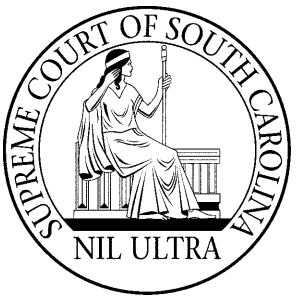

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 5, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2009-UP-172-Willie D. Reaves v. Franklin Reaves
(Marion, Judge William Young)

2009-UP-173-State v. Eric Wilson
(Darlington, Judge James E. Lockemy)

2009-UP-174-SCDSS v. Patrice C.
(Oconee, Judge Timothy M. Cain)

2009-UP-175-SCDSS v. Jennifer W.
(Berkeley, Judge Frances P. Segars-Andrews)

2009-UP-176-SCDSS v. Ernest M.
(Greenville, Judge R. Kinard Johnson, Jr.)

2009-UP-177-SCDSS v. Adrienne M.
(Greenville, Judge R. Kinard Johnson, Jr.)

2009-UP-178-State v. Yolanda Huggins
(Richland, Judge Michelle J. Childs)

2009-UP-179-State v. Paul Gilliard
(Florence, Judge Thomas W. Cooper, Jr.)

2009-UP-180-State v. Herman Lee Beasley
(Greenville, Judge C. Victor Pyle, Jr.)

2009-UP-181-State v. Keith Eigner
(Union, Judge Lee S. Alford)

2009-UP-182-State v. Samuel Brunson
(Sumter, Judge Howard P. King)

PETITIONS FOR REHEARING

4462-Carolina Chloride v. Richland County	Pending
4491-Payne v. Payne	Pending
4493-Mazloom v. Mazloom	Pending

4498-Clegg v. Lambrecht	Pending
4504-Stinney v. Sumter School Dt.	Pending
4505-SCDMV v. Holtclaw	Pending
4507-The State v. J. Hill	Pending
4510-The State v. Hicks	Pending
4511-Harbit v. City of Charleston	Pending
4512-Robarge v. City of Greenville	Pending
4513-Bessie Pringle v. SLR	Pending
4514-State v. Juhne Harris	Pending
4515-James Gainey v. Jody Gainey	Pending
4516-State v. Fred R. Halcomb, Jr.	Pending
4517-Campbell v. Jordan	Pending
4518-John and Jane Loe #1 &#2 v. Mother	Pending
4522-State v. Bryant, Herbert	Pending
4525-Chad Mead v. Jessex	Pending
4526-State v. Billy Cope	Pending
4527-State v. James Sanders	Pending
4528-James Judy v. Ronnie Judy	Pending
4529-State v. Jarrod Wayne Tapp	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-032-State v. James Bryant	Pending

2009-UP-029-Demetre v. Beckmann	Pending
2009-UP-060-State v. Lloyd	Denied 4/15/09
2009-UP-061-State v. McKenzie	Pending
2009-UP-086-State v. Tran	Pending
2009-UP-088-Waterford Place HOA v. Barnes	Pending
2009-UP-092-Logan v. Wachovia Bank	Pending
2009-UP-093-State v. Mercer	Pending
2009-UP-105-Smith, Wilma v. Smith, Arthur	Pending
2009-UP-113-State v. Mangal	Pending
2009-UP-125-Terra Davis-Daniels v. The Pines Apartments	Pending
2009-UP-138-State v. Wilber Xavie Summers	Pending
2009-UP-144-SCDSS v. Heidi F.	Pending
2009-UP-146-SCDSS v. Sandra B.	Pending
2009-UP-147-J. Grant v. City of Folly Beach	Pending
2009-UP-150-Autmus Peeks v. SCDC	Pending
2009-UP-159-Durden, George v. Durden, Shirley	Pending
2009-UP-160-SCDHEC v. Stuart Platt	Pending
2009-UP-162-Greg Chandler v. Arnoldean Bradford	Pending
2009-UP-165-State v. Alti Monte Haskell	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4285-State v. Danny Whitten	Pending
4314-McGriff v. Worsley	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4325-Dixie Belle v. Redd	Pending
4339-Thompson v. Cisson Construction	Pending
4344-Green Tree v. Williams	Pending
4353-Turner v. SCDHEC	Pending
4374-Wieters v. Bon-Secours	Pending
4377-Hoard v. Roper Hospital	Pending
4387-Blanding v. Long Beach	Pending
4394-Platt v. SCDOT	Pending
4396-Jones (Est. of C. Jones) v. L. Lott	Pending
4401-Doe v. Roe	Pending
4405-Swicegood v. Lott	Pending
4406-State v. L. Lyles	Pending
4407-Quail Hill, LLC v Cnty of Richland	Granted 4/22/09
4412-State v. C. Williams	Pending
4414-Johnson v. Beauty Unlimited	Granted 4/23/09
4417-Power Products v. Kozma	Pending

4422-Fowler v. Hunter	Pending
4423-State v. Donnie Raymond Nelson	Pending
4426-Mozingo & Wallace v. Patricia Grand	Pending
4428-The State v. Ricky Brannon	Pending
4437-Youmans v. SCDOT	Pending
4439-Bickerstaff v. Prevost	Pending
4440-Corbett v. Weaver	Pending
4441-Ardis v. Combined Ins. Co.	Pending
4444-Enos v. Doe	Pending
4447-State v. O. Williams	Pending
4448-State v. A. Mattison	Pending
4450-SC Coastal v. SCDHEC	Pending
4451-State v. J. Dickey	Pending
4454-Paschal v. Price	Pending
4455-Gauld v. O'Shaugnessy Realty	Pending
4458-McClurg v. Deaton, Harrell	Pending
4459-Timmons v. Starkey	Pending
4460-Pocisk v. Sea Coast	Pending
4463-In the Matter of Canupp	Pending
4465-Trey Gowdy v. Bobby Gibson	Pending
4467-Pee Dee Stores v. Carolyn Doyle #2	Pending
4469-Hartfield v. McDonald	Pending

4472-Eadie v. Krause	Pending
4473-Hollins, Maria v. Wal-Mart Stores	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4480-Christal Moore v. The Barony House	Pending
4483-Carpenter, Karen v. Burr, J. et al.	Pending
4487-John Chastain v. C. Dan Joyner	Pending
4488-Christal Moore v. The Barony House	Pending
4495-State v. James W. Bodenstedt	Pending
4496-Kent Blackburn v. TKT	Pending
4500-Standley Floyd v. C.B. Askins	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Denied 3/18/09
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-126-Massey v. Werner Enterprises	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-187-State v. Rivera	Pending
2008-UP-209-Hoard v. Roper Hospital	Pending
2008-UP-240-Weston v. Margaret Weston Medical	Denied 4/23/09
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-285-Biel v. Clark	Pending

2008-UP-289-Mortgage Electronic v. Fordham	Pending
2008-UP-310-Ex parte:SCBCB (Sheffield v. State)	Granted 4/23/09
2008-UP-330-Hospital Land Partners v. SCDHEC	Pending
2008-UP-424-State v. D. Jones	Pending
2008-UP-431-Silver Bay v. Mann	Pending
2008-UP-512-State v. M. Kirk	Pending
2008-UP-534-State v. C. Woody	Pending
2008-UP-539-Pendergrass v. SCDPP	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Bartell v. Francis Marion	Pending
2008-UP-565-State v. Matthew W. Gilliard	Pending
2008-UP-591-Mungin v. REA Construction	Pending
2008-UP-596-Doe (Collie) v. Duncan	Pending
2008-UP-606-SCDSS v. Serena B and Gerald B.	Pending
2008-UP-607-DeWitt v. Charleston Gas Light	Pending
2008-UP-612-Rock Hill v. Garga-Richardson	Pending
2008-UP-629-State v. Lawrence Reyes Waller	Pending
2008-UP-645-Lewis v. Lewis	Pending
2008-UP-646-Robinson v. Est. of Harris	Pending
2008-UP-647-Robinson v. Est. of Harris	Pending
2008-UP-648-Robinson v. Est. of Harris	Pending

2008-UP-649-Robinson v. Est. of Harris	Pending
2008-UP-651-Lawyers Title Ins. V. Pegasus	Pending
2008-UP-664-State v. Davis	Pending
2008-UP-673-State v. Randall Smith	Pending
2008-UP-705-Robinson v. Est of Harris	Pending
2008-UP-712-First South Bank v. Clifton Corp.	Pending
2009-UP-007-Miles, James v. Miles, Theodora	Pending
2009-UP-008-Jane Fuller v. James Fuller	Pending
2009-UP-030-Carmichael, A.E. v. Oden, Benita	Pending
2009-UP-035-State v. J. Gunnells	Pending
2009-UP-066-Darrell Driggers v. Professional Finance	Pending
2009-UP-067-Bernard Locklear v. Modern Continental	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased), Claimant,

Respondent,

v.

Palmetto State Transportation Company, Employer, and Canal Insurance Company, Carrier,

Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Pickens County
John C. Few, Circuit Court Judge

Opinion No. 26646
Heard January 22, 2009 – Filed May 4, 2009

REVERSED

Duke K. McCall, Jr., of Leatherwood, Walker, Todd & Mann, of Greenville, for Petitioners.

Kathryn Williams, of Greenville, for Respondent.

JUSTICE KITTREDGE: This workers' compensation case involves the jurisdictional question of whether the claimant was an employee or independent contractor. We granted a writ of certiorari to review the court of appeals decision holding the claimant was an employee. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006). We reverse, and hold the claimant was an independent contractor for workers' compensation purposes. In connection with our jurisprudence in evaluating whether a claimant is an employee or an independent contractor for workers' compensation purposes, we overrule the test announced in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).[1]

Scott R. Wilkinson was a long-haul truck driver for Palmetto State Transportation Company. After a period of admitted employment, Wilkinson opted to alter his relationship with Palmetto, and the parties entered into a formal independent contractor arrangement. The detailed contract was honored by Wilkinson and Palmetto, including the provision giving Wilkinson sole authority over "the means and methods of the performance of all transportation services." In resolving this jurisdictional question, we view the evidence as clearly preponderating in favor of an independent contractor relationship.

I.

Palmetto is an interstate motor carrier. Wilkinson began as an employee for Palmetto, as a long-haul truck driver, in January of 1998. About a year later, Wilkinson and Palmetto agreed to alter their employment relationship to that of an independent contractor. To this end, Wilkinson purchased a tractor and the parties executed an "Equipment Lease Contract."

[1] In fairness to the court of appeals, the circuit court and workers' compensation commission, we are in essence reversing ourselves.

The contract sets forth in detail the respective rights and responsibilities of the parties.

Of particular relevance in determining the nature of the parties' relationship are the following contract features. Wilkinson and Palmetto intended "to create the relationship of CARRIER and INDEPENDENT CONTRACTOR and not an EMPLOYER-EMPLOYEE relationship." The parties negotiated an increased rate per mile. Wilkinson was solely responsible for all expenses associated with acquiring, financing, maintaining and insuring the tractor. Wilkinson assumed further responsibility for "the means and methods of the performance of all transportation services," including, if necessary, hiring and supervising other drivers for the leased tractor. In this regard, the obligation for withholding and employment taxes fell to Wilkinson. Wilkinson also agreed "to carry Workers Compensation coverage in the limits statutory [sic] within the State of South Carolina." Wilkinson ultimately complied with this contract provision by purchasing an occupational accident policy from Zurich American Insurance Company, which provided for a lump sum of $50,000 and monthly payments of $2,000 for 100 months, in the event of death.[2] Termination of the contract required thirty days' notice, and a wrongful termination entitled the non-breaching party to recover damages.

Wilkinson died on May 16, 2002, in a motor vehicle accident while driving his tractor for Palmetto. The Zurich policy was paid to Wilkinson's spouse, Lea Ann. Lea Ann also filed a workers' compensation claim, contending that her husband was Palmetto's employee. Palmetto, through its workers' compensation insurance carrier, defended on the basis Wilkinson was an independent contractor. The workers' compensation commission, circuit court and court of appeals found that Wilkinson was an employee, and therefore his spouse was entitled to workers' compensation benefits. The basis for this finding of compensability comes from the

[2] This appeal raises no issue with respect to the amount of insurance coverage and the limits available under our workers' compensation laws.

employee/independent contractor test announced in *Dawkins v. Jordan*, which we now overrule.

II.

A.

We are presented with the question whether Wilkinson was, at the time of his fatal accident, an employee or independent contractor. Because the question is jurisdictional, the Court may take its own view of the preponderance of the evidence. *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995).

Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. *Ray Covington Realtors*, 318 S.C. at 547, 459 S.E.2d at 303; *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. *Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970); *see also Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).

In *Dawkins*, this Court took the additional step of imposing a framework for weighing the standard factors in a manner that favored, unduly we now believe, a finding of employment:

> [F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

Id. at 439, 534 S.E.2d at 703 (quoting *Arthur Larson & Lex K Larson*, 3 LARSON'S WORKERS' COMPENSATION LAW § 61.04 (2000)). We overrule *Dawkins*' analytical framework, for it most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions.[3] *See Ray Covington Realtors*, 318 S.C. at 547-48, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe*, 254 S.C. at 198-200, 174 S.E.2d at 398-99.

B.

We are persuaded the four factors preponderate in favor of a finding that Wilkinson was an independent contractor. In evaluating the four factors, we are guided initially by the parties' independent contractor agreement. But more importantly, we are guided by the parties' conduct, which mirrored the terms of the contract. *See Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (noting that "in determining the nature of [the parties'] relationship," the contract "has considerable weight," but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive").

