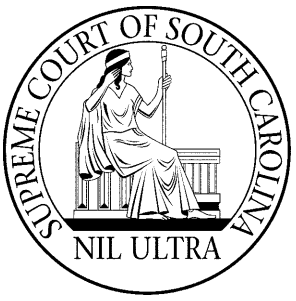

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 23, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Darrell Dotson, Respondent

Appellate Case No. 2019-001503

Opinion No. 27922
Submitted September 26, 2019 – Filed October 23, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Carey Taylor Markel, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

James Darrell Dotson, of North Carolina, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of not more than one year. Respondent requests his suspension be applied retroactively to October 13, 2016, the date of his interim suspension. *See In re Dotson*, 418 S.C. 253, 792 S.E.2d 1 (2016). We accept the Agreement and suspend Respondent from the practice of law in this state for one year, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Client J retained Respondent to represent him in a workers' compensation matter. Respondent failed to completely and diligently pursue Client J's legal matter and

failed to adequately communicate with Client J for several months, including Client J's repeated requests for his client file.

During the time he represented Client J, Respondent suffered from a mental health condition that impaired his fitness to practice law. Respondent failed to seek adequate and appropriate treatment and failed to withdraw from the representation.

Initially, Respondent failed to respond to ODC's notice of investigation regarding Client J's complaint. Ultimately, Respondent appeared before ODC in response to a subpoena issued pursuant to Rule 19(c)(3), RLDE, Rule 413, SCACR. Following a Rule 19(c)(3) interview with ODC, Respondent entered into a deferred discipline agreement, which was accepted by the Commission on October 22, 2014. In the deferred discipline agreement, Respondent admitted violating the following Rules of Professional Conduct: 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), and 8.1 (knowingly failing to respond to a lawful demand for information from a disciplinary authority), Rule 407, SCACR. Respondent agreed to comply with certain terms and conditions set forth in the deferred discipline agreement. When Respondent failed to comply with the deferred discipline agreement, the Commission terminated the agreement on October 16, 2015.

Matter II

Client S paid Respondent $4,500 to represent him in his divorce proceeding. Respondent stopped communicating with Client S, and the divorce action was dismissed based on the 365-day rule. Respondent did not respond to Client S's phone calls.

Respondent initially failed to provide a written response to ODC's notice of investigation. Only after being compelled to appear and provide testimony pursuant to Rule 19, RLDE, did Respondent provide any response to Client S's complaint. Respondent stated he spoke with Client S, met with him "numerous times," prepared and filed the pleadings, and appeared on behalf of Client S at a temporary hearing; however, Respondent admitted he subsequently let the case lapse. Respondent explained he did not provide Client S with his client file because it was locked in a storage unit and Respondent could not afford to pay the past-due bill. Respondent maintained the files were subsequently destroyed by Hurricane Matthew.

Matter III

In April 2011, Client K retained Respondent to represent her in a personal injury claim arising from a car accident. Client K also alleged she retained Respondent to represent her in her divorce. Client K claimed she had not heard from Respondent since April 2016, and he was not returning her calls or text messages. Respondent took no meaningful action on Client K's behalf, leading to the dismissal of her personal injury case. Respondent also failed to respond to ODC's inquiries into this matter.

Relevant disciplinary history

Respondent's relevant disciplinary history includes: (1) a June 21, 1999 letter of caution citing Rule 1.15, RPC; (2) an August 18, 2006 letter of caution citing Rule 8.1, RPC; (3) a January 5, 2011 letter of caution citing Rule 8.1, RPC; and (4) the October 22, 2014 deferred discipline agreement discussed with regard to Matter I above citing Rules 1.1, 1.2, 1.3, 1.4, and 8.1, RPC.

Law

Respondent admits that by his conduct he violated Rules 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.15(d) (safeguarding client property); 1.16(a) (declining or terminating representation); 3.2 (making reasonable efforts to expedite litigation consistent with the interest of the client); 8.1(b) (knowingly failing to respond to a lawful demand for information from a disciplinary authority); and 8.4(e) (engaging in conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR.

Respondent also admits his conduct constitutes grounds for discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for one year. Accordingly, we accept the Agreement and suspend Respondent for a period of one year, retroactive to the date of his interim

suspension. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission, or enter into a reasonable payment plan with the Commission, within thirty (30) days of the date of this opinion. Respondent shall also continue to comply with the April 23, 2019 payment plan he entered into with the Commission to reimburse the Lawyers' Fund for Client Protection (the Lawyers' Fund) for the Receiver's costs and itemized expenses incurred during the receivership. *See In re Dotson*, S.C. Sup. Ct. Order dated Sept. 7, 2017 (terminating the receivership, relieving the Receiver, and ordering Respondent to reimburse the Lawyers' Fund in the amount of $3,476.52 for payments the Lawyers' Fund made to the Receiver's Office).

Additionally, we remind Respondent that, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months or more), including completion of the Legal Ethics and Practice Program Ethics School within one year prior to filing a petition for reinstatement.

Finally, within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Benjamin Cervantes Hernandez, Petitioner.

Appellate Case No. 2019-000023

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
John C. Hayes, III, Circuit Court Judge

Opinion No. 27923
Submitted October 4, 2019 – Filed October 23, 2019

AFFIRMED AS MODIFIED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General Mark Reynolds Farthing, of Columbia, for Respondent.

PER CURIAM: Petitioner filed a petition for a writ of certiorari asking this Court to review the court of appeals' decision in *State v. Hernandez*, Op. No. 2018-UP-

343 (S.C. Ct. App. withdrawn, substituted, and refiled Sept. 26, 2018). We grant the petition, dispense with further briefing, and affirm as modified.

I.

Petitioner visited the home of a family friend in July 2015. During this visit, three female minors accused him of inappropriately touching them. The mother of one of the victims called the police, who arrived at the home shortly thereafter. The police took a statement from Petitioner and later arrested him.

Petitioner was indicted for two counts of criminal sexual conduct (CSC) with a minor in the third degree and one count of CSC with a minor in the second degree. At the trial, the jury acquitted Petitioner of the two counts of CSC with a minor in the third degree, but convicted Petitioner of CSC in the second degree. Petitioner was sentenced to fifteen years' imprisonment and placed on the sex offender registry.

The court of appeals affirmed Petitioner's conviction and sentence. *Id*. Both parties filed petitions for rehearing with the court of appeals. The court of appeals denied both parties' petitions for rehearing, but withdrew the original opinion and substituted a second, unpublished opinion. We granted Petitioner's petition for a writ of certiorari.

II.

Petitioner argues the court of appeals erred in affirming the trial court's denial of his request to charge the jury on first and second degree assault and battery as lesser-included offenses of CSC. Specifically, Petitioner contends this case presents a novel question of law as to whether the codification of common law assault and battery and its various degrees changed the status of assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of CSC. Petitioner asserts the status survived the codification. We disagree.

In 2010, the South Carolina General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act), which codified all assault and battery crimes into ABHAN, and first, second, and third degree assault and battery. S.C. Code Ann. § 16-3-600 (2015). As we stated in *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014), the "legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses," and in place of those offenses, codified "four degrees of assault and battery." 407

S.C. at 315, 755 S.E.2d at 434. The Act also provides that ABHAN is a lesser-included offense of attempted murder; assault and battery in the first degree is a lesser-included offense of ABHAN and attempted murder; assault and battery in the second degree is a lesser-included offense of first degree assault and battery, ABHAN, and attempted murder; and assault and battery in the third degree is a lesser-included offense of second degree assault and battery, first degree assault and battery, ABHAN, and attempted murder. *Id*.

