determination because Mother "always had custody of her two minor children. She never relinquished custody (temporary or otherwise) of her children to Stepmother." She further contends the family court's reliance on *Moore* was misplaced because the Children were transferred from one natural parent (Mother) to the other (Father) under a "voluntary" safety plan signed by Mother. We disagree.

In *Moore*, our supreme court established the factors a court must consider in making a custody determination when a natural parent seeks to reclaim custody of a child from a third party:

> 1) The parent must prove that he is a fit parent, able to properly care for the child and provide a good home.
>
> 2) The amount of contact, in the form of visits, financial support or both, which the parent had with the child while it was in the care of a third party.

[13] At oral argument, counsel for Mother informed this court that Mother and David have now divorced. This information was not before the family court; thus, it is not proper for this court to consider it in our review of the family court's order. We note nothing prevents Mother from filing an action to address this change in circumstances as it may impact the consideration of custody or visitation.

> 3) The circumstances under which temporary relinquishment occurred.
>
> 4) The degree of attachment between the child and the temporary custodian.

300 S.C. at 79–80, 386 S.E.2d at 458 (citations omitted).

Mother relies on this court's language in *Baker v. Wolfe*, 333 S.C. at 605, 510 S.E.2d at 726, and our return of the minor child to her biological parent in *Urban v. Kerscher*, 423 S.C. at 615, 817 S.E.2d at 130, to support her argument. However, our review of these cases supports the family court's analysis here. In *Baker*, this court found *Moore* inapplicable based on the circumstances surrounding the mother's relinquishment of the children:

> This case began as a custody dispute between parents who had joint custody of the children. There was no court order or agreement between the parents relinquishing custody to the Grandmother. Although the Mother voluntarily relinquished physical custody of the children in 1993, she relinquished custody to the Father, not a third party. Given that the Father resided with the Grandparents, the Mother may well have assumed that the Grandmother would be the primary caretaker of the children. Nonetheless, her relinquishment of the children to the Father does not seem to be the same type of relinquishment contemplated in *Moore*. Accordingly, given the unique factual circumstances of this case, we conclude that *Moore* is not controlling, although its factors may provide some guidance. Instead, we believe this case is controlled by a determination of the Mother's fitness as a parent and a consideration of the best interests of the children.

333 S.C. at 610, 510 S.E.2d at 729. The court affirmed the family court's findings that mother was unfit and that custody should remain with the paternal grandmother based on evidence that mother and stepfather were drug users and

"[t]hat the Mother has allowed her children to be physically abused by the Stepfather indicat[ing] that the Mother is either unable to or uninterested in properly protecting the children." *Id.* at 610, 510 S.E.2d at 729.

Moreover, *Urban* is inapposite because this court found the mother there to be "a fit parent, able to properly care for Child and provide a good home." *Urban*, 423 S.C. at 626, 817 S.E.2d at 135. Mother lived with her fiancé in a clean and stable home, and Urban's child had a good relationship with the mother's fiancé. *Id*. Urban's relinquishment of her child was truly voluntary, and the court found it "commendable that Urban recognized her previous inability to care for Child and, in good faith, left Child with people willing and able to provide for Child while Urban attempted to better her family's circumstances." *Id*. at 630, 817 S.E.2d at 137.

Here, we agree Mother's relinquishment to Father pursuant to a DSS safety plan was not the same initially voluntary relinquishment addressed in *Moore*. Although Mother agreed to the July 2015 safety plan, she likely faced no reasonable alternative as she sought to cooperate with DSS to expedite the return of the Children to her care. And, we agree that when custody changed, Mother viewed this as relinquishing custody to Father, rather than Stepmother. But as in *Baker*, the family court here properly relied on the *Moore* factors for guidance in considering custody. *See Baker* at 610, 510 S.E.2d at 729. Like the *Baker* court, we believe this case is controlled by a determination of Mother's fitness as a parent and a consideration of the best interests of the children. *See id*. "While there is a presumption in favor of awarding custody to a natural parent over a third party, that presumption applies only if the parent is found to be fit." *Id*. at 611, 510 S.E.2d at 730. Thus, we find the family court properly awarded Stepmother sole custody of the Children.

III. Psychological Parent

Mother next argues the family court erred in finding Stepmother was the Children's psychological parent because there was no "parental void" in the Children's lives prior to Father's death and she never consented to or fostered a parent-like relationship between the Children and Stepmother. Mother further contends Stepmother's relationship with the Children was not of sufficient length to rise to the level of a parent-like relationship. We disagree.

In order to establish the existence of a psychological parent-child relationship, a party must demonstrate:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and]
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Marquez v. Caudill, 376 S.C. 229, 242, 656 S.E.2d 737, 743 (2008) (alterations by court) (quoting *Middleton v. Johnson*, 369 S.C. 585, 596–97, 633 S.E.2d 162, 168 (Ct. App. 2006)). "[W]hen both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life." *Middleton*, 369 S.C. at 598, 633 S.E.2d at 169.