This Court remains sensitive to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage. That principle, however, does not go so far as to justify an analytical framework that preordains the result. Moreover, that principle should not trump an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect.

---

[3] We overrule post-*Dawkins* appellate court decisions of this state to the extent those decisions relied on *Dawkins*' claimant-friendly approach. Those cases include *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002) and *Paschal v. Price*, 380 S.C. 419, 670 S.E.2d 374 (Ct. App. 2008). We take no position with respect to the proper result in such cases under the pre-*Dawkins*' evenhanded and balanced approach.

Materiality, in this context, is measured by the factors of right or exercise of control, method of payment, furnishing of equipment and right to fire. The policy considerations favoring a finding of compensability are further diminished where, as here, the independent contractor procures workers' compensation coverage or its functional equivalent.

1. Direct Evidence of the Right or Exercise of Control

It is not uncommon in the long-haul trucking industry for carriers to utilize drivers who own and operate their own tractors, known as owner-operators. These arrangements must be carefully scrutinized to ensure that the actual relationship between the trucking company and the purported independent contractor truly reflects the parties' stated agreement. We are sensitive to the unequal bargaining power that may exist between the trucking company and the driver. In this regard, it naturally follows that a trucking company, with a desire to avoid a workers' compensation claim, may be tempted to have "its cake and eat it, too." The result would be an ostensible independent contractor arrangement where the trucking company exercises almost complete control over the method and manner of the transportation services.

Cognizant of these concerns, we have reviewed the actual relationship between Wilkinson and Palmetto. Palmetto utilizes approximately eighty drivers in its business, the vast majority of whom are employees. Wilkinson started as an employee, but desired to drive his own tractor and become an owner-operator. He did so, as reflected in the parties' contract.

As noted above, the contract provided that Wilkinson "shall determine the means and methods of the performance of all transportation services." We find that, true to the contract, Wilkinson exercised the right of control as to the transportation services. The fact that Palmetto contacted Wilkinson for potential assignments and provided the pickup location does not change the result. Wilkinson retained the right to refuse any assignment. If Wilkinson agreed to an assignment and made the pickup, he exercised complete control over the delivery and chose his travel routes without direction from Palmetto. The nature of the relationship between Wilkinson and Palmetto is

incompatible with that of an employee-employer. Concerning the right and exercise of control, this factor favors a finding of an independent contractor relationship.

Before moving to the next factor, we address two matters which at first glance appear to evidence Palmetto's right of control. First is the presence of a global positioning satellite (GPS) system in each tractor. The record establishes, however, that GPS monitoring was for the benefit of Palmetto customers tracking shipment of goods, not Palmetto's exercise of control over drivers. Second is the presence of governmental regulatory controls affecting the transportation of goods in interstate commerce. The parties' contract required Wilkinson to operate "the equipment in accordance with all applicable regulations." We agree with the Pennsylvania Supreme Court that requiring a worker to comply with the law is not evidence of control by the putative employer.

> [R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status. "The employer cannot evade the law . . . and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver."

Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 762 A.2d 328, 335 (Pa. 2000) (citations omitted).

We agree that the strong regulatory presence concerning motor carriers reflects control by the government, not the motor carrier.[4]

[4] The federal regulatory scheme is discussed in more detail below.

2. Furnishing of Equipment

Wilkinson relies on the presence of Palmetto's insignia on the outside of the tractor, together with the display of Palmetto's Department of Transportation motor carrier number, as proof of an employment relationship. Even if Wilkinson's reliance on the Palmetto insignia and motor carrier identification number were a factor in his favor, it would be far from dispositive. *Universal Am-Can*, 762 A.2d at 332 (noting that "[t]he presence of a carrier's insignia on the outside of a rig is merely one of the many factors to be considered when determining employee/independent contractor status and does not command a conclusion of employee status"). The placement of a motor carrier's insignia and identification number on the tractor is required by federal regulations. 49 C.F.R. § 376.11(c)(1) (2008); 49 C.F.R. § 390.21 (2008).

We do not give controlling weight to the presence of Palmetto's insignia and identification number on Wilkinson's tractor. Again, we view the presence of Palmetto's insignia and identification number on the tractor as governmental control, not carrier control. On balance, we find the factor of "furnishing of equipment" points to an independent contractor relationship. We make this finding primarily because Wilkinson owned his own tractor and paid for all costs associated with the tractor.[5]

3. Method of Payment

Wilkinson was paid per mile, with an increase in the rate when he transitioned from an employee to an independent contractor. The method of payment was entirely consistent with Wilkinson's independent contractor status. Palmetto furnished "1099" forms to Wilkinson, who in turn filed tax returns as a sole proprietor, specifically an "over the road trucke[r]."

[5] Wilkinson assumed responsibility for all costs, including fuel, oil, repairs, insurance, road taxes, fuel taxes, mileage taxes, and any weight violations, with the caveat that he would be reimbursed for weight violations if he picked up a sealed trailer.

Wilkinson's tax returns include forms for his business expenses and self-employment taxes. The method of payment bears no indicia of an employment relationship.

4. Right to Fire

This factor is the most difficult to evaluate for two reasons. One, unlike the other three factors, Wilkinson and Palmetto never had a need to confront this issue. Next is the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term "fire," for it embraces the employment relationship.

We are left with only the contract terms, and each party makes a strong argument. Wilkinson contends that the testimony of Palmetto's representative reflects a belief that Wilkinson could essentially be fired at will. Palmetto presented a host of reasons it believed it could terminate its relationship with Wilkinson. Those reasons (which never materialized) included a "consistent" refusal to haul loads and perceived poor work performance.

Palmetto counters that the "right to fire" does not exist under the parties' contract. According to Palmetto, the contract defined the terms under which the parties could terminate the relationship. Under the contract, either party could terminate the contract upon thirty days' notice. The agreement further provided that, "[i]n the event either party commits a material breach of any term of this Agreement; . . . the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages."

We find Palmetto did not have a "right to fire" Wilkinson. The termination of the parties' relationship was controlled by their agreement. The termination provisions, when viewed in the context of the agreement as a whole, leads to a finding of an independent contractor arrangement.

C.

We believe it helpful to address a related area of law, specifically the existence of federal law in the trucking industry. Although the parties raise no issue concerning the federal law, an overview of certain federal regulations serves to support our ultimate determination as well as inform the narrow reach of our decision.

Congress provides in 49 U.S.C.A. § 14102(a) (West 2007) that the "Secretary [of Transportation] may require a motor carrier . . . that uses motor vehicles not owned by it . . . to—(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier." The Secretary of Transportation, through the Federal Motor Carrier Safety Administration, has promulgated regulations addressing a carrier's lease of equipment from an owner-operator.

For example, 49 C.F.R. § 376.12(c)(1) (2008) states that the "lease [of equipment by the carrier] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."[6] This regulation, and others, reflects the regulatory

[6] As noted, we are presented with no issue concerning the effect of federal law on the contract between Wilkinson and Palmetto. Although the contract assigns to Wilkinson the responsibility of "maintaining the equipment" and "operating the equipment in accordance with all applicable regulations," the agreement also states that Palmetto's "business of providing motor carrier transportation services to the public is subject to regulation by the Federal Government acting through the Interstate Commerce Commission and the Department of Transportation, and by various state and local governments." The contract provides in the ensuing section that Wilkinson's

goal of promoting highway safety. *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir. 1975) (discussing the federal regulatory goal of promoting highway safety in general, specifically including preventing carriers from avoiding safety standards by the practice of leasing equipment from non-regulated carriers).

As a result of a motor carrier's general duty for the safe operation of leased equipment, our finding today of an independent contractor relationship between Wilkinson and Palmetto is necessarily limited to the workers' compensation context. Moreover, federal law is not intended to affect a state court's determination of the relationship between a carrier and a lessor of equipment under workers' compensation laws. 49 C.F.R. § 376.12(c)(4) (2008) (providing that imposing ultimate responsibility on a carrier under federal law is not "intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee"). We find the comment to subsection (c)(4) of the federal regulation instructive:

> While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship. . . .
>
> We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact. . . . By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

---

responsibilities are "subject in each case only to any regulatory requirements which may be placed on [Palmetto] by various governmental agencies."

Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (1992).

The federal regulations may, therefore, not be viewed as controlling when a state court is charged with assessing whether the relationship between a motor carrier and a lessor of equipment is one of employment or independent contractor for workers' compensation purposes. In the workers' compensation setting, we properly make the determination under our common law framework.

III.

We reverse the court of appeals and find Wilkinson was an independent contractor for purposes of workers' compensation. As such, his estate is not entitled to benefits. We overrule the approach approved in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) that the presence of "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation." Consistent with pre-*Dawkins*' case law, the common law factors—right or exercise of control, method of payment, furnishing of equipment and right to fire—should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor. We emphasize the narrow reach of our decision today, as we analyze the employment versus independent contractor question for purposes of workers' compensation only. Having found that Wilkinson was an independent contractor for workers' compensation purposes, we need not reach the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

REVERSED.

TOAL, C.J., WALLER, PLEICONES JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Nancy Holland Mayer, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the issuance of an order placing her on interim suspension and appointing an attorney to protect her clients' interests.

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

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

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

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

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

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

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

Columbia, South Carolina
April 30, 2009

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

---

O R D E R

By order dated January 29, 2009 (copy attached), this Court adopted amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules and these amendments were submitted to the General Assembly pursuant to Article V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
April 29, 2009

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

---

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
January 29, 2009

Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

(1) Rule 1, South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to read as follows:

Rule 1
Scope of Rules

These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply. These rules govern Alternative Dispute Resolution (ADR) processes in the courts of this State as follows:

(a) With the exceptions stated in Rule 3, these rules govern court-annexed ADR processes in South Carolina Circuit Courts in civil suits, and in South Carolina Family Courts in domestic relations actions:

(1) in counties designated by the Supreme Court of South Carolina for mandatory ADR;

(2) as required by statute; or

(3) as ordered by a court of competent jurisdiction.

(b) With the exception of Rules 3, 4, 5, 6, 7(e) and (f), 9(b) and (d), and Rule 10(a), these rules shall govern ADR processes that are neither court mandated nor required by statute in all cases pending in the courts of this State.

(c) These rules shall govern all mediations in Medical Malpractice actions as required by S.C. Code Ann. § 15-79-120 and S.C. Code Ann. § 15-79-125(C).

(2) Rule 15, South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended by adding the following sentence at the end of the first paragraph of the rule:

> Recertification of a neutral who, by virtue of current job restrictions is prohibited from serving under these rules, is allowed if the neutral submits the appropriate recertification paperwork, pays the applicable fee and agrees upon termination of the prohibiting employment to promptly supplement the application to list at least one county for court appointments.

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

O R D E R

By order dated January 28, 2009 (copy attached), this Court adopted an amendment to Rule 232 of the South Carolina Appellate Court Rules and this amendment was submitted to the General Assembly pursuant to Article V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, this amendment is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
April 29, 2009

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, Rule 232 of the South Carolina Appellate Court Rules (SCACR) is amended to read as shown in the attachment to this order. This amendment shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
January 28, 2009

RULE 232
AGREEMENTS AND SETTLEMENTS

(a) Agreements Generally. Any agreement submitted to the appellate court for its consideration shall be in writing and signed by the parties or their attorneys. Further, any agreement submitted to the appellate court shall be public unless a motion to seal is filed and the appellate court determines that the matters should be sealed under the standard provided by Rule 41.1, SCRCP.

(b) Settlement Agreements. If a settlement agreement relates to a matter that is pending before an appellate court, the settlement agreement need not be submitted to the appellate court unless approval by the appellate court, a lower court or tribunal is required before the agreement can be effective, or the parties desire to have the agreement approved by the appellate court.

(c) Agreements Regarding Rules. Any agreement to modify a requirement of these Appellate Court Rules must be approved by the appellate court.

(d) Vacation of Prior Opinions, Orders or Judgments. In the agreement, the parties may request vacation of opinions, orders, decisions and judgments previously issued in the matter. The agreement must set forth the facts that warrant this extraordinary relief. If the matter is pending before the Supreme Court and the agreement requests the vacation of an order or opinion of the Court of Appeals, the Supreme Court, in its discretion, may seek a recommendation from the Court of Appeals regarding the request for vacation. If an agreement containing a request for vacation is rejected, the parties may resubmit the agreement without the request for vacation.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

O R D E R

By order dated January 29, 2009 (copy attached), this Court adopted amendments to the South Carolina Appellate Court Rules to reflect the passage of Act No. 413 of 2008, and these amendments were submitted to the General Assembly pursuant to Article V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
April 29, 2009

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

ORDER

On October 21, 2008, the General Assembly overrode the Governor's veto of Senate Bill 429 relating to DNA evidence, and the Senate Bill became Act No. 413 of 2008. Based on this legislation, amendments to the South Carolina Appellate Court Rules (SCACR) are necessary.

Accordingly, pursuant to Article V, §4 of the South Carolina Constitution, the SCACR is amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
January 29, 2009

Amendments to the South Carolina Appellate Court Rules

(1) Rules 224 through 230, SCACR, of the current rules are renumbered as Rules 240 through 246, SCACR. All references to these renumbered rules shall be amended in all other court rules and forms.