Prior to the passage of the Act, ABHAN was considered a lesser-included offense of CSC. *See State v. Primus*, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002) (holding that despite ABHAN failing the traditional elements test,[1] the Court would continue to treat ABHAN as a lesser-included offense of assault with intent to commit CSC), *overruled on other grounds by State v. Gentry*, 563 S.C. 93, 610 S.E.2d 494 (2005); *see also Magazine v. State*, 361 S.C. 610, 618, 606 S.E.2d 761, 765 (2004) ("ABHAN is a lesser-included offense of CSC.").

In *Primus*, we held ABHAN would be a lesser included offense of assault with intent to commit CSC—despite the fact it failed the elements test—"to have a uniform approach to CSC and ABHAN offenses." 349 S.C. at 581, 564 S.E.2d at 106. We relied on *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001), *overruled on other grounds by Gentry*, 363 S.C. 93, 610 S.E.2d 494, in which we stated "we have consistently incorporated ABHAN into the CSC framework as a lesser included offense of" assault with intent to commit CSC. 346 S.C. at 607, 552 S.E.2d at 729; *see also Magazine*, 361 S.C. at 618, 606 S.E.2d at 765 ("ABHAN is a lesser-included offense of CSC." (citing *Primus*)). Now that the Legislature has codified all degrees of assault and battery crimes, and has particularly set forth which offenses are lesser included offenses, we no longer see the need to ignore the elements test. We now hold ABHAN is not a lesser included offense of CSC. Thus, the trial court did not err in refusing to instruct the jury on ABHAN. Accordingly, we affirm the court of appeals as modified.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

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[1] The elements test evaluates whether each of the offenses requires a different element of proof. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alice Bellardino, Petitioner.

Appellate Case No. 2018-001872

ORIGINAL JURISDICTION

Opinion No. 27924
Submitted October 4, 2019 – Filed October 23, 2019

JUDGMENT DECLARED

Elizabeth Fielding Pringle, Kieley Marie Sutton, and Constantine George Pournaras, of Columbia, for Petitioner.

Attorney General Attorney General Alan McCrory Wilson and Deputy Attorney General Donald J. Zelenka, of Columbia; and Dana M. Thye, of Columbia, for Respondent.

PER CURIAM: We granted Petitioner's request to hear this declaratory judgment action in our original jurisdiction. Petitioner asks us to declare section 44-23-410 of the South Carolina Code (2018) unconstitutional because it precludes summary courts from ordering competency evaluations when there is a question of

a defendant's competence to stand trial. Because we hold section 44-23-410 does not preclude summary courts from ordering competency evaluations, we decline to hold section 44-23-410 unconstitutional.

FACTS

Petitioner was charged with disorderly conduct, and the case was called for trial in the City of Columbia municipal court. At trial, Petitioner's attorney moved for a competency evaluation. Following a hearing on the issue, the municipal court found there was reason to believe Petitioner lacked the capacity to understand the proceedings against her or to assist in her own defense as a result of a lack of mental capacity. Although the court found Petitioner was entitled to a competency evaluation, the court held it did not have the authority to order a competency evaluation because the language of section 44-23-410 (2018) limits the authority to order evaluations to circuit courts and family courts. Accordingly, the court denied the motion for a competency evaluation and stayed all proceedings in Petitioner's case.[1]

LAW

"A person who is: (1) found [in public] in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner . . . is guilty of a misdemeanor" entitled "public disorderly conduct." S.C. Code Ann. § 16-17-530(A) (Supp. 2019). Subsection 16-17-530(A) provides that "upon conviction," the defendant "must be fined not more than one hundred dollars or be imprisoned for not more than thirty days." Summary courts[2] "shall have exclusive jurisdiction

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[1] Petitioner's request to the circuit court to order an evaluation was denied because the case was not before that court.

[2] The term "summary court" is poorly defined in our code of laws. According to subsection 16-3-1510(6) of the South Carolina Code (2015), "'Summary court' means magistrate or municipal court." That is a precise definition, but technically, the definition applies only to title 16, chapter 3, article 15. § 16-3-1510. Historically, "summary court" was a descriptive term used to distinguish a magistrate or municipal court from a court of record. A "court of record" must record all proceedings—word for word—for appellate review. A magistrate court, however, need only summarize what occurred for appellate review. *See* S.C. Code Ann. § 22-3-730 (2007) ("All proceedings before magistrates shall be summary or

of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." S.C. Code Ann. § 22-3-540 (2007).[3] Therefore, a defendant charged with disorderly conduct may not be tried in circuit court, but must be tried in the exclusive jurisdiction of the summary court.

However, a person who lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing a defense may not be subjected to a trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This prohibition is "fundamental to an adversary system of justice." *Id*. at 172. The conviction of an accused person who is legally incompetent violates due process, and state procedures must be adequate to protect this right. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Therefore, a summary court must have the power to order that an expert evaluate a defendant the court suspects lacks competency, to determine whether the court's suspicion is valid. Otherwise, due process prevents the court from proceeding to trial.

Section 44-23-410(A) (2018) provides, in part:

> Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall: (1) order examination of the person [by the Department of Mental Health or the Department of Disabilities and Special Needs]; or (2) order the person committed for examination and

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with only such delay as a fair and just examination of the case requires."). Thus, a magistrate court is by definition "summary" in some contexts, but it is by description "summary" in all contexts.

[3] Section 22-3-540 uses the term "Magistrates," but as we explained in footnote 2, the magistrate court is a summary court.

> observation to an appropriate facility of the Department of Mental Health or the Department of Disabilities and Special Needs."

Nothing in section 44-23-410 references summary courts or their authority to order competency evaluations. Rather, section 44-23-410 provides procedural requirements for circuit courts and family courts ordering competency evaluations. However, there is also nothing in section 44-23-410 prohibiting a summary court from ordering an evaluation. To construe the section as prohibiting a summary court from ordering an evaluation when the court suspects the defendant is not competent would render the section unconstitutional. "We will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation." *Hampton v. Haley*, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013) (citing *Joytime Distributors & Amusement Co., Inc. v. State,* 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)).

Because a competency determination is required by due process when the trial court suspects the defendant lacks competence, we construe section 44-23-410 to merely set forth the formal procedure to be followed in circuit and family court, and not to limit the authority of summary courts to order an evaluation. Because it is necessary to protect the due process rights of defendants, summary courts must have the inherent authority to order competency evaluations.

The question becomes who must pay for the evaluation. Pursuant to section 44-23-410, when such an evaluation is ordered by a circuit or family court, the examination must be provided or paid for by the Department of Mental Health or the Department of Disabilities and Special Needs. There is no such provision for an evaluation ordered by the summary court. As we have explained, summary courts have the inherent power to order an evaluation, but no court has inherent power to order an executive branch agency to pay for one. Thus, until the Legislature has a chance to address the provision of such examinations, the prosecuting entity must agree to pay the costs of the evaluation of indigent defendants. Otherwise—as the summary court ordered here—the prosecution may not go forward.

