The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who remain administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be

removed from the roll of attorneys in this State. Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 9, 2004

SUSPENSION
COMMISSION ON CLE & SPECIALIZATION
2003 REPORT OF COMPLIANCE
AS OF APRIL 1, 2004

Robert J. Cantrell
PO Box 2752
Anderson, SC 29622
(INTERIM SUSPENSION BY COURT)

Andrea F. DeBerry-Santos
2745 Suwanee Lakes Trail
Suwanee, GA 30024

Brigina Dicks-Woolridge
203 North 5th Avenue
Dillon, SC 29536
(INTERIM SUSPENSION BY COURT)

Rodney L. Foushee
PO Box 1599
Little River, SC 29566

Sam R. Haskell, Jr.
PO Box 2708
Sumter, SC 29154

Ronald W. Hazzard
618 Chestnut Rd., #106
Myrtle Beach, SC 29572
(INTERIM SUSPENSION BY COURT)

Jeffrey A. Keenan
603 N. Kings Highway
Myrtle Beach, SC 29577

Dirk J. Kitchel
943 Portabella Lane
Charleston, SC 29412
(INTERIM SUSPENSION BY COURT)

John P. Mann, Jr.
PO Box 10437
Greenville, SC 29603
(INTERIM SUSPENSION BY COURT)

Timothy V. Norton
PO Box 61255
North Charleston, SC 29419
(INTERIM SUSPENSION BY COURT)

Richard A. Veon
21 South 21st Street
Philadelphia, PA 19103

Suzanne Wells
203 Harry C. Raysor Dr., N
St. Matthews, SC 29135

M. Parker Vick
PO Box 2396
Spartanburg, SC 29304
(INTERIM SUSPENSION BY COURT)

Mitzi C. Williams
PO Box 1652
Savannah, GA 31402

ATTORNEYS SUSPENDED FOR NONPAYMENT OF 2004 LICENSE FEES AS OF APRIL 1, 2004

Annette E. Ball
150 Houston St.
Mobile, AL 36606-1432

Hans David Bengard
100 Wells St., Apt. 312
Hartford, CT 06103

James Leslie Bowman
P.O. Box 872
Gastonia, NC 28053-0872

Ava Latresha Boyd
719 Sixth St., SE., Apt A
Washington, DC 20003

Harry Philip Brody
Office of Capital Collateral Counsel
3801 Corporex Dr., #210
Tampa, FL 33619

Christopher Lynn Byerly
407 Iona St.
Fairmont, NC 28340

Christopher Stephen Danielsen
Diggs Danielsen, LLC
1700 Oak St., Ste. D
Myrtle Beach, SC 29577

Alexander Dawson
P.O. Box 1188
Graham, NC 27253

Robert George Fleischmann
P.O. Box 22797
Charleston, SC 29413

George A. Folsom
5207 Falmouth Rd.
Bethesda, MD 20816-2914

Rodney L. Foushee
P.O. Box 1599
Little River, SC 29566

Julia Ann Gold
Univ. of Washington School of Law
406 24th Ave., E.
Seattle, WA 98112

Miles L. Green, Jr.
878 Peachtree St., Unit 703
Atlanta, GA 30309

William C. Guida
10202 Amber Hue Lane
Las Vegas, NV 89144

Carter Durand Harrington
P.O. Box 61540
N. Charleston, SC 29419-1540

Frances Lyles Haseldon
2502 Longest Ave.
Louisville, KY 40204

Jeffrey Alan Keenan
Pavilack & Assoc., PA
P.O. Box 2740
Myrtle Beach, SC 29578

Angela Deese Marshall
P.O. Box 711
Sparta, NC 28675

James D. McKinney Jr.
17 Lander St.
Greenville, SC 29607-1621

Gerald Francis Meek
P. O. Box 2961
Fayetteville, NC 28302-2961

Kevin Louis Paul
Center for Capital Litigation
P. O. Box 11311
Columbia, SC 29211

Catherine W. Swearingen
RR1 Box 446
Pelham, TN 37366-9742

Suzanne Wells
Home Gold, Inc.
203 Harry C. Raysor Dr., N.
St. Matthews, SC 29135

John Burton West Jr.
Hull Towill Norman Barrett & Salley, PC
P.O. Box 1564
Augusta, GA 30901

Charles Peter Yezbak III
144 Second Ave. N, Ste. 200
Nashville, TN 37201

The Supreme Court of South Carolina

In the matter of William C. Guida, Respondent

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, William Craig Guida was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 23, 2004, Mr. Guida submitted his resignation from the South Carolina Bar. We accept Mr. Guida's resignation.

Mr. Guida shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Guida shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William C. Guida shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina
April 7, 2004

The Supreme Court of South Carolina

In the matter of John G. Roark, Respondent

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 5, 1976, John G. Roark was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 20, 2004. Mr. Roark submitted his resignation from the South Carolina Bar. We accept Mr. Roark's resignation.

Mr. Roark shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Roark shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John G. Roark shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina
April 7, 2004

The Supreme Court of South Carolina

O R D E R

The attached certificate form is hereby approved for use with Rule 403, SCACR.

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

April 7, 2004
Columbia, South Carolina

The Supreme Court of South Carolina

CERTIFICATE

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $25. Except for the signatures, all entries must be legibly printed or typed.

COURT OF COMMON PLEAS or FEDERAL DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

EQUITY TRIAL

Case Name:_____Date:_____ATTEST:_____
Name of Judge and Title:_____ Signature of Judge

FAMILY COURT

1.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

ADMINISTRATIVE HEARING

Case Name:_____Date:_____ATTEST:_____
Name of Presiding Officer and Title:_____ Signature of Presiding Officer

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form. I further certify that I have observed or participated in the above trials in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

Revised 4/7/2004

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

Should the trial or hearing conclude prior to a final decision by the trier of fact, it shall be sufficient if one party has completed the presentation of its case.

(c) Trial Experiences Required. An attorney must complete ten (10) trial experiences. The required trial experiences may be gained by any combination of (b)(1) or (b)(2) but must include the following:

(1) three (3) civil jury trials in a Court of Common Pleas, or two (2) civil jury trials in Common Pleas plus one (1) civil jury trial in the United States District Court for the District of South Carolina;

(2) three (3) criminal jury trials in General Sessions Court, or two (2) criminal jury trials in General Sessions plus one (1) criminal jury trial in the United States District Court for the District of South Carolina;

(3) one (1) trial in equity heard by a circuit judge, master-in-equity, or special referee in a case filed in the Court of Common Pleas;

(4) two (2) trials in the Family Court; and

(5) one (1) hearing before an Administrative Law Judge or administrative officer of this State or of the United States. The hearing must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

(d) When Trial Experiences May be Completed. Trial experiences may be completed any time after the completion of one-half (1/2) of the credit hours needed for law school graduation.

(e) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer. A filing fee of $25 shall accompany the Certificate.

(f) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years at the time the attorney is admitted to practice law in South Carolina may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit which shall be filed with the Supreme Court. A filing fee of $25 shall accompany the affidavit.

(g) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a Federal District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the family court trials.

(h) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials. Each trial must meet the requirements of (c)(1), (2) or (4) above, and only one (1) family court trial may be used. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (c) above) must be submitted for the trials.

(i) Federal Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a Federal Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) civil trials which meet the requirements of (c)(1) above, three (3) criminal trials which meet the requirements of (c)(2) above, and two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(j) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(k) Confidentiality. The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

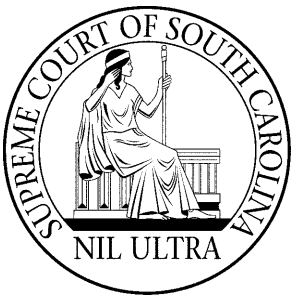
Notice of approval or disapproval of the trial experiences should be sent to:

NAME: _____

STREET OR P. O. BOX: _____

STATE and ZIP: _____

TELEPHONE NO. (Home)(_____)_____ (Work)(_____)_____



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 12, 2004

ADVANCE SHEET NO. 14

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Drusilla Kemp, Lenora Hickman, Cecil D. Rawlings, and William W. Rawlings, III, Respondents,

v.

Snoda Elizabeth A. Rawlings, and William L. Shipley, as Personal Representative of the Estate of William Wyatt Rawlings, Jr., Defendants,

Of whom Snoda Elizabeth A. Rawlings is, Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 25800
Heard March 4, 2004 - Filed April 5, 2004

REVERSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan, and Jeff Z. Brooker, III, all of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for appellant.

Morris D. Rosen and Donald B. Clark, both of Rosen, Rosen & Hagood, LLC, of Charleston, for respondents.

JUSTICE MOORE: We are asked to determine whether the circuit court erred by affirming the probate court's decision finding appellant was not entitled to certain joint account funds following the death of her husband. We reverse.

FACTS

This case involves the construction of the will of Colonel William Rawlings (Col. Rawlings). Col. Rawlings' adult children (respondents) filed a complaint in probate court alleging constructive trust, accounting, and conversion, against appellant, who is Col. Rawlings' widow. William L. Shipley, the attorney who is the personal representative of Col. Rawlings' estate and who drafted the will, was named as a party to the action. Respondents sought to recover funds appellant withdrew from joint accounts she held with Col. Rawlings approximately a year before his death.

Appellant, who was 78 years old, and Col. Rawlings, who was 77 years old, were married in December 1988. Both Col. Rawlings and appellant had adult children from prior marriages. In 1990, Col. Rawlings executed his will with the assistance of Attorney Shipley. The pertinent portions of the will state:

> ITEM III: I have made adequate provisions for my beloved wife, SNODA ELIZABETH A. RAWLINGS, *as we have a joint or survivorship bank account or joint or survivorship savings account and she is entitled to and I give and bequeath all funds in said account* except for any Certificates of Deposit accounts which are not joint or survivorship accounts. . . .

(Emphasis added). Col. Rawlings left the residue of his property to respondents.

Attorney Shipley testified Col. Rawlings told him he had accounts solely in his name and joint accounts with appellant, none of which were identified by bank or by account number. Shipley testified Col. Rawlings stated his intent was to ensure appellant was well taken care of with all of his joint accounts if he predeceased her.

At the time the will was executed, Col. Rawlings and appellant had a joint checking and a joint savings account at C&S National Bank of South Carolina. When NationsBank acquired C&S Bank in 1991, those accounts were converted to NationsBank accounts. Subsequently, Col. Rawlings withdrew $80,000 from the NationsBank joint savings account and opened a joint brokerage account with appellant at First Union. In 1995, Col. Rawlings closed the First Union joint brokerage account and opened a new joint brokerage account with appellant at Wachovia. He also opened a joint checking account with appellant at Wachovia. He later closed the NationsBank accounts.

In 1997, Col. Rawlings, suffered a heart attack and was hospitalized. He was subsequently transferred to Roper Care Alliance and remained there for a month. When he returned home, he was cared for by appellant and paid sitters. A year later, when appellant could no longer care for Col. Rawlings at home, he was placed in the Charleston VA Hospital nursing facility. Appellant then instituted a guardianship/conservatorship action and, in February 1999, appellant was appointed to be Col. Rawlings' guardian and conservator.

Approximately two months before the petition was filed to declare Col. Rawlings incompetent, appellant, on the advice of counsel, withdrew over $130,000 from the Wachovia brokerage account she shared with him and deposited them into her individual Wachovia brokerage account. Thereafter, she placed $30,000 of those funds in Col. Rawlings' conservatorship account. Some of the funds were withdrawn as cash and have not been accounted for;

however, appellant indicated this money was spent on Col. Rawlings' medical care and home sitting care.

After a trial, the probate court found for respondents on the constructive trust and accounting claims, but declined to award any additional damages on the conversion claim. The probate court found Col. Rawlings bequeathed to appellant only the joint accounts existing at the time he executed the will and not the joint accounts existing at his death, that the bequest to appellant had adeemed, that the funds in the joint accounts opened after the execution of the will belonged to Col. Rawlings during his lifetime, and that appellant would be required to repay the funds she withdrew from those joint accounts to the estate.

The probate court imposed a constructive trust against appellant in the amount of $225,162.70. Attorney Shipley, as personal representative of the estate, was ordered to pay respondents' attorney's and accountant's fees out of the estate prior to appellant's exercising her right to an elective share pursuant to S.C. Code Ann. § 62-2-201 (Supp. 2003).[1] Appellant appealed to the circuit court, which affirmed the probate court.

ISSUE I

Did the probate court err by finding appellant was not entitled to the funds in the joint accounts under the will?

[1]Section 62-2-201 provides that if a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate.

DISCUSSION

Appellant argues the probate court erred by finding Col. Rawlings intended to leave only the joint accounts existing at the time he executed the will, *i.e.* the C&S Bank joint checking and savings accounts, to her.[2]

An action to construe a will is an action at law. Bob Jones Univ. v. Strandell, 344 S.C. 224, 543 S.E.2d 251 (Ct. App. 2001). When reviewing an action at law, on appeal of a case tried without a jury, our jurisdiction is limited to the correction of errors of law and this Court will not disturb the judge's findings of fact unless found to be without evidence that reasonably supports the judge's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

The cardinal rule of will construction is the determination of the testator's intent. Matter of Clark, 308 S.C. 328, 417 S.E.2d 856 (1992). A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction. *Id.* The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. Allison v. Wilson, 306 S.C. 274, 411 S.E.2d 433 (1991). Every word or phrase in a will must be considered and, if practicable, effect must be given to them. *Id.* An interpretation that fits into the whole scheme or plan of the will is most apt to be the correct interpretation of the intent of the testator. Lemmon v. Wilson, 204 S.C. 50, 28 S.E.2d 792 (1944).