In this case, Father consented to and fostered Stepmother's parent-like relationship with the Children. When Father was alive, he worked long hours as a police officer, and Stepmother acted as a caregiver during Father's visitation periods. Stepmother testified Mother initially encouraged her relationship with the Children, and the two women communicated more than Mother and Father did regarding their care. The Children called Stepmother by her first name, Meghan, and Mother had previously texted Father that the Children could call Stepmother "Mommy Meghan." In any event, whether Mother consented to and fostered the

Children's relationship with Stepmother is not controlling because the evidence establishes Father fostered this relationship before his death.

Second, the Children have resided with Stepmother in the same household. The Children began living with Stepmother and Father full time in July 2015. Prior to that, Father and Mother had joint custody, and Father had a very liberal visitation schedule. Thus, the evidence demonstrates the Children have been residing full-time with Stepmother since at least 2015. *See Id.* at 598, 633 S.E.2d at 169 (in determining whether the psychological parent "resided with" the child, the court "can conceive of a situation, as in this case, where the legal parent and the psychological parent operated under a sort of joint custody agreement where the child spends half the time at the legal parent's house. The other half of the time is spent at the psychological parent's house, which the child also considers home. This type of arrangement also suffices to meet the second part of the test.").

Third, Stepmother has "assumed obligations of parenthood by taking significant responsibility for [the Children's] care, education and development, including contributing towards [their] support, without expectation of financial compensation." *See Marquez*, 376 S.C. at 242, 656 S.E.2d at 743 (quoting *Middleton*, 369 S.C. at 597, 633 S.E.2d at 168). While Father was still living, Stepmother undertook many of the caretaking responsibilities for the Children. Her caregiving responsibilities increased when the Children came to live with Father and Stepmother full-time pursuant to the July 2015 safety plan. Stepmother took the Children to and from school, to doctor's visits, and to visit Paternal Grandparents. For example, Stepmother arranged for an appointment at the eye doctor for M.J. to get glasses when she discovered he was having difficulty seeing at school. Additionally, Stepmother paid for the Children's counseling sessions with Hutton.

Finally, Stepmother has been in a parental role for a length of time sufficient to establish a bonded, parent-like relationship with the Children. Stepmother first met the Children on Easter weekend in 2013. During Father's visitation periods and after the Children moved in with the couple, Stepmother undertook caretaking duties such as taking the Children to school and doctor's appointments. Stepmother communicated with Mother about the Children, including keeping her informed about school events. Further, the GAL testified the Children had formed a bonded parent-like relationship with Stepmother. We acknowledge no "parental void" existed until Father's death on March 18, 2016. However, after Father died,

Stepmother stepped into Father's shoes as the parental figure who provided security in the Children's lives. Of note is Patino's testimony that the Children consistently reported Stepmother was someone they could trust and that they felt safe with her, whereas the Children believed Mother was someone they needed to protect. Accordingly, we agree with the family court's finding that Stepmother was the psychological parent of M.J. and D.J.[14]

IV. Grandparents' Visitation Award

Mother argues the family court erred in awarding visitation to Paternal Grandparents because there was no evidence they were ever denied visitation. We disagree.

"[A] biological parent[']s death and an attempt to maintain ties with that deceased parent[']s family may be compelling circumstances justifying ordering visitation over a fit parent[']s objection." *Marquez*, 376 S.C. at 249, 656 S.E.2d at 747. Section 63-3-530(A)(33) of the South Carolina Code (Supp. 2021) grants the family court the following jurisdiction:

> to order visitation for the grandparent of a minor child where either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats, if the court finds that:

[14] Because the Children were not in Stepmother's sole custody for one year prior to the commencement of this litigation, Mother challenges the family court's finding that Stepmother is the Children's de facto custodian. In light of the controlling statutory language, we vacate the family court's de facto custodian finding. *See* S.C. Code Ann. § 63-15-60(A)(2) (2010) (providing a "'de facto custodian' means, unless the context requires otherwise, a person who has been shown by clear and convincing evidence to have been the primary caregiver for and financial supporter of a child who: . . . (2) has resided with the person for a period of one year or more if the child is three years of age or older. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child must not be included in determining whether the child has resided with the person for the required minimum period.").

> (1) the child's parents or guardians are unreasonably depriving the grandparent of the opportunity to visit with the child, including denying visitation of the minor child to the grandparent for a period exceeding ninety days; and
>
> (2) awarding grandparent visitation would not interfere with the parent-child relationship; and:
>
> > (a) the court finds by clear and convincing evidence that the child's parents or guardians are unfit; or
> >
> > (b) the court finds by clear and convincing evidence that there are compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

"When grandparents have such a parent-like relationship, it can be particularly important to the welfare of the children for the court to maintain the relationship." *Bazen v. Bazen*, 428 S.C. 511, 532, 837 S.E.2d 23, 34 (2019); *see also id.* at 536, 837 S.E.2d at 36 (Kittredge, J., concurring in part and dissenting in part) (opining "the critical factor in this case is the prominent and significant role the grandparents had in the lives of their grandchildren prior to the death of" father).