(2) Rules 231 through 241, SCACR, of the current rules are renumbered as Rules 260 through 270, SCACR. All references to these renumbered rules shall be amended in all other court rules and forms.

(3) The following is added:

RULE 247
CERTIORARI TO REVIEW DNA TESTING DECISIONS

(a) Review by Writ of Certiorari. A final order of the circuit or family court denying or granting DNA testing under the Access to Justice Post-Conviction DNA Testing Act (S.C. Code Ann. §§17-28-10 to -120) shall be reviewed upon petition of either party for a writ of certiorari according to the procedure set forth in this rule.

(b) Notice of Appeal and Ordering Transcript. The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order. If review will involve testing relating to a case in which a sentence of death was imposed or will involve a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance, the notice of appeal shall be filed with the Supreme Court. In all other cases, the notice of appeal shall be filed with the Court of Appeals. Under Rule 204, SCACR, the Supreme Court may certify a case for review by the Supreme Court. Further, in the same manner and under

the same time limitations as provided for appeals from the Court of General Sessions or the Family Court in juvenile delinquency cases in Rule 207, the petitioner shall obtain from the court reporter a transcript of the proceedings in the lower court.

(c) Service and Filing of Petition and Appendix. Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for a writ of certiorari on opposing counsel and shall file with the Clerk of the appellate court in which the matter is pending an original plus six (6) copies of the petition, two (2) copies of the Appendix, and proof of service showing the Appendix and petition have been served. As provided by Rule 267(d), one copy of the Appendix filed with the appellate court shall be filed unbound.

(d) Content of Petition. The petition shall contain:

(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.

(2) A concise statement of the case containing the facts material to the consideration of the questions presented.

(3) A direct and concise argument in support of the petition. The argument on each question shall include citation of authority and specific reference to pertinent portions of the lower court record. The total length of a petition shall not exceed twenty-five (25) pages.

(e) Content of Appendix. The Appendix shall contain:

(1) The entire lower court record.

(2) A copy of the final order entered in the proceeding.

(3) An index setting forth the principal matters contained in the appendix. This index shall be in the same form required for a Record on Appeal under Rule 210(e).

(f) Return of Respondent. Within thirty (30) days after service of the petition and Appendix, respondent shall serve a copy of a return on opposing counsel, and shall file with the Clerk of the appellate court in which the matter is pending an original and six (6) copies of the return and proof of service showing that the return has been served. The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement. The total length of a return shall not exceed twenty-five (25) pages.

(g) Reply. The petitioner shall have ten (10) days from the date of service of the return to file with the Clerk of the appellate court in which the matter is pending an original and six (6) copies of a reply and proof of service showing that the reply has been served. The total length of the reply shall not exceed fifteen (15) pages.

(h) Procedure Upon Grant of Certiorari. Upon the concurrence of any two justices of the Supreme Court or one judge of a three-judge panel of the Court of Appeals, the petition may be granted on any question presented. The petition will be considered by the appellate court without oral argument. If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of a brief on all parties to the appeal, and file with the Clerk of the appellate court fifteen (15) copies of the brief, along with proof of service. At the time the brief is filed, petitioner shall also file thirteen (13) additional copies of the Appendix. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of a brief on all parties to the appeal, and file with the Clerk of the appellate court fifteen (15) copies of the brief, along with proof of service. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of the reply brief on all parties to the appeal and file with the Clerk of the appellate court fifteen (15) copies of the reply brief, along with proof of service. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the appellate court.

(i) Review of Decisions of the Court of Appeals. A final decision of the Court of Appeals under this rule may be reviewed as provided by Rule 242, SCACR.

(4) Rules 224 through 239, SCACR, and Rules 248 through 259, SCACR

shall be marked as reserved for future use.

(5) Rule 606, SCACR, is amended to read:

RULE 606
RETENTION AND DISPOSITION OF EXHIBITS IN THE CIRCUIT AND FAMILY COURTS

(a) Duty of Clerk. Unless otherwise directed by the court or this rule, the clerk of court for the county shall retain possession of all exhibits admitted into evidence or marked for identification during a hearing or trial before the circuit or family court.

(b) Release of Exhibits. The clerk may temporarily release exhibits to the court reporter during the hearing or trial or when necessary to prepare the transcript, to a person designated by order of an appellate court when exhibits are needed for an appellate proceeding, or to any other person as may be ordered by the court.

(c) Retention Period by Clerk.

(1) Criminal Cases (Including Juvenile Delinquency Cases).

(A) Capital Cases. In any criminal case in which a sentence of death has been imposed, the exhibits shall be retained by the clerk and shall not be disposed of except upon order of the Supreme Court or upon the death of the defendant. In the event of the death of the defendant, the circuit court shall direct a disposition of the exhibits**.**

(B) Non-Capital Cases. The clerk of court shall retain the exhibits in non-capital cases (including juvenile delinquency cases) for at least eighteen (18) months after sentence is imposed or, if an appeal is taken, for eighteen (18) months after the remittitur is sent by the appellate court. For the

purpose of this rule, the term "sentence" shall include commitment or other care and treatment imposed at the dispositional hearing in a juvenile delinquency case. After the expiration of this retention period, the clerk shall dispose of the exhibits as provided by (d)(1)(B) and (d)(1)(C) below. In the event the defendant should die during this retention period, the exhibits may be immediately disposed of as provided by (d)(1)(C) below even for offenses covered by the Preservation of Evidence Act (S.C. Code Ann. §§ 17-28-300 to -360).

(2) Civil Cases.

(A) Collateral Challenges Regarding Capital Cases. In any post-conviction relief case or other civil collateral proceeding challenging a criminal case involving a sentence of death, the exhibits shall be retained by the clerk and shall not be disposed of except upon order of the Supreme Court or upon the death of the criminal defendant. In the event of the death of the defendant, the circuit court shall direct a disposition of the exhibits.

(B) All Other Civil Cases. The clerk shall retain the exhibits in all other civil cases for sixty (60) days after the entry of the final judgment in the matter or, if an appeal is taken, sixty (60) days after the remittitur is sent by the appellate court. After the expiration of this retention period, the clerk shall dispose of the exhibits as provided by (d)(2)(B) below.

(d) Disposition of Exhibits by Clerk.

(1) Criminal Cases (Including Juvenile Delinquency Cases).

(A) Capital Cases. As indicated by (c)(1)(A) above, the clerk shall not dispose of exhibits in a capital case except upon order of the Supreme Court or upon the death of the defendant. In the event of the death of the defendant, the circuit court shall direct a disposition of the exhibits**.**

(B) Disposition of Exhibits in Cases Involving Crimes Listed in the Preservation of Evidence Act. In any non-capital case involving one of the offenses listed in the Preservation of Evidence Act or accessory before the fact to one of those offenses, a custodian designated by the governing body of the county or, if such designation has not been made, the sheriff of the county, shall be responsible for obtaining the exhibits from the clerk after the expiration of the time period specified in (c)(1)(B) above. Unless otherwise ordered by the court under S.C. Code Ann. § 17-28-340, the designated custodian, or the sheriff if no other custodian has been designated, shall be responsible for retaining the exhibits for the periods specified by the Preservation of Evidence Act. After notice from the clerk, the designated custodian, or the sheriff if no other custodian has been designated, shall have thirty (30) days to take custody of the exhibits and provide the clerk with a receipt for the exhibits. Failure to do so may be treated as contempt of the circuit or family court.

(C) All Other Criminal Cases. Unless the court has ordered some other disposition of the exhibit, the party introducing an exhibit shall immediately reclaim the exhibit from the clerk after the expiration of the retention period specified in (c)(1)(B) above. The party shall sign a receipt for the exhibit. For exhibits that are not reclaimed, the clerk may dispose of an exhibit:

> **(i)** Forty-five (45) days after the mailing of a notice to the party introducing the exhibit advising the party that the exhibit will be destroyed or disposed of if not reclaimed within thirty (30) days. This notice shall not be sent prior to the expiration of the retention period specified in (c)(1)(B) above. The notice shall be sent to the party's last counsel of record as shown by the case file or, if the party has no counsel of record, to the party at the party's last known address as shown by the case file; or

(ii) Regardless whether notice is given under (i) above, twenty-four (24) months after the sentence was imposed or, if an appeal was taken, twenty-four (24) months after the remittitur was issued.

(2) Civil Cases.

(A) Collateral Challenges Regarding Capital Cases. As indicated by (c)(2)(A) above, the clerk shall not dispose of exhibits in a post-conviction relief case or other civil collateral proceeding challenging a criminal case involving a sentence of death except upon order of the Supreme Court or upon the death of the criminal defendant. In the event of the death of the defendant, the circuit court shall direct a disposition of the exhibits.

(B) All Other Civil Cases. Unless the court has ordered some other disposition of the exhibit, the party introducing an exhibit shall immediately reclaim the exhibit from the clerk of court after the expiration of the retention period specified in (c)(2)(B). The party shall sign a receipt for the exhibit. For exhibits which are not reclaimed, the clerk may dispose of the exhibit:

(i) Forty-five (45) days after the mailing of a notice to the party introducing the exhibit advising the party that the exhibit will be destroyed or disposed of if not reclaimed within thirty (30) days. This notice shall not be sent prior to the expiration of the retention period specified in (c)(2)(B) above. The notice shall be sent to the party's last counsel of record as shown by the case file or, if the party has no counsel of record, to the party at the party's last known address as shown by the case file; or

(ii) Regardless whether notice is given under (i) above, six (6) months after the entry of final judgment in the matter or, if an appeal was taken, six months after the remittitur was issued.

(e) Effect of the Failure to Reclaim Exhibits; Liability of Clerk. The failure of a party to reclaim an exhibit within thirty (30) days after the

time the party is authorized to do so under (d)(1)(C) or (d)(2)(B) shall be construed as the party's consent to destroy or otherwise dispose of the exhibit, and no cause of action shall lie against the clerk for the destruction or other disposition of the exhibit. Except as otherwise provided by law, this rule or order of the court, an exhibit which is not reclaimed under (d)(1)(C) or (d)(2)(B) shall become the property of the county and the clerk shall deliver the exhibit to the county; provided, however, if the exhibit has no value or de minimis value, the clerk may destroy the exhibit.

(f) Record of Disposition. A record of exhibits which have been disposed of by the clerk under (d) above shall be maintained. At a minimum, the case file should contain a description, copy or photograph of the exhibit; the date any notice under (d)(1)(C)(i) or (d)(2)(B)(i) was mailed; the date of the disposition of the exhibit; the nature of the disposition including the name of the party, person or agency to whom it was returned if applicable; and a copy of the receipt for the exhibit if the exhibit was returned.

(g) Illegal Items. This rule shall not authorize the return of an exhibit to any person when the exhibit is a weapon, controlled substance, poison, explosive or any other kind of property which the person may not lawfully possess. In such cases, the exhibit shall be disposed of in the manner provided by law or in a manner ordered by the court.

(h) Authority of Court. The court may, on motion by a party or its own motion, direct the release of an exhibit at any time, and may allow the substitution of a copy, photograph or description in place of the exhibit. If such substitution is allowed, the copy, photograph or description shall be admissible in any subsequent proceedings to the same extent that the exhibit would have been admissible. The court may, on motion by a party or its own motion, direct the retention of an exhibit beyond the period specified by this rule upon a showing of good cause. The court may, on motion by a party or someone having an interest in the exhibit, direct that an exhibit be returned to someone other than the party who introduced the exhibit. In cases involving one of the offenses listed in the Preservation of Evidence Act or accessory before the fact to one of those offenses, no substitution, return or other disposition of the exhibit shall be made unless the requirements of S.C. Code Ann. § 17-28-340 have been satisfied.

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Rules of Civil Procedure

O R D E R

By order dated January 29, 2009 (copy attached), this Court adopted an amendment to the South Carolina Rules of Civil Procedure and this amendment was submitted to the General Assembly pursuant to Article V, §4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, this amendment is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
April 29, 2009

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Rules of Civil Procedure

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 43(k) of the South Carolina Rules of Civil Procedure (SCRCP) is amended to read as shown in the attachment to this order. This amendment shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
January 29, 2009

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

The Supreme Court of South Carolina

Scott Ellison, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Counsel for petitioner filed a petition for a writ of certiorari from an order denying and dismissing his application for post-conviction relief (PCR). By order dated November 6, 2008, the Court of Appeals denied the petition.[1] Petitioner's petition for rehearing was denied on December 18, 2008.

Thereafter, petitioner's counsel sought and received a thirty day extension of time to serve and file a petition for a writ of certiorari in this Court pursuant to Rule 226, SCACR. The State asserts the petition for a writ of certiorari should be denied based on this Court's decisions in Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008)(stating Court will not entertain

[1] The order states, "This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. The petition for a writ of certiorari is denied."

petitions for a writ of certiorari pursuant to Rule 226 where Court of Appeals issues "letter denial"), Missouri v. State, 378 S.C. 594, 663 S.E.2d 480 (2008)(extending Haggins to petitions for a writ of certiorari filed in this Court pursuant to Rule 226 following Court of Appeals' issuance of order denying petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)), and In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990)(stating this Court reviews decisions of Court of Appeals by way of writ of certiorari only where special reasons justify exercise of that power).