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[2]Appellant makes a *res judicata* argument that the probate court had already ruled on the proper disposition of the proceeds of the accounts in its order in the guardianship/conservatorship action. However, the probate court did not in fact rule on how the funds should be distributed and specifically reserved ruling on that issue until a later date.

From the terms of the will, it appears the intent of Col. Rawlings in making the bequest to appellant was to make an adequate provision for her through their joint bank accounts. However, as the probate court found, extrinsic evidence is admissible to determine if there is a latent ambiguity in the will. If there is such an ambiguity, then the court may also consider extrinsic evidence to determine whether Col. Rawlings intended to leave appellant only the C&S Bank joint accounts they had at the time the will was executed or whether he intended to leave appellant the joint bank accounts that existed at the time of his death. *See* Bob Jones Univ., *supra* (court may admit extrinsic evidence to determine whether latent ambiguity exists; once the court finds latent ambiguity, extrinsic evidence is also permitted to determine testator's intent.). A latent ambiguity is one in which the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. *Id.*

A latent ambiguity is present in Col. Rawlings' will. The words of the will bequeath the joint bank account or joint savings account appellant and Col. Rawlings have. When applying those words, especially the word "have," an ambiguity arises as to whether Col. Rawlings intended to leave only the C&S joint bank accounts to appellant because those were the accounts they had at the time the will was executed, or whether he intended to leave any joint bank account to appellant. Evidence of Col. Rawlings' intent can be found in the will and from Attorney Shipley's testimony.

The will provides that Col. Rawlings has "made adequate provisions for [his] beloved wife" through a joint bank account they "have." This indicates his intention that he desires his wife to be adequately provided for. Further, Attorney Shipley testified that, by his will, Col. Rawlings intended that appellant should be well taken care of with "all of his joint accounts" if he predeceased her.

At Col. Rawlings' death, the C&S Bank joint accounts were no longer in existence; however, Col. Rawlings transferred the funds in those accounts (after a series of transfers) to Wachovia in bank accounts held jointly with appellant. Given Col. Rawlings' intent and the fact that he is presumed to

know that a will speaks at death, the probate court erred by finding that, under the will, appellant was not entitled to the joint accounts she and Col. Rawlings held at the time of his death. *See* Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964) (will speaks at death); *In re* Estate of Holden, 343 S.C. 267, 539 S.E.2d 703 (2000) (everyone is presumed to have knowledge of the law). Further, the probate court erred by adding language to the terms of Col. Rawlings' will, *i.e.* by finding the joint account language referred only to joint accounts held at C&S Bank. There is no evidence to reasonably support the probate court's interpretation of the will. *See* Townes Assocs., Ltd., *supra* (judge's findings of fact will not be disturbed unless found to be without evidence which reasonably supports judge's findings).

Accordingly, under the will, appellant is entitled to the funds in those accounts.[3] Further, as will be discussed *infra*, appellant is not required to return the funds she withdrew from the joint accounts to the estate.

ISSUE II

Did appellant's withdrawal of funds from the joint accounts before Col. Rawlings' death cause the funds to become assets of the estate?

DISCUSSION

Appellant argues her withdrawal of funds from the joint accounts prior to Col. Rawlings' death did not cause the funds to become assets of the estate given he intended for her to have those funds.

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[3]Given our conclusion that Col. Rawlings' intention in the will was to provide for appellant by giving her the funds in any joint accounts they may have, it is unnecessary to address appellant's argument that the probate court erred by finding the bequest of funds to appellant had adeemed. *See* Rikard v. Miller, 231 S.C. 98, 97 S.E.2d 257 (1957) (specific legacies are adeemed when thing bequeathed is, in testator's lifetime, lost, disposed of, or so substantially changed or altered as not to exist in kind when will takes effect).

Events similar to the instant case occurred in Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001), although there was not a will at issue. In Vaughn, the decedent held joint accounts, to which she was the sole contributor, with her nephew. A few days before her death, the nephew withdrew all of the funds from those accounts. Pursuant to S.C. Code Ann. §§ 62-6-103(a), 62-6-104(a), and 62-6-101(13) (1987),[4] we held the nephew was not entitled to the funds because the funds belonged to the decedent during her lifetime and did not belong to the nephew, such that he could withdraw the funds, prior to her death.

Because there was only $442 left in one of the joint accounts when Col. Rawlings died, the probate court correctly held appellant is entitled to the survivorship presumption as to that $442. However, as the probate court found, citing Vaughn, she is not entitled to the survivorship presumption as to the funds she withdrew. Appellant did not contribute any money to the joint accounts. Thus, under section 62-6-103(a), all of the funds from the Wachovia joint accounts belonged to Col. Rawlings during his lifetime because he was the sole contributor. Appellant had withdrawn almost all of the funds and deposited them into her own accounts. Therefore, she cannot claim ownership of the funds based on § 62-6-104(a), the right of survivorship provision.

However, under the will, appellant is entitled to the funds she withdrew prior to Col. Rawlings' death. In Vaughn, we stated that, "[w]hile the

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[4]Section 62-6-103(a) provides, "A joint account belongs, *during the lifetime of all parties*, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (Emphasis added). Section 62-6-104(a) provides that any sums "remaining on deposit" at the time of the death of one of the parties to the account belong to the surviving party or parties as against the estate of the decedent. Finally, § 62-6-101(13) provides that the term "sums on deposit" specifically includes the balance payable on a multiple-party account and does not extend to withdrawn funds.

Decedent may well have intended for [the nephew]to receive the Joint Accounts' funds after her death, the nephew chose to rely solely on the statutory presumption and did not present other evidence of intent." *See also* § 62-6-103(a) (joint account belongs, during the lifetime of all parties, to parties in proportion to net contributions by each to sums on deposit, unless there is clear and convincing evidence of different intent). In the instant case, appellant has presented "other evidence of intent" that Col. Rawlings intended for appellant to receive the joint accounts' funds after his death. This "other evidence of intent" is in the form of Col. Rawlings' will wherein he gave and bequeathed to appellant the funds in their joint account. Given our conclusion that, under the will, Col. Rawlings intended to give appellant the funds in the joint accounts, this is evidence of Col. Rawlings' intent for appellant to receive those funds regardless of whether she withdrew them prior to his death.

Accordingly, the probate court erred by finding appellant was not entitled to the funds she had withdrawn from the joint accounts as against Col. Rawlings' estate.

ISSUE III

Did the probate court err by finding respondents are entitled to an award of attorney's fees and accountant's fees?

DISCUSSION

The probate court held respondents were entitled to have their attorney's fees and accountant's fees paid out of the estate since they were compelled to bring this action and the action benefited the common fund of Col. Rawlings' estate. However, because appellant is entitled to keep the funds she withdrew from the joint accounts she held with Col. Rawlings, the

probate court's ruling that respondents' attorney's fees and accountant's fees should be paid out of the estate is reversed.[5]

CONCLUSION

We find the circuit court erred by affirming the probate court's decision denying appellant her entitlement to the funds, some of which were previously withdrawn by her, from the joint accounts she held with her husband prior to his death. Accordingly, the circuit court's order is **REVERSED.**

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Roger M. Young, concur.

[5]Appellant is not entitled to have her attorney's fees paid out of the estate given she has not defended an action for the recovery, preservation, protection, or increase of a "common fund." *See* Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) (court may make allowance of reasonable fee out of common fund created or preserved, for an attorney representing a party who, at own expense, has successfully maintained or defended an action for recovery, preservation, protection, or increase of common fund).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Minyard Lee Woody, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 25801
Heard February 4, 2004 - Filed April 5, 2004

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Melody J. Brown, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Petitioner.

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

CHIEF JUSTICE TOAL: The State argues that the Court of Appeals erred when it held that Respondent's two prior convictions of armed robbery constituted one offense under S.C. Code Ann. § 17-25-50 (1985). We disagree and affirm the Court of Appeals' decision.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Minyard Woody ("Respondent") was convicted of second-degree burglary in July 1999. During trial, the State argued that S.C. Code Ann. § 17-25-45 (Supp. 2000) mandated a life sentence without the possibility of parole because Respondent had been convicted of two counts of armed robbery on January 21, 1981. The two previous armed robbery convictions stemmed from a single incident but involved two different victims: Respondent robbed a Fast Fare convenient store and was convicted of armed robbery of both the store's clerk and the store itself.

The trial judge sentenced Respondent to a life sentence without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2000).[1] The Court of Appeals reversed and held that Respondent's two prior convictions were the same offense under S.C. Code Ann. § 17-25-50 (1985), and therefore the "three strikes rule" of section 17-25-45 – requiring a life sentence without the possibility of parole when convicted of three "serious" crimes – does not apply. The State submits the following issue on appeal:

> **Did the Court of Appeals err in holding that Respondent's two prior convictions constituted one offense under section 17-25-50?**

LAW/ANALYSIS

In 2003, this Court published two opinions addressing issues similar to those in the present case. *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105

[1] Section 17-25-45(B) is a recidivist statute that provides, in part, that a person convicted of a "serious offense" as defined within the statute must be sentenced to life in prison without the possibility of parole if that person has two or more prior convictions for "serious" or "most serious" offenses.

(2003); *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (2003). The holdings of those cases are somewhat inconsistent, due to the contradictory language between sections 17-25-45 and 17-25-50.

Section 17-25-45(B) mandates that criminal defendants who are convicted of three "most serious" or "serious" crimes be sentenced to life imprisonment without parole.[2]

On the other hand, section 17-25-50, entitled "Considering closely connected offenses as one offense" states:

> [i]n determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

However, section 17-25-45(B) begins with the phrase: "[n]otwithstanding any other provision of law…," indicating that it should be interpreted and enforced in isolation of other applicable sections, such as section 17-25-50. Further, in July 2003, this Court held that section 17-25-50 is inapplicable in a "three strikes rule" analysis. *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (2003). This Court opined:

> that the legislature intends that § 17-25-45 be construed independent of any other statute is reinforced by the introductory language of subsections (E) and (F), both of which begin "For purposes of determining a prior conviction under this section only…." It is no longer necessary or appropriate to harmonize or reconcile § 17-25-45 and § 17-25-50 in light of the General Assembly's unmistakable instruction that § 17-25-45 be applied without regard to any other provision of law.

[2] Armed robbery is listed as one of the "most serious offense[s]" according to § 17-25-45(C)(1).

353 S.C. 441, 445, 579 S.E.2d 289, 291 (2003).

However, in October 2003, after these parties submitted their briefs, this Court overturned *Benjamin* in *State v. Gordon*, 356 S.C. 143, 152, 588 S.E.2d 105, 109 (2003), holding that the two statutes must be construed together, otherwise section 17-25-50 is utterly useless.

In the present case, Respondent's prior criminal record included two convictions of armed robbery. Given this Court's recent ruling in *State v. Gordon*, and the fact that the offenses were committed at the same time, the two offenses constitute only one offense under section 17-25-50. Accordingly, Respondent has only two strikes against him, not three.

CONCLUSION

We affirm the Court of Appeals' decision, holding that Respondent's two prior convictions of armed robbery constitute one offense.

MOORE, J., and Acting Justices Daniel F. Pieper and Alexander S. Macaulay, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I continue to adhere to my opinion in State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003), which was overruled by State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). In my opinion, Benjamin correctly analyzed the seeming tension between S.C. Code Ann. § 17-25-45 (Supp. 2000) and § 17-25-50 (1985). I would reverse the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Bonnie Nelson Brown, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Abbeville County
J. Ernest Kinard, Jr., Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25802
Heard March 3, 2004 - Filed April 12, 2004

REVERSED

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Charles H. Richardson,
Assistant Attorney General W. Rutledge Martin, all of Columbia; and William Townes Jones, of Greenwood, for Petitioner.

Assistant Appellate Defender Tara S. Taggart of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' opinion in State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002). We reverse.

FACTS

Brown received a traffic citation on March 13, 1996, in Greenwood County, for Failure to Register a Vehicle and Operating an Uninsured Vehicle. A trial was held in Greenwood County by a magistrate on May 8, 1997. After Brown was convicted, he moved for a new trial. A new trial was granted by the magistrate.

At his second trial on July 16, 1997, Brown was found guilty by a Greenwood County jury, Magistrate Lasonia Williams' presiding. Judge Williams sentenced Brown to 40 days in jail, or payment of a fine. Since Brown could not pay the fine, he immediately went to jail. Brown served the full sentence.

On August 6, 1997, Judge Williams received a written notice of appeal from the second Greenwood County magistrate's trial, which was filed in the Clerk's office on August 27, 1997. On September 2, 1997, Judge Williams filed an Answer to the Appeal. On October 1, 1997, Brown's appeal came before Circuit Judge Johnson, who reversed the jury verdict and remanded the case for a new trial. The Order granting a new trial stated that while Brown had successfully moved for a change of venue, venue had not in fact been changed. [1] Judge Johnson also reversed on another ground, which is not at issue in this case.