JUDGMENT DECLARED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

Re: Amendments to Rules 407; 413; 428; 501; and 502,
South Carolina Appellate Court Rules

Appellate Case No. 2019-000372

ORDER

The Office of Commission Counsel, on behalf of the Commission on Lawyer Conduct and the Commission on Judicial Conduct, has submitted a number of proposed amendments to the Rules for Lawyer Disciplinary Enforcement, which are contained in Rule 413 of the South Carolina Appellate Court Rules; and the Rules for Judicial Disciplinary Enforcement, which are contained in Rule 502 of the South Carolina Appellate Court Rules.

The amendments to Rule 413 and Rule 502: (1) detail the process for a lawyer or judge to appear before disciplinary counsel to respond to questions; (2) clarify that the official transcript of proceedings is prepared by the Commission court reporter; (3) detail how disciplinary counsel alerts the Supreme Court when a complaint is filed against a lawyer or judge during review of another matter by the Supreme Court; (4) restrict additional filings by any party following a motion for reconsideration of an order placing a lawyer or judge on interim suspension; (5) restructure the rule detailing the process for a lawyer to seek reinstatement following a suspension of less than nine months; (6) require that a lawyer seeking reinstatement after suspension of nine months or more must reimburse, or enter into a payment plan to reimburse, the Lawyers' Fund for Client Protection for all claims paid on the lawyer's behalf; (7) clarify that disciplinary counsel must notify the complainant of the disposition of a complaint, and allow disciplinary counsel to release information about a previously dismissed complaint to the lawyer or judge who was the subject of the dismissed complaint; (8) clarify that the Rules of Civil Procedure and the Rules of Evidence apply only after formal charges have been filed; and (9) require that complaints against lawyers and judges be filed with the

Office of Disciplinary Counsel, rather than the Commission on Lawyer Conduct or the Commission on Judicial Conduct.

The amendment requiring complaints against lawyers and judges be filed with the Office of Disciplinary Counsel requires minor amendments to a number of other court rules. Those other rules include several of the Rules of Professional Conduct,[1] which are contained in Rule 407 of the South Carolina Appellate Court Rules; Rule 428(b) of the South Carolina Appellate Court Rules; and Canon 3D of the Code of Judicial Conduct, which is contained in Rule 501 of the South Carolina Appellate Court Rules.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we grant the Office of Commission Counsel's request to amend these various rules, with some modifications. The amendments, which are set forth in the attachment to this Order, are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
October 23, 2019

[1] We note Rule 1.15(h) of the Rules of Professional Conduct has been amended to state that every lawyer maintaining a trust account must file a written directive requiring the financial institution to report to the Office of Disciplinary Counsel, rather than to the Commission on Lawyer Conduct, when any properly payable instrument is presented for payment against insufficient funds. We recognize these written directives will take time to update; therefore, lawyers whose written instruments currently require reporting to the Commission of Lawyer Conduct are not in violation of the rule. Lawyers should update these directives at their earliest convenience.

The Rules for Lawyer Disciplinary Enforcement (RLDE), which are contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), are amended to provide as follows:

Rule 2(e), RLDE is amended to provide:

> **(e) Complaint:** information in any form from any source received by disciplinary counsel that alleges, or from which a reasonable inference can be drawn, that a lawyer committed misconduct or is incapacitated. If there is no written complaint from another person, disciplinary counsel's written statement of the allegations constitutes the complaint.

Rule 6(b), RLDE, is amended to add the following provision as paragraph (4), with the remaining paragraphs renumbered to reflect the change:

> **(4)** supervise and monitor scheduling of Commission court reporter;

Rule 9, RLDE, is amended to provide:

> **RULE 9**
> **CIVIL RULES APPLICABLE**
>
> Except as otherwise provided in these rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure apply in lawyer discipline cases following the filing of formal charges, incapacity cases, and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. The right to discovery, however, applies only after formal charges have been filed and shall be limited to that provided by Rule 25.

The first sentence of Rule 12(d), RLDE, is amended to provide:

> **(d) Disclosure Necessary for Withdrawal as Counsel.** When it is necessary to obtain the permission of a tribunal to withdraw from representation, a lawyer may reveal the fact that the client filed a complaint with disciplinary counsel to help establish good cause for withdrawal.

Rule 16(c), RLDE, is amended to provide:

> **(c) Action by Disciplinary Counsel.** Upon receiving competent evidence that a lawyer has been charged or convicted of a crime, disciplinary counsel shall determine whether the crime involved is a serious crime as defined by Rule 2. If the crime is a serious crime, disciplinary counsel may seek an interim suspension under Rule 17(a) if the lawyer has been charged with a serious crime, and shall seek an interim suspension under Rule 17(a) if the lawyer has been convicted of a serious crime. If the crime is not a serious crime, disciplinary counsel shall process the matter in the same manner as any other information coming to the attention of disciplinary counsel.

Rule 17(d), RLDE, is amended to provide:

> **(d) Motion for Reconsideration.** A lawyer placed on interim suspension may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on disciplinary counsel. Any additional filings by the lawyer or disciplinary counsel shall be made only upon request by the Supreme Court.

Rule 19(a), RLDE, is amended to provide:

> **(a) Screening.** Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges lawyer misconduct, incapacity, or the inability to

participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. If the information would not constitute misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. Disciplinary counsel shall notify the complainant of the disposition of the complaint. Disciplinary counsel is not required to notify the lawyer of the complaint or disposition but may release information about the complaint to the lawyer upon written request. If the information raises allegations that would constitute lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 19(c)(3) and (4), RLDE, are amended to provide:

(3) Before disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions from disciplinary counsel. The appearance shall be on the record at the date, time, and place scheduled by disciplinary counsel, and the testimony shall be under oath or affirmation. The appearance shall be conducted by disciplinary counsel in the manner disciplinary counsel deems appropriate. If disciplinary counsel requests the lawyer's appearance, disciplinary counsel must give the lawyer 20 days' notice.

(4) Any person making an appearance and answering questions pursuant to Rule 19 shall be entitled to obtain the official transcript of his or her testimony from the Commission court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown. The lawyer may arrange to have a separate stenographic record and transcription made at the lawyer's own expense.

The first two sentences of Rule 19(e), RLDE are amended to provide:

> **(e) Complaints Against Disciplinary Counsel.** Complaints against disciplinary counsel or a lawyer member of disciplinary counsel's staff shall be filed with the Commission on Lawyer Conduct for review by Commission counsel. If a complaint is filed with disciplinary counsel and is against disciplinary counsel or a lawyer member of disciplinary counsel's staff, disciplinary counsel shall immediately forward the complaint to Commission counsel.

Rule 26(c)(5), RLDE, is amended to provide:

> **(5)** The hearing shall be recorded verbatim and the official transcript shall be promptly prepared by the Commission court reporter and filed with the Commission. A copy of the transcript shall be made available to the respondent at respondent's expense.

Rule 27(d), RLDE, is amended to provide:

> **(d) Stay for Further Proceedings.** Disciplinary counsel shall advise the Supreme Court if it receives any other complaint(s) against respondent during review by the Supreme Court. Disciplinary counsel may also advise the Supreme Court if there any pending complaints against respondent at the time the matter is submitted for review. The Supreme Court may stay its review pending the Commission's determination of any other complaint(s). The Supreme Court may impose a single sanction covering all recommendations for discipline from the Commission against a respondent.

Rule 29(a), RLDE, is amended to provide:

> **(a) Lawyers Disciplined or Transferred to Incapacity Inactive Status in Another Jurisdiction.** Within fifteen days of being disciplined or transferred to incapacity inactive status in another jurisdiction, a lawyer admitted to practice in this state shall inform

disciplinary counsel in writing of the discipline or transfer. Upon notification from any source that a lawyer within the jurisdiction of the Commission has been disciplined or transferred to incapacity inactive status in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with the Commission and the Supreme Court.