Counsel for petitioner maintains petitioner's case is distinguishable because the Court of Appeals did not issue a letter denial or an order denying the petition pursuant to Johnson. Counsel further notes the Court of Appeals is well aware of this Court's ruling in Haggins, but chose not to issue a letter denial in petitioner's case, indicating the Court of Appeals' desire to ensure its ruling is subject to review by this Court. Citing O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999), counsel also contends petitioner fears being procedurally barred from review of his federal constitutional claims in a subsequent petition for a writ of

habeas corpus if he does not seek review by this Court. Finally, counsel argues the policy established in Haggins and Missouri violates petitioner's rights under the Equal Protection Clause because it denies an arbitrarily constituted group of PCR applicants access to this Court.

In Haggins, we noted a decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed "a special reason" justifying the exercise of our discretion under Rule 226. We noted further that an informal letter denial cannot meet any of the five criteria we consider when determining whether to grant certiorari to review a decision of the Court of Appeals pursuant to Rule 226. While the language in our opinion in Haggins could be construed to preclude review of the Court of Appeals' order in the case at hand, we realize that the specific holding in Haggins applies only to letter denials. Accordingly, we take this opportunity to extend our decisions in Haggins and Missouri to cases in which the Court of Appeals has issued an order denying a writ of certiorari in a PCR matter and in cases in which the Court of Appeals initially issues an order granting a writ of certiorari in such matters but later issues an opinion

dismissing the writ as improvidently granted without further discussion of the case. Our decision is based on the same reasoning set forth in Haggins. We also find petitioner's equal protection argument unavailing for the reasons set forth in Missouri.

Finally, our decision does not preclude federal habeas corpus review under Boerckel. The United States Supreme Court specifically stated in Boerckel that nothing in its decision requires exhaustion of any state remedy when a state has provided that remedy is not available. We have, by our decisions in Haggins, Missouri, and the case at hand, provided that discretionary review by this Court is not available following the issuance of the types of decisions addressed therein. Accordingly, petitioner's failure to obtain discretionary review by the Court in this case should not preclude federal habeas corpus review.

Because we hereby hold we will not entertain petitions for a writ of certiorari under Rule 226 from orders such as the one issued by the Court of Appeals in this case, we deny counsel's request for an extension of time to serve and file a petition for a writ of certiorari and her motion for leave to submit a petition for a writ of certiorari.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

April 10, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Lynn Posner, Respondent,

v.

Daniel A. Posner, Appellant.

Appeal From Richland County
Aphrodite K. Konduros, Family Court Judge

Opinion No. 4533
Heard February 19, 2009 – Filed April 16, 2009

DISMISSED

Richard C. Detwiler and Kathleen M. McDaniel, of Columbia, for Appellant.

James T. McLaren and C. Dixon Lee, III, of Columbia, for Respondent.

WILLIAMS, J.: Daniel A. Posner (Husband) appeals the family court's decision that (1) the Marital Settlement Agreement (the Agreement) between Husband and Susan Lynn Posner (Wife) requires that Wife receive her share of Husband's Tax Deferred Savings Plan (the TDSP) plus any growth or loss on the entire account; (2) Husband has not purged himself of contempt from a prior family court order; and (3) Wife is entitled to attorneys' fees and costs. We affirm the family court's holding that Husband remains in contempt and we dismiss the remainder of Husband's appeal under the Fugitive Disentitlement Doctrine (FDD).

FACTS

Husband and Wife were married in 1984. They have two daughters (the Children), both of whom are now over the age of nineteen. Husband and Wife divorced in 2001. Wife currently resides in South Carolina and Husband resides in Pennsylvania. The Final Divorce Decree approved and incorporated by reference the Agreement. The Agreement provides, among other things, that Husband shall maintain life insurance designating Wife as beneficiary for the benefit of the Children, restore the balance of certain UGMA[1] accounts for the Children, reimburse Wife for health insurance premiums and other medical costs incurred by Wife for the Children, and provide Wife with information or authorization to access information regarding Husband's IBM stock cost basis. The Agreement also provides for the entry of a Qualified Domestic Relations Order (the QDRO) to divide the TDSP, which Husband acquired during his employment with IBM.

The central issues presented in this case stem from two events, both of which relate to the Agreement. The first is the July 20, 2004, family court order finding Husband in contempt for violating the terms of the Agreement (the Contempt Order). Husband failed to appear for the hearing pursuant to the Rule to Show Cause. Wife argues because Husband has failed to purge himself of this contempt, his appeal to this Court should be dismissed under

[1] Uniform Gifts to Minors Act.

the FDD.[2] The second event is the February 21, 2006, distribution of Husband's TDSP by IBM, which the family court held was in accordance with the terms of the Agreement and the QDRO. Husband argues the family court's interpretation of the Agreement and the QDRO as it related to distribution of the TDSP was erroneous.

A. The Contempt Order

On July 20, 2004, the family court found Husband in contempt for failing to comply with certain terms of the Agreement. Specifically, the family court found Husband in contempt, stating Husband failed (a) to maintain life insurance designating Wife as beneficiary for the benefit of the Children, (b) to restore the balance of certain UGMA accounts for the Children, (c) to reimburse Wife for health insurance premiums and other medical costs incurred by Wife for the Children, and (d) to provide Wife with information or authorization to access information regarding Husband's IBM stock cost basis. The family court further ordered a bench warrant be issued directing Husband's arrest and incarceration due to his failure to appear pursuant to the Rule to Show Cause for the hearing. The family court ordered Husband be incarcerated for 90 days, but that he could purge himself of the contempt by complying with the order. A bench warrant was issued for Husband's arrest on July 22, 2004.

Three years later, on March 15, 2007, a hearing was held on Husband's motion requesting the family court reform, interpret, or enforce the QDRO in a manner consistent with the Agreement. At that hearing, Wife argued Husband's motion should be barred under the FDD because Husband had yet to comply with the Contempt Order. Following the hearing, the family court issued an order stating although it had considered Wife's argument concerning the FDD, the family court nevertheless determined it "would be best for it to address the merits of [Husband's] Motion." The family court

[2] The Fugitive Disentitlement Doctrine permits a court to "dismiss an appeal by a person who stands in contempt of court in the proceeding in which he seeks to take an appeal." Scelba v. Scelba, 342 S.C. 223, 228, 535 S.E.2d 668, 671 (Ct. App. 2000).

went on to find that Husband had failed to purge himself of his contempt under the Contempt Order. The court held, "Much of the same documentation presented at [the] hearing was also presented earlier to Judge Riddle and was found to be inaccurate, non-complying and otherwise insufficient to serve to purge [Husband] of the prior contempt sentences." Husband did not appear at this hearing. The July 22, 2004 bench warrant is still outstanding.

B. Distribution of the TDSP

The QDRO was issued and filed in January 2006. On February 21, 2006, IBM distributed the TDSP by transferring $203,590.12 to Wife and $135,349.10 to Husband. Thereafter, Husband filed a motion in family court requesting that the court reform, interpret, or enforce the QDRO in a manner consistent with the Agreement. Wife, in turn, submitted an amended return, answer and counterclaim to Husband's motion in which she asserted IBM had interpreted the QDRO correctly in its distribution and alleged Husband had not purged himself of the family court's finding of civil contempt almost three years earlier.

The family court held Husband and Wife received their proper distribution under the QDRO and that, contrary to Husband's contentions, Wife was not overpaid. The family court also awarded Wife $5,000 in attorneys' fees and costs. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005). However, this broad scope of review does not require this Court to disregard the family court's findings. Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 149-50 (Ct. App. 2005). Nor must we ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003). However, our

broad scope of review does not relieve the appellant of the burden of convincing this Court that the family court committed error. Nasser-Moghaddassi, 364 S.C. at 190, 612 S.E.2d at 711.

LAW & ANALYSIS

A. Husband's Contempt

Husband argues he has performed the acts specified in the Contempt Order, thereby purging his contempt and, therefore, it was error for the family court to find that he remains in contempt. In contrast, Wife argues the family court properly held that Husband remains in contempt and, therefore, his appeal should be dismissed under the FDD. We must, therefore, first determine whether the family court erred in holding Husband has failed to purge himself of contempt. We hold it did not.

On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the family court has abused its discretion. Lukich v. Lukich, 368 S.C. 47, 56, 627 S.E.2d 754, 759 (Ct. App. 2006). The purpose of holding an individual in civil contempt is "to coerce that individual to do the thing required by the order for the benefit of the complainant." Miller v. Miller, 375 S.C. 443, 456, 652 S.E.2d 754, 761 (Ct. App. 2007) (citing Floyd v. Floyd, 365 S.C. 56, 75, 615 S.E.2d 465, 475 (Ct. App. 2005)). "In civil contempt cases, the sanctions are conditioned on compliance with the court's order. . . . [T]he contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Id. at 457, 652 S.E.2d at 761.

Here, the Contempt Order found Husband in contempt on several grounds, among which was his failure to replenish the UGMA accounts for the Children. Further, he failed to appear before the family court pursuant to a Rule to Show Cause, resulting in a bench warrant being issued for his arrest.

i. UGMA Accounts

The Contempt Order stated Husband could purge his contempt as to the UGMA accounts by providing written proof that he redeposited $24,588, plus 8% interest, from July 30, 1998, until the date of the redeposit within the time limits specified by the Agreement.

As proof that he replenished the UGMA accounts, Husband points to two exhibits in the record. The first is a July 28, 2004 letter from Husband's then attorney to Wife's attorney purporting to show a breakdown of the UGMA account from July to December 2001, as well as all of 2002 and 2003. However, this letter states that the "[t]otal deposited" on the account during this period was only $7,953.09, not $24,588 as was required by the Contempt Order. The letter also references an "enclosed" account summary, but we find no such summary in the record. The second is a plain piece of paper entitled "Rationalization of [A]ccount Transactions for UGMA." This paper purports to show that Husband has redeposited $24,372.86 to the UGMA account. However, this document does not indicate who created it, when it was created, or for what purpose. Furthermore, there is no documentation in the record from the UGMA account to corroborate deposits claimed by Husband. Taken together, we do not find these exhibits serve as sufficient written proof that Husband has complied with the provisions of the Contempt Order dealing with the UGMA accounts. At best, they provide conflicting evidence as to exactly how much Husband has redeposited.

The family court also found the other documentation Husband submitted as proof that he had complied with the Contempt Order to be insufficient. After review of this evidence, we find no abuse of discretion in the family court's conclusion as to Husband's non-compliance.

ii. Bench Warrant

The Contempt Order also stated Husband was in contempt for his willful failure to appear before the family court as required by the Rule to Show Cause and a bench warrant was to be issued for Husband's arrest. This

sanction was reserved until Husband appeared before the family court pursuant to the bench warrant. Husband has yet to appear before the family court to be sentenced for his prior failure to appear.

B. The FDD

Because we find Husband has failed to purge himself of contempt, we must next determine whether the FDD can be applied to dismiss his case.

The FDD is a discretionary right of an appellate court to "dismiss an appeal by a person who stands in contempt of court in the proceeding in which he seeks to take an appeal." See Scelba, 342 S.C. at 228, 535 S.E.2d at 671 (describing the doctrine as an inherent power of the court "to ignore the demands of litigants who persist in defying the legal orders and processes"). This power of the court has long been recognized by the United States Supreme Court. Ortega-Rodriguez v. United States, 507 U.S. 234, 239 (1993). The rationales for this doctrine include: (1) the difficulty of enforcement against one not willing to subject himself to the court's authority, (2) the inequity of allowing the "fugitive" to use the resources of the courts only if the outcome is an aid to him, (3) the need to avoid prejudice to the non-fugitive party, and (4) the discouragement of flights from justice. Scelba, 342 S.C. at 228-29, 535 S.E.2d at 671. For an appellate court to invoke the FDD to dismiss an appeal, two requirements must be met: (1) the appellant must be a fugitive; and (2) there must be a connection between the appellant's fugitive status and the appellate process the appellant seeks to utilize. Id.

In Scelba, this Court applied the FDD to dismiss the appeal of a wife due to her "flagrant disregard of prior orders in [the] litigation." Id. at 232, 535 S.E.2d at 673. In that case, the husband moved for a divorce on the ground of adultery. Id. at 226, 535 S.E.2d at 670. At a temporary hearing, the family court ordered the parties to account to each other for all property and ordered the wife to surrender certain items and pay the husband's attorney's fees. Id. The wife refused to allow her husband to enter the family home to inventory and appraise the property, so the husband requested a Rule to Show Cause against the wife. Id. The wife refused to attend the hearing

and was held in contempt. Id. at 227, 535 S.E.2d at 670. In its final order, the family court granted the divorce, divided the marital property, and ordered the wife to pay the husband's attorney's fees. Id. at 227-28, 535 S.E.2d at 671. The wife appealed all three issues. Id. This Court dismissed the wife's appeal under the FDD because the wife had been found in contempt for failing to appear at a rule to show cause hearing, failing to appear at a scheduled deposition, and failing to appear at a final hearing for fear of being arrested on the bench warrant. Id. at 229, 535 S.E.2d at 671-72.

We find that here, as in Scelba, the requirements of the FDD are met. First, Husband is a fugitive in this litigation. The family court found Husband in contempt for failing to comply with a number of provisions in the Agreement. Moreover, since the issuance of the bench warrant by the family court, Husband has yet to appear before that court. As such, "matters giving rise to the bench warrant have not been adjudicated because of [Husband's] refusal to submit to the family court's jurisdiction." Id. at 229, 535 S.E.2d at 672.