Here, Paternal Grandparents have played an active role throughout the Children's lives, helping to care for them, volunteering at their school, and participating in the DSS safety plan, even when Father was alive. When Mother and Father were still married, the Children spent every Saturday with Paternal Grandparents, and after Mother and Father separated, they spent time with Paternal Grandparents during Father's visitation weekends. The Children have their own room at Paternal Grandparents' house. Paternal Grandmother believed it was very important that she and Grandfather maintain a relationship with the Children to provide extra guidance and support given their Father's death. She explained:

> We feel like the Court has allowed us to be interveners and step forward where Allen [Father] is not here. And so we love Meghan [Stepmother] and know she's keeping them safe. And we appreciate that. But we also know that there's some things that we can do that Allen would like us to do, I would think.

Over the summer, Paternal Grandparents hoped to take the Children to Texas to spend more time with Paternal Grandmother's mother, and made a plan with Stepmother for the trip. Paternal Grandparents also wanted the Children to see where their late Father spent time during the summers in Texas when he was a child. However, Mother refused to accommodate this request. At that time, Mother had the Children on alternating Tuesdays, every Thursday, and every other weekend; thus, Paternal Grandparents were unable to schedule the trip.

The GAL testified regarding Paternal Grandparents' inability to take the Children on the Texas trip. She stated, "They've told me they've got extended family out-of-state and that their daddy had a history of visiting there. So I think in the future it's important that they be able to have time to be able to take the kids to those places."[15]

The family court ordered Paternal Grandparents "shall have visitation with the minor children as mutually agreed between themselves and [Stepmother]." To the extent the parties could not agree, the court set forth the following schedule: at least one weekend every other month from Saturday at 6:00 p.m. through Sunday at 6:00 p.m., one week in the summer, six hours on Father's Day, two hours on Easter, and five hours on Christmas. We agree with the family court's award of visitation to Paternal Grandparents, and we find it appropriate under the circumstances of this case. Critically, we find the award comports with the language and intent of the jurisdictional statute.

Although Paternal Grandparents were not blatantly denied visitation, certain instances in the record can be construed as unreasonably denying visitation because they demonstrate the inability of Mother, and possibly other parties, to be

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[15] The GAL conducted two phone conferences with the family court regarding visitation periods in an effort to help the parties reach an agreement as to accommodating plans among the various parties. These efforts were unsuccessful.

flexible in rearranging the visitation schedule, even for events or trips that would be beneficial to the Children. *See*, *e.g., Brown v. Key*, 425 S.C. 490, 498, 823 S.E.2d 212, 217 (Ct. App. 2019) (recognizing the danger that "a parent can circumvent the statute by intentionally and disingenuously thwarting a grandparent's ability to meet the statutory requirements—for example, by allowing grandparents a fleeting visit with a child every eighty-nine days or intentionally offering visitation when parent knows grandparent cannot be available").[16]

Providing a set schedule in the family court's order for Paternal Grandparents' visitation mitigates the risk of future litigation over visitation in this case, which has been in almost constant litigation for the majority of the Children's lives.[17] Accordingly, we affirm the family court's award of visitation to Paternal Grandparents.

Conclusion

Based on the foregoing, the family court's order is

AFFIRMED IN PART and VACATED IN PART.

HEWITT, J., and LOCKEMY, A.J., concur.

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[16] For example, during the December trial dates, the family court encouraged the parties to work together to develop a Christmas visitation schedule. The parties indicated they had attempted to negotiate the Christmas visitation but discussions had "stalled." However, the parties also indicated they were able to agree on Halloween and Thanksgiving "very quickly." Thus, the family court asked the GAL to facilitate reaching a Christmas visitation schedule.

[17] Notably, Stepmother requested an order granting Paternal Grandparents' claim for visitation. Mother challenged it.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Larry Tyler, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002364

ON WRIT OF CERTIORARI

Appeal From Darlington County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5902
Heard November 4, 2020 – Filed March 16, 2022

REVERSED AND REMANDED

Appellate Defender Victor R. Seeger, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Assistant Attorney General Johnny Ellis James, Jr., all of Columbia, for Respondent.

MCDONALD: In this action for post-conviction relief (PCR), Larry James Tyler argues his trial counsel provided ineffective assistance by failing to move to sever the trial of his charge for second-degree sexual exploitation of a minor from the trial of his remaining indictments. The PCR court found trial counsel was "not deficient in any manner" and dismissed Tyler's application. We reverse and remand.

Facts and Procedural History

A Darlington County Grand Jury indicted Tyler for second-degree sexual exploitation of a minor, criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor. Tyler pled not guilty to these charges.

