The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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DEPUTY CLERK

POST OFFICE BOX 11330
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N O T I C E

IN THE MATTER OF MARGARET C. TRIBERT, PETITIONER

On December 19, 2000, Petitioner was definitely suspended from the practice of law for a period of one year, retroactive to July 9, 1999. See In the Matter of Tribert, 343 S.C. 326, 540 S.E.2d 467 (2000). She has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than June 25, 2001.

Columbia, South Carolina

April 24, 2001

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
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N O T I C E

IN THE MATTER OF GEORGE K. LYALL, PETITIONER

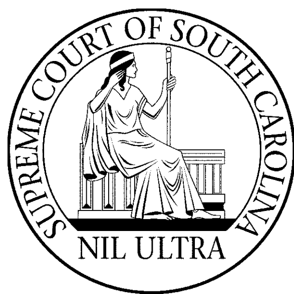
George K. Lyall, who was definitely suspended from the practice of law for a period of nine months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 8, 2001, beginning at 10:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

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

Columbia, South Carolina
April 30, 2001



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 30, 2001

ADVANCE SHEET NO. 16

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Lamarko S. Roscoe, Petitioner,

v.

State of South Carolina, Respondent.

____

ON WRIT OF CERTIORARI

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Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

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Opinion No. 25287
Submitted March 22, 2001 - Filed April 30, 2001

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AFFIRMED

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Assistant Appellate Defender Robert M. Pachak, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, all of Columbia, for respondent.

____

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Lamarko Roscoe's application for Post-Conviction Relief (PCR). We affirm.

FACTS

Roscoe pleaded guilty to kidnapping, armed robbery, and burglary in the first degree.[1] In exchange for his plea, charges of grand larceny, possession of a weapon during commission of a violent crime, and criminal conspiracy were *nol prossed*.[2] At the plea hearing, Roscoe was advised that he could get "as much as 70 years to life" for armed robbery, kidnapping and burglary in the first degree, and that, with the addition of accessory charges, he was facing as much as 140 years to life.[3] The plea judge then advised Roscoe that the potential sentence for armed robbery was **25 years** in jail. In fact, pursuant to S.C. Code § 16-11-330 (Supp. 2000), the maximum sentence for armed robbery was **30 years**. 1993 S.C. Acts 184, § 170.[4] Sentencing was deferred until such time as

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[1] On October 13, 1995, Roscoe and a co-defendant (Evans) entered the home of Parker and Brenda Shaw in Edgefield and waited for them. When they got home, Mr. Shaw was tied up with duct tape, and Mrs. Shaw was taken to a bedroom and held at gunpoint. Two other adults, Mark and Jennifer Fentress, and two grandchildren, were also held hostage in the home. The Shaws' daughter, Amy, then came home and was abducted by a third co-defendant (Jeberk) and taken to the bank in Augusta where she was employed and forced to give him $86,000.00 from the safe.

[2] The solicitor also indicted Roscoe with only single counts of kidnapping and armed robbery, notwithstanding there were multiple victims.

[3] At sentencing, the State agreed to withdrawal of the accessory pleas since Roscoe could not be convicted as both an accessory and a principal.

[4] Prior to 1993, section 16-3-330 provided a 25-year sentence for armed robbery. S.C. Code Ann. § 16-3-330 (1985).

a co-defendant's case was disposed of in federal court. Thereafter, Roscoe was sentenced to 30 years, concurrent, on each offense (armed robbery, burglary in the first degree and kidnapping).

Roscoe sought PCR, claiming his plea was involuntary because he was advised by the plea judge that he could receive 140 years to life (including the accessory charges), when in fact, he could not have been sentenced both as an accessory and of the principal offense. The PCR court denied relief, finding the pleas to the accessory charges had been withdrawn at sentencing. However, the court *sua sponte* noted that the plea judge had mis-advised Roscoe the potential sentence for armed robbery was 25, rather than 30 years. Accordingly, the armed robbery charge was remanded for re-sentencing. Roscoe sought certiorari contending the erroneous sentencing advice had rendered his pleas involuntary, requiring them to be vacated.