Second, there exists a sufficient nexus between Husband's fugitive status and the appellate process he seeks to utilize. In Huskey v. Huskey, this Court found a sufficient nexus existed and thus refused to hear a husband's appeal of an equitable division of marital property. 284 S.C. 504, 505, 327 S.E.2d 359, 360 (Ct. App. 1985). In that case, the husband absconded from the family court's jurisdiction to avoid arrest for failure to appear in connection with a contempt proceeding arising from the divorce but concerning matters outside the property division. Id.

Here, the nexus is even stronger than in Huskey. Husband's fugitive status derives from not only his failure to appear before the family court pursuant to the Rule to Show Cause resulting in a bench warrant being issued for his arrest, but also his failure to comply with the provisions of the Agreement itself. On appeal, Husband asks this Court to interpret the Agreement in a manner more favorable to him than the family court's interpretation. Husband has failed to abide by the court order which approves the Agreement, absented himself from the jurisdiction, and evaded the processes of the court. In short, his conduct frustrates the administration of

justice. We hold that under the FDD Husband may not use the resources of this Court in this manner. See Scelba, 342 S.C. at 229, 535 S.E.2d 671 (holding one of the rationales behind the FDD is to prevent an appellant from "us[ing] the resources of the courts only if the outcome is an aid to him").

CONCLUSION

Accordingly, Husband's appeal is

DISMISSED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Eric Spratt, Respondent.

Appeal From York County
Clifton Newman, Circuit Court Judge

Opinion No. 4534
Heard March 18, 2009 – Filed April 21, 2009

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Appellant.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia; and Solicitor Kevin Scott Brackett, of York, for Respondent.

GOOLSBY, A.J.: The State appeals concurrent sentences imposed by the trial court on Eric Spratt following his convictions for trafficking in crack cocaine and for possession of marijuana. The State contends the trial court erred in not permitting an uncounseled 1998 guilty plea to possession of cocaine to be used for sentence enhancement without first determining whether Spratt waived his right to counsel at that time. We agree and remand.

The Sixth and Fourteenth Amendments to the United States Constitution prohibit a prior uncounseled conviction resulting in a sentence of imprisonment from being used to enhance the punishment for a subsequent conviction.[1] In State v. Payne, this court concluded the defendant bears the burden of proof when collaterally attacking a prior conviction the State seeks to use for sentence enhancement.[2] This court based its decision, at least in part, on the presumption of regularity given to final judgments.[3] Once the State has proven the prior conviction, the defendant must prove it is constitutionally defective or otherwise invalid by a preponderance of the evidence.[4]

A prior uncounseled conviction is not constitutionally defective or invalid when the defendant knowingly, voluntarily, and intelligently waived his right to counsel.[5] Further, courts in other jurisdictions have held the trial

---

[1] State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998) (citing Nichols v. U.S., 511 U.S. 738 (1994)).

[2] 332 S.C. at 272, 504 S.E.2d at 338.

[3] Id.

[4] Id.

[5] See State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) ("It is well-established that an accused may waive the right to counsel and proceed pro se."); Faretta v. California, 422 U.S. 806, 818-21 (1975) (holding a defendant has a constitutional right to waive his right to counsel).

court may consider prior uncounseled convictions as a basis for sentence enhancement when the defendant validly waived his right to counsel.[6]

Here, the trial court did not consider evidence concerning whether Spratt waived his right to counsel during his prior uncounseled guilty plea hearing. In fact, the trial court stated "the issue [is not] whether or not [Spratt waived] his right to counsel. . . . The question is whether or not an uncounseled guilty plea can be used for sentence enhancement purposes."

Accordingly, we reverse and remand this case to the trial court and direct the trial court to reevaluate Spratt's sentence after considering evidence regarding whether Spratt waived his right to counsel during his prior uncounseled guilty plea hearing.

REVERSED AND REMANDED.

PIEPER and LOCKEMY, JJ., concur.

---

[6] See State v. Jackson, 57 F.3d 1012, 1019 (11th Cir. 1995) (stating convictions obtained after a defendant knowingly, intelligently, and voluntarily waived his right to counsel are not presumptively void and holding the district court did not err in considering Jackson's prior uncounseled conviction as a basis for sentence enhancement because Jackson knowingly, intelligently, and voluntarily waived his right to counsel); State v. Windle, 74 F.3d 997, 1001 (10th Cir. 1996) (holding the district court properly included three prior uncounseled misdemeanor convictions resulting in imprisonment in its sentencing determination when evidence established the defendant waived his right to counsel for each of the prior convictions); Garcia v. State, 909 S.W.2d 563, 566 (TX App. 1995) (upholding Garcia's felony DWI conviction enhanced by four prior misdemeanor DWI convictions when Garcia failed to meet his burden of proving he did not waive his right to counsel for each of the prior convictions).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Valerie Russell, f/k/a Valerie Cox, Appellant,

v.

Alan Lee Cox, Respondent.

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 4535
Submitted April 1, 2009 – Filed April 27, 2009

AFFIRMED

Thomas F. Allgood, Jr., of Augusta, for Appellant.

Vicki J. Snelgrove, of Aiken, for Respondent.

THOMAS, J.: Valerie Russell, f/k/a Valerie Cox (Mother), appeals the family court's dismissal of her action to register and modify a foreign divorce and custody order. We affirm.[1]

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS AND PROCEDURAL HISTORY

Mother and Alan Lee Cox (Father) are the parents of a daughter (Child) born March 3, 2004, and were divorced in Glynn County, Georgia, on February 28, 2006. Pursuant to the final judgment and decree, Father received sole custody of Child. Mother was ordered to pay child support and received strictly supervised visitation. The visitation was to take place the second Saturday and Sunday of each month for three hours on each day at a location in North Augusta, South Carolina, as designated by Father. Furthermore, as noted in the decree, Father was a full-time medical student residing in North Augusta at the time of the divorce.

After the divorce, Mother moved from Georgia to Florida and married her current spouse on February 29, 2008. On March 23, 2008, Mother brought this action in the Aiken County Family Court seeking registration in South Carolina of the Georgia divorce decree and custody order and modification of the custody and visitation provisions of the order. In her complaint, Mother asserted she currently resided in Florida, Father resided in South Carolina, and Child resided with Father's parents, who lived in Aiken County, South Carolina. Mother sought custody of Child and, in the alternative, removal of the supervision restrictions on her visitation privileges.

On April 9, 2008, Father answered and counterclaimed, requesting among other relief that the action be dismissed because "[t]he child and parents still have significant connections with the State of Georgia and substantial evidence relating to the child's care, protection, training and personal relationships are in the State of Georgia."

The family court held a hearing in the matter on April 15, 2008. By order dated May 7, 2008, and filed May 8, 2008, the family court denied Mother's motion for registration and modification of the Georgia order and granted Father's motion to dismiss the action. Mother appeals.

LAW/ANALYSIS

I. Jurisdiction

Mother first argues the family court, in declining to exercise jurisdiction over this matter, placed undue emphasis on evidence that Father was domiciled in Georgia and improperly ignored evidence that Father and Child now resided in South Carolina. We agree with Mother that Father's domicile was not relevant to a determination of jurisdiction; however, we uphold the family court's dismissal of this action based on its finding that Father has remained a resident of Georgia.

Under the Uniform Child Custody Jurisdiction and Enforcement Act (the Act), which took effect in this State on June 8, 2007, a South Carolina family court, except in certain situations not applicable here, may not modify a custody order issued by a court of another state unless a court of this State has jurisdiction to make an initial custody determination under the Act and (1) the court of the issuing state determines either that it no longer has continuing jurisdiction or that a court of this State would be a more convenient forum; or (2) either a South Carolina court or a court of the issuing state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the issuing state. S.C. Code Ann. § 63-15-334 (formerly S.C. Code Ann. § 20-7-6034) (Supp. 2007 and 2008).[2]

There appears to be no dispute in the present case that a South Carolina family court could exercise jurisdiction to make an initial custody determination. Both Father and Child have continuously resided in South Carolina for several years preceding the filing of this lawsuit. Furthermore, there is no indication in the record before us that a Georgia court has ruled whether or not Georgia has continuing jurisdiction over the matter, whether or not South Carolina would be a more convenient forum, or whether or not anyone connected with the matter presently resides in Georgia. The only

[2] Georgia adopted the Uniform Child Custody Jurisdiction and Enforcement Act in 2001. See Hall v. Wellborn, 673 S.E.2d 341, 342 (Ga. Ct. App. 2009).

question here is whether the South Carolina family court correctly found that Father, notwithstanding significant evidence that he currently resided in South Carolina, was still a resident of Georgia as well. We hold the family court's determination was correct.[3]

" '[R]esidence' is a more elastic and flexible term than domicile or citizenship. A person may have only one domicile, but may have several residences." Cook v. Fed. Ins. Co., 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975). Although there are no cases as yet from this jurisdiction that expressly define the phrase "presently reside" as that language is used in the Act, we do not believe the legislature intended that this term apply only to those situations in which all parties to the dispute are physically present within the borders of the state whose jurisdiction is at issue. See S.C. Code Ann. § 63-15-330(C) (formerly S.C. Code Ann. § 20-7-6030(C)) (Supp. 2007 and 2008) ("Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.").

Based on our review of the record, we hold there is sufficient evidence to support the family court's determination that Father has remained a resident of Georgia during this litigation. He owns real estate in Georgia, where he is also registered to vote. Furthermore, he continues to hold a Georgia driver's license, is paid by the United States Defense and Accounting Office as a Georgia resident, and files his income taxes listing Georgia as his state of residence. In addition, as evidenced by a statement from the registrar of the Medical College of Georgia, Father is enrolled as a full-time student and expects to receive his Doctor of Medicine degree on May 8, 2009. Also significant is the fact that, although on his student loan application Father

[3] We recognize the family court attempted to justify its ruling by making several references to Father's status as a Georgia domicile; however, the court also specifically found Father "has not abandoned his residency in the State of Georgia." Although the court may have erroneously equated the concepts of residence and domicile, we believe the appealed order had sufficient findings of fact to the effect that Father, for purposes of the Act, presently resided in Georgia.

stated his "permanent city" was North Augusta, South Carolina, he listed Georgia as his state of legal residence.

Finally, we are mindful of the long-standing deference courts of this State have "given to the jurisdiction of the state that initially rules on a custody matter." Widdicombe v. Tucker-Cales, 366 S.C. 75, 87, 620 S.E.2d 333, 339-40 (Ct. App. 2005), vacated in part on other grounds, 375 S.C. 427, 653 S.E.2d 276 (2007); see also Clay v. Burckle, 369 S.C. 651, 658, 633 S.E.2d 173, 177 (Ct. App. 2006) (holding that because the state that issued the initial custody order properly continued to exercise jurisdiction in the matter, South Carolina lacked authority to modify the custody decision); Sinclair v. Albrecht, 287 S.C. 20, 23, 336 S.E.2d 485, 487 (Ct. App. 1985) ("Although more than one state may meet these jurisdictional requirements, once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive."). In our view, the enactment of the Act in this State has only enhanced this deference because now modification of a custody decision from another jurisdiction can occur only upon the satisfaction of certain specified conditions.

II. Convenience of the Forum

Mother next argues the family court erred in finding that Georgia is the more convenient forum to litigate this dispute and, in so doing, incorrectly determined that Georgia should retain jurisdiction in the matter. We disagree.

Under section 63-15-342 of the South Carolina Code, "[a] court of this State, which has jurisdiction under this article to make a child custody determination, may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." S.C. Code Ann. § 63-15-342)(A) (formerly § 20-7-6042(A)) (Supp. 2007 and 2008).

Assuming without deciding that South Carolina had jurisdiction under the Act to adjudicate this matter, we hold the family court acted within its

discretion in declining to exercise this jurisdiction based on a finding that Georgia was the more convenient forum. See Charest v. Charest, 329 S.C. 511, 516, 495 S.E.2d 784, 786 (Ct. App. 1997) ("The family court in its discretion may enter an order declining to exercise jurisdiction based on a finding that it is an inconvenient forum, which this Court will uphold absent an abuse of that discretion."). All the prior litigation in this case took place in Georgia, and it appears undisputed that the Georgia court continues to monitor Mother's child support obligation. Furthermore, as Mother admitted in her affidavit, many of her visits with Child now take place in Georgia.

CONCLUSION

Based on our determination that Father has remained a Georgia resident throughout this litigation, we affirm the family court's ruling that Georgia should retain jurisdiction over this matter. We further hold the family court did not abuse its discretion in finding Georgia was the more convenient forum to litigate this dispute.

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roberta Cook Gibson, as
Trustee and Personal
Representative of the Estate of
Georgia F. Mitchell, deceased, Respondent,

v.

Bank of America, N.A., Appellant.

Appeal From Florence County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 4536
Heard February 18, 2009 – Filed April 29, 2009

REVERSED

Thomas William McGee, III, and Erik T. Norton, of Columbia, for Appellant.

J. Boone Aiken, III, of Florence, James B. Richardson, Jr., of Columbia, for Respondent.

GEATHERS, J.: In this negligence and conversion action, Respondent Roberta Gibson obtained a judgment for actual and punitive damages against Appellant Bank of America (BOA) on Gibson's cause of action for negligence. BOA appeals the trial court's denial of its motions for a directed verdict and judgment notwithstanding the verdict (JNOV) on the ground that Gibson's negligence claim is barred by the three-year statute of limitations, as set forth in S.C. Code Ann. § 15-3-530(5) (2005).[1] We reverse.