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[1] Actually, venue had already been changed. Greenwood County has a central magistrate court since it is only one district. S.C. Code Ann. § 22-2-190 (24) (1989). When a party wants to change venue in a magistrate court with one district, "the papers shall be turned over to the nearest magistrate not disqualified from hearing the cause in the county, who shall proceed to try the case as if he had issued the warrant or summons." S.C. Code Ann. § 22-3-920 (1989). Unlike circuit court, change of venue in a magistrate court

At this point in the proceedings, the Chief Magistrate of Greenwood County coordinated with the Abbeville County Chief Magistrate to comply with their mutual understanding of Judge Johnson's 1997 Order requiring a change of venue. After consultation, the charges were transferred to Abbeville County for trial.

A third trial was conducted by Abbeville Magistrate G.T. Ferguson, and Brown was again convicted. Although Brown had initially sought a change of venue to another county, he objected to being tried in Abbeville County prior to the proceedings there. Brown, again, appealed his conviction to Circuit Court and the conviction was affirmed on October 13, 2000. In his order, Judge Johnson stated:

> Venue was proper in Abbeville County since Defendant had previously requested a change of venue in Greenwood. Greenwood County has only one magistrate district. The only place to change venue was to an adjoining county…The verdict of the lower court is affirmed.

Brown appealed to the Court of Appeals.

During oral argument, the Court of Appeals sua sponte raised the issue whether the Circuit Court had subject matter jurisdiction to reverse the 1997 convictions from the second Greenwood County trial given the fact that Brown did not serve his notice of appeal on Judge Williams within 10 days of his convictions. The Court asked whether Brown had moved for a new trial since moving for a new trial extends one's deadline to appeal from

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with only one district ordinarily means changing judges, not place of trial. In this case, the second Greenwood County case was originally in front of Judge Cantrell and Brown requested a change of venue. Accordingly, the case was properly transferred to Judge Williams, another magistrate within Greenwood County. Only one change of venue transfer of right is allowed to each party in a magistrate court. S.C. Code Ann. § 22-3-920 (1989).

magistrate's court. S.C. Code Ann. § 22-3-1000 (Supp. 1996).[2] The Court gave Brown "ten days within which to provide this Court with a copy of the motion for a new trial that he filed." Brown, 570 S.E.2d at 559 n. 2 (Judge Connor's dissent quoting from oral argument).

Brown, instead, filed two affidavits, his, and one from a third party who attended the second 1997 trial. The affidavits state that Brown moved for a new trial immediately following the announcement of the verdict. The State filed a Motion Objecting to Consideration of Affidavits. The Court of Appeals found that Brown made a timely motion for a new trial and thus the 1997 Greenwood County appeal had been properly before the circuit court. Further, it vacated the 2000 Abbeville convictions, holding that a criminal action must be brought before a magistrate with jurisdiction in the county where the alleged offense occurred. The Court of Appeals concluded that the Abbeville magistrate had no subject matter jurisdiction to try Brown on these Greenwood charges. The State petitioned for a writ of certiorari, which was granted.

ISSUES

A. Did the Court of Appeals err in concluding the 1997 appeal from Brown's second Greenwood County conviction was timely?

B. Did the Court of Appeals err in finding the Abbeville County Magistrate's Court lacked subject matter jurisdiction to try Brown?

ANALYSIS

A. Did the Court of Appeals err in concluding the appeal from Brown's second Greenwood County conviction was timely?

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[2] Brown's convictions were in 1997. At that time the deadline to serve an appeal was twenty-five days after the magistrate's grant or denial of a motion for a new trial. S.C. Code Ann. § 22-3-1000 (Supp. 1996). The period was extended in 1999 to thirty days. See Annotation, S.C. Code Ann. § 22-3-1000 (Supp. 2001).

The Court of Appeals erred in concluding the appeal from Brown's second conviction was timely. The Court of Appeals considered two affidavits, which were not included in the record on appeal, in determining that Brown filed a timely notice of appeal. The Court stated it could consider these affidavits because: (1) "justice dictates that the resolution of issues pertaining to subject matter jurisdiction be a paramount concern for our courts"; (2) "issues concerning the existence of subject matter jurisdiction may be raised at any time and by any party or the court"; (3) "the affidavits were submitted pursuant to the Court's invitation and were necessary for the crucial determination of whether subject matter jurisdiction existed. The affidavits submitted by Brown are therefore deemed a part of the record." Brown, 570 S.E.2d at 562.

The Court of Appeals erred in considering these affidavits. First, there is no question of subject matter jurisdiction. In Great Games, Inc. v. South Carolina Dept. of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000), this Court addressed whether a circuit court lost "subject matter" jurisdiction over an appeal because the defendant failed to meet the requirement of posting a bond or paying a fine before appealing. In a footnote, this Court stated:

> [t]he circuit court erroneously characterized the jurisdictional defect as one relating to the court's subject matter jurisdiction. Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong"… *The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of "appellate" jurisdiction over the case, but it does not affect the court's subject matter jurisdiction.* (emphasis supplied) (internal citations omitted). Great Games, 529 S.E.2d at 83 n.5.

As noted above, this Court has held the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction, not the circuit court's subject matter jurisdiction. The Court of Appeals erred in concluding that subject matter jurisdiction was implicated by the failure to timely appeal a conviction from magistrate's court. Circuit

court has the power to hear and determine this class of appeals. S.C. Code Ann. §14-5-340 (1976).

Further, in Judge Williams' Answer to an Appeal, she stated, "[t]his Court does recognize that Section 22-3-1000 of South Carolina Code of Laws does give the appellant an additional 25 days, *but only after the denial of a motion for a new trial. This Court never received such motion from the Defendant.* He has only filed an appeal for reversal of the jury verdict in which he was found guilty of Failing to register a vehicle and Operating an uninsured vehicle. *The Court feels this appeal was not timely filed* and that the jury verdict should not be reversed." (emphasis supplied).

This Court has held that it is error for the Court of Appeals to consider facts not included in the magistrate's return. State v. Osborne, 335 S.C. 172, 176 n. 6, 516 S.E.2d 201, 203 n. 6 (1999)(holding that it was error for the Court of Appeals to rely on the recitation of facts contained in an appellate order instead of restricting itself to the facts contained in the magistrate's return). See also State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984)(magistrate's return is the official record of trial proceedings); State v. Sarvis, 265 S.C. 144, 147, 217 S.E.2d 38, 39 (1975)("While the arguments indicate some disagreement as to the facts, we are bound by the Return of the magistrate before whom the respondent was tried").

Judge Williams clearly stated in her Return that Brown did not move for a new trial. The Court of Appeals was bound by this factual determination and erred in considering the two affidavits, which were outside the Record on Appeal.

CONCLUSION

The 1997 appeal from the Greenwood County Magistrate conviction was untimely. Accordingly, these convictions from the second Greenwood County trial stand, and the Abbeville case is a nullity. The decision of the Court of Appeals is REVERSED. We need not reach the issue whether a magistrate can effectuate an inter-county transfer on criminal charges, nor the

effect, if any, of the fact that Brown has already served his entire sentence on these charges.

TOAL, C.J., WALLER, J., and Acting Justices Alison R. Lee and G. Thomas Cooper, concur.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

In the Matter of Daniel F. Norfleet, Respondent.

Opinion No. 25803
Heard January 8, 2004 - Filed April 12, 2004

INDEFINITE SUSPENSION

Attorney general Henry Dargan McMaster and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Daniel F. Norfleet, of Summerville, pro se.

PER CURIAM: In this attorney disciplinary matter, formal charges were filed against Respondent four times between December 12, 2000 and June 13, 2001. On March 26, 2002, a hearing was held to address the various charges. The full panel of the Commission on Lawyer Conduct ("Commission") adopted the sub-panel's report, and recommended Daniel F. Norfleet ("Respondent") be suspended from the practice of law for a period of two years, with conditions. The Commission recommended Respondent be required to undergo instruction in law office management, with a particular emphasis on trust account management, along with counseling in civility and appropriate conduct toward clients and others. The Commission also recommended that Respondent be required to make restitution to Wayne Howard in the amount of $8,381.52 and to pay the costs of the Commission's proceedings, in the amount of $2,164.37. We find the gravity of Respondent's misconduct justifies harsher

sanctions. Therefore, we hereby impose an indefinite suspension, with conditions, effective as of the date of this opinion.

First Formal Charges

The Byron Matter (Charlotte Riley Complaint)

The Commission found Respondent made false statements, commingled funds, and mismanaged his trust account in connection with this matter.

Respondent was the closing attorney in a real estate transaction for Patrick Byron in February 2002. As a result of the closing, two loans with Carolina First Bank were to be satisfied. Respondent's first check, issued from his trust account satisfied the first mortgage. The second check, made payable to Carolina First Bank in the amount of $8,739.77, for satisfaction of the second mortgage, was returned for non-sufficient funds.[1] The second check was used to purchase two certified checks from Carolina First Bank in the amounts of $8,731.44 and $8.33.

Respondent's wife, who was serving as his bookkeeper, secretary, and office manager testified she used the second trust account check to purchase the two cashiers checks and was aware that the account may not have had sufficient funds to cover the trust account check. She testified she concealed her actions from her husband. The Commission found the requirements of Rule 417, SCACR, regarding use, balancing, and maintenance of a trust account were incumbent on Respondent, not his wife.

[1] The second trust account check was issued from the trust account of Wyckoff and Norfleet. Testimony at the hearing revealed Respondent was still operating the trust account, which had been held jointly by Respondent and his former law partner, Pete Wyckoff. The firm had been dissolved in 1995. Unknown to Mr. Wyckoff, Respondent had continued to operate the trust account under the name of Wyckoff and Norfleet.

During this same time period, Respondent represented Wayne Howard in a Workers Compensation case. The case settled and the attorney for the defendant's insurance carrier mailed Respondent a letter enclosing a draft payable jointly to Mr. Howard and Respondent in the amount of $8,381.51. The letter accompanying the draft instructed Respondent not to negotiate the insurance company's draft until he had completed and mailed to opposing counsel the Final Lump Sum Agreement and Release, with the endorsement of the Workers Compensation Commission. Respondent did not follow the instructions in the letter. The draft, drawn on the account of Huron Insurance Company, was endorsed by Respondent's wife and deposited in Respondent's trust account. With this deposit, sufficient funds were on deposit in Respondent's trust account to purchase another check, payable to Carolina First Bank in the amount of $8,739.77, which was used to pay off the Byron's second mortgage.

The Commission found Respondent made a false statement to Wayne Howard in a letter dated August 4, 2000, in which he stated the settlement check he had received was stale and must be reissued. The Commission concluded Respondent misrepresented to his client Respondent's receipt of the settlement check.

Vaughan Realty Matter

The Commission found Respondent commingled funds.

On January 7, 2000, Respondent closed a real estate transaction between Vaughan Homes and Rebecca Moore. Respondent issued a trust account check for $2,378.25, dated January 7, 2000, payable to Vaughan Realty, Inc., as commission. The check was returned for non-sufficient funds.

Matthew Neylon, an official with Vaughan Homes, Inc., telephoned Respondent's office several times. Neylon received a cashier's check from Respondent's office in satisfaction of the commission obligation.

The Commission concluded that since the Vaughan Realty check had been returned, monies used to replace it must have come from a source other than the Vaughan/Moore real estate closing.

Additional Trust Account Mismanagement

In connection with the following incidents, the Commission found Respondent failed to maintain control over his trust account.

Respondent wrote a check for $950 from the Wyckoff and Norfleet trust account to pay his office rent. Additionally, the Commission received evidence showing the trust account had a negative balance in December 1999, February 2000, and March 2000. Between December 1, 1999, and March 31, 2000, Respondent had six instances of overdraft fees and seven instances of NSF fees.

Failure to Respond to Disciplinary Charges

Respondent failed to reply to two letters from the Commission concerning the Byron real estate transaction. Additionally, Respondent did not reply to the Commission's Notice of Full Investigation, which was returned unclaimed by the postal service following three attempts of service.

Withholding Taxes

The Commission found Respondent failed to withhold from his employees certain taxes on behalf of the State of South Carolina, thereby breaching his fiduciary duty owed to the State of South Carolina. The Commission received into evidence a series of South Carolina Department of Revenue Warrants for Distraint filed against Respondent. Additionally, Respondent has not filed personal income tax returns since 1996.

Sub-panel's Findings

The sub-panel found Respondent had committed attorney misconduct, in violation of the *Rules of Professional Conduct*, Rule 407, SCACR, and Rule 7 of Rule 413, SCACR. The sub-panel found violations of numerous provisions of Rule 407, particularly Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.15 (safekeeping property); Rule 1.5 (fees); Rule 4.1 (truthfulness in statements to others); Rule 8.1(b)(knowingly failing to respond to a lawful demand for information from a disciplinary authority); and Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct), (c) (conduct involving moral turpitude) and (d) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (e) (conduct prejudicial to the administration of justice).

From Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, SCACR, the sub-panel found Respondent had violated Rule 7(a)(1) (violating a Rule of Professional Conduct;); Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State); and Rule 7(a)(3) (knowingly failing to respond to a demand from a disciplinary authority).