ISSUE

Were Roscoe's pleas rendered unknowing and involuntary due to the trial court's erroneous statement that the maximum sentence he could receive was 25, rather than 30 years?

DISCUSSION

Allegations of trial court error are not cognizable on PCR. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); see also State v. Johnson, 333 S.C. 459, 510 S.E.2d 423 (1999). In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would

have insisted on going to trial.[5] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). Roscoe has made no showing of prejudice in this case.[6]

Initially, Roscoe claims **all** of his pleas are affected by the erroneous advice concerning the armed robbery charge. However, Roscoe was properly advised and sentenced on the kidnapping and burglary charges, and he fails to demonstrate his pleas to these offenses were in any way affected by the mis-advice concerning armed robbery. Accordingly, his pleas to kidnapping and burglary are unaffected.

Moreover, Roscoe has failed to demonstrate that his plea to armed robbery was affected by the trial court's statement. The record is devoid of evidence that, if Roscoe had known the maximum penalty for armed robbery was 30, rather than 25 years, he would not have pled guilty and would have insisted upon going to trial. As noted previously, in exchange for Roscoe's plea, charges of grand larceny, possession of a weapon during commission of a violent crime, and criminal conspiracy were *nol prossed*. Further, the solicitor elected to indict Roscoe for only one count of armed robbery and kidnapping, notwithstanding there were multiple victims. Moreover, Roscoe was advised by the plea judge

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[5] Given that Roscoe is seeking PCR, his claim that his plea was rendered involuntary due to the trial judge's erroneous sentencing advice is, in reality, a claim that counsel was ineffective in failing to object to or otherwise clarify the trial court's erroneous sentencing advice.

[6] Although we have consistently held a defendant must have a full understanding of the consequences of his plea and of the charges against him, Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991), the defendant must also demonstrate prejudice to be entitled to relief on PCR.

that he was facing 70 years to life. It strains credulity to suggest that if he had been told that he was, in fact, facing 75 years to life, Roscoe would have decided against accepting the plea. Accord Manley v. United States, 588 F.2d 79, 82 (4th Cir. 1978)(holding "a mistake of a few years in advice about the length of what would otherwise be a long term would not constitute ineffectiveness of counsel").

Roscoe cites three cases for the proposition that a plea which is induced by erroneous sentencing information is thereby rendered involuntary. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). In each of these cases, however, there was evidence supporting a finding that the defendant's plea was induced such that, but for the erroneous advice, the defendant would not have pled guilty but would have insisted on going to trial. Here, there is simply no such evidence.

Finally, in the context of incorrect advice from the trial court, we held in Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994), that "erroneous . . . advice from the bench could, on certain facts, mislead a defendant to his detriment; however, it would be wholly impractical to maintain a rule which requires the automatic reversal of a guilty plea without something more."[7] Roscoe has failed to demonstrate "something more" in this case. Accordingly, the PCR court's order is

AFFIRMED.[8]

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[7] Hunter involved a trial court's explanation of minimum parole eligibility pursuant to a specific statute in a situation in which the defendant was actually parole eligible. We modified State v. Brown, 306 S.C. 381, 412 S.E.2d 399 (1991), to the extent Brown appeared to dictate a guilty plea must be reversed for any misstatement of parole eligibility by a trial judge.

[8] Given that Roscoe was sentenced in excess of the maximum penalty for armed robbery, we affirm the PCR court's remand for resentencing. See State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999).

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James W. Breeden, Jr., Employee,

Respondent/Appellant,

v.

TCW, Inc./Tennessee Express, Employer, and Granite State Insurance Co., Carrier,

Appellants/Respondents.

ORDER WITHDRAWING ORIGINAL OPINION
AND SUBSTITUTING OPINION, AND
DENYING PETITIONS FOR REHEARING

PER CURIAM: Opinion No. 3319, filed in the appeal above on March 12, 2001, is hereby withdrawn and the following opinion is substituted therefor. Furthermore, after careful consideration of the Petitions for Rehearing, this court is unable to discover any material fact or principle of law that has been overlooked or disregarded. It is, therefore, ordered that the petitions for rehearing be denied.