At Tyler's trial, the State's first witness, Dorris Brown, testified she occasionally took her granddaughters (Child and Sister) to visit Tyler's mother, who lived with him. On one of these visits, Tyler gave the children a cell phone. According to Dorris, "when they got in the car they said, 'Grandma, he gave us a phone and . . . [there are] naked men on there.'" The children tried to show Dorris the cell phone, but she did not see any "naked pictures" and told them they needed to give the phone back to Tyler. Within "about ten minutes," Dorris had returned the phone to Tyler's house. On cross-examination, trial counsel asked, "Now, you said that they said there was a picture of a naked lady on the phone. Did you see that picture?" Dorris replied, "Yeah, I glanced and quickly turned my head. . . . [Then, I g]ot the phone from them and [carried] it back in the house."

Child, who was twelve years old at the time of trial, also testified about the cell phone. She had the phone for about ten minutes before the group left Tyler's house. Child saw some pictures of a girl wearing bikinis and another of Tyler wearing blue underwear. On cross-examination, Child confirmed she did not read any of the text messages on the phone and explained on redirect, "We just looked at the pictures."

Sister was ten years old at the time of trial. Sister testified the pictures on the phone were of "[s]ome girls with bathing suits on." One of the pictures was of Tyler "with some blue drawers on." Neither Child nor Sister read any of the text messages on the phone.

Child's twenty-one-year-old cousin, Tyquan Brown, testified Tyler later gave his mother the cell phone and she gave it to Tyquan to use. As Tyquan began "going through the phone cleaning it out," he saw several pictures, including one of Tyler "in a blue Speedo." Tyquan added, "I think I [saw] a picture of a kid, another kid, or something in there." "But I deleted most of them because I just thought it was just some—that dude had just had a whole bunch of crazy stuff on his phone." However, Tyquan also noticed several text messages on the phone "saved as drafts" that appeared to be intended for Child. He explained,

> At the same time I'm thinking like maybe it's another [redacted first name]. Maybe he's not talking about my cousin. Then I [saw] where he was like, "I know this is wrong because you're a little girl" and all type of stuff like that saying that—talking about he want her in his bed and that she a kid. But what really stood out to me was when he was like, "Don't tell [Sister] because you know she will tell" or something like that.

Tyquan immediately called Child's mother (Mother) and gave her the phone. Mother reviewed the pictures on the phone, including one of Tyler "with just a blue like Speedo on, and he didn't have on any over clothes." Mother called the police after reading the draft text messages on the phone.

Deputy Eric Hodges, a lieutenant in the criminal investigation division of the Darlington County Sheriff's Office, met with Mother and then began to investigate Tyler. Upon learning Tyler was driving with a suspended license, Deputy Hodges initiated a traffic stop and arrested Tyler on the license violation. Hodges advised Tyler of his *Miranda* rights,[1] and Tyler agreed "to answer some questions."[2] Deputy Hodges obtained a search warrant for Tyler's home and vehicle, and law enforcement recovered pictures from Tyler's computer and "some other phones."

Deputy Russell Harrell, a forensic investigator for the Darlington County Sheriff's Office, testified that he recovered the text message drafts from the cell phone but

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] The trial court admitted Tyler's recorded statement into evidence, and the State published it to the jury.

was unable to recover any pictures from it. He then read the unsent text messages to the jury. The first draft message stated, "[Child] . . . to fall in love with a little girl as young as you are, but I can't stop my heart from loving you, girl. I wish I had another hour alone with you and nobody knew." The second read, "Me in trouble. Please, [Child] especially don't tell [Sister]. She will surely tell someone. This is just between you and me, my love." The third stated, "Never want to be apart from each other ever again. I love you, little angle [sic]. Wish I could make you my wife. If I could you—if I could you would be in my bed tonight. Don't get me." The fourth stated, "Where we were. I would [tell] you how much I love you, [Child] by holding you close to me and plant a kiss on your lovely lips so powerful that we both would never." Finally, Deputy Harrell read, "[Child] you were so beautiful. Please don't tell anyone what I am telling you. First time I ever saw you; [Child] I fell for you. I know a man should not suppose."

Deputy Harrell then described the images pulled from Tyler's computer and email account, and the State entered these images into evidence without objection.[3] He testified the photos are "predominantly of girls that are below the age of ten. . . . They're posed in unnatural positions, and scant[i]ly clad. Some with bare butts." The most graphic of the photos is an image of "a young girl in a kneeling position, and anal sex is being performed."

In its instructions to the jury, the trial court explained "there are four different charges here, so you will have to take up each of the charges separately in your deliberations and reach separate verdicts on each and every charge." The jury found Tyler guilty as indicted, and the trial court imposed concurrent sentences of three years' imprisonment for contributing to the delinquency of a minor and eight years' imprisonment for each of the other charges. Tyler filed a direct appeal, and this court affirmed his convictions. *State v. Tyler*, Op. No. 2015-UP-025 (S.C. Ct. App. filed Jan. 14, 2015) (finding the case was properly submitted to the jury because Tyler gave Child and Sister a cell phone containing a picture of Tyler in his underwear and draft text messages indicating his desire to have Child in his bed; the evidence further showed Tyler employed "grooming" tactics with Child).