Rule 32, RLDE, is amended to provide:

RULE 32
REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION OF LESS THAN NINE MONTHS

(a) Affidavit for Reinstatement. Unless otherwise provided for in the Supreme Court's suspension order, a lawyer who has been suspended for a definite period of less than 9 months shall be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel and the Commission on Lawyer Conduct, an affidavit stating that the lawyer:

(1) is in good standing with the Commission on Continuing Legal Education and Specialization with regard to mandatory continuing legal education requirements, and the lawyer has no outstanding license fees due to the South Carolina Bar;

(2) has fully complied with the requirements of the suspension order;

(3) has completed the Legal Ethics and Practice Program Ethics School within the preceding year or the lawyer certifies he or she will enroll in and complete the next available Legal Ethics and Practice Program Ethics School; and

(4) has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the receiver or the attorney appointed to

assist the receiver pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the attorney appointed to assist the receiver under Rule 31(g), RLDE.

(b) Pending Disciplinary Investigations. The lawyer must also provide a statement from disciplinary counsel stating whether any disciplinary investigations are currently pending against the lawyer. If a disciplinary investigation is currently pending against the lawyer, the Supreme Court shall give disciplinary counsel an opportunity to oppose the lawyer's reinstatement pending the conclusion of that investigation. For the purposes of meeting this requirement, a lawyer who files a petition for reinstatement under this rule waives the confidentiality provisions of Rule 12 concerning any pending investigations.

(c) Additional Requirements for Criminal Convictions. If suspended for conduct resulting in a criminal conviction and sentence, the lawyer must also successfully complete all conditions of the sentence, including, but not limited to, any period of probation or parole. In such a case, the lawyer must attach to the affidavit documentation demonstrating compliance with this provision.

(d) Proof of Service; Filing Fee. The affidavit filed with the Supreme Court shall be accompanied by proof of service on disciplinary counsel and the Commission on Lawyer Conduct and a filing fee of $200.

(e) Order Granting Petition. When all preconditions set out in this rule are met, the Court shall issue an order of reinstatement. The order shall be public.

Rule 33(f), RLDE, is amended to add paragraph (12), which provides:

(12) The lawyer has reimbursed the Lawyers' Fund for Client Protection for all claims paid on the lawyer's behalf or has entered into

a payment plan with the Commission on Lawyer Conduct for reimbursement to the Lawyers' Fund for Client Protection for all claims paid on the lawyer's behalf.

The Rules for Judicial Disciplinary Enforcement (RJDE), which are contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR), are amended as follows:

Rule 2(e), RJDE, is amended to provide:

> **(e) Complaint:** information in any form from any source received by disciplinary counsel that alleges or from which a reasonable inference can be drawn that a judge committed misconduct or is incapacitated. If there is no written complaint from another person, disciplinary counsel's written statement of the allegations constitutes the complaint.

Rule 6, RJDE, is amended to add the following provision as paragraph (3), with the remaining paragraphs renumbered to reflect the change:

> **(3)** supervise and monitor scheduling of Commission court reporter;

Rule 9, RJDE, is amended to provide:

> **RULE 9. CIVIL RULES APPLICABLE**
>
> Except as otherwise provided in these rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure apply in judicial discipline cases following the filing of formal charges, incapacity cases, and proceedings to determine whether a judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. The right to discovery, however, applies only after formal charges have been filed and shall be limited to that provided by Rule 25.

Rule 16(c), RJDE, is amended to provide:

> **(c) Action by Disciplinary Counsel.** Upon receiving competent evidence that a judge has been charged or convicted of a crime, disciplinary counsel shall determine whether the crime involved is a serious crime as defined by Rule 2. If the crime is a serious crime, disciplinary counsel may seek an interim suspension under Rule 17(a) if the judge has been charged with a serious crime, and shall seek an interim suspension under Rule 17(a) if the judge has been convicted of a serious crime. If the crime is not a serious crime, disciplinary counsel shall process the matter in the same manner as any other information coming to the attention of disciplinary counsel.

Rule 17(d), RJDE, is amended to provide:

> **(d) Motion for Reconsideration.** A judge placed on interim suspension may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on disciplinary counsel. Any additional filings by the judge or disciplinary counsel shall be made only upon request by the Supreme Court.

Rule 19(a), RJDE, is amended to provide:

> **(a) Screening.** Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges judicial misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. If the information would not constitute misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. Disciplinary counsel shall notify the complainant of

the disposition of the complaint. Disciplinary counsel is not required to notify the judge of the complaint or disposition but may release information about the complaint to the judge upon written request. If the information raises allegations that would constitute judicial misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 19(c)(3) and (4), RJDE, are amended to provide:

(3) Before disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the judge may request that the judge appear before disciplinary counsel to respond to questions from disciplinary counsel. The appearance shall be on the record at the date, time, and place scheduled by disciplinary counsel, and the testimony shall be under oath or affirmation. The appearance shall be conducted by disciplinary counsel in the manner disciplinary counsel deems appropriate. If disciplinary counsel requests the judge's appearance, disciplinary counsel must give the judge 20 days' notice.

(4) Any person making an appearance and answering questions pursuant to Rule 19 shall be entitled to obtain the official transcript of his or her testimony from the Commission court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown. The judge may arrange to have a separate stenographic record and transcription made at the judge's own expense.

Rule 26(c)(5), RJDE, is amended to provide:

(5) The hearing shall be recorded verbatim and the official transcript shall be promptly prepared by the Commission court reporter and filed with the Commission. A copy of the transcript shall be made available to the respondent at respondent's expense.

Rule 27(d), RJDE, is amended to provide:

> **(d) Stay for Further Proceedings.** Disciplinary counsel shall advise the Supreme Court if it receives any other complaint(s) against respondent during review by the Supreme Court. Disciplinary counsel may also advise the Supreme Court if there any pending complaints against respondent at the time the matter is submitted for review. The Supreme Court may stay its review pending the Commission's determination of any other complaint(s). The Supreme Court may impose a single sanction covering all recommendations for discipline from the Commission against a respondent.

The following Rules of Professional Conduct, which are located in Rule 407 of the South Carolina Appellate Court Rules (SCACR), are amended to provide as follows.

The first sentence of Rule 1.15(h), RPC, is amended to provide:

> (h) Every lawyer maintaining a law office trust account shall file with the financial institution a written directive requiring the institution to report to the Office of Disciplinary Counsel when any properly payable instrument drawn on the account is presented for payment against insufficient funds.

Rule 5.1, Cmt. 9, RPC, is amended to provide:

> [9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Office of Disciplinary Counsel is found in Rule 428, SCACR. See also Rule 8.3(c) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

Rule 7.3(d)(3), RPC, is amended to provide:

> (3) Each solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS COMMUNICATION OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE OFFICE OF DISCIPLINARY COUNSEL, 1220 SENATE STREET, SUITE 309, COLUMBIA, SOUTH CAROLINA 29201—TELEPHONE NUMBER 803-734-2038." Where the solicitation is

written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

Rule 8.3(a) and (b), RPC, is amended to provide:

(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Office of Disciplinary Counsel in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

(b) A lawyer who is disciplined or transferred to incapacity inactive status in another jurisdiction shall inform the Office of Disciplinary Counsel in writing within fifteen days of discipline or transfer.