FACTS/PROCEDURAL HISTORY

Gibson is the personal representative of the Estate of Georgia F. Mitchell. Mitchell died on November 19, 2000, at the age of ninety-two. Prior to her death, Mitchell maintained an interest-bearing checking account and a money market account at BOA's banking center on Parker Road in Florissant, Missouri. Both accounts were joint accounts co-owned by Mitchell and her best friend, Lucille Gilda. From November 16, 1999 through March 28, 2000, sixteen unexplained withdrawals from Mitchell's account occurred. During this time period, Mitchell relocated from Missouri to Cheraw, South Carolina on January 22, 2000 to live with Gibson, the widow of Mitchell's nephew. Within a few weeks after Mitchell's arrival in South Carolina, Gibson contacted her estate planning attorney to inquire about estate planning services for Mitchell, who was very affluent. As a

---

[1] In view of our disposition of this issue, we decline to address BOA's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); Barr v. City of Rock Hill, 330 S.C. 640, 646 n.3, 500 S.E.2d 157, 160 n.3 (Ct. App. 1998) (affirming grant of summary judgment on the expiration of the statute of limitations and declining to address appellants' remaining arguments on the trial court's alternate grounds for granting summary judgment).

result of his meeting with Mitchell, the attorney prepared a trust, will, and power of attorney for Mitchell. Gibson was named as the trustee of Mitchell's trust and Gibson's children were named as beneficiaries of Mitchell's will.

Mitchell received statements for her BOA accounts for the months ending February 7, 2000 and June 9, 2000.[2] The February 7 statement showed a balance of $43,961.37 for the money market account and a balance of $25,526.97 for the checking account. The June 9 statement showed an approximate balance of $1,288.53 for the money market account and a balance of $20,537.99 for the checking account.[3] Thus, the combined depletion of the money market and checking accounts from February 7, 2000 to June 9, 2000 totaled $47,661.82. The statements for the intervening months, which showed the last six unexplained withdrawals, were held at the Parker Road banking center at the direction of the center's manager, Victoria Gan. According to Gan's deposition testimony, she had asked another BOA employee working in the statements department to send Mitchell's account statements to Gan's attention at the Parker Road banking center because Lucille Gilda had requested that the statements be held at the bank due to mail security concerns. Gan also testified that she mailed those statements to Mitchell at her South Carolina address in May 2000. After Mitchell had an opportunity to go through her mail, Gibson forwarded Mitchell's BOA statements to Gibson's daughter, Elizabeth Chanter, who was a certified public accountant. Chanter did not review those statements at that time.

---

[2] The February 7 statement was mailed to Mitchell's Missouri address and the June 9 statement was mailed to Mitchell's South Carolina address.

[3] The copy of the June 9, 2000 statement in the Record on Appeal does not show the page listing the exact balance for the money market account, but the "average balance" is shown on page one of the statement. Based on a comparison of the actual balance for February 7 to the average balance for that same date, the June 9 average balance is close enough to the June 9 actual balance for the Court to determine whether the depletion of the account should have alerted Mitchell to a problem.

Gan acted as the teller for virtually all of the sixteen unexplained withdrawals, and most of those withdrawals were in amounts of $5,000 or $10,000. According to Gan's testimony, after Mitchell relocated to South Carolina, she wrote a letter to Gan requesting that Gan mail to her four cashier's checks in the amount of $10,000 each. That letter has never been produced. Gan also testified that after she mailed the checks, Mitchell showed up at the Parker Road banking center on March 8, 10, and 15, respectively, to cash three of those checks and that Mitchell also appeared for all of the other unexplained withdrawals that Gan handled from November 1999 through March 2000. However, Gibson disputed Gan's testimony and presented evidence that Mitchell was in South Carolina on the dates in question. Notably, Gibson presented evidence of Mitchell's execution of her will on the afternoon of March 15, 2000, in her attorney's office in South Carolina.

After Mitchell's death, several charities filed a petition in the Chesterfield County Probate Court to contest Mitchell's will. As a result of that litigation, in June 2002, BOA sent to Gibson several subpoenaed documents pertaining to Mitchell's accounts at the Parker Road banking center. Gibson gave the documents to Elizabeth Chanter to review. Upon reviewing the monthly statements for the first time, Chanter noticed the unexplained withdrawals, and, in July 2002, she prepared a chart summarizing the withdrawals. In October 2002, through counsel, Gibson finally contacted BOA to inquire about the withdrawals.

On September 26, 2003, Gibson filed the instant action against BOA, asserting causes of action for negligence, conversion, and intentional infliction of emotional distress. BOA later sought leave to file a third-party complaint against Victoria Gan on the theory that Gan may have participated in the unexplained withdrawals without BOA's knowledge or approval. Gan was suspected of embezzling funds from Mitchell's accounts through the unexplained withdrawals. The trial court denied the motion to file a third-party complaint but granted BOA's motion for summary judgment on

Gibson's emotional distress claim. The trial court also ruled that Gibson's complaint stated a claim for common law conversion in addition to statutory conversion.

At trial, BOA made a motion for a directed verdict on several grounds, including the preclusion of Gibson's claims by the three-year statute of limitations for tort actions, S.C. Code Ann. § 15-3-530(5) (2005). The trial court granted BOA's directed verdict motion on all causes of action as they related to the ten unexplained withdrawals that occurred before Mitchell's relocation to South Carolina. The trial court based this ruling on the ground that the corresponding bank statements were mailed to Mitchell at her Missouri address, providing her with notice of the withdrawals within just a few weeks and, thus, the statute of limitations barred Gibson's claims as to those particular withdrawals. As to the remaining six unexplained withdrawals, the trial court denied BOA's directed verdict motion on the negligence and common law conversion claims, concluding that whether the February 7, 2000 and June 9, 2000 account statements placed Mitchell on notice that she had a claim against BOA was a question of fact for the jury. The trial court granted BOA's directed verdict motion as to Gibson's statutory conversion claim.

The jury returned a verdict against BOA on the negligence claim for $55,510.18 in actual damages and $40,000 in punitive damages. The jury returned a verdict for BOA on Gibson's common law conversion claim. BOA filed a motion for a JNOV, but the trial court denied the motion. This appeal followed.

ISSUE ON APPEAL

Was Gibson's negligence claim barred by the statute of limitations?

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV,

this Court applies the same standard as the trial court." Gadson ex rel. Gadson v. ECO Serv.s of S.C., Inc., 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party. Id. at 175-76, 648 S.E.2d at 588. The motions should be denied when the evidence yields more than one inference or its inference is in doubt. Id. at 176, 648 S.E.2d at 588. "An appellate court will only reverse the [trial] court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Id.

LAW/ANALYSIS

BOA argues that the trial court erred in denying its motions for a directed verdict and JNOV on the ground that Gibson's negligence claim is barred by the statute of limitations. We agree.

The limitations period of S.C. Code Ann. § 15-3-530(5) (2005), which is the applicable limitations period for a negligence claim, begins to run when the plaintiff "knew **or by the exercise of reasonable diligence** should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). In other words, the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989).

The standard as to when the limitations period begins to run is objective rather than subjective. Burgess, 300 S.C. at 186, 386 S.E.2d at 800. Therefore, the limitations period "begins to run when a person **could or should have known**, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." Id. (emphasis in original).

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory developed.

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) (quoting Snell v. Columbia Gun Exch. Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

> A key element in the reasonable diligence test is "notice." The fact that an injured party may not comprehend the full extent of the damage is immaterial. . . . Under section 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. This is an objective, not a subjective, determination.

Id. (citations omitted).

When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court. Cf. Johnston v. Bowen, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim).

Here, it is disputed as to when Mitchell or Gibson received the statements for March 2000, April 2000, and May 2000, which showed the last six unexplained withdrawals. However, it is undisputed that Mitchell received the February 2000 and June 2000 statements by mid-June 2000, and those statements showed a depletion of the money market and checking accounts totaling $47,661.82.[4] Nonetheless, the trial court concluded that whether the February and June statements placed Mitchell on notice that she had a claim against BOA was a question of fact for the jury.

The evidence relevant to Mitchell's notice of an existing claim is undisputed. Mitchell and Gibson received the February 2000 and June 2000 statements by mid-June 2000. Further, although Gibson's daughter, Elizabeth Chanter, gave her opinion as a lay witness that those statements did not indicate that "somebody's taking the money," she did admit that if someone were reviewing those statements to determine account balances, they would have noticed a combined depletion approximating $50,000 in the checking and money market accounts.[5] Moreover, a simple inquiry of the co-owner of these accounts, Lucille Gilda, would have eliminated any doubt over whether she was responsible for any of the withdrawals in question.

Even when the evidence is viewed in the light most favorable to Gibson and Mitchell, there is only one reasonable inference as to when they knew or should have known that they had a claim against BOA—when Mitchell received the June 9 statement. Cf. S.C. Code Ann. § 36-1-201(25) (2003) (stating that in South Carolina's version of the U.C.C., a person has "notice" of a fact when (a) he has actual knowledge of it; (b) he has received a notice

---

[4] The February 7 statement showed a balance of $43,961.37 for the money market account and a balance of $25,526.97 for the checking account. The June 9 statement showed an approximate balance of $1,288.53 for the money market account and a balance of $20,537.99 for the checking account.

[5] Although Chanter is a CPA, she testified as a fact witness. She was never qualified as an expert witness.

or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists).

Therefore, the determination of when Mitchell or Gibson knew or should have known that they had a claim was a matter of law, and the trial court erred in submitting the question to the jury. See Gadson, 374 S.C. at 175-76, 648 S.E.2d at 588 (holding that the court is required to view the evidence and reasonable inferences in the light most favorable to the non-moving party but concluding that the trial court's ruling may be reversed when there is no evidence to support the ruling or when the ruling is controlled by an error of law); cf. Johnston, 313 S.C. at 65, 437 S.E.2d at 47 (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim).

Gibson's counsel cites Citizens & S. Nat'l Bank of S.C. v. State Budget & Control Bd., 246 S.C. 140, 142 S.E.2d 874 (1965), to support the argument that receipt of a bank statement alone is not enough to trigger the running of the statute of limitations and that until the depositor receives the forged item for inspection, the statute cannot begin to run. However, the cited opinion does not truly support this argument because in that case, the South Carolina Supreme Court did not have the question of the adequacy of the statement alone squarely before it. Rather, the Citizens opinion actually supports BOA's argument that Mitchell's receipt of the June 9 statement placed her on notice that she had some type of claim. The Court in Citizens quoted with approval the following language from Kan. City Title & Trust Co. v. Fourth Nat'l Bank in Wichita, Kan., 10 P.2d 896, 901 (Kan. 1932):

> [W]here the bank renders a statement to the depositor showing him the status of his checking account, it says to him in effect: 'This bank owes you this stated balance, and no more.' Such statement may fairly be construed as a notice that any claim the

> depositor may make in excess of the stated balance would be resisted by the bank. And in view of the situation the depositor's formal demand for a greater sum would be unnecessary to perfect the depositor's cause of action, and likewise to set in motion the Statute of Limitations. If this is not the legal effect of the bank's monthly statement to its depositor, it is not apparent what function the monthly statement performs.

Citizens, 246 S.C. at 144, 142 S.E.2d at 875 (quoting Kan. City, 10 P.2d at 901)) (emphasis added).

In the instant case, a review of the account balances in the June 9, 2000 statement would have prompted a reasonable depositor to contact BOA and, at the very least, request BOA to send her the statements for account activity between time periods shown on the February 7 statement and June 9 statement. If, after making a reasonable inquiry of the accounts' co-owner, Lucille Gilda, as to her activities on the accounts between February 7 and June 9, Mitchell disagreed with the bank's representation of what it owed her as of June 9, she was then on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy. See Grillo, 340 S.C. at 503, 532 S.E.2d at 3 (stating that the fact that an injured party may not comprehend the full extent of the damage is immaterial and that the statute of limitations is triggered by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a claim).

Gibson argues that Mitchell could have inferred that Gilda had withdrawn the money and that, therefore, the June 9 statement's representation of the account balances could not have placed Mitchell on notice that previous withdrawals were unauthorized or that she might have a claim for any perceived discrepancies. However, a reasonably diligent depositor would direct an inquiry to any co-owners of the accounts to determine if their activity on the accounts did in fact account for the shortfall.

Mitchell and Gibson were on notice of a claim by mid-June 2000. Thus, the statute of limitations expired by mid-June 2003. Gibson did not file the instant action until September 2003. As a result, Gibson's negligence claim against BOA was barred by the statute of limitations. While we find the circumstances of this case troubling, we are constrained by the law. Statutes of limitations "are designed to promote justice by forcing parties to pursue a case in a timely manner." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000). "Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." Id. at 19, 528 S.E.2d at 413-14; see also Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (noting that statutes of limitations have long been respected as fundamental to a well-ordered judicial system and that they embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs). Therefore, our courts are unable to entertain Gibson's negligence claim against BOA.

CONCLUSION

Accordingly, the trial court's denial of BOA's motions for a directed verdict and JNOV is

REVERSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael R. Gartside, Respondent/Appellant

v.

Ellen T. Gartside, Appellant/Respondent.

Appeal From Charleston County
Jane D. Fender, Family Court Judge

Opinion No. 4537
Heard March 17, 2009 – Filed April 29, 2009

AFFIRMED

H. Stanley Feldman, of Charleston, for Appellant/Respondent.

Paul Daniel Schwartz, of Charleston, for Respondent/Appellant.