[3] None of the photographs recovered from Tyler's computer and email account depict Child or Sister, and the record contains no evidence that the two minor children saw these photos.

Tyler subsequently filed this action for post-conviction relief, arguing trial counsel was ineffective in failing to object to the consolidated trial of the four offenses because his charge for second-degree sexual exploitation of a minor should have been tried separately from the charges of criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor. Tyler contends that if the charges had been tried separately, the highly prejudicial photograph relevant to the sexual exploitation charge would not have been admissible as to the other three charges; thus, the trial of all four charges in one proceeding prejudiced him.

At his evidentiary hearing before the PCR court, Tyler testified he wrote trial counsel several times asking to sever the charges, but trial counsel never made a motion for separate trials. Tyler argued the consolidated trial of the four charges was prejudicial because the jury likely considered his guilt on the sexual exploitation charge as indicative that he was guilty of the other offenses as well.

Trial counsel testified his strategy was to show the information on Tyler's phone was not actually disseminated to the girls. Counsel explained that Tyler's draft texts "were thoughts that were not meant to be shared with anybody and just inadvertently got discovered" by their cousin.[4] Trial counsel saw no reason to seek a separate trial of the sexual exploitation charge, explaining, "[B]ased on the theory that we had developed, first of all, the information we felt had not been sufficiently communicated to the young lady on the four [sic] charges dealing with her. And the exploitation, the pictures, except for one, we felt we could minimize."

On cross-examination, trial counsel reiterated his strategy was, "Number One, the pictures, except for one, were not bad. And, Number Two, there was very little if any communication of his thoughts in his e-mails and pictures and otherwise with the young ladies or the young lady specifically." Trial counsel confirmed he never filed a motion to sever or objected to the consolidated trial of Tyler's four indictments.

PCR counsel then asked trial counsel:

[4] Tyquan was at least nineteen when Tyler gave his mother the cell phone to use.

Q: Do you think that with these two incidents or separate charges that there would have been a reason to make that motion [to sever]?

A: Perhaps. I don't remember that being an issue that we discussed in detail. No.

Q: Going along with that, perhaps, I guess what would your reason, looking at it, what would it be to make that request?

A: Well, as [Tyler] says, you know, perhaps one would lead the jury to believe the other.

Q: Do you think that that could have been the case in this case?

A: I didn't see it. No.

There is some confusion in the transcript about who speaks next, but it appears the State asked trial counsel whether the reason he did not see the need for a motion to sever was based on his experience and the facts of the case. Trial counsel's response: "And the development of the trial strategy with Mr. Tyler, yes."

The PCR court then inquired:

Q: Just how could you have separated [the four different indictments]? . . . .

A: Three dealt with his attempted communication with the young lady, and one dealt with the picture.

Q: We've got disseminating, contributing.

A: And the solicitation of a minor.

Q: Exploitation.

A: In my mind the exploitation dealt with the picture of the young lady involved in a sexual act. The disseminating, the solicitation of a minor and contributing all dealt with [Child].

Q: So there is some distinction there?

A: There is some distinction there, yes, sir.

Q: Okay. But in your mind was it a significant enough distinction on which a Court could separate these?

A: I did not think so, Your Honor.

The PCR court denied relief and dismissed the application, finding Tyler's claim that trial counsel was ineffective in failing to move for a separate trial on the sexual exploitation charge was "without merit" because there was no reasonable basis upon which to make a motion for separate trials. Relying on this conclusion, the PCR court found trial counsel's representation was not deficient. The PCR court further found Tyler was not prejudiced by the trial of all four charges in a single proceeding because the trial court instructed the jury to consider each charge separately and "reach separate verdicts on each and every charge."[5]

Tyler's PCR counsel filed a petition for a writ of certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), along with a motion to be relieved. Tyler filed a pro se response to the court's *Johnson* letter and several supplemental letters. This court denied counsel's request to be relieved and ordered briefing on the question of whether trial counsel was ineffective in failing to move to sever Tyler's second-degree sexual exploitation of a minor charge from the trial of his remaining charges.

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a

[5] The PCR court further noted Tyler was no longer confined at the South Carolina Department of Corrections when it entered the order of dismissal.

PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* at 180. "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

Law and Analysis

Tyler argues trial counsel was ineffective in failing to move for a separate trial of his charge for second-degree sexual exploitation of a minor because it was unrelated to the other charges, did not arise from the same set of circumstances, and could not be proved by the same evidence. Tyler further notes the evidence providing the basis for the sexual exploitation charge would not have been admissible in a separate trial of the three charges related to Child and the cell phone. Moreover, he contends trial counsel's failure to seek a separate trial on the sexual exploitation charge prejudiced him because the evidence relevant only to that charge—namely, the photograph of a child being anally assaulted—was improper propensity evidence and "impermissibly convinced the jury" he was guilty of the remaining charges. We agree.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To prove ineffective assistance, a petitioner must prove trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result in his trial would have been different. *Id.* at 691–94; *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* In

determining whether "the identified acts or omissions were outside the wide range of professionally competent assistance. . . . , the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* "At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010).