Rule 428(b), SCACR, is amended to provide:

> **(b)** The Attorneys to Intervene shall promptly report to the Executive Director whether any actions were recommended to the lawyer, whether the lawyer agreed to any recommendations, and whether further action is recommended. Further action may include action under Rule 28, RLDE, Rule 413, SCACR. In the event a referral to the Office of Disciplinary Counsel is recommended by the Attorneys to Intervene, that referral shall be made by them promptly.

Canon 3D(4) of the Code of Judicial Conduct, which is contained in Rule 501, SCACR would also be amended to provide:

> **(4) A judge who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Office of Disciplinary Counsel in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.**

The Supreme Court of South Carolina

Re: Amendment to Rule 411(b), South Carolina Appellate Court Rules

Appellate Case No. 2019-001577

ORDER

The South Carolina Bar has proposed amending Rule 411(b) of the South Carolina Appellate Court Rules to permit members of the Lawyers' Fund for Client Protection Committee to serve up to two consecutive terms, and to allow the Court to appoint members for less than a full three-year term to stagger membership terms.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we amend Rule 411(b) of the South Carolina Appellate Court Rules as set forth below, effectively immediately.

> **(b) Membership and Terms of Office of Lawyers' Fund for Client Protection Committee.** The Lawyers' Fund for Client Protection Committee shall consist of twelve (12) members of the South Carolina Bar and one (1) member selected from the general public appointed by the President and approved by the Supreme Court. The appointments shall be for a term of three (3) years, and no member shall serve more than two (2) consecutive terms. The Court, in its discretion, may appoint members for terms of less than three (3) years so that the number of terms expiring shall be approximately the same each year. Vacancies shall be filled for the unexpired term in the same manner as the original appointments to the Committee.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
October 23, 2019

The Supreme Court of South Carolina

Re: Amendments to Rule 501, South Carolina Appellate Court Rules

Appellate Case No. 2019-000847

ORDER

The South Carolina Bar has proposed amending the Commentary to Canon 4B of the Code of Judicial Conduct, which is contained in Rule 501 of the South Carolina Appellate Court Rules, to include a new paragraph permitting judges to encourage lawyers to provide pro bono services. We grant the Bar's request to add the commentary, with a minor modification to the last sentence.

Pursuant to Article V, Section 4 of the South Carolina Constitution, Canon 4B is amended, as set forth in the attachment to this Order. This amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
October 23, 2019

Canon 4B, CJC, Rule 501, SCACR is amended to add the following language as the second paragraph in the Commentary:

> A judge may promote the administration of justice by supporting and encouraging lawyers to provide pro bono legal services as long as the judge does not employ coercion or abuse the prestige of the judicial office. Such support and encouragement may include, but is not limited to: participating in events to recognize lawyers who do pro bono work; establishing general procedural or scheduling accommodations for pro bono lawyers as feasible; acting in an advisory capacity to pro bono programs; assisting an organization in the recruitment of lawyers or law firms to provide pro bono legal services so long as the recruitment effort cannot reasonably be perceived as coercive; participating in programs concerning the law which promote the provision of pro bono legal services; and providing leadership in convening, participating or assisting in advisory committees and community collaborations devoted to the provision of legal services to the indigent or those with low incomes.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael P. Thornton, Respondent,

v.

Anita L. Thornton, Appellant.

Appellate Case No. 2016-001177

Appeal From Dorchester County
William J. Wylie, Jr., Family Court Judge

Opinion No. 5688
Heard October 1, 2018 – Filed October 23, 2019

AFFIRMED AS MODIFIED

Megan Catherine Hunt Dell, of Dell Family Law, P.C., of Charleston; and Theresa Marie Wozniak Jenkins, of Theresa Wozniak Jenkins, Attorney at Law, LLC, of Charleston, both for Appellant.

Michael P. Thornton, of Ridgeville, pro se.

WILLIAMS, J.: In this domestic relations matter, Anita L. Thornton (Wife) appeals the family court's final divorce decree, arguing the family court erred in (1) identifying, valuing, and apportioning marital assets and debts; (2) miscalculating Wife's child support obligation; (3) awarding primary custody of the parties' two children to Michael P. Thornton (Husband); (4) failing to find Wife prejudiced by a "structural" error related to a hearing on her petition to enforce visitation; (5)

relying too heavily on the guardian ad litem's (GAL) conclusions; (6) relying on the forensic consultant, Dr. Marc Harari's conclusions, which were based on information provided by the GAL; (7) granting Husband a divorce on the ground of adultery; (8) failing to find a conflict of interest regarding a personal relationship between Husband and an employee of the Dorchester County Clerk of Court; and (9) requiring the parties to pay their own attorney's fees, requiring Wife to pay a greater percentage of the GAL's fees and Dr. Harari's fees, and requiring Wife to pay the private investigator's fees. We affirm as modified.[1]

FACTS/PROCEDURAL HISTORY

Husband and Wife married on November 16, 1996. The parties have two emancipated children. In 2011, Husband introduced Wife to his co-worker, Charles Stringfellow (Stringfellow). Stringfellow and his son spent significant time with Husband, Wife, and the parties' children. Wife indicated Husband encouraged her relationship with Stringfellow. Wife and Stringfellow began to spend time alone together, and Wife talked with Stringfellow about the problems she and Husband had in their relationship. In April or May 2012, Husband became suspicious of Wife's activities after he witnessed Wife consistently coming home late at night and discovered phone calls and text messages between Wife and Stringfellow. When Husband confronted Wife, she denied engaging in an extramarital affair. Husband hired Steven Russell, a private investigator, to follow Wife and document her activities because Husband believed Stringfellow was Wife's paramour. Russell observed Wife and Stringfellow at Stringfellow's apartment on a number of occasions.

In August 2012, Husband filed for divorce on the ground of adultery. That action was administratively dismissed, and Husband filed a new complaint on January 9, 2014, again seeking a fault-based divorce on the ground of adultery. Wife answered and counterclaimed against Husband, seeking a divorce on the ground of one year's continuous separation.

The family court held an eight-day final merits hearing over the course of three months and subsequently issued a final order and decree of divorce (the Final

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[1] Appellant conceded at oral argument that the issues concerning equitable distribution, grounds for divorce, and fees and costs are the only issues remaining before this court due to the emancipation of the parties' children.

Order), granting Husband a divorce on the ground of Wife's adultery. The Final Order awarded joint custody of the minor children to the parties with Husband as the primary legal and physical custodian. The Final Order required Wife to pay sixty-seven percent of the GAL's fees[2] and sixty-seven percent of Dr. Harari's fees.[3] Wife was also required to reimburse Husband $3,770 for his private investigator's fees. Each party was responsible for his or her own attorney's fees.

As to equitable distribution, the Final Order found Wife was entitled to one-half of the value of Husband's 401K Account (the 401K Account) as of May 12, 2014 ($56,040.69), which amounted to $28,020.35. The Final Order also required each party to pay one-half of a $27,100 debt owed to the 401K Account (the Loan), so the family court reduced Wife's portion of the 401K Account and awarded Wife $14,470 from the 401K Account. The Final Order subsequently required Wife to pay one-half of the $12,254.95 remaining balance of the Loan (the Remaining Loan Balance). Each party was ordered to pay one-half of the outstanding debt owed to Verizon Wireless (the Verizon Debt). Wife was awarded one-half of Husband's pension plan (the Pension Plan) upon its vesting on June 8, 2016 ($72,034.08), which amounted to $36,017.04. The Final Order required Husband to pay Wife $6,623.95 for her equity in a Jayco Hornet Camper (the Camper). With regards to the former marital home (the Home), both parties requested and the family court ordered Husband to remove Wife's name from the mortgage, refinance the Home within ninety days, and pay Wife one-half of the equity. Wife filed a Rule 59(e), SCRCP, motion seeking reconsideration, which the family court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in identifying, valuing, and apportioning marital assets and debts?