Second Formal Charges

Leroy Ferrell Matter

Respondent represented Leroy Ferrell in a post-conviction relief matter. Ferrell's case was dismissed. Ferrell testified that he requested Respondent appeal the order of dismissal, but Respondent failed to do so. Respondent testified he did not appeal the order because he believed it was not meritorious.

The Commission did not find clear and convincing evidence of attorney misconduct, finding "credence in Respondent's

contention that he believed further appeal on Mr. Ferrell's behalf would have been fruitless."

Failure to Respond to Disciplinary Charges

The Commission concluded Respondent failed to respond to a Notice of Full Investigation mailed to Respondent on or about November 2, 2000, in connection with the Leroy Ferrell matter. The notice was returned as unclaimed by the U.S. Postal Service.

Respondent stated he was living in Florida at the time of the November 2, 2000, mailing and that he advised the Commission of his whereabouts. Although the Commission found there was evidence that Respondent failed to respond, the Commission found Respondent's contention he was living in Florida to be a mitigating factor.

Sub-panel's Findings

The sub-panel found Respondent committed attorney misconduct, in violation of the *Rules of Professional Conduct*, Rule 407, SCACR, and Rule 7 of Rule 413, SCACR. The sub-panel concluded Respondent violated Rule 1.1 (competence), Rule 8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority), and Rule 8.4, subsections (a) (violating a Rule of Professional Conduct) and (e) (conduct prejudicial to the administration of justice).

Third Formal Charges

The Commission concluded Respondent committed two violations in connection with his representation of Jimmy Ray Stroud in litigation against Randy and Christina Read and Christina's parents Mr. and Mrs. Rickard. The litigation primarily involved visitation disputes concerning Mary Paige Stroud, a daughter born to Jimmy Ray Stroud and Christina Read during their marriage.

Unprofessional Conduct

Mary Paige Stroud was enrolled at Hilton Head Elementary School. Gretchen Keefner, a principal at the school, testified Respondent unexpectedly came to the school and requested to view Paige's school records and visit with her. Keefner testified Respondent did not present any identification and was dressed in casual attire. Keefner further testified Respondent became verbally abusive when she refused him access to her file. Specifically, Keefner testified Respondent threatened to sue her personally and have her fired if she did not turn over the file.

When Respondent became agitated, Keefner requested the presence of her supervisor, Henry Noble. Noble testified Respondent was dressed in "beach attire" and was very angry, loud, and threatening. Noble retrieved Paige's file for Respondent's review. Noble testified Respondent became "furious" when he found documents on which Paige had signed her name as "Paige Read" instead of "Paige Stroud."

Additionally, Sheryl B. Keating, a counselor at Coastal Empire Community Health Center on Hilton Head Island, testified that during two or three conversations with Respondent, he became angry and threatening when Keating refused to provide him with confidential information relating to her counseling sessions with Paige Stroud and her mother.

Despite Respondent's denial of these allegations, the sub-panel determined that clear and convincing evidence weighed in favor of Keefner, Noble, and Keating and that the allegations regarding Respondent's conduct toward them were proven.

Failure to Respond to Disciplinary Charges

Respondent failed to respond to a Notice of Full Investigation mailed to him on or about December 27, 2000. The

Commission found as a mitigating factor that Respondent was living in Florida.

Sub-panel's findings

The sub-panel concluded Respondent breached the *Rules of Professional Conduct*, Rule 407, SCACR. Specifically, Respondent violated Rule 1.1 (competence); Rule 4.4 (respect for the rights of third persons); Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct, (c) (engaging in conduct involving moral turpitude), and (e) (conduct prejudicial to the administration of justice. From Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, the sub-panel found Respondent violated Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law) and Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State).

Fourth Formal Charges

Respondent failed to pay a court reporter $182.90 for a transcript which he ordered involving a case filed in Dorchester County Family Court. The court reporter prepared the transcript, but never mailed the transcript to Respondent after three unsuccessful attempts to procure payment from Respondent. Ultimately, another attorney took over representation of Respondent's client in the case and paid for the transcript.

Sub-panel's findings

The sub-panel concluded Respondent breached the *Rules of Professional Conduct*, Rule 407, SCACR. Specifically, Respondent violated Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.15 (safekeeping property); Rule 1.5 (fees); Rule 4.1 (truthfulness in statements to others); Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct), (c) (conduct involving moral turpitude), (d) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and (e) (conduct prejudicial to the administration of justice). From

Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, the sub-panel found Respondent violated Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law) and Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State).

LAW/ANALYSIS

This Court may make its own findings of fact and conclusions of law, and is not bound by a panel's recommendation. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The sanction of indefinite suspension has been imposed by this Court in similar cases involving multiple acts of misconduct. See e.g., In re Gaines, 348 S.C. 208, 559 S.E.2d 577 (2002) (indefinite suspension given attorney's prior history of bad conduct and for, *inter alia*, failing to properly maintain client escrow account and failure to make timely payment to court reporters); In re Devine, 345 S.C. 633, 550 S.E.2d 308 (2001) (indefinite suspension warranted for, *inter alia*, failing to respond to the Office of Disciplinary Counsel and misappropriation of client funds); In re Graab, 334 S.C. 633, 515 S.E.2d 93 (1999) (accepting Agreement for Discipline by Consent to indefinitely suspend attorney for, *inter alia*, failing to keep complete records of trust account funds, failure to provide competent representation, failure to make truthful statements to others, failure to respond to Office of Disciplinary Counsel, and failure to respect the rights of others).

Respondent's numerous incidences of misconduct, including his misappropriation of approximately $20,000 of trust account funds, his failure to honor his tax obligations, his repeated failure to respond to the disciplinary charges against him, and his unprofessional behavior, justify an indefinite suspension. Furthermore, we take exception to the sub-panel's finding that Respondent did not commit misconduct in failing to file a notice of appeal in the Leroy

Ferrell matter. Accordingly, we find a violation of the *Rules of Professional Conduct*, Rule 407, SCACR. The only appropriate course of action would have been to file an appeal on Mr. Ferrell's behalf. We hold Respondent acted incompetently in failing to file the notice of appeal in violation of Rule 1.1.

Additionally, we take note Respondent has previously received a public admonition from this Court, dated May 1, 2001. Respondent was admonished for his aggressive representation and unprofessional behavior, which caused avoidable conflicts.

CONCLUSION

The record is unclear of the total restitution owed to Wayne Howard. Respondent shall effectuate within sixty days of the date of this opinion an agreement with Disciplinary Counsel to implement a payment plan to ensure the timely and prompt payment of restitution to Wayne Howard and to any other parties to whom monies are owed. Upon reaching the agreement, the parties shall submit the plan to this Court, indicating all monies owed and to whom. With any application for reinstatement, Respondent must provide satisfactory evidence he has complied with the payment plan and paid the costs of the Commission's proceedings in the amount of $2,164.37. Additionally, Respondent must show he has received instruction in law office management, with emphasis on trust account management and received counseling in appropriate conduct towards clients and others. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing compliance with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

INDEFINITE SUSPENSION.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James R. Barber, III, concur.

The Supreme Court of South Carolina

RE: Amendments to South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, the following amendments are made to the Appellate Court Rules:

(1) Rule 403(e), SCACR, is amended by adding the following to the end of that provision: "A filing fee of $25 shall accompany the Certificate."

(2) Rule 403(f), SCACR, is amended by adding the following to the end of that provision: "A filing fee of $25 shall accompany the affidavit."

(3) The phrase "fee of $100" in Rule 405(e), SCACR, is replaced with the phrase "fee of $400".

(4) The third sentence from the end of Rule 32 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is amended to read: "The affidavit filed with the Supreme Court shall be

accompanied by proof of service showing service on disciplinary counsel, and a filing fee of $200."

(5) The phrase "fee of $100" in Rule 33(c) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is replaced with the phrase "fee of $1,500".

(6) The second sentence of Rule 419(f), SCACR, is amended to read: "The petition for reinstatement shall comply with the requirements of Rule 32, RLDE, Rule 413, SCACR, to include a filing fee of $200."

(7) The following rule is added:

Rule 423
Certificates of Good Standing

> A certificate of good standing may be issued by the Clerk of the Supreme Court to a person admitted to practice law in this state or to a person who holds a limited certificate to practice law in this state if the person is a member in good standing with the South Carolina Bar and is not under suspension for any reason. A person admitted or holding a limited certificate may request a certificate of good standing by submitting a written request to the Clerk of the Supreme Court accompanied by a filing fee in the amount of $25. If multiple copies are requested, an additional fee of $5 shall be charged for the second or subsequent copy of the certificate.

These amendments shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating.

Columbia, South Carolina
April 7, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Durrette Wooten, Jr.,	Plaintiff,
v.	
Mona Rae Howell Wooten,	Defendant and Third-Party Plaintiff,
v.	
Pam Perry,	Third-Party Defendant,
OF WHOM Thomas Durrette Wooten, Jr., is the	Appellant,
and Mona Rae Howell Wooten is the	Respondent.

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3610
Heard January 13, 2003 – Filed March 10, 2003
Withdrawn, Substituted and Refiled June 5, 2003

AFFIRMED AS MODIFIED IN PART and REVERSED AND REMANDED IN PART

C. Dixon Lee, II, and James T. McLaren, of Columbia; Lon H. Shull, of Mt. Pleasant; for Appellant.

Robert N. Rosen, of Charleston; for Respondent.

HEARN, C.J.: Thomas Durrette Wooten, Jr., (Husband) appeals several aspects of a divorce decree, including the award of the marital home to Wife, the identification of certain credit card charges incurred after the parties' separation as marital debt, the decision to grant Wife permanent alimony of $4,300 per month, and the award to Wife of $52,917.21 in attorney's fees and costs. We affirm as modified in part and reverse and remand in part.

Husband and Mona Rae Wooten (Wife) were married in 1976. They have three children, all of whom are past the age of majority.

The parties married while Husband was completing medical school and Wife was employed as a nursing instructor at The Medical University of South Carolina. Husband finished his residency in 1980 and the couple moved to Columbia for him to pursue open-heart surgery anesthetics. A year later they moved back to the Charleston area and purchased a riverfront home on Johns Island. The couple transformed the house, which was described as "barely livable," into a five-bedroom home containing nearly 5,000 square feet and valued at $675,000.00 at the time of the divorce hearing.

During the marriage, the parties enjoyed a comfortable, if not extravagant lifestyle, which was largely centered on outdoor activities such as boating, hunting, and fishing. Husband and the parties' older daughter and son were actively involved in hunting and fishing. Wife described fishing as Husband's "main love."

Wife stayed home with the children while they were small and worked in Husband's practice as a bookkeeper. In 1995, Wife went to work in the Charleston County Coroner's office. At the time of trial, Wife was employed as the deputy coroner for Charleston County earning a salary of

approximately $47,000 per year. Husband was earning approximately $217,000 per year.

At some point during the marriage, Husband admitted to Wife that he had been unfaithful to her with the wife of another anesthesiologist while away at a medical meeting. Wife testified that Husband also admitted to her that he had been sexually intimate with the wife of a fishing buddy. Husband, however, testified that he had only engaged in a one-night stand with the wife of someone he fished with while at a fishing tournament in Kiawah.

In 1986 or 1987, approximately twelve years before the parties separated, Wife began a year-long affair with a family friend. The affair continued even after Husband confronted Wife, and subsequently the parties entered counseling. The parties saw four or five different counselors during this troubled time in their marriage.

In February of 1999, Husband left the marital home and subsequently underwent a vasectomy. Although Wife sought a reconciliation, Husband informed the parties' marriage counselor that he no longer loved Wife and only wanted to discuss a division of their marital assets.

Husband commenced this action in June of 1999 for an order of separate maintenance and support and an equitable division of the parties' assets and debts. Wife answered and counterclaimed seeking a divorce on the ground of adultery, possession and ownership of the marital home, equitable division of marital property, alimony, and attorney's fees.

At trial, the parties announced they had reached an agreement regarding the division of their personal property. Husband also conceded that Wife was entitled to alimony and to an equal division of the marital estate. The remaining issues were tried over a five-day period after which the family court judge issued a final order granting Wife a divorce on the ground of adultery.

Although Husband conceded at trial that Wife was entitled to a fifty-fifty division of the marital estate, he requested that the only asset of the parties that can be readily liquidated, the marital home, be sold to accomplish this division. The court valued the marital estate at $1,571,103.[1] To accomplish the fifty-fifty division of the marital estate, the family court judge awarded the marital home to Wife, together with its mortgage debt, her retirement account, and $137,395.50 from Husband's retirement account. Husband was awarded his interest in his medical practice valued at $41,000, the remainder of his retirement account, and indebtedness totaling $83,552. The family court also awarded Wife $4,300 per month in permanent, periodic alimony, and $52,917.21 in attorney's fees and costs.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find the facts in accordance with our own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). However, we are mindful of the fact that the family court judge, who had an opportunity to observe the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997).

DISCUSSION

I. Credit Card Debt

Husband asserts the family court judge erred in identifying $12,332 in credit card charges incurred by Wife after the parties' separation as marital debt and in allocating that debt to him. We agree.

Wife testified that although Husband initially paid all household bills when he left the marital home, sometime in June of 1999 he told her that

[1] The marital estate consisted of the marital home valued at $675,000, with equity of $539,349; Husband's retirement accounts valued at $844,026; Wife's retirement account valued at $11,077; and, Husband's interest in his medical practice valued at $41,000.

she should start paying some of the bills. After that time, and up until the time of the temporary hearing, Husband paid the mortgage payments on the marital home while Wife used her credit card for other expenses such as food and veterinary bills. Wife testified that she had a credit card bill of $12,322. The family court judge treated this debt as a marital debt subject to equitable apportionment. We find that this was error.