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002). "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002); *see also State v. Middleton*, 288 S.C. 21, 23, 339 S.E.2d 692, 693 (1986) (holding the defendant's charges failed to meet the requirements for consolidation because "the crimes did not arise out of a single chain of circumstances, and required different evidence for proof"); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (1985) (finding the joinder of two forgery charges of the same nature in one indictment and one trial was improper where the offenses did not arise out of a single chain of circumstances, the offenses were not provable by the same evidence, and joinder prejudiced the defendant).

Here, the PCR court erred in relying on its finding that, "Trial Counsel noted that all charges stemmed from the same events and one search warrant." The record does not support this finding. While the exploitative photos from Tyler's computer were located during the execution of a search warrant obtained as a result of the draft texts and photos reported in connection with the cell phone, no other evidence supports the statement that the exploitation charge resulting from the computer photos "stemmed from the same events." Trial counsel recognized the distinction when specifically questioned about it.

Our case law addressing trials of separate charges in consolidated proceedings demonstrates the error in Tyler's case. In *State v. McGaha*, 404 S.C. 289, 299, 744

S.E.2d 602, 607 (Ct. App. 2013), this court found the trial court properly permitted the trial of McGaha's charges in a single proceeding. Examining the *Harris* test, the court reiterated that "a trial court may try separate charges together" when all four elements of the test are met. *Id.* at 293–294, 744 S.E.2d at 604. The court further recognized that our supreme court has, at times, articulated the test differently, addressing only the "fourth element from *Harris*—whether the joint trial prejudiced the defendant. It was unnecessary in those cases, therefore, for the court to consider the first three elements." *Id.* at 294 n.4, 744 S.E.2d at 604 n.4; *see also State v. Cutro*, 365 S.C. 366, 375–76, 618 S.E.2d 890, 895 (2005) (holding three offenses similar in kind, place, and character—each involving Shaken Baby Syndrome inflicted on infants at a defendant's daycare—fit within the *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) exceptions for common scheme or plan or motive; thus, the charges were properly tried jointly and defendant suffered no propensity prejudice); *State v. Nelson*, 331 S.C. 1, 6–7, 501 S.E.2d 716, 719 (1998) (reversing the defendant's convictions for criminal sexual conduct (CSC) and committing lewd acts on a minor because children's toys, videos, photographs of young girls, and other evidence tending to depict him as a pedophile were improperly admitted at trial); *State v. Smith*, 322 S.C. 107, 110–11, 470 S.E.2d 364, 365–66 (1996) (reversing homicide conviction because failure to sever charges prejudiced the defendant and finding conviction for assault and battery of a high and aggravated nature would not be admissible under *Lyle* as evidence of other relevant crimes in subsequent trial on homicide charge); *Lyle*, 125 S.C. at 406, 118 S.E. at 811–13 (discussing permissible uses of bad acts evidence and noting prejudicial nature of evidence submitted solely to establish propensity).

McGaha was alleged to have committed first-degree CSC and lewd acts upon two minor sisters. *McGaha*, 404 S.C. at 291–92, 744 S.E.2d at 603. In finding the trial court properly held McGaha's abuse of both minors stemmed from a single chain of circumstances, the court noted:

> McGaha gained access to the children because the grandmother allowed him to live in their [playroom]. McGaha used this access on multiple occasions to take each child from her bed to the [playroom], where he molested her. [Child 1] was eight and [Child 2] was seven when the abuse ended. The time periods of the abuse overlapped almost precisely—McGaha abused [Child 1] between March 2009 and August 2010 and

> [Child 2] between May 2009 and August 2010. Their similar ages and the similar duration of the abuse supports the trial court's emphasis on its finding that they "had the same relationship to" McGaha. The molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element.

Id. at 295, 744 S.E.2d at 605.

The charges in McGaha's two cases were "not merely of the same general nature—they [were] identical." *Id.* at 297–98, 744 S.E.2d at 606. And it is significant that McGaha's charges were proved by the same evidence. *Id.* The court held, "a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other." *Id.* at 297, 744 S.E.2d at 606. The State correctly argued evidence of McGaha's molestation of either child would be admissible in a separate trial as to the other under Rule 404(b), SCRE, as proof of a common scheme or plan in that there existed a logical connection between the crimes due to the showing of a "close degree of similarity." *Id.* at 298, 744 S.E.2d at 607.