II. Did the family court err in granting a divorce to Husband on the ground of adultery?

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[2] The family court calculated sixty-seven percent of the GAL's fees to be $13,531.63

[3] The family court calculated sixty-seven percent of Dr. Harari's fees to be $7,872.50.

III. Did the family court err in requiring the parties to pay their own attorney's fees, requiring Wife to bear a greater portion of the fees incurred by the GAL and Dr. Harari, and requiring Wife to reimburse Husband for the private investigator's fees?

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

LAW/ANALYSIS

I. Equitable Distribution

Wife argues the family court erred in the equitable division of the Loan, the 401K Account, the Camper, the Pension Plan, the Verizon Debt, and the Home.

"In reviewing a division of marital property, an appellate court looks to the overall fairness of the apportionment." *Brown v. Brown*, 412 S.C. 225, 235, 771 S.E.2d 649, 655 (Ct. App. 2015). "Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is fair." *Doe v. Doe*, 370 S.C. 206, 213–14, 634 S.E.2d 51, 55 (Ct. App. 2006).

A. The Loan

Wife argues the family court erred in (1) finding the Loan was a marital debt and (2) equitably apportioning the Loan. We affirm the family court's finding that the Loan was a marital debt and the apportionment of the 401K Account, but we modify the family court's apportionment of the Loan.

1. The Loan as Marital Property

"For purposes of equitable distribution, a 'marital debt' is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable." *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005). Subsection 20-3-620(B)(13) of the South Carolina Code (2014) requires the family court to consider "existing debts incurred by the parties or either of them during the course of the marriage" when equitably apportioning the parties' marital property. Subsection 20-3-620(B)(13) "creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment." *Pruitt v. Pruitt*, 389 S.C. 250, 264, 697 S.E.2d 702, 710 (Ct. App. 2010). "Therefore, when a debt is proven to have accrued before the commencement of marital litigation, the burden of proving the debt is non-marital rests on the party who makes such an assertion." *Schultze v. Schultze*, 403 S.C. 1, 8, 741 S.E.2d 593, 597 (Ct. App. 2013).

Husband testified that in May 2012 he obtained the Loan for $27,100 for marital purposes. He admitted he did not tell Wife about the Loan. Husband presented undisputed testimony that he used the Loan funds to pay various marital bills and to repay loans from his parents that were obtained by Husband and Wife to pay marital bills such as their mortgage payment. Husband asserted he made all of the payments towards the Loan, and the current Loan balance is $12,254.95 (the Remaining Loan Balance). Wife did not present any evidence regarding the nature of the Loan or contradicting Husband's testimony about the use of its funds to rebut the presumption that the Loan was a marital debt. *See Pruitt*, 389 S.C. at 264, 697 S.E.2d at 710 (finding subsection 20-3-620(B)(13) "creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in to the totality of the equitable apportionment"). We find Wife has failed to meet her burden of proving the Loan is non-marital. *See Schultze*, 403 S.C. at 8, 741 S.E.2d at 597 ("[W]hen a debt is proven to have accrued before the commencement of the marital litigation, the burden of proving the debt is non-marital rests on the party who makes such an assertion."). Therefore, we find the family court did not err in classifying the Loan as a marital debt or in finding Husband and Wife are equally responsible for the Loan.

2. Apportionment of the 401K Account and the Loan

The family court erred in reducing Wife's portion of the 401K Account by one-half of the amount of the Loan while also requiring Wife to pay one-half of the Remaining Loan Balance. Requiring Wife to pay one-half of the Remaining Loan Balance while simultaneously reducing her portion of the 401K Account by half of the Loan would result in overpayment by Wife. Thus, we modify the family court's apportionment of the Remaining Loan Balance to make Husband responsible for the entire Remaining Loan Balance. We affirm the family court's apportionment of the 401K Account with Husband receiving $41,570.34 and Wife receiving $14,470.35. This apportionment satisfies Wife's responsibility for one-half of the Loan.

B. The Camper

Wife argues the family court erred in its valuation of the Camper. Specifically, Wife argues it was an error of law for the family court to average the values for the Camper assigned by Husband and Wife.

Wife testified the parties bought the Camper in 2007 or 2008 for $24,000. Wife asserted the Camper had a current value of $16,955, and Husband testified the Camper's current value was approximately $9,000 to $10,000. The parties did not present an appraisal to the family court and failed to provide other credible evidence of valuation. In the Final Order, the family court determined the Camper's value was $13,247.90 by averaging the values provided by the parties and awarding Wife $6,623.95, one-half of the value. We find the family court erred in averaging the values provided by the parties to arrive at a value, but upon our de novo review, we find the value of $13,247.90 is appropriate and within the range of the evidence presented. *See Ferguson v. Ferguson*, 300 S.C. 1, 5, 386 S.E.2d 267, 269 (Ct. App. 1989) (finding it is inappropriate for the family court to average the property values testified to by the parties to arrive at a value), *superseded by statute on other grounds*, S.C. Code Ann. § 20-3-130(D) (2014), *as recognized by Gilfillin v. Gilfillin*, 344 S.C. 407, 544 S.E.2d 829 (2001)); *Pirri v. Pirri*, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (2006) ("A family court may accept the valuation of one party over another, and the court's valuation of martial property will be affirmed if it is within the range of evidence presented."). Therefore, we find Wife is entitled to $6,623.95, one-half of the Camper's value.

C. The Pension Plan

Wife argues the family court erred in awarding her a specific, numerical amount of the Pension Plan because the total value of the Pension Plan used by the family court is not supported by the evidence. We agree.

A nonvested pension plan is subject to equitable distribution. *Ball v. Ball*, 314 S.C. 445, 447, 445 S.E.2d 449, 450 (1994). However, because "the distribution of the other assets is not affected by the award of the nonvested pension plan, its exact dollar value is not crucial." *Id*. at 447, 445 S.E.2d at 451. "Rather, the court must only determine the portion of the plan to which the spouse is entitled." *Id*. at 447–48, 445 S.E.2d at 451. While benefits do not have to be vested to be subject to equitable division, "they are not marital property unless they are earned during the marriage." *Mullarkey v. Mullarkey*, 397 S.C. 182, 189, 723 S.E.2d 249, 253 (Ct. App. 2012); *Shorb v. Shorb*, 372 S.C. 623, 629, 643 S.E.2d 124, 127 (Ct. App. 2007) ("[T]his [c]ourt has consistently held that both vested and nonvested retirement benefits are marital property if the benefits are acquired during the marriage and before the date of filing."); S.C. Code Ann. § 20-3-630(A) (2014) ("[M]arital property . . . means all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of the marital litigation."). This court has held when there are successive actions, the date of filing or commencement of marital litigation that should be used in determining whether property is marital "is triggered by the 'same litigation which brings about the equitable division.'" *Chanko v. Chanko*, 327 S.C. 636, 639–40, 490 S.E.2d 630, 632 (Ct. App. 1997) (*quoting Shannon v. Shannon*, 301 S.C. 107, 112, 390 S.E.2d 380, 383 (Ct. App. 1990)); *id.* at 638–640, 490 S.E.2d at 631–32 (finding that the family court did not err in using the date of the subsequent filing of an action for equitable division—instead of the date of a previous action that was stricken for failure to timely prosecute— in determining what constituted marital property).