"Marital property" for purposes of the South Carolina Apportionment of Marital Property Act is defined in S.C. Code Ann. § 20-7-473 (Supp. 2002) as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." In making an equitable apportionment, the family court should consider ". . . any other existing debts incurred by the parties or either of them during the course of the marriage[.]" S.C. Code Ann. § 20-7-472(13) (Supp. 2002). "[S]ection 20-7-472 creates a [rebuttable] presumption that a debt of either spouse incurred prior to marital litigation is a marital debt and must be factored in the totality of equitable apportionment." Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1993).

Because Hardy establishes a presumption in favor of treating a debt as marital when it is incurred prior to marital litigation, the party claiming the debt is nonmarital bears the burden to overcome that presumption. See also Hickum v. Hickum, 320 S.C. 97, 463 S.E.2d 321 (Ct. App. 1995) (stating the burden of proving a spouse's debt as nonmarital rests on the party who makes such an assertion). In the instant case, however, it is undisputed that the debt was incurred after marital litigation was commenced. Accordingly, the presumption in favor of the debt as marital is lost, and the burden moved to Wife to establish that the debt was incurred for the benefit of the marriage. See Peirson v. Calhoun, 308 S.C. 246, 417 S.E.2d 604 (Ct. App. 1992) (holding that a debt incurred after the parties' separation may be equitably apportioned where there has been a showing that the debt was incurred for the benefit of the marriage).

There was no showing by Wife that the credit card debt was incurred for the benefit of the marriage. Accordingly, it does not qualify as a

marital debt subject to equitable apportionment.[2] We therefore reverse this portion of the family court's order allocating the credit card debt to Husband.

II. Marital Home

Husband next contends the family court judge erred in awarding Wife ownership of the marital home as part of her share of the marital estate, arguing it was inequitable to award Wife the only asset of the parties that readily lends itself to liquidation. We agree.

Husband's position throughout trial was that although Wife was entitled to share equally in the marital estate, the marital home should be sold to enable the parties to capture its substantial equity. At the time of trial, the marital home, which was titled in Wife's name, had equity of at least $539,349. Husband proposed that the home be jointly titled in both parties' names and sold so that the parties could combine their $250,000 exclusions for capital gains taxes. Gerald Feinberg, a CPA, testified for Husband concerning the tax consequences to the parties of the various methods of equitable distribution. Feinberg testified that if the parties sold the marital home together, they could take advantage of the joint capital gains exclusion of $500,000. Husband further testified that if Wife was awarded the home and he had to liquidate his retirement account in order to satisfy the remaining equitable division award and to make a down payment on a residence for himself, he would suffer substantial tax and withdrawal penalties. Feinberg testified these penalties would result in Husband losing fifty-one percent of the value of any retirement funds he withdrew. Wife, on the other hand, testified that she wanted to be awarded the marital home in partial satisfaction of her equitable share because "[I]t's my home. It's where my life is centered. ...It's where I have my kids and enjoyment. It's where I have my friends and enjoyment."

In awarding the marital home to Wife as part of her equitable share, the family court judge specifically stated that she had not given

[2] We express no opinion as to whether or not the family court could have required Husband to reimburse Wife for some or all of these charges as an incident of support.

Husband's fault any weight. She likewise held that in awarding the home to Wife, she did not consider the children's use of the home, as they were all emancipated and Husband had no obligation to support them other than their college education. These findings were not appealed from and are therefore the law of this case. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (stating that an issue which is not challenged on appeal, whether right or wrong, becomes the law of the case).

Additionally, the family court judge specifically noted that she had not considered the tax ramifications of the sale of the house and the taxability of the pension payments. Relying on Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996), the family court judge found that she was precluded from dividing the parties' property based on after-tax dollars stating that, "To make a decision based on after-tax dollars is for this Court to engage in speculation as to what the parties will do in the future."

The apportionment of marital property is within the family court judge's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Bowers v. Bowers, 349 S.C. 85, 97, 561 S.E.2d 610, 616 (Ct. App. 2002). Section 20-7-472 lists fifteen factors for the family court to consider when making an equitable apportionment of the marital estate and vests the family court with the discretion to determine what weight should be assigned to each factor. On review, this court looks to the overall fairness of the apportionment, and if the result is equitable, taken as a whole, that this court might have weighed specific factors differently than the family court is irrelevant. Id.

We find the family court judge abused her discretion in awarding the marital home to Wife as part of the equitable division. Case law indicates that the family court judge should first attempt an in-kind distribution. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). However, an in-kind distribution is most equitable where the assets being divided are similar in character. In our view, the family court judge's decision to award Wife the major marketable asset of the parties, while awarding Husband primarily his retirement account, was not an equitable in-kind distribution. Under Husband's proposal, all assets of the parties would have been equally divided on a fifty-fifty basis. Under Wife's proposal, the

captured equity in the marital home was viewed as being equivalent to Husband's retirement plan, despite the fact that the equity in the marital home was readily available with little or no tax consequence to Wife and the funds in Husband's retirement plan were subject to a total penalty of fifty-one percent if withdrawn.

Wife presented no testimony to dispute the testimony of Husband and his expert concerning the tax ramifications of the proposals for equitable division. Therefore, in this case it is uncontradicted that the Husband's proposal for equitable division would have allowed the parties to take advantage of the joint $500,000 capital gains exclusion while the Wife's proposal would result in the Husband incurring a severe penalty of over fifty per cent in the liquidation of a portion of his retirement fund. Moreover, we believe the family court incorrectly concluded that appellate case law precluded her from considering the tax consequences of the equitable distribution.

In Ellerbe, the husband asserted the family court judge erred in discounting the value of the parties' retirement plans when the order did not require the plans to be liquidated. This court agreed, finding that "[b]ecause we see no need for the accounts to be liquidated, we hold the family court erred in valuing the parties' retirement accounts at 48% of their face values." 323 S.C. at 289, 473 S.E.2d at 885 (emphasis supplied). Here, as in Ellerbe, the family court's order does not contemplate the liquidation of the Husband's retirement account. However, we believe it was an error for the family court to have disregarded Husband's substantial evidence establishing the necessity to withdraw funds from his retirement account to comply with the family court's division of the marital property. Because the family court should have recognized Husband's need to liquidate the account, the tax consequences of that liquidation should have been considered. See S.C. Code § 20-7-472(11) (Supp. 2002) (specifically requiring the family court to consider "the tax consequences to each or either party as a result of any particular form of equitable apportionment[.]"). The family court judge apparently interpreted Ellerbe to hold that potential tax ramifications should never be considered by the family court in deciding how to fashion an equitable division if the chosen method of division in the order does not expressly require liquidation of an asset. This restrictive interpretation is

flawed where, as here, in comparing competing alternatives for division of the property, the tax consequences should have been considered in order to accomplish an equitable division in the first place.

We likewise find the case of Bowers distinguishable. In Bowers, this court declined to find error when the family court judge failed to consider the tax consequences resulting from its award to the wife of one-half the value of the husband's 401(k) account. Citing Ellerbe, this court found no abuse of discretion, but stated there was no evidence that either party anticipated liquidation of the account. This is in marked contrast to the evidence presented here from Husband and his expert witness that he would be required to liquidate his retirement account in order to comply with the order and to acquire a home for himself.

Taking our own view of the evidence presented in this case, we do not believe that the apportionment of marital assets was fair to both parties. Wife's emotional attachment to the marital home should not outweigh the undisputed expert testimony that in order to effect a division which is equitable to both parties, the marital home should be sold and the parties should realize the benefits of the $500,000 capital gains exclusion. We find it was error for the family court judge to have viewed these two assets–the equity in the marital home and Husband's retirement plan–as though they were equivalent assets. The family court abused its discretion in awarding the marital home to Wife in the face of undisputed testimony that both parties would realize a significant tax benefit by selling the home and dividing its proceeds. Accordingly, we reverse this portion of the family court's order and remand this issue back to the family court to enter an order consistent with this opinion.

III. Alimony

Husband next argues the family court judge's award of $4,300 per month in permanent periodic alimony was excessive. Although the alimony award does not appear excessive in view of the disparity in the parties' incomes and the length of the marriage, the family court judge based this alimony award upon her assumption that Wife would be residing in the marital home. Accordingly, she considered Wife's many needs and expenses

that would be associated with her ownership and maintenance of that home, such as an additional $300 to be used by Wife in acquiring a boat. Because we have reversed that portion of the family court order which awarded Wife the marital home as part of her equitable apportionment, we feel compelled to remand the issue of alimony to the family court for recalculation in light of Wife's present needs. See Ellerbe, 323 S.C. at 297, 473 S.E.2d at 889 (remanding the issue of alimony for reconsideration in light of remanding the issue of the equitable division award, which is a factor relevant to the award of alimony).

IV. Attorney's Fees and Costs

Finally, Husband asserts the family court judge erred in awarding Wife $52,917.21 in attorney's fees and costs.[3] He argues the court erred in awarding any fees to Wife because of the numerous errors he asserts she made in the trial order. He further contends the amount of the award was excessive given his financial condition. We disagree.

An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson, 295 S.C. at 415, 368 S.E.2d at 903. In deciding whether to award attorney's fees, the family court should consider the parties' ability to pay their own fee, the beneficial results obtained by counsel, the respective financial conditions of the parties, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). When determining the amount of fees to award, the court is to consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

Even though Husband prevailed on two of the equitable division issues in this appeal, the beneficial results obtained are only one of several factors to be considered by the family court in deciding whether or not to

[3] Husband had already contributed $25,547.50 toward Wife's fees at the time of trial for a total award of $75,129.21.

award attorney's fees. The other factors outlined above clearly militate in favor of an award to Wife. Moreover, Wife's attorney received a favorable result on the issue of divorce and on the issue of alimony, which this court remanded only because of our decision on the equitable division of the marital home. Finally, Husband commenced this action for separate support and maintenance and Wife was required to obtain competent counsel to defend it.

Nor are we persuaded that the amount of fees and costs awarded by the family court was excessive under the circumstances. Husband testified at trial that his own attorney's and accountant's fees were $70,000, although the family court judge found in her order that he had incurred fees and costs of $58,998.24.

Wife's counsel is an accomplished family practitioner with an excellent reputation in the community. Particularly given the wide disparity in the parties' incomes, we do not believe it was error for the family court judge to have awarded Wife the entire amount of her attorney's fees and costs incurred in defending this action.

CONCLUSION

Accordingly, we affirm the family court judge's award of attorney's fees and costs, reverse her decision to treat Wife's credit card charges incurred after the date of filing as a debt subject to equitable division, reverse her decision to award Wife the marital home as part of her equitable division and direct that the home be sold, and remand the equitable division and alimony issues to the family court for further consideration consistent with this opinion.

CURETON J., concurs.

ANDERSON J., dissents in a separate decision.

ANDERSON, J. (dissenting): I respectfully dissent. In this domestic case, Thomas Durrette Wooten, Jr. (Husband) appeals from an order of the Family Court. The issues include identification of marital debt, equitable division of marital property, alimony, and attorney's fees and costs. I disagree with the analysis and reasoning of the majority. I vote to affirm in part, reverse in part, and modify in part.

FACTS/PROCEDURAL BACKGROUND

Husband and Mona Rae Wooten (Wife) were married in 1976. They have three children, all of whom are past the age of majority.

At the time of the marriage, Husband was on the verge of completing medical school at the Medical University of South Carolina and Wife was employed at the University as a nursing instructor. When Husband completed his residency, the parties moved to Columbia so Husband could take a job performing open heart surgery anesthetics.

After approximately one year, the parties moved to Mt. Pleasant. Soon thereafter, Husband and Wife purchased a home on Johns Island, where they lived throughout the duration of the marriage. Although the home, located on two acres of riverfront property, was "barely livable" at the time of the purchase, the parties renovated, restored, expanded, and otherwise improved the home. Eventually, the home became an integral part of the parties' lifestyles, particularly that of Wife. The parties did not travel extensively or host extravagant parties, but often entertained friends in the home and participated in boating and other recreational activities on the river. Husband and Wife purchased about twenty-four boats during the marriage, ranging in size from a jon boat to a thirty-five foot ocean-going fishing vessel.

Around February 10, 1999, Husband left the marital home and refused to tell Wife where he was planning to live. One month later, he informed the parties' marriage counselor he no longer loved his wife and only wanted to discuss division of their assets. On March 19, 1999, Husband underwent a vasectomy. Husband admitted he was romantically involved with Pam Perry,

his then married co-worker, in April of 1999, although he denied any prior romantic involvement with her.

For a time immediately following the parties' separation, Husband paid Wife's expenses. After Husband told Wife she would have to start paying her bills from her own money, Wife began relying heavily on use of her credit cards to make purchases such as food and prescription drugs, and to pay college tuition for one of the parties' children.

Husband filed this action in June of 1999 seeking, inter alia, an order allowing him to live separate and apart from Wife and equitably apportioning the parties' marital property and debts. Wife answered and counterclaimed, seeking a divorce on the ground of adultery, possession and ownership of the marital home, equitable division of marital property, an award of alimony, and ancillary relief.