In *State v. Tallent*, 430 S.C. 438, 442, 845 S.E.2d 508, 510 (Ct. App. 2020), *cert. denied*, S.C. Sup. Ct. order dated March 9, 2021, the defendant argued the circuit court erred in denying his motion to sever his charge for contributing to the delinquency of a minor from the consolidated trial of other indictments alleging he sexually abused his minor stepdaughter for several years.[6] Tallent claimed the charges did not arise from the same set of circumstances and the admission of evidence that he provided drugs and alcohol to his stepdaughter and her minor brothers was unduly prejudicial and would be otherwise inadmissible in a separate trial of his CSC and lewd act charges. *Id.* at 445, 845 S.E.2d 511–12. This court rejected Tallent's arguments and affirmed his convictions because:

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[6] Tallent also argued the circuit court erred in admitting evidence of his manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine in violation of Rule 403, SCRE, as the probative value of this drug evidence was substantially outweighed by its prejudicial effect. *Id.*

First, Tallent's abuse of stepdaughter covered a period of years in various homes where the family lived. During parts of this same period, Tallent supplied stepdaughter and her brothers with illegal drugs and alcohol. He also taught the brothers how to manufacture crack cocaine during this same time period. Although the charges did not arise out of a single isolated incident, the CSC, lewd act, and contributing to the delinquency of a minor charges "arose from, in substance, a single course of conduct or connected transactions." In short, there was evidence that this improper conduct was continuous and spanned several years.

Second, the charges were proved by common evidence. All four charges were proved by the same witnesses—stepdaughter and her brothers.

Third, the charges were of the same general nature. The State presented evidence showing Tallent abused stepdaughter in the same locations and during the same time periods that he supplied her and her younger brother (the only brother mentioned in the indictment) with drugs and alcohol.

The State's witnesses also testified Tallent's providing stepdaughter with marijuana and alcohol was evidence of Tallent "grooming" stepdaughter so he could abuse her. Although the charges in this case technically differ from each other in that some were sexual in nature and the contributing to the delinquency of a minor charge was drug-related, all are more broadly of the same general nature and could be fairly characterized as involving abusive conduct toward minors.

Fourth, and critically, it is hard to say the joinder of these charges caused unfair prejudice. Tallent contends he was harmed by the drug evidence because it was not relevant to the CSC and lewd act charges. But the test is not so

> narrow, and precedent says "there may be evidence that is relevant to one or more, but not all, of the charges."

Id. at 430 S.C. at 446–47, 845 S.E.2d at 512–13 (internal citations omitted).

Unlike the circumstances in *McGaha* and *Tallent*, Tyler's charges did not all arise from a single course of conduct, connected transactions, or a course of continuous grooming-related conduct. The charge for second-degree sexual exploitation of a minor arose from Tyler's possession of photographs, found on his computer and in connection with his email account, depicting young girls engaged in provocative poses or sexual activity. The three other indictments arose from the pictures and text messages found on the cell phone he gave Child, Sister, and Tyquan. The only connection between the sexual exploitation offense and Tyler's other three offenses was the fact that law enforcement found the exploitative pictures on his computer while executing a search warrant obtained during the investigation of the deleted photos and draft messages from the cell phone.

Additionally, the evidence the State needed to prove the exploitation offense—the photographs from the computer and email account—was distinct from that used to prove Tyler's other offenses—the text messages from the cell phone and testimony about the messages and pictures on the phone. Thus, the exploitation charge should have been tried separately, and trial counsel was deficient in failing to seek a separate trial. *See Simmons*, 352 S.C. at 350, 573 S.E.2d at 860 (holding "offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together").

In the present case, Tyler took photographs of Child and her family, none of which were alleged to be criminal in nature, and drafted text messages on his phone in which he inappropriately professed his feelings for her. Such conduct was most definitely "odd" and "creepy," as described by trial counsel in his closing argument. However, the State's introduction of the photograph from Tyler's computer depicting an unrelated young girl being anally assaulted emphasized Tyler's behavior was not just "odd" or "creepy," but that of a sexual predator.

Tyler's substantive rights were violated because trying the charges together created the risk that the jury would wrongfully convict him on one set of charges based on evidence admissible only as to the other. Such prejudice could have been avoided

had trial counsel sought a separate trial of Tyler's exploitation charge because the highly prejudicial evidence—the photo and other provocative images from Tyler's computer—would not have been admissible in a trial on the three charges related to Child and the cell phone. *See State v. Perry*, 430 S.C. 24, 37 n.6, 842 S.E.2d 654, 661 n.6 (2020) (noting that while "dissimilarities between charged crimes are not integral to the joinder analysis, the State's choice to try them together made their dissimilarity directly related to the Rule 404(b) analysis"); *McGaha*, 404 S.C. at 298, 744 S.E.2d at 606 ("In cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

At the PCR hearing, trial counsel testified he did not see any reason to seek separate trials, and no evidence supports that his analysis was related to a valid strategic decision. *Contra Smith*, 386 S.C. at 567, 689 S.E.2d at 632 ("[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (emphasis added)). Trial counsel acknowledged the unrelated photo of a young girl engaged in a sex act "was an awful picture" but did not explain how he thought he could minimize its impact or why this was a reasonable tactic. Trial counsel admitted when asked about the sexual exploitation charge in relation to the three indictments involving Child that "perhaps one would lead the jury to believe the other." He further agreed with the PCR court that there was "some distinction" between the charges, adding, "three dealt with his attempted communication with the young lady, and one dealt with the pictures. . . . In my mind the exploitation dealt with the picture of the young lady involved in a sexual act. The disseminating, the solicitation of a minor and contributing all dealt with [Child]."