At the hearing, Husband testified the Pension Plan did not vest until June 8, 2016, and at that time, the lump sum value of the Pension Plan would be $72,034.08. The family court awarded Wife one-half of that amount—$36,017.04—upon the vesting of the Pension Plan. However, other documentation indicated different lump sum values because the Pension Plan was not yet vested. We find the family court erred in awarding Wife an exact dollar amount from the Pension Plan because the value of the Pension Plan upon vesting was unknown. We modify the

family court's order to award Wife one-half of the Pension Plan accrued between the date of the parties' marriage, November 16, 1996, and the date of the second filing, January 9, 2014, as of the time the Pension Plan vests. *See Shorb*, 372 S.C. at 629, 643 S.E.2d at 127 ("[N]onvested retirement benefits are marital property if the benefits are acquired during the marriage and before the date of filing."); *Chanko*, 327 S.C. at 339–40, 490 S.E.2d at 632 (finding that when determining if property is marital the date of filing or the commencement of litigation from the case that brings about the equitable division should be used by the family court).

D. The Verizon Debt and the Home

Wife argues the family court erred in finding the Verizon Debt was not a marital debt and in failing to include an affirmative obligation for Husband to pay Wife fifty percent of the equity in the Home. We find these arguments are without merit because the Final Order divided the Verizon Debt as a marital debt and ordered each party to pay fifty percent of the debt, and the Final Order required Husband to pay Wife fifty percent of the equity in the Home within ninety days.

In considering the overall fairness of the equitable distribution—with the aforementioned modifications—we find the overall equitable distribution is fair. *See Brown*, 412 S.C. at 235, 771 S.E.2d at 655 ("In reviewing a division of marital property, an appellate court looks to the overall fairness of the apportionment.").

II. Ground for Divorce

Wife argues the family court erred in granting Husband a divorce on the ground of adultery because Husband failed to prove she possessed the inclination and opportunity to commit adultery. We disagree.

"Proof of adultery as a ground for divorce must be 'clear and positive and the infidelity must be established by a clear preponderance of the evidence.'" *Brown v. Brown*, 379 S.C. 271, 277–78, 665 S.E.2d 174, 178 (Ct. App. 2008) (quoting *McLaurin v. McLaurin*, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987)). "Because of the 'clandestine nature' of adultery, obtaining evidence of the commission of the act by the testimony of eyewitnesses is rarely possible, so direct evidence is not necessary to establish the charge." *Id*. at 278, 665 S.E.2d at 178 (quoting *Fulton v. Fulton*, 293 S.C. 146, 147, 359 S.E.2d 88 (Ct. App. 1987)). "[A]dultery may be proven by circumstantial evidence that establishes both a

disposition to commit the offense and the opportunity to do so." *Brown*, 379 S.C. at 278, 665 S.E.2d at 178; *see also Nemeth v. Nemeth*, 325 S.C. 480, 484, 481 S.E.2d 181, 183 (Ct. App. 1997) ("Circumstantial evidence showing the opportunity and inclination to commit adultery is sufficient to establish a prima facie case." (emphasis omitted)). In general, this "proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed." *Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985). "[H]owever, evidence placing a spouse and a third party together on several occasions, without more, does not warrant a finding of adultery." *Gorecki v. Gorecki*, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010). Sexual intercourse is not required to establish adultery; sexual intimacy is sufficient to support a finding of adultery. *Nemeth*, 235 S.C. at 486, 481 S.E.2d at 184.

We find the family court properly granted a divorce to Husband on the ground of adultery because Husband presented clear and positive proof of Wife's infidelity. *See Brown*, 379 S.C. at 277–88, 665 S.E.2d at 178. Husband testified he began to suspect Wife was committing adultery when she began consistently coming home late at night and he discovered Wife's late night and early morning phone calls and text messages with Stringfellow. Russell, Husband's private investigator, testified Wife went to Stringfellow's apartment at 8:48 P.M. on June 23, 2012, and remained in the apartment behind closed doors until 1:20 A.M. on June 24, 2012. Around 1:00 A.M. the same night, Clayton, another private investigator, witnessed Stringfellow walk Wife to her car and observed Wife and Stringfellow exchange a kiss. Russell tracked Wife's car to Stringfellow's apartment complex again on June 26, 2012, and noted Wife and Stringfellow remained in Stringfellow's apartment from 8:38 P.M. until 11:46 P.M. After Stringfellow's son discovered Russell's surveillance that evening, Russell noted Wife and Stringfellow acted "consistent with someone having been caught" when they exited Stringfellow's apartment. Russell also noted Stringfellow had changed clothes and Wife appeared disheveled. Finally, Russell testified that on another occasion during his investigation he personally observed Wife and Stringfellow spend the night together at Wife's mother's house.

Conversely, Wife testified that she and Stringfellow were friends and Husband encouraged her to spend time with Stringfellow and to confide in Stringfellow about issues in their marriage. She indicated she exercised with Stringfellow and played tennis with Stringfellow and his son. Wife testified that during the six

months before the parties' separation, she began to disengage emotionally from her relationship with Husband. Wife denied kissing Stringfellow before her separation from Husband, and she averred that she did not begin a romantic relationship with Stringfellow until January 2013, after Husband filed for divorce the first time.

We find this evidence establishes Wife's inclination and disposition to commit adultery with Stringfellow and her opportunity to do so at Stringfellow's apartment on June 23, 2012, and June 26, 2012. *See Nemeth*, 325 S.C. at 484, 481 S.E.2d at 183 ("Circumstantial evidence showing the opportunity and inclination to commit adultery is sufficient to establish a prima facie case." (emphasis omitted)). Therefore, we affirm the family court's grant of a divorce to Husband on the ground of adultery.[4]

III. Fees and Costs

Wife argues the family court erred in requiring each party to pay his or her own attorney's fees, failing to consider whether the GAL's fees were reasonable, requiring Wife to pay a greater percentage of the GAL's fees and Dr. Harari's fees, and requiring Wife to reimburse Husband for the fees incurred from his private investigator. We disagree.

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[4] Because our finding that the family court properly granted Husband a divorce on the ground of adultery is dispositive, we decline to address Wife's argument that the family court erred in declining to consider an alternate ground for divorce because Husband could not demonstrate by a clear preponderance of the evidence that she committed adultery prior to their separation. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive). Further, Wife's two remaining arguments against a grant of divorce on the ground of adultery related to public policy and the family court's ability to grant a divorce on the ground of one year's continuous separation. However, Wife neither raised these arguments to the family court at the hearing nor in her Rule 59(e), SCRCP, motion. Thus, we find these arguments are not preserved for this court's review. *See Doe v. Roe*, 369 S.C. 351, 375–76, 631 S.E.2d 317, 330 ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses such as attorney's fees, expert fees, and investigation fees to either party in a divorce action. In determining whether to award attorney's fees, the family court should consider the following factors: "(1) the party's ability to pay his/her own attorney's fee; (2) [the] beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). In awarding attorney's fees, the family court must make specific findings of fact on the record for each of the required factors. *McKinney v. Pedery*, 413 S.C. 475, 489, 776 S.E.2d 566, 574 (2015). "When a party's uncooperative conduct in discovery and litigation increases the amount of the other party's fees and costs, the [family] court can use this as an additional basis" in its decision of whether to award attorney's fees. *Bojilov v. Bojilov*, 425 S.C. 161, 185, 819 S.E.2d 791, 804 (Ct. App. 2018). This court has found the same equitable considerations that apply to attorney's fees also apply to costs. *Garris v. McDuffie*, 288 S.C. 637, 644, 344 S.E.2d 186, 191 (Ct. App. 1986).