The Family Court heard the action over five days in April and May of 2000. The parties reached an agreement as to equal division of their personal property, such that the central issues remaining for adjudication at trial were alimony and the equitable division of marital property. The parties agreed on a fifty-fifty division of the marital estate.

The Family Court valued the parties' marital estate at $1,328,156. The principal assets consisted of the marital home, which had a fair market value of $675,000 and an equitable value of $539,349; Husband's $844,026 retirement accounts; Wife's $11,077 retirement plan; and Husband's $41,000 interest in his medical practice.

The Family Court granted Wife a divorce on the ground of adultery and determined the marital estate should be divided equally between the parties. To accomplish this division, the court awarded Wife full ownership of the marital home, together with its mortgage debt, her retirement account, and $137,395.50 from the husband's retirement accounts. The court awarded Husband his interest in his medical practice and the remainder of his retirement accounts, and allocated indebtedness to him totaling $83,552.50. The court found Wife was entitled to $4,300 per month in permanent periodic

alimony, and $52,917.21 in attorney's fees and costs. Husband's post-trial motion for reconsideration was denied.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Likewise, we are not obligated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (ruling that because appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the Family Court's findings where matters of credibility are involved); Terwilliger v. Terwilliger, 298 S.C. 144, 378 S.E.2d 609 (Ct. App. 1989) (holding the resolution of questions regarding credibility and the weight given to testimony is a function of the Family Court judge who heard the testimony). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved. Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000).

LAW/ANALYSIS

I. Credit Card Debt

Husband argues the Family Court erred in identifying $12,332 in credit card charges as marital debt subject to equitable division, and in allocating the debt to him, inasmuch as Wife incurred the debt after this action was commenced. I agree the debt should not have been allocated to Husband.

South Carolina Code Ann. § 20-7-472 (Supp. 2002) provides in pertinent part:

> In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors:
>
> . . . .
>
> (13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage . . . .

Debts incurred for marital purposes are subject to equitable distribution. Jenkins v. Jenkins, 345 S.C. 88, 545 S.E.2d 531 (Ct. App. 2001). Section 20-7-472 creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is a marital debt, and must be factored into the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 463 S.E.2d 321 (Ct. App. 1995).

"Marital debt" has been defined as debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable. Thomas v. Thomas, 346 S.C. 20, 550 S.E.2d 580 (Ct. App. 2001), cert. granted, Jan. 24, 2002; Hardy v. Hardy, 311 S.C. 433, 429 S.E.2d 811 (Ct. App. 1993). In equitably dividing a marital estate, the Family Court is to consider the net estate, and must apportion marital debt in conjunction with the apportionment of assets. Hardy, 311 S.C. at 437, 429 S.E.2d at 813; see also Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997) (marital debt is a factor to be considered in making the equitable apportionment). Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith, 327 S.C. at 457, 486 S.E.2d at 520 (section 20-7-472 implicitly requires that marital debt, like marital property, be specifically identified and apportioned in the equitable distribution); Frank v. Frank, 311 S.C. 454, 429

S.E.2d 823 (Ct. App. 1993). The same rules of fairness and equity which apply to the equitable division of marital property also apply to the division of marital debts. Hardy, 311 S.C. at 437, 429 S.E.2d at 813-14.

The burden of proving a spouse's debt as nonmarital rests upon the party who makes such an assertion. Hickum, 320 S.C. at 103, 463 S.E.2d at 324; Hardy, 311 S.C. at 437, 429 S.E.2d at 814. "If the trial judge finds that a spouse's debt was not made for marital purposes, it need not be factored into the court's equitable apportionment of the marital estate, and the trial judge may require payment by the spouse who created the debt for nonmarital purposes." Hickum, 320 S.C. at 103, 463 S.E.2d at 324.

Even where a spouse individually incurs debt after a marital separation but before a divorce decree is entered, the debt should be apportioned in accordance with the principles of equitable distribution where there is a showing that the debt was incurred for the joint benefit of both parties. See Peirson v. Calhoun, 308 S.C. 246, 417 S.E.2d 604 (Ct. App. 1992); see also Allen v. Allen, 287 S.C. 501, 339 S.E.2d 872 (Ct. App. 1986) (finding that while it is proper to consider marital debts in making an equitable distribution of marital assets, it is also incumbent upon the court which apportions such debts to ensure the debts were incurred for the joint benefit of the parties during the marriage).

Giving full efficacy to the burden of proof rule, I am unable to discern from the record on appeal that the credit card debts incurred by Wife during the parties' separation were for any purpose inuring to the benefit of Husband. Rather, Wife testified she used her credit card to pay part of a college tuition bill for one of the parties' children and to buy medication, food, and clothing. While these were perhaps legitimate expenses, the resulting credit card debt was not, in my view, incurred for the joint benefit of the parties within the meaning of the governing statute and applicable case law. Moreover, these credit card charges were incurred by Wife subsequent to the filing of marital litigation. The court erred in considering the credit card charges as marital debt subject to equitable apportionment. Concomitantly, I vote to reverse the portion of the Family Court's order allocating the credit card debt to Husband.

II. Marital Home

Husband asserts the Family Court erred in awarding Wife ownership of the marital home as part of her share in the marital estate. I disagree.

The Family Court is given broad jurisdiction in the equitable distribution of marital property. Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995); see also Greene v. Greene 351 S.C. 329, 569 S.E.2d 393 (Ct. App. 2002) (holding Family Court has wide discretion in determining how marital property is to be distributed). The court may use any reasonable means to divide the property equitably. Bowyer v. Sohn, 290 S.C. 249, 349 S.E.2d 403 (1986); Belton v. Belton, 325 S.C. 456, 481 S.E.2d 174 (Ct. App. 1997); see also Coxe v. Coxe, 294 S.C. 291, 363 S.E.2d 906 (Ct. App. 1987) (stating Family Court judges are given broad jurisdiction in equitable distribution of marital property and trial judge may use any reasonable means to divide estate equitably). The apportionment of marital property is within the Family Court judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Peirson v. Calhoun, 308 S.C. 246, 417 S.E.2d 604 (Ct. App. 1992).

In order to effect an equitable apportionment, the Family Court may require the sale of marital property and a division of the proceeds. Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); S.C. Code Ann. § 20-7-476 (Supp. 2002) (providing that "[t]he court in making an equitable apportionment may order the public or private sale of all or any portion of the marital property upon terms it determines."). The court, however, should first attempt an "in-kind" distribution of the marital assets. Donahue, 299 S.C. at 360, 384 S.E.2d at 745; Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). A Family Court may grant a spouse title to the marital home as part of the equitable distribution. Donahue, 299 S.C. at 360, 384 S.E.2d at 745. Pursuant to § 20-7-472(10) of the South Carolina Code, the court, in making apportionment, "must give weight in such proportion as it finds appropriate to all of the following factors: . . . (10) the desirability of awarding the family home as part of equitable distribution." S.C. Code Ann. § 20-7-472(10) (Supp. 2002).

Section 20-7-472 lists fifteen factors for the Family Court to consider when making an equitable apportionment of the marital estate. Bowers, 349 S.C. at 97, 561 S.E.2d at 616. The statute vests the Family Court with the discretion to decide what weight should be assigned to the various factors. Id. On review, this Court looks to the overall fairness of the apportionment, and if the result is equitable, that this Court might have weighed specific factors differently than the Family Court is irrelevant. Id.

In deciding to award Wife the marital home in partial realization of her share in the marital estate, the Family Court expressly weighed: the length of time the parties and their children resided in the home during the marriage; Wife's desire to remain in the home; and the central role the home played in the parties' lifestyles during the marriage. As well, the court considered the fact that Wife's deceased father personally performed much of the woodwork on the home during the process of renovation. Pointedly, the court specifically noted that it "could not award the marital home to the Wife no matter how desirable unless it were a part of the fifty percent (50%) of the marital estate to which she is entitled."

Under these facts and circumstances, there is no error or abuse of discretion in the Family Court's decision to award Wife the marital home instead of ordering its sale. I am particularly convinced of the propriety of the court's decision in this regard in light of Husband's vastly superior income and ability to purchase a home without the necessity of divesting Wife of the marital home.

III. Tax Ramifications

Husband claims the Family Court erred in failing to consider the tax consequences in the division of the marital estate. I disagree.

In Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996), the Court of Appeals analyzed tax issues in connection with equitable apportionment and stated:

> South Carolina Code Ann. § 20-7-472(11) (Supp. 1995) requires the family court to consider the tax consequences to each

> party resulting from equitable apportionment. However, if the apportionment order does not contemplate the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation. See Graham v. Graham, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990); see also Roe v. Roe, 311 S.C. 471, 429 S.E.2d 830 (Ct. App. 1993). Moreover, a transfer of these funds from one party to the other as a part of an equitable division should not result in a tax consequence. Josey v. Josey, 291 S.C. 26, 351 S.E.2d 891 (Ct. App. 1986). Here, the parties were awarded their respective accounts. Because we see no need for the accounts to be liquidated, we hold the family court erred in valuing the parties' retirement accounts at 48% of their face values. In redetermining equitable distribution, the family court shall consider the face values of the parties' retirement accounts.

Id. at 289, 473 S.E.2d at 884-85.

After Ellerbe, this Court, in Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002), examined tax effects as applied to the valuation and distribution of the husband's 401(k) account. Bowers explicates:

> We further find no error in the Family Court's failure to expressly consider tax consequences resulting from its award to Wife of one-half the value of Husband's 401(k) account. Where an order of equitable apportionment does not contemplate the liquidation or sale of an asset, it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation. Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996). Here, the court's order does not require or contemplate liquidation of Husband's 401(k) account and there is no evidence indicating either party anticipated liquidation of the account.

Id. at 97-98, 561 S.E.2d at 617.

I reject the contention by Husband that the apportionment of marital property in the case sub judice contemplates the liquidation or sale of an asset. The court's order does not require or contemplate liquidation of Husband's retirement accounts or the sale of the house. Husband asseverates that, in actuality, he will be required to liquidate either the retirement accounts or to sell the house or both in an attempt to comply financially with the court's distribution.

In contrariety to Husband's argument, there is no evidence indicating he will be required to engage in a liquidation of the retirement accounts or to sell the house, other than his self-serving assertions. The Family Court did not err in failing to expressly consider tax consequences resulting from its award to Wife of the house.

IV. Alimony

Husband contends the Family Court's award to Wife of $4,300 per month in permanent periodic alimony was excessive. I agree.

The decision to grant or deny alimony rests within the discretion of the Family Court judge. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Clardy v. Clardy, 266 S.C. 270, 222 S.E.2d 771 (1976); Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997). The judge's discretion, when exercised in light of the facts of each particular case, will not be disturbed on appeal absent abuse thereof. Dearybury, 351 S.C. at 282, 569 S.E.2d at 369; Long v. Long, 247 S.C. 250, 146 S.E.2d 873 (1966). An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 535 S.E.2d 913 (2000); Stewart v. Floyd, 274 S.C. 437, 265 S.E.2d 254 (1980).

Alimony is a substitute for the support which is normally incident to the marital relationship. Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); Morris v. Morris, 335 S.C. 525, 517 S.E.2d 720 (Ct. App. 1999); Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988). Generally, alimony should place the supported spouse, as nearly as is practical, in the same position of support he or she enjoyed during the

marriage. Allen v. Allen, 347 S.C. 177, 554 S.E.2d 421 (Ct. App. 2001); McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998). It is the duty of the Family Court to make an alimony award that is fit, equitable, and just if the claim is well founded. Hinson v. Hinson, 341 S.C. 574, 535 S.E.2d 143 (Ct. App. 2000); Woodward v. Woodward, 294 S.C. 210, 363 S.E.2d 413 (Ct. App. 1987). Alimony should not, however, serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support. Williamson v. Williamson, 311 S.C. 47, 426 S.E.2d 758 (1993); McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998); Brandi v. Brandi, 302 S.C. 353, 396 S.E.2d 124 (Ct. App. 1990).

In making an award of alimony, the following factors must be considered and weighed: (1) the duration of the marriage and ages of the parties at the time of the marriage and at the time of the divorce; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse, together with the need of each spouse for additional training or education in order to achieve that spouse's income potential; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action; (9) custody of the children; (10) marital misconduct or fault of either or both parties if the misconduct has affected the economic circumstances of the parties, or contributed to the breakup of the marriage; (11) tax consequences; (12) existence of any support obligations from a prior marriage; and (13) such other factors the court considers relevant. Dearybury, 351 S.C. at 282-83, 569 S.E.2d at 369; Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001); S.C. Code Ann. § 20-3-130(C) (Supp. 2002). No one factor is dispositive. Lide v. Lide, 277 S.C. 155, 283 S.E.2d 832 (1981); Allen, 347 S.C. at 184, 554 S.E.2d at 425.

I am compelled to agree with Husband that, in this case, the Family Court arrived at an excessive amount in determining Wife's award of alimony. At the time of trial, Husband was fifty-one years old and earned about $217,000 annually. Wife was fifty-two years old, employed as a

Deputy Coroner for Charleston County, and earned approximately $47,000 annually, or $3,924 per month. According to Wife's financial declaration, her total monthly expenses (including, inter alia, the mortgage on the marital home, $250 for anticipated credit card payments, $300 for anticipated lien payments on a new car, and a $789 entertainment expense) amount to about $5,730 per month. Consequently, the Family Court's award of $4,300 per month to the wife in alimony, added to her *net* monthly income of $2,552, would afford her a monthly income of $6,852, thereby exceeding her needs by approximately $1,122 per month.