WILLIAMS, J.: In this family law action, we determine whether the family court erred in (1) reducing Michael Gartside's (Husband) alimony obligation and (2) failing to award attorneys' fees and costs to Husband. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Ellen Gartside (Wife) divorced in 2003. At the time of the divorce, Husband was employed by the Carolina Yacht Club (the Club) and Wife was employed as a public school teacher. The final decree stated Husband and Wife earned gross monthly wages of $9,079 and $3,814, respectively. The final decree awarded Wife periodic alimony in the amount of $1,775 per month.

At the time of the divorce, Husband had been making $108,948 per year at the Club according to his financial declaration. From December 18, 2003 until October 1, 2005, Husband made his alimony payments to Wife. However, Husband lost his job at the Club in October 2005, at which time he was making between $105,000 and $106,000, according to his testimony.[1] After being let go by the Club, Husband found a job working for the Muhler Company (Muhler) in November 2005, where he received a reported salary of $60,000 per year.

On January 17, 2006, Husband, through counsel, mailed Wife a letter advising her he would be able to continue paying the current alimony only through April 28, 2006, with his severance package from the Club, but thereafter, he would be unable to continue to pay the $1,775 per month.

On March 17, 2006, Husband filed an action in the Charleston County family court seeking a reduction in his alimony obligation, alleging a substantial and material change in circumstances. The complaint alleged that

[1] The parties do not dispute Husband lost his job at the Club through no fault of his own.

Husband had only been able to maintain his alimony payments because of his severance package, which was to expire in April 2006.

The case was tried in April 2007 before the family court. Husband and Wife submitted their financial declarations to the family court and testified as to their respective financial situations. As of February 1, 2007, Husband's gross monthly income was $5,200, while his net monthly income was $3,488. His total monthly expenses were $7,372. As of February 18, 2007, Wife's gross monthly income was $5,249, while her net monthly income was $3,787. Her total monthly expenses were $4,045.

At trial, Husband was asked about his efforts at finding employment after the Club terminated him. Husband testified that "hundred thousand dollar club jobs" existed in the tri-county area, but none were available. At one point, Husband submitted his resume to the Country Club of Charleston, but was not offered a position. Husband further testified he believed jobs within his profession existed outside of the tri-county area that would pay approximately what the Club had paid. Husband made no efforts, however, to interview outside of the tri-county area. Husband also testified that, before settling in Charleston in 1982, he had relocated to Pennsylvania, Colorado, Georgia, and Texas, all in furtherance of his career.

After considering all of the evidence, the family court reduced Husband's alimony obligation from $1,775 per month to $800 per month. The court stated:

> [Husband and Wife] moved to Charleston, S.C., in 1982 . . . . [T]hey have raised their children here, have owned property here, have had their work careers here, have put down roots, have made friends and have established themselves as citizens of Charleston County[,] and if [they] were still living together and [Husband] had lost his job, I have serious doubts they would move away just so they could continue making the same salary . . . .

> [Husband] testified that there were no comparable jobs available in the Charleston area[,] . . . and I find no compelling reason that [Husband] should be forced to leave the environment he has known for 25 years to seek employment which might pay the same as he was receiving in Charleston at his previous employment.

Husband submitted an affidavit in support of his request for attorneys' fees and costs, which the family court denied. This appeal followed.

STANDARD OF REVIEW

An appellate court reviewing a family court order may find facts in accordance with its own view of the preponderance of the evidence. Robinson v. Tyson, 319 S.C. 360, 362, 461 S.E.2d 397, 398-99 (Ct. App. 1995). This broad scope of review does not, however, require the reviewing court to disregard the findings of the family court, which, having seen and heard the witnesses, is in a better position to examine their credibility. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979). Nor does this broad review relieve an appellant of his or her burden of convincing the appellate court that the family court committed error. Id. at 523, 252 S.E.2d at 892.

LAW/ANALYSIS

1. Whether the family court erred in reducing Husband's alimony obligations?

Wife argues the family court abused its discretion in reducing Husband's alimony obligation. We disagree.

The purpose of alimony is to provide the ex-spouse a substitute for the support that was incident to the former marital relationship. Croom v. Croom, 305 S.C. 158, 160, 406 S.E.2d 381, 382 (Ct. App. 1991). The question of whether to increase or decrease alimony based on a finding of

changed circumstances is a matter committed to the sound discretion of the family court. Brunner v. Brunner, 296 S.C. 60, 64, 370 S.E.2d 614, 617 (Ct. App. 1988). The family court's determination of whether to modify support will not be disturbed on appeal unless the family court abused its discretion. Id. An abuse of discretion occurs when the family court's decision is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support. McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984).

In order to justify a modification of an alimony award, the changes in circumstances must be substantial or material. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997) (citing Calvert v. Calvert, 287 S.C. 130, 138, 336 S.E.2d 884, 888 (Ct. App. 1985)). In determining whether the change in circumstances warrants a modification, several considerations relevant to the initial determination of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the payee spouse. Penny v. Green, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004).

We agree with the family court that Husband's change of circumstances constitutes a substantial and material change. Moreover, because we find evidentiary support for its decision, we see no abuse of discretion in the family court's lowering Husband's alimony obligations from $1,775 per month to $800 per month. First, Husband's annual income has been reduced from $108,948 at the time of the divorce to $60,000. See Miles v. Miles, 355 S.C. 511, 519, 586 S.E.2d 136, 140 (Ct. App. 2003) (affirming family court's reduction in ex-husband's monthly alimony from $4,583 to $2,500 in light of the fact ex-husband's monthly income had been reduced from $18,100 to less than $14,000). Second, because Husband's income was reduced to $60,000 per year, his monthly expenses now exceed his monthly income by almost $4,000. Therefore, even if Husband were to cut out some of what Wife describes as his "discretionary" expenses, he would still remain in debt at the end of each month. Third, Wife's overall financial situation has arguably improved since the divorce. Not only have her monthly wages increased slightly since the divorce from $3,263 to $3,474, but she testified she is no

longer receiving medical treatment for her emotional condition, which she was at the time of the divorce. Taken together, we find these facts support the family court's decision to lower Husband's alimony obligation.

2. Whether Husband's former income should have been imputed?

a. Preservation

Husband argues this issue is not preserved for appeal because it was not raised to the family court prior to Wife's Rule 59(e), SCRCP, motion to alter judgment. We disagree.

But for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the family court. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). As such, a party cannot use a Rule 59(e) motion to present to the family court an issue the party could have raised prior to judgment but did not. Crary v. Djebelli, 321 S.C. 38, 43, 467 S.E.2d 128, 131-32 (Ct. App. 1995), rev'd on other grounds, 329 S.C. 385, 496 S.E.2d 21 (1998).

Although the first time the phrase "whether income should be imputed" appeared in the pleadings was in Wife's Rule 59(e) motion, we feel this issue is nevertheless preserved because the issue of imputed income was both raised to and ruled upon by the family court. First, counsel for Wife asserted at trial that "the number one consideration [in this case] is that [Husband] is underemployed" because "[Husband] chooses to stay with his fiancée in Charleston and not . . . look anywhere else." Underemployment and imputation of income go hand in hand. See Patel v. Patel, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) ("It is proper to impute income to a party who is voluntarily unemployed or underemployed."); Penny, 357 S.C. at 592, 594 S.E.2d at 175 ("The family court's imputation of income to Husband was

tantamount to finding Husband underemployed."). Thus, by raising the issue of underemployment, we believe Wife sufficiently raised the issue of income imputation. Second, the issue of income imputation was ruled upon by the family court when it justified its alimony reduction, at least in part, by the fact that there "were no comparable jobs available in the Charleston area" and there was "no compelling reason that [Husband] should be forced to leave the environment he has known for 25 years to seek employment which might pay the same as he was receiving in Charleston." This was an implicit rejection of the argument that Husband was underemployed. See Pryor v. Nw. Apartments, Ltd., 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App. 1996) (finding an issue preserved when the circuit court implicitly ruled on and rejected the respondent's argument). Accordingly, we find the issue is preserved.

b. Merits

Wife argues the family court erred in failing to impute to Husband an income comparable to that of his former position at the Club when modifying his alimony obligations. We disagree.

Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity. Kelley v. Kelley, 324 S.C. 481, 488, 477 S.E.2d 727, 731 (Ct. App. 1996). The failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed. Id. at 488-89, 477 S.E.2d at 731. Although some of the precedents appear inconsistent, the common thread in cases when actual income versus earning capacity is at issue is that courts must closely examine the payor spouse's good faith and reasonable explanation for the decreased income. Id. at 489, 477 S.E.2d at 731; see Mazzone v. Miles, 341 S.C. 203, 209, 532 S.E.2d 890, 893 (Ct. App. 2000) (declining to impute more than minimum wage to husband when there was no evidence that the loss of his job was due to any wrongdoing, or that his decision to start his own business was motivated by a desire to avoid his child support obligations). However, a payor spouse can be found to be

voluntarily underemployed even in the absence of a bad faith motivation. Arnal v. Arnal, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006).

Here, Wife does not dispute Husband lost his job at the Club through no fault of his own. Husband networked for other club positions in the Charleston area but found no other positions available. At one point, Husband submitted his resume to the Country Club of Charleston, but to no avail. Other than this, Husband has not pursued positions at any other clubs outside of Charleston. Instead, he accepted employment outside of his profession at Muhler at a much lower salary than he received at the Club. Husband's explanation for not pursuing employment at his former salary is that he does not wish to relocate from Charleston, where he has lived since 1982. As the family court pointed out, Husband "ha[s] put down roots, ha[s] made friends and ha[s] established [himself] as [a] citizen[] of Charleston County." We find this to be a good faith, reasonable explanation for his reduced income.

To impute to Husband his former income in this case would essentially force him to move outside of Charleston. Courts are reluctant to invade a party's freedom to pursue the employment path of their own choice or impose unreasonable demands upon parties. Kelley, 324 S.C. at 489, 477 S.E.2d at 731; see also LaFrance v. LaFrance, 370 S.C. 622, 647, 636 S.E.2d 3, 16 (Ct. App. 2006) (holding the family court erred by imputing $100,000 income to husband when the available positions identified by wife's expert witness as paying that salary would all require husband to move away from his current residence and his three minor children). Other jurisdictions are similarly reluctant to impute income based on the availability of jobs that require relocation. See Budnick v. Budnick, 595 S.E.2d 50, 59 (Va. Ct. App. 2004) (finding no error in trial court's refusal to impute lost income to wife who refused to accept a job transfer to a different city within the state).

Furthermore, the South Carolina Child Support Guidelines (the Guidelines) address the issue of determining earning capacity. The Guidelines define "income" as "the actual gross income of the parent if employed to full capacity, or potential income if unemployed or

underemployed." S.C. Code Ann. Regs. 114-4720(A) (Supp. 2008). The Guidelines further provide:

> In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of the parent based on that parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community.

Id. (emphasis added). This suggests that, in determining earning capacity for purposes of imputing income, a community standard should be applied when determining the availability of employment.

In sum, we find no error in the family court's decision not to impute to Husband his former income.

3. Whether the trial court erred in reducing Husband's alimony obligations by 55% when Husband's loss of income was approximately 40%?

Wife argues even if the reduction in alimony, in and of itself, was not an abuse of discretion, the family court nevertheless abused its discretion in reducing Husband's alimony obligations by fifty-five percent when Husband's loss of income was only forty percent. However, Wife has cited no legal authority to support the argument that this was an error of law. As such, this argument is conclusory, and such arguments are deemed abandoned on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments).

4. Whether the family court erred in failing to award Husband attorneys' fees and costs?

Husband argues the family court abused its discretion in refusing to award him attorneys' fees and costs. We disagree.

An award of attorneys' fees rests within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006). In determining whether attorneys' fees should be awarded, the following factors should be considered: (1) the party's ability to pay his or her own attorneys' fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorneys' fees 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) (citing Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991)). A beneficial result will not secure an award of attorneys' fees where the other factors do not support such an award. Mazzone, 341 S.C. at 214, 532 S.E.2d at 895.

The family court considered the appropriate factors in its final order and held that "each party should be responsible for paying his and her own respective attorneys' fees." Although Husband's attorney obtained a beneficial result, we believe in light of the other factors, the family court did not abuse its discretion in denying Husband's request for attorneys' fees. According to Husband's affidavit in support of attorneys' fees and costs, his attorneys' fees totaled $12,064.92. According to Wife's financial declaration dated February 18, 2007, she earns a gross income of only $3,474 per month as a school teacher. Thus, Husband's attorneys' fees represent over three months worth of pay for Wife. Moreover, Wife is in no better position to pay Husband's fees than Husband is to pay his own, as Husband earns $60,000 per year at Muhler. Accordingly, we find the family court did not abuse its discretion in refusing to award Husband attorneys' fees and costs.

CONCLUSION

Accordingly, the family court's decision is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Janice C., Henry M., Willie B., George T., Stanley E., John Doe, John Roe, and John Joe, Defendants,

Of Whom Janice C. and Stanley E. are the Appellants.

In the interests of:

B.C., A.C., B.C., J.C., and N.C., minor children under the age of 18.

Opinion No. 4538
Heard January 22, 2009 – Filed April 30, 2009

AFFIRM IN PART AND REVERSE IN PART

Appeal from Williamsburg County
R. Wright Turbeville, Family Court Judge

Charles Thomas Brooks, of Sumter, for Appellants.