A. Attorney's Fees

Wife argues the family court erred in requiring each party to pay his or her own attorney's fees. We disagree.

Upon our de novo review, we find the evidence in the record supports the family court's requirement that each party pay his or her own attorney's fees. Both parties are employed, and while Husband has a higher monthly income than Wife, Wife received a loan from Stringfellow to "pay all of her fees and expenses for this litigation." Wife also received portions of the 401K Account, the Pension Plan, the Camper, and the Home in the equitable apportionment of the parties' marital property. Following the parties' separation, Husband paid for Wife's health insurance, and he paid child support to Wife even though he had primary custody of and was financially responsible for the parties' children. Requiring Husband to pay Wife's attorney's fees would have been detrimental to the standard of living of Husband and the parties' children. Additionally, Husband's attorney achieved more beneficial results in the litigation. *See E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816 (requiring a family court to consider the party's ability to pay his or her own attorney's fees, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the attorney's fee on each party's

standard of living when determining whether to award attorney's fees). Furthermore, Wife's filing of additional discovery motions and insisting on pursuing custody despite the children's "unwavering desire" to live with Husband led to additional costs in the action. *See Bojilov*, 425 S.C. at 185, 819 S.E.2d at 804 (noting the court may consider increases in a party's fees and costs caused by the other party's uncooperative conduct in discovery and litigation when determining whether to award attorney's fees); *Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010) ("This court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees."). Accordingly, we affirm the family court's requirement that each party pay his or her own attorney's fees.

B. Reasonableness of the GAL Fees

Wife argues the family court erred in failing to consider whether the GAL's fees were reasonable.

A court-appointed GAL "is entitled to reasonable compensation, subject to the review and approval of the [family] court." S.C. Code Ann. § 63-3-850(B) (2010). Subsection 63-3-850(B) requires the family court to consider the following factors in determining the reasonableness of the GAL's fees and costs:

> (1) the complexity of the issues before the court;
> (2) the contentiousness of the litigation;
> (3) the time expended by the guardian;
> (4) the expenses reasonably incurred by the guardian;
> (5) the financial ability of each party to pay fees and costs; and
> (6) any other factors the court considers necessary.

This court has held that "any other factors the court considers necessary" includes the ultimate work product of the GAL and the completeness of his or her investigation. *Pirayesh v. Pirayesh*, 359 S.C. 284, 297, 596 S.E.2d 505, 512–13 (Ct. App. 2004).[5]

[5] *Pirayesh* cites to section 20-7-1533 of the South Carolina Code (Supp. 2003). 359 S.C. at 297–98, 596 S.E.2d at 512–13. Section 63-3-850 was formerly cited as section 20-7-1533.

The family court originally authorized the GAL to charge a reasonable fee not to exceed $5,000 at an hourly rate of $150; however, the GAL requested and received approval for multiple fee increases throughout the course of the litigation,[6] and the parties agreed to pay Dr. Harari's trial retainer from the GAL's account. At the conclusion of the GAL's testimony, she indicated her fees totaled $20,196.63. Wife admits the dispute was complex and contentious. *See* § 63-3-850(B)(1)–(2) (requiring the family court to consider the complexity of the issues before the court and the contentiousness of the litigation when determining the reasonableness of a GAL's fees and costs). However, Wife argues the GAL expended an unreasonable amount of time.

Upon a de novo review of the record, the GAL's invoices to the parties reveal a thorough investigation and extensive involvement in this case. Her involvement included drafting and submitting reports on her findings, reviewing documents, interviewing eleven individuals, testifying during the eight-day hearing, paying Dr. Harari's retainer from her fees after the parties agreed to do so, and responding to Wife's subpoena for the GAL's entire file and all communications related to the parties' children. Furthermore, the GAL's billing system applied a default hourly rate lower than the authorized $150 to many of the charges, resulting in discounts to the parties, and the GAL credited any interest charges back to the parties. Therefore, we find no excessive or unnecessary charges. *See* § 63-3-850(B)(3)–(4) (requiring the family court to consider the time expended and the expenses reasonably incurred by the GAL in determining the reasonableness of a GAL's fees and costs). As noted in our discussion of the attorney's fees, both parties had the ability to pay the fees. *See* § 63-3-850(B)(5) (requiring the family court to consider the financial ability of each party to pay fees and costs in determining the reasonableness of a GAL's fees and costs). Thus, we find the GAL's fees were reasonable.

C. Apportionment of the GAL and Dr. Harari's Fees

Wife argues the family court erred in requiring her to pay the majority of the GAL and Dr. Harari's fees. We disagree.

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[6] Subsection 63-3-850(A) allows a GAL to exceed the fee initially authorized by the judge if the GAL provides notice to both parties and obtains the judge's written authorization.

A de novo review of the record indicates Wife's conduct during the course of the litigation warrants her being held responsible for a larger proportion of the fees. Wife refused to comply with the GAL's requests for records and the GAL's request that she submit to a test to detect alcohol consumption. Wife also insisted on pursuing custody of the parties' sons despite (1) their "unwavering desire" to live with Husband and (2) her estrangement from her sons. *See Klein v. Barrett*, 427 S.C. 74, 89, 828 S.E.2d 773, 781 (Ct. App. 2019) (affirming the family court's finding that the wife should bear the majority of the fees and costs because she was in a superior financial position and because "a significant portion of the GAL fee was incurred solely as a result of [the wife's] continuously submitted documents and correspondence and other communication to the GAL over the course of [the] litigation"); *see also Garris*, 288 S.C. at 644, 344 S.E.2d at 191 (noting the same equitable considerations that apply to attorney's fees also apply to costs); *Bojilov*, 425 S.C. at 185, 819 S.E.2d at 804 (noting that the court may consider increases in a party's fees and costs caused by the other party's uncooperative conduct in discovery and litigation when determining whether to award attorney's fees). Accordingly, we affirm the family court's award and allocation of the GAL and Dr. Harari's fees.

D. Private Investigator Fees

Wife argues the family court erred in requiring her to pay Husband's private investigator fees. We disagree.

Because Husband provided sufficient evidence to obtain a divorce on the statutory ground of adultery, we find the family court appropriately required Wife to reimburse Husband for his private investigator fees. *See* S.C. Code Ann. §§ 20-3-120 and 20-3-130 (2014) (authorizing the family court to order payment of suit money to either party in a divorce); *Ellerbe v. Ellerbe*, 323 S.C. 283, 298, 473 S.E.2d 881, 889 (Ct. App. 1996) ("Reimbursable expenses include reasonable and necessary expenses incurred in obtaining evidence of a spouse's infidelity."). Thus, we affirm the family court on this issue.

CONCLUSION

Accordingly, the decision of the family court is

AFFIRMED AS MODIFIED.

HUFF and SHORT, JJ., concur.