Although Wife established entitlement to alimony, the amount of the Family Court's award is excessive and amounts to an abuse of discretion. Accordingly, I vote to reverse the amount of alimony awarded and modify the Family Court's order to reduce the award of permanent periodic alimony to $3,000 per month.

V. Attorney's Fees and Costs

Husband maintains the Family Court erred in ordering him to contribute $52,917.21 towards Wife's attorney's fees and costs. I disagree.

Under South Carolina Code Ann. § 20-3-130(H) (Supp. 2002), the judge may order one party to pay a reasonable amount to the other for attorney's fees and costs incurred in maintaining an action for divorce. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997). An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000); see also Woodall v. Woodall, 322 S.C. 7, 471 S.E.2d 154 (1996) (award of attorney's fees and costs is within sound discretion of Family Court judge). Before awarding attorney's fees, the Family Court should consider (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001). In determining the amount of attorney's fees to award, the court should consider: (1) the nature, extent, and difficulty of the services rendered;

(2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991); Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002).

Here, Husband abandoned the marital home, began an adulterous affair, refused to participate in marital counseling in any meaningful way, rejected Wife's attempts at reconciliation, and decided to commence marital litigation, thereby putting Wife to the task of defending against the action. In addition, the issues of equitable apportionment and distribution were highly contested at trial and, notwithstanding this Court's modifications to the Family Court's order on appeal, Wife's attorney obtained several beneficial results on her behalf, including an award of divorce on the ground of adultery and an equal division of the marital estate.

Having reviewed the award of attorney's fees in light of the applicable factors, I conclude the Family Court did not abuse its discretion. There is sufficient evidentiary support in the record to uphold the judge's award of attorney's fees.

CONCLUSION

I vote to reverse the Family Court's order identifying $12,332 in credit card charges as marital debt subject to equitable division, and in allocating the debt to Husband. Wife made no showing and the record did not reveal that the credit card debts Wife incurred during the parties' separation were incurred for any purpose inuring to the benefit of Husband. Moreover, these credit card charges were incurred by Wife subsequent to the filing of marital litigation. Thus, the debt should not have been allocated to Husband.

Although Wife established entitlement to alimony, the amount of the Family Court's award is excessive and amounts to an abuse of discretion. Accordingly, I vote to reverse the amount of alimony awarded and modify the Family Court's order to reduce the award of permanent periodic alimony from $4,300 to $3,000 per month.

The court did not err in awarding Wife the marital home in partial realization of her share in the marital estate. In addition, the Family Court properly ordered Husband to contribute $52,917.21 towards Wife's attorney's fees and costs. I vote to affirm the judge's rulings regarding the marital home and the award of attorney's fees and costs.

For the foregoing reasons, I vote to affirm in part, reverse in part, and modify in part.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Wayne Richardson, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3773
Submitted December 8, 2003 – Filed April 5, 2004

AFFIRMED

Richard Harold Warder, of Greenville, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Deborah R. J. Shupe, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

CURETON, A.J.: Thomas Wayne Richardson appeals his convictions for criminal sexual conduct, third degree and criminal sexual conduct with a minor, second degree. We affirm.

FACTS

In June 1999, Richardson met SS[1], pastor of a Greenville church, during revival services at another local church. Richardson befriended SS by informing him that he represented the Richardson Family Foundation (the "Foundation"), an organization that helped churches and individuals obtain federally funded grants. Richardson participated in several services at SS's church.

KS, SS's sixteen-year-old daughter, met Richardson through her parents. Prior to this meeting, KS had heard Richardson speak at her father's church several times. During these speaking engagements, Richardson informed the congregation that he helped churches and intended to help rebuild the church and its related facilities.

On August 20, 1999, KS's parents asked her to provide administrative help to Richardson. On that day, Richardson was working in his hotel room. KS testified Richardson made sexual advances when the two were alone. Immediately after she refused his requests, KS's parents returned to the hotel room. She did not tell her parents about what had happened because she was afraid and in shock.

The next day, SS invited Richardson to stay at his home. KS, her parents, and her seven brothers and sisters also lived in the home, including TS, KS's fourteen-year-old sister. KS testified she helped Richardson with some of his paperwork while he was a guest. During one of these sessions, Richardson demanded that she go into the closet in her room and pull her pants down. When she questioned him, he responded that he would not help her church or

[1] We use the parties' initials to further protect the identity of the minor victims in this case.

anybody in the ministry if she told anyone. Richardson then had sexual intercourse with her.

KS testified Richardson asked her to perform oral sex on another occasion. She further stated that Richardson came to her room several times and had sexual intercourse with her. When KS asked Richardson if what he was doing was wrong, Richardson claimed it was not wrong and justified his response with scriptures. During this time, Richardson told her the people in the ministry would not get anything if she did not comply or if she told anyone.

KS claimed the encounters with Richardson affected her performance in school and caused her to have headaches and stomach aches. On October 28, 1999, KS broke down and told her school principal that Richardson raped her at the family home. TS also admitted to being sexually assaulted by Richardson.

TS revealed similar behavior by Richardson. She testified that one evening Richardson entered her room and made sexual advances. TS refused his requests. Later in the evening, Richardson came to her room while she was asleep. He then got into her bed and began touching her. While he was doing this, he told TS that if she told anyone he would not help her church or her family. According to TS, Richardson removed her clothing and began to have sexual intercourse with her. When she asked Richardson to stop, he reiterated that he would not do anything for the church or her family if she did not comply. TS testified Richardson came to her room at night on several other occasions. She did not tell her parents about the incidents because she was embarrassed and afraid to say anything.

Following the discussions with the girls and their school principal, SS and his wife immediately informed the Greenville County Sheriff's Department about what had happened to their daughters. An investigation was conducted which included both KS and TS undergoing a sexual assault examination. After the investigation was completed, a Greenville County grand jury indicted Richardson for one count of criminal sexual conduct, third degree as to KS and one count of criminal sexual conduct with a minor, second degree as to TS.

Richardson testified in his own defense. He denied raping or molesting either KS or TS, but admitted to having an affair with their mother.

The jury convicted Richardson of criminal sexual conduct, third-degree and criminal sexual conduct with a minor, second-degree. The judge sentenced Richardson to five years imprisonment for criminal sexual conduct, third degree and ten years imprisonment for criminal sexual conduct with a minor, second-degree. The sentences were to be served concurrently. Richardson appeals.

DISCUSSION

I.

Richardson argues the trial court erred by denying his motions for a directed verdict concerning the charge of criminal sexual conduct, third degree. He contends the evidence failed to establish that he used force or coercion to accomplish a sexual battery on KS.

At the conclusion of the State's case, Richardson moved for a directed verdict as to the charge of criminal sexual conduct, third degree. He asserted there was no evidence of force or coercion. Specifically, he contended the element of coercion required "threats of violence." He also argued that even if the evidence could be construed that Richardson persuaded KS to engage in sexual intercourse, persuasion alone was not sufficient to constitute coercion. At the conclusion of the case, Richardson renewed his motion. The trial judge denied both motions.

When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003), cert. denied, 124 S. Ct. 101 (2003). Therefore, "where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed

verdict must be granted." State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000).

"A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and . . . [t]he actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances." S.C. Code Ann. § 16-3-654(1)(a) (2003); see State v. Ervin, 333 S.C. 351, 354, 510 S.E.2d 220, 222 (Ct. App. 1998) ("Criminal sexual conduct in the third degree specifies the actor must use force or coercion without aggravating circumstances to accomplish the sexual battery.").

Our Supreme Court has found that "force" and "coercion" as used in section 16-3-654 have "basically the same meaning." State v. Hamilton, 276 S.C. 173, 178, 276 S.E.2d 784, 786 (1981). "They 'mean to make a person . . . follow a prescribed and dictated course; . . . to inflict or impose: force one's will on someone.'" Id. (quoting American Heritage Dictionary 513). The State, in order to prove criminal sexual conduct in any degree, must prove "'that the sexual battery occurred under circumstances where the victim's consent was lacking.'" Id. (quoting State v. Cox, 274 S.C. 624, 628, 266 S.E.2d 784, 786 (1980)).

Viewed in the light most favorable to the State, the evidence was sufficient to submit to the jury the charge of criminal sexual conduct, third degree. Richardson presented himself as someone who could provide significant financial assistance to KS's family and her church. By inviting Richardson into his home, SS conveyed to his family that he was interested in what Richardson could offer. KS testified, and her parents corroborated, that she had been raised in the church and taught to respect her elders and people in positions of authority. Based on these values, she was afraid that she would be punished if she did not do what Richardson asked her to do. Furthermore, KS testified that Richardson had sexual intercourse with her despite her refusals and her questioning whether he was wrong in what he was doing. According to KS, Richardson supported his actions by quoting scriptures. KS testified she was also concerned that her family and church would be deprived of Richardson's assistance if she failed to comply with his requests. Additionally, she denied she was a willing participant.

Based on this evidence, a jury could reasonably infer that Richardson used coercion to accomplish the sexual battery on KS. KS viewed Richardson as an authority figure who relied on religion to support his actions. This authority coupled with Richardson's repeated threat to withhold his assistance could have intimidated KS to the point of overcoming her will. See State v. Hardy, 409 S.E.2d 96, 98 (N.C. Ct. App. 1991) ("[A]uthority itself intimidates; the implicit threat to exercise it coerces. Coercion . . . is a form of constructive force." (quoting State v. Etheridge, 352 S.E.2d 673, 681-82 (N.C. 1987))). Although Richardson contends KS consented and never complained, this alone does not entitle him to a directed verdict. Instead, it creates a question of fact in terms of credibility. See State v. Burroughs, 328 S.C. 489, 495, 492 S.E.2d 408, 411 (Ct. App. 1997) (finding trial court did not err in denying defendant's motion for a directed verdict in case involving criminal sexual conduct, third degree, given credibility question was created where defendant claimed the encounter was consensual and the victim testified she refused and was in fear for her life).

Furthermore, we are not persuaded by Richardson's argument that the evidence "at best . . . supports an attempt to convince KS *not to disclose* a sexual relationship, but does not support force or coercion to actually *engage* in one." Initially, we note this specific argument was not raised during Richardson's motion for a directed verdict. As such, we question whether it is preserved for our review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). In any event, the dichotomy that Richardson attempts to create between statements to prevent a victim from reporting the incident and statements meant to coerce a victim is without merit. Both types of statements may be coercive, especially in this case where KS testified there was a continued pattern of abuse. Even if there were such a distinction, it would not be applicable in this case given KS asserted that she rebuffed Richardson until he warned her that her non-compliance would jeopardize his offers of help to the church.

II.

Richardson argues the trial judge erred in admitting prejudicial evidence that had the effect of attacking his character. He contends the solicitor asked him improper questions concerning: (1) whether Richardson considered himself

a "man of God," and (2) the nature and history of the Foundation.

On cross-examination, the solicitor asked Richardson whether he considered himself a "man of God." Richardson objected to the question on the ground of relevancy. The judge overruled the objection.

Later in the cross-examination, the solicitor inquired about the nature and history of Richardson's foundation. When the solicitor asked about the Foundation's addresses in other states, Richardson objected. Out of the presence of the jury, Richardson argued the solicitor was trying to question him about matters related to the pending charge of obtaining goods under false pretenses. He contended the charge was not at issue during the trial and it constituted a "bad act" under Lyle.[2] The solicitor responded the questions went to Richardson's credibility and established the coercive nature of his acts involving KS and TS. The judge sustained the objection.

The solicitor continued the cross-examination by asking Richardson what representations he had made to the congregations in Greenville. Richardson generally objected. The judge overruled the objection. Richardson testified the Foundation could assist churches in developing programs to obtain government subsidies and grants.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Initially, we note Richardson's argument concerning the "man of God" questioning is not preserved for our review. At trial, Richardson objected to this question on the ground of relevancy. On appeal, Richardson asserts the question placed his character at issue. Because Richardson objected to the testimony on a different ground at trial than what he argues on appeal, this argument is not

[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

properly before this Court. See State v. Myers, 344 S.C. 532, 535, 544 S.E.2d 851, 853 (Ct. App. 2001) (finding where defendant objected at trial on the ground that testimony was irrelevant, he could not argue on appeal that testimony improperly placed his character at issue); see also State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (holding a party cannot argue one ground below and then argue another ground on appeal); State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (stating to be preserved for appeal, an issue must be raised to and ruled on by the trial judge).

In any event, we find no error in the admission of the challenged testimony. First, the solicitor's questioning did not elicit "prior bad act" evidence. See 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."); Lyle, 125 S.C. at 415-16, 118 S.E. at 807 (South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator.). The resulting testimony regarding the history and the work of the Foundation cannot be construed as substantive evidence constituting a "bad act" under Lyle. Nor did it establish that Richardson had a propensity to commit criminal sexual conduct. Furthermore, the judge excluded any potential "bad act" evidence when he sustained Richardson's objection to the solicitor's apparent attempt to delve into the charge for obtaining goods under false pretenses.