While our supreme court's decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019), addressed bifurcation rather than a consolidated trial, we find the court's analysis instructive here. In 2013, Cross was indicted for first-degree CSC with a minor. *Id.* at 469, 832 S.E.2d at 283. As Cross had pled guilty to a previous charge of first-degree CSC with a minor in 1992, the State used the 1992 conviction as the predicate element supporting the 2013 first-degree CSC charge.

Id. at 470, 832 S.E.2d at 283–84; s*ee* S.C. Code Ann. §16-3-655(A) (2015) ("A person is guilty of criminal sexual conduct with a minor in the first degree if: . . . . (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).").

In a pretrial hearing, Cross moved to bifurcate the 2013 trial, requesting that the lewd act charge and sexual battery element of first degree CSC with a minor be tried first; then, if the jury concluded Cross was guilty of the sexual battery alleged in the indictment, evidence of the 1992 conviction and Cross's sex offender registry status could be introduced to prove section 16-3-655(A)(2)'s prior conviction element. *Cross*, 427 S.C. at 470, 832 S.E.2d at 284. Cross argued he would be prejudiced if the jury were to learn of his 1992 conviction and registry status in the same trial phase addressing his conduct against the minor victim in the 2013 case because the evidence of his prior conduct against another child would cement his "predilection" for such offenses. *Id.* The trial court disagreed and denied bifurcation; Cross was convicted and sentenced to an aggregate term of twenty-five years' imprisonment. *Id.* at 473, 832 S.E.2d at 285.

Our supreme court reversed and remanded for a new trial, finding the probative value of the 1992 conviction—at the point in the trial at which it was introduced—was substantially outweighed by the danger of unfair prejudice and "that prejudice would have been totally eliminated had the trial been bifurcated." *Id.* at 482, 832 S.E.2d at 290. The court recognized "evidence of Cross's 1992 conviction for first-degree CSC with a minor had insurmountable probative value in proving the prior conviction element of the 2013 charge. However, evidence of the 1992 conviction was in no way probative of whether Cross committed the underlying sexual battery" at issue in the 2013 trial. *Id.* at 477, 832 S.E.2d at 287–88. The court determined the danger of the jury convicting Cross because of his 1992 conviction alone was so high, the trial court should have prevented the jury from hearing of it until the jury reached a verdict on the underlying conduct alleged in the indictment. *Id.* at 477–78, 832 S.E.2d at 288.

The same danger arose here when the highly prejudicial photo supporting Tyler's sexual exploitation charge was admitted as evidence before the same jury considering his unrelated charges involving Child. It is difficult to imagine how

such an image could *not* influence a jury, and the likelihood that the jury convicted Tyler on the three charges involving Child based on evidence inadmissible as to those charges and introduced to support only the separate sexual exploitation charge is not a danger we can ignore.

The fact that the evidence of Tyler's guilt for disseminating harmful material to a minor was marginal adds to the likelihood that Tyler was prejudiced by the trial of all four charges in one proceeding. The relevant statute provides that the minor must be exposed to "material or performance that depicts sexually explicit nudity or sexual activity." S.C. Code Ann. § 16-15-375(1) (2015). Although Child and Sister initially told Dorris there were "naked" pictures on the cell phone, they clarified at trial that the pictures were of girls wearing bikinis and Tyler wearing blue underwear. Likewise, both Tyquan and Mother testified Tyler was wearing "a blue Speedo."

We are bound by the language of the statute, and although providing a phone with bikini and Speedo pictures to the children was inappropriate, the photos did not depict "sexually explicit nudity" or "sexual activity." Thus, it appears the jury's guilty verdict on the dissemination charge was likely based on the evidence admitted on the sexual exploitation charge. At least one of the photos recovered from Tyler's computer and email account most certainly depicted "sexually explicit nudity or sexual activity," but there is no evidence that those photos were ever disseminated to Child or Sister. *See, e.g.*, *Tate*, 286 S.C. at 464, 334 S.E.2d at 290 (finding joinder prejudicial where it is likely a jury would infer criminal disposition based on evidence of one forgery and on that basis alone find defendant guilty of a separate forgery). For these reasons, trial counsel's failure to move for a separate trial on the sexual exploitation charge constituted deficient performance that prejudiced Tyler.

Conclusion

Based on the foregoing, we find the evidence does not support the PCR court's dismissal of Tyler's action. We reverse and remand to the court of general sessions for a new trial.

REVERSED AND REMANDED.

KONDUROS, J. and LOCKEMY, A.J. concur.