Helen McFadden, of Kingstree, for Respondent.

LOCKEMY, J.: This is an expedited termination of parental rights (TPR) action pursuant to section 20-7-1572 of the South Carolina Code

(Supp. 2007) (current version at 63-7-2570 (Supp. 2008)).[1] Janice C. (Mother) appeals the family court's order terminating her parental rights as to her five children (Children). Stanley E. (Father) appeals the family court's termination of his parental rights as to his child, N.C. We reverse the family court's TPR of Mother and affirm the family court's TPR of Father.

FACTUAL / PROCEDURAL BACKGROUND

Mother is a mentally disabled single mother of five special needs children, ages eleven, nine, eight, seven, and four. Each child has a different father. Father is the father of Mother's youngest child, N.C.

In 2004, the Williamsburg County Department of Social Services (DSS) took Children into emergency protective custody. At the time of removal, two of the children lived with Mother and three of the children lived with their maternal grandmother (Grandmother).[2] The family court found Mother's home had no water and no electricity, and Mother was behind in her rent. Grandmother's home had no water, no stove, and weak and sagging floors. In addition, Grandmother was diabetic and had badly swollen knees. Ultimately, the family court held there was probable cause for law enforcement to take emergency protective custody of Children.

DSS developed a treatment plan for Mother and Grandmother. Mother's treatment plan required Mother to secure and maintain appropriate housing, enroll at the South Carolina Department of Disabilities and Special Needs, and complete parenting effectiveness training classes. The family court approved the treatment plan, finding Mother "made some progress

[1] Effective June 16, 2008, the General Assembly amended the Code of Laws of South Carolina by adding Title 63, the South Carolina Children's Code, and transferring all provisions of Title 20, Chapter 7 to Title 63. See Act No. 361, 2008 S.C. Acts 3623 (stating "the transfer and reorganization of the code provisions in this act are technical . . . and are not intended to be substantive").

[2] Mother's three oldest children were removed and placed with Grandmother in 2001 after Mother broke the arms of a non-relative two-year-old girl. As a result of the incident, Mother's name was entered in the South Carolina Central Registry of Child Abuse and Neglect.

toward removing the risk of harm to the minor children." Grandmother passed away during the course of this action.

Father began visiting and supporting his daughter, N.C., in 2006. He had little contact with N.C. prior to that time. Father informed DSS that he was unable to take N.C. because he did not have his own home. Instead, Father suggested DSS place N.C. with Father's adult daughter, Brandy. Although Brandy initially expressed an interest in N.C., Brandy later told DSS she wanted Father to take a paternity test to prove N.C. was her sister. Father refused to take a paternity test. Ultimately, DSS did not offer Father a treatment plan because his parental rights had been terminated as to other children in the past.

DSS initiated a termination of parental rights (TPR) action against Mother, Father, and several other biological fathers in January 2007. In May 2007, the family court terminated Mother's parental rights to Children after finding termination was in the best interest of Children and the following statutory grounds: (1) Children lived outside of Mother's home for six months and Mother failed to remedy the conditions that caused the removal; (2) Mother had a diagnosable condition unlikely to change within a reasonable time and the condition made Mother unlikely to provide minimally acceptable care of Children; (3) Mother neglected Children, and because of the severity or repetition of the abuse or neglect, it was not likely the home could be made safe within twelve months; and (4) Children had been in foster care for fifteen of the most recent twenty-two months.

The family court relied on the testimony of the guardian ad litem (GAL), foster care caseworker, and Mother and Father in determining that TPR was in the best interest of the Children. However, the family court noted: "There is no doubt that Janice C[.] expresses her love and concern for her children. However, she is unable to care for them. Stanley E[.] professes love and concern for his child, but will not change his living situation in order to care for the child." During the termination hearing, the GAL testified TPR was in the Children's best interest because they "need[ed] some permanency." However, GAL admitted he never visited or interviewed Mother or Children. The family court noted: "[GAL's] opinion is that the children are best served by being freed for adoption in order to be placed in a stable home with the opportunity to meet the special needs of each child." In

addition, Gloria Davis, the foster care caseworker, testified Mother failed to complete her treatment plan. Other evidence presented, however, demonstrates Mother was making progress toward completing her treatment plan and had completed all of the parenting classes. The family court's order also terminated Father's parental rights as to N.C. after finding termination was in the best interest of N.C. and the following statutory grounds: (1) Father severely neglected N.C. and it is unreasonable that the home can be made safe within twelve months; (2) Father abandoned N.C.; and (3) N.C. has been in foster care for fifteen out of the most recent twenty-two months. Mother and Father appeal.

II. MOTHER'S APPEAL

A. Standard of Review

Mother first argues the family court applied the incorrect standard of review. Specifically, Mother contends the family court applied the preponderance of the evidence standard in terminating her parental rights instead of the proper clear and convincing standard. We disagree.

Initially, we note the family court's order provides: "Based upon an examination of the pleadings, consideration of all of the testimony and evidence presented, and the recommendations of the guardian ad litem for the minor child, I find that the evidence presented is clear and convincing, and from such evidence and testimony, I make the following findings . . . ." (emphasis added). Based on this language, we find the family court applied the correct standard of review. Furthermore, any error was harmless because we are determining our own findings from the record as to whether clear and convincing evidence supports the termination of parental rights. See S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 609, 582 S.E.2d 419, 423 (2003).

B. Proofs of Service

Mother also argues the family court erred by referencing properly filed acceptances and affidavits of services in its TPR order where the proofs of service were not entered into evidence at the hearing. We disagree.

Rule 201, SCRE, governing the taking of judicial notice, provides as follows:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
>
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . .
>
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding . . . .

When a court takes judicial notice of a fact it "admit[s] into evidence and consider[s], without proof of the facts, matters of common and general knowledge." Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (citation omitted). To be subjected to judicial notice, a fact must be of "such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability." Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (citation omitted). Further, "a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

Here, the family court took judicial notice of acceptances and affidavits of services. These documents were filed with the family court; therefore, they were part of the record. Accordingly, the family court did not err by referencing the documents in its order. Furthermore, even if this court determines the family court erred by referencing the documents, any error was harmless because Mother does not argue any party was improperly served.

C. TPR

Finally, Mother contends the family court erred by terminating her parental rights. We agree.

> The termination of the legal relationship between natural parents and a child presents one [of] the most difficult issues this Court is called upon to decide. We exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result.

Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005).

Procedures for TPR are governed by statute. See S.C. Code Ann. §§ 63-7-2510 to 2610 (Supp. 2008). The purpose of the TPR statute is:

> to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 63-7-2510 (Supp. 2008).

The family court may order TPR upon a finding of one or more of the eleven statutory grounds and a finding that TPR is in the best interest of the child. See S.C. Code Ann. § 63-7-2570 (Supp. 2008). The TPR statute "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship." S.C. Code Ann. § 63-7-2620 (Supp. 2008).

"If the family court finds that a statutory ground for [TPR] has been proven, it must then find that the best interests of the child would be served by [TPR]." Doe v. Baby Boy Roe, 353 S.C. 576, 580, 578 S.E.2d 733, 735 (Ct. App. 2003). "In a termination of parental rights (TPR) case, the best interests of the children are the paramount consideration." Id. at 579, 578 S.E.2d at 735. "The interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 63-7-2620 (Supp. 2008).

In this case, there is no question that at least one of the eleven statutory grounds for TPR has been met. It is undisputed Children have been in foster care since July 27, 2004 and have not lived with Mother since that date. See S.C. Code Ann. § 63-7-2570(8) (Supp. 2008). The question of whether TPR is in Children's best interest, however, is a more difficult issue.

At the TPR hearing, Gloria Davis, a foster care caseworker, testified for DSS. She testified Mother "cares for her Children, but does not know how to parent the children." She stated Mother visited Children in foster care on a regular basis and rarely missed a visit. She also provided nonmonetary support to Children, including food items and clothing. Davis testified Children enjoyed interacting with Mother and recognized Mother as their mother. Although Davis maintained Mother failed to maintain adequate housing, Davis conceded she last visited Mother's home five months prior to the hearing and only observed the living room during that visit. Davis added Mother failed to complete her treatment plan, explaining Mother refused services from the Department of Special Needs and failed to complete parenting classes.

Other evidence presented at the hearing, however, demonstrates Mother was making progress toward completing her treatment plan. Leteesa George, of the Department of Special Needs, testified Mother recently accepted services with the Department of Special Needs. George added she was in the process of preparing Mother's intake packet to determine whether Mother was eligible for services. In addition, Vanessa Boatwright, of Consulting Concepts, testified DSS referred Mother to Consulting Concepts for parenting classes. Boatwright stated Mother completed all of the parenting classes and contributed to the classes.

Dr. Douglas Ritz, a clinical psychologist who evaluated Mother on February 9, 2007, also testified at the hearing. He testified the evaluation lasted approximately two to three hours, and Ritz did not observe Mother taking care of Children. Ritz opined Mother's "cognitive abilities came in the diagnostic category of mild mental retardation" and she functions at a second-grade level. Ultimately, he determined a person with Mother's characteristics could not adequately parent five children without some type of live-in help.

The GAL appointed to the case in 2006 testified although Mother loves Children, visited them, and provided in-kind support, he did not feel she was capable of caring for Children and meeting their needs. He noted Mother's and Children's special needs. GAL further testified Children had been in foster care for three years and were doing well. He admitted he never visited or interviewed Mother or Children but recommended TPR because Children "need[ed] some permanency." However, he further testified that he had no objection to permanent foster care, which would allow the children to have a continuing relationship with their Mother, if no adoptive resource was available.

A primary objective of the TPR statutes is to free children for the stability adoption can provide. See S.C. Code Ann. § 63-7-2510 (Supp. 2008). TPR would leave Children without a legal mother. Reunification may never be a possibility given Mother's limitations. However, reversing TPR will maintain Mother's parental rights and will allow Mother to continue visiting Children, while they remain in their current foster care home where they are receiving the services they need. We hesitate to grant TPR when the GAL and Dr. Ritz never observed Mother interacting with her Children. Furthermore, the record does not reflect and the GAL admitted he never visited or interviewed Mother or Children. Therefore, we do not believe the GAL "conduct[ed] an independent assessment of the facts . . . ." S.C. Code § 63-11-510 (Supp. 2008). We also note a discrepancy in the GAL's testimony. Though he recommended TPR because Children need some permanency, he also recognized Mother loves her Children and has provided in-kind support.

Because Children's best interests are the paramount consideration in a TPR action, under these facts, it appears the family court erred in finding termination of Mother's parental rights was in Children's best interests. We

see no harm in allowing Children to remain in their current placement, which would enable visitation between Mother and Children to continue. Moreover, the record is devoid of any evidence that suitable adoptive parents have been identified. Consequently, TPR will not provide future stability for Children. Accordingly, we believe TPR is premature at this time based on the record before the court and reverse the family court's TPR of Mother.

III. FATHER'S APPEAL

A. Standard of Review

Father argues the family court applied the incorrect standard of review. Mother raised this very same issue in her brief, and it is addressed above. As stated above, we affirm the family court as to this issue and find the family court applied the correct standard of review. Furthermore, any error was harmless because we are determining our own findings from the record as to whether clear and convincing evidence supports the termination of parental rights. See S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. at 609, 582 S.E.2d at 423.

B. Proofs of Service

Father argues the family court erred by referencing properly filed acceptances and affidavits of services in its TPR order where the proofs of service were not entered into evidence at the hearing. Father, however, does not argue any party was improperly served. This issue was raised by Mother and is addressed above. We affirm.

C. Treatment Plan

Father argues the family court erred by ruling DSS was not required to offer him a treatment plan. We disagree.

"If the court orders that a child be removed from the custody of the parent or guardian, the court must approve a placement plan." S.C. Code Ann. § 63-7-1680 (Supp. 2008). "[T]he nature of the changes in the home and family situation that must be made to correct the problems that necessitated removal" must be included in the plan. Id.

Father never had custody of N.C. and has always maintained that he could not provide a home for N.C. In fact, Father did not begin visiting and supporting N.C. until she was in foster care. Furthermore, offering Father a treatment plan to reunite Father with N.C. would have been futile because Father told DSS he was unable to accept custody of N.C. because he did not have his own home.

D. TPR

Finally, Father contends the family court erred by terminating his parental rights. We disagree.

There is no question that at least one of the eleven statutory grounds for TPR has been met. N.C. has been in foster care since July 27, 2004 and she has never lived with Father. See S.C. Code Ann. § 63-7-2570(8). Additionally, because the evidence clearly and convincingly indicates TPR is in N.C.'s best interest we affirm the family court's TPR of Father.

Father lives with his girlfriend and has admitted he cannot bring N.C. into that home. Father's situation can also be distinguished from that of Mother. Evidence demonstrates Mother completed her parenting classes and rarely missed visits with her children. We find Mother's efforts to comply with her treatment plan, together with her mental handicaps distinguish her situation from Father's situation. Furthermore, Mother has maintained a relationship with her Children since their birth, whereas Father's relationship with N.C. only began in 2006. Additionally, though not outcome determinative, we find problems with Father's failure to submit to a paternity test. Accordingly, we believe terminating Father's parental rights is in N.C.'s best interest and the family court's order is therefore

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and THOMAS, J.J., concur.