Secondly, the evidence was relevant as to the issue of Richardson's alleged coercion of KS and TS. See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make, the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Because KS and TS testified Richardson threatened to withhold from their church the Foundation's assistance if they did not comply with Richardson's sexual demands, it was relevant as to why they in fact complied. Specifically, the evidence established the basis of Richardson's authority over KS and TS. Furthermore, the testimony was

relevant to Richardson's credibility given he denied ever sexually assaulting either KS or TS. See State v. Outlaw, 307 S.C. 177, 179, 414 S.E.2d 147, 148 (1992) ("It is well-settled that when a defendant takes the stand he becomes subject to impeachment like any other witness. The defendant may be asked about prior bad acts, not the subject of a conviction, which go to his credibility.")(citations omitted).

In a related argument, Richardson contends that even if the testimony did not involve a prior bad act under Lyle, the evidence effectively attacked his character. See Rule 404(a), SCRE (stating evidence of a person's character or character trait is inadmissible for the purpose of establishing the person acted in conformity with that particular character or trait on a particular occasion); State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) ("Both rules [Lyle and that regarding character evidence] are grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." (quoting State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990))). We disagree with Richardson's contention and find the evidence concerning the Foundation and Richardson's involvement in it did not serve the purpose of tending to prove Richardson sexually assaulted KS or TS. Rather, the evidence served to substantiate the testimony of KS and TS regarding their reasons for complying with Richardson's demands.

Even if the challenged testimony constituted improper "character evidence," any error in its admission was harmless. The testimony was cumulative to other similar testimony that was admitted without objection. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (stating the erroneous admission of prior bad act evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) (stating admission of improper evidence is harmless where it is merely cumulative to other evidence); see also State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (holding error is harmless when it could not reasonably have affected the result of the trial). KS, TS, SS and his wife all testified without objection

that Richardson told them and SS's congregation that the Foundation would assist the church and individuals obtain federal grants to further the ministry. Additionally, the solicitor questioned Richardson without objection about the Foundation.

III.

Richardson argues the trial judge erred in permitting the solicitor to make improper and prejudicial comments to the jury during closing arguments. Specifically, he contends the comments constituted a direct attack on his credibility.

Richardson failed to make any objection during closing arguments. He also failed to move for a mistrial on the ground of improper argument. As such, this issue is not properly preserved for our review. See State v. Wiggins, 330 S.C. 538, 550, 500 S.E.2d 489, 496 (1998) (stating failure to object to comments made during argument precludes appellate review of the issue); State v. Penland, 275 S.C. 537, 538-39, 273 S.E.2d 765, 766 (1981) (holding defendant's failure to move for a mistrial on grounds of improper argument by the State constitutes waiver of the issue on appeal); State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("The proper course to be pursued when counsel makes an improper argument is for opposing counsel to *immediately* object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.").

Based on the foregoing, Richardson's convictions and sentences are **AFFIRMED.**

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marlboro Park Hospital and
Chesterfield General Hospital, Appellants,

v.

South Carolina Department of
Health and Environmental
Control and Doctor's Outpatient
Surgical Clinic, LLC, Respondents.

Appeal From Richland County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 3774
Formerly Unpublished Opinion No. 2004-UP-228
Heard January 14, 2004 – Filed March 30, 2004
Revised and Refiled April 12, 2004

REVERSED AND REMANDED

David B. Summer, Jr. and Faye A. Flowers, both of Columbia, for Appellants.

E. Katherine Wells, of Columbia; Michael A. Molony and Stephen L. Brown, both of Charleston; and Douglas Jennings, Jr., of Bennettsville, for Respondents.

KITTREDGE, J.: Marlboro Park Hospital and Chesterfield General Hospital (Hospitals) appeal the circuit court's decision affirming the South Carolina Department of Health and Environmental Control Board's (the DHEC Board) grant of a certificate of need to Doctor's Outpatient Surgical Clinic (DOSC), which reversed the decision of a South Carolina Administrative Law Judge (ALJ) denying the certificate. On appeal, the Hospitals argue the circuit court erred in (1) affirming the DHEC Board's *de novo* review of the ALJ's decision; and (2) finding that the ALJ improperly considered evidence not presented at a preceding Staff Review Hearing conducted by the South Carolina Department of Health and Environmental Control (DHEC). We agree and reverse, finding the DHEC Board erred in using a *de novo* standard of review rather than one requiring substantial evidence. Additionally, we find that substantial evidence supports the decision of the ALJ. We further find that the ALJ properly considered evidence not presented to DHEC in a preceding Staff Review Hearing because the evidence was related to issues presented during that hearing. Accordingly, we reverse and remand to the circuit court to reinstate the decision of the ALJ.

FACTS/PROCEDURAL HISTORY

DOSC filed its application for a certificate of need with DHEC in 1998, seeking to construct an ambulatory surgery center in Bennettsville. The Hospitals opposed the application.

DHEC conducted a Staff Review Hearing on the application during which both parties presented information supporting their respective positions. In particular, the Hospitals argued that the proposed outpatient surgery center would adversely impact the Hospitals and need for the center was insufficient. DHEC recommended approval of the application for the certificate of need.

The Hospitals requested a contested case hearing before the ALJ. The ALJ conducted a hearing over a seven-day period, during which both sides presented evidence and testimony from eighteen witnesses. After making findings of fact, the ALJ concluded the application did not meet the legal

criteria for approval of the certificate of need. The ALJ's decision was based in part on the lack of need of a facility and in part on the negative impact the facility would have on the Hospitals.

DOSC appealed this decision to the DHEC Board. In a hearing lasting a little over one hour, the DHEC Board heard oral arguments from both parties. It subsequently issued its order reversing the order of the ALJ and granting the certificate of need. The Board set forth its own findings of fact that contradicted many of the ALJ's findings.

The Hospitals appealed to the circuit court, which affirmed the DHEC Board's decision. The Hospitals subsequently filed a motion for reconsideration, which the circuit court denied. This appeal follows.

LAW/ANALYSIS

I. The Board's Standard of Review

The Hospitals argue the Board improperly found facts according to its own view of the evidence utilizing a *de novo* standard. We agree.

The ALJ presides over all hearings of contested DHEC permitting cases. See S.C. Code Ann. § 1-23-600(B) (Supp. 2002). In such cases, the ALJ serves as the finder of fact. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). On appeal of such a contested case, a reviewing tribunal "must affirm the ALJ if the findings are supported by substantial evidence, not based on the [Board's] own view of the evidence." Dorman v. Dep't of Health & Envtl. Control, 350 S.C. 159, 166, 565 S.E.2d 119, 123 (Ct. App. 2002). Here, DHEC's Board indisputidly sat in an appellate capacity when reviewing the ALJ's decision. We find that the DHEC board erred by applying a *de novo* standard of review rather than a "substantial evidence" standard.[1]

[1] We are well aware that the DHEC Board's brazen attitude and utter disregard for the proper standard of review created the procedural chaos that followed. The parties, in their respective filings with the Board, conceded that the substantial evidence standard governed the review of the ALJ's factual determinations. In defiance of the parties'

II. ALJ's Consideration of New Evidence

The Hospitals further assign error to the DHEC Board's determination, with which the circuit court concurred, that S.C. Code Ann. § 44-7-210(E) (Supp. 2000) confines contested hearings before the ALJ to the exact evidence considered during the preceding Staff Review Hearing. We agree with this assignment of error.

The DHEC Board held that the ALJ erred in considering evidence not presented during the Staff Review Hearing, all of which undisputedly related to core issues addressed during that hearing.[2] Relying on S.C. Code Ann. § 44-7-210(E), the Board stated that "parties are not allowed to submit new or additional facts for consideration at the contested case hearing which were not part of the administrative record at the time of the [DHEC Staff Review Hearing.]"[3] We find the DHEC Board's interpretation of Section 44-7-210(E) erroneous.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the

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concession and applicable law, the DHEC Board made its own findings of fact, and unapologetically refused to consider the entire record developed in the contested hearing before the ALJ.

[2] Two core issues addressed in DHEC's Staff Review Hearing addressed (1) whether there was sufficient need for the proposed facility, and (2) the extent to which, if any, the proposed facility would have an adverse impact on the Hospitals. The ALJ considered evidence related to these issues, including the following evidence not presented during the preceding Staff Review Hearing: (1) expert testimony regarding need and adverse impact of the center because the experts were hired subsequent to the hearing; (2) the Hospitals' Joint Annual Reports; (3) 1997 outmigration data compiled by the Budget and Control Board; and (4) information on the impact of the federal 1997 Balanced Budget Act's reduction in payments to health care providers. This evidence dealt squarely with the issues before the ALJ.

[3] The circuit court did not specifically address this issue in oral arguments, its subsequent written order, or in response to the Hospitals' motion for reconsideration.

language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitatchi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Here, S.C. Code Ann. § 44-7-210(E) states "[t]he **issues** considered at the contested case hearing are limited to those presented or considered during the staff review and decision process." (emphasis added). However, the DHEC Board expansively interpreted the statute to preclude the ALJ in contested hearings from receiving any **evidence** not presented to DHEC during a Staff Review Hearing. We reject this interpretation, finding it conflicts with the plain language of the statute and the ordinary meaning of the word "issues" as used in this context.

Additionally, the interpretation advanced by the DHEC Board and circuit court is inconsistent with applicable case law providing a *de novo* review for ALJ hearings conducted in a posture similar to that in the case at bar. See Brown, 348 S.C. at 512, 560 S.E.2d at 413 (noting that when reviewing a contested case on appeal, the ALJ conducts a *de novo* hearing with the presentation of evidence and testimony.). A trial *de novo* is one in which "the whole case is tried as if no trial whatsoever had been had in the first instance." Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Moreover, when reviewing a contested case on appeal, "[t]he ALJ, as the fact-finder, must make sufficiently detailed findings supporting the denial [or grant] of a permit application." Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002). "Detailed findings enable [an appellate court] to determine whether such findings are supported by the evidence . . . ." Id. Here, because the ALJ was conducting a *de novo* hearing, we find that he properly considered the evidence presented in his pursuit to make "sufficiently detailed findings" of fact for subsequent review.

Based on our interpretation of the unambiguous language in S.C. Code Ann. § 44-7-210(E) (Supp. 2000) and case law providing the ALJ a *de novo* review in contested hearings arising from a DHEC's Staff Review Hearing, we conclude that the DHEC Board erred in expanding the term "issues" to include "evidence." In light of the DHEC Board's error, we consequently find that the circuit court erred in its acquiescence to the DHEC's Board position.

III. Substantial Evidence

The Hospitals contend there was substantial evidence to support the ALJ's finding that the certificate of need should be denied. In particular, they maintain substantial evidence was presented to show the proposed facility would adversely impact the two existing facilities and the need for a new facility was insufficient. Consequently, based upon the credible evidence *as determined by the ALJ*, the application would not comply with the State Health Plan, thus requiring a denial of the permit by DHEC. We agree.

Under S.C. Code Ann. § 44-7-210(C) (2002), DHEC must deny a Certificate of Need if an application does not comply with the State Health Plan. Under the applicable State Health Plan, approval of an ambulatory surgical facility requires that six certain criteria must be met. These criteria include proof of a documented need for the facility and a discussion on the impact on existing facilities. The State Health Plan also ranked nine criteria to be considered while reviewing DOSC's application. The nine criteria in order of importance to DHEC are need, community need documentation, distribution (accessibility), acceptability, efficiency, adverse effect on other facilities, record of the Applicant, ability to complete the project, and financial feasibility.[4]

As previously discussed, review of the ALJ's factual determinations is measured by the substantial evidence standard. Substantial evidence is not

[4] The State Health Plan also adds: "[DHEC] will continue to evaluate applications for ambulatory surgery centers on their individual merit. However, it is the determination of [DHEC] that the benefits of improved accessibility will not outweigh the adverse affects caused by the duplication of existing services or equipment."

merely a scintilla of evidence, nor is it evidence viewed blindly from one side. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (2000) Instead, substantial evidence is evidence that, in light of the whole record, allows reasonable minds to reach the reviewing tribunal's conclusion. Id. Here, the Hospitals, as the moving parties, bore the burden of proving that DOSC's requested certificate of need should be denied. See S.C. Code Ann. § 44-7-210(E) (Supp. 2000) ("The burden of proof in a reconsideration or contested case hearing must be upon the moving party.").

The ALJ found the Hospitals adequately demonstrated that the proposed facility would have a significant adverse impact on the two Hospitals and that there was not sufficient need demonstrated to justify the new facility. Given evidence presented at the ALJ hearing regarding the lack of full utilization of the Hospitals' current facilities, the probability that the new facility will not be able to recapture enough patients to meet its projections, and the result that patients would be taken from the Hospitals, we find substantial evidence existed in the record before the ALJ to support the ALJ's decision denying the certificate of need. We do recognize the evidence to the contrary. But, as noted, the appropriate standard of review precludes a *de novo* review on appeal. Where, as here, reasonable minds could reach the same decision as the ALJ, that decision is supported by substantial evidence.

CONCLUSION

For the forgoing reasons, the decision of the circuit court is reversed, and the matter is remanded to the circuit court to reinstate the decision of the ALJ.

REVERSED AND REMANDED.

HEARN, C.J., and CURETON, A.J., concur.