AND IT IS SO ORDERED.

s/ Kaye G. Hearn, C. J.

s/ C. Tolbert Goolsby, Jr., J.

s/ H. Samuel Stilwell, J.

Columbia, South Carolina
April 24, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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James W. Breeden, Jr., Employee,

Respondent/Appellant,

v.

TCW, Inc./Tennessee Express, Employer, and Granite State Insurance Co., Carrier,

Appellants/Respondents.

____

Appeal From Colleton County
Gerald C. Smoak, Sr., Circuit Court Judge

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Opinion No. 3319
Heard February 7, 2001 - Filed March 12, 2001
Withdrawn and Substituted April 24, 2001

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AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

____

Stanford E. Lacy, of Collins & Lacy, of Columbia, for appellants/respondents.

Saunders F. Aldridge, III, of Hunter, Maclean, Exley & Dunn, of Savannah, GA; D. Michael Kelly, of Suggs & Kelly, of Columbia; and William B. Harvey, III, of Harvey & Battey, of Beaufort, for respondent/appellant.

———————

STILWELL, J.: TCW, Inc./Tennessee Express (Employer) and its workers' compensation carrier, Granite State Insurance Company (Carrier), appeal the order of the circuit court affirming the full commission's decision to reduce Carrier's lien and the finding that Carrier's lien does not include future medical expenses. James Breeden, Jr. cross-appeals asserting that the circuit court did not have jurisdiction to hear Employer's and Carrier's appeal from the full commission because their notice of intent to appeal was deficient. As to Employer's and Carrier's appeal, we affirm in part, reverse in part, and remand. As to Breeden's cross-appeal, we affirm.

FACTS

On December 14, 1993, Breeden was severely injured when a truck owned by Piggly Wiggly crossed the center line and hit Breeden's truck head on. At the time of the accident Breeden was an owner/operator driving under Employer's ICC license. Breeden filed a workers' compensation claim which Employer denied on the theory that Breeden was an independent contractor, not an employee. The single commissioner found Breeden was an employee, and the full commission affirmed. Employer and Carrier did not appeal further. Workers' compensation benefits were brought current and provided thereafter.

On July 28, 1995, Breeden filed another Form 50 alleging he was totally disabled as a result of traumatic physical brain injury. The single commissioner found for Breeden and awarded lifetime benefits pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2000). Employer and Carrier did not appeal this decision.

During this same time, Breeden pursued a third party claim against Piggly Wiggly. Piggly Wiggly's liability carrier advanced $50,000 to help defray expenses, including living expenses, for Breeden's family. This was done with Carrier's consent and with the understanding that this money would be included as part of the ultimate settlement. Piggly Wiggly had $11 million in liability insurance coverage, and the parties acknowledge that liability was clear. Breeden alleged economic losses alone that were over $9 million including future medical expenses and a range of total cognizable damages from $18 to

$25 million. However, no lawsuit was ever filed against Piggly Wiggly, and Mr. Breeden's claim was settled for $4.2 million while his wife's loss of consortium claim was settled for $1.8 million. The Breedens' attorney explained that the claims were settled for such a low sum compared to the amount of insurance available and the extent of provable damages because "[w]e had to. This family was coming apart at the seams."

Subsequent to settling the third party claim against Piggly Wiggly, Breeden notified the workers' compensation commission of the settlement and moved to have the commission determine Carrier's lien and the balance remaining to be paid to Carrier under S.C. Code Ann. § 42-1-560(g) (1985). At the hearing, Breeden took the position that Carrier's lien should be reduced using the total cognizable damages provision of S.C. Code Ann. § 42-1-560(f). Both sides introduced detailed life care plans projecting Breeden's future medical needs.

The single commissioner found that Breeden was not entitled to a lien reduction and ordered the proceeds from the third party claim distributed in accordance with section 42-1-560(g). He also found section 42-1-560(f) relating to total cognizable damages was not applicable and did not impact the provisions of 42-1-560(g). Additionally, he held "compensation" as used in section 42-1-560 to include all future medical expenses. The single commissioner awarded Breeden's attorneys $1,456,626 in fees and litigation expenses and ordered $801,713.81 be paid to Carrier for its lien to date. He ordered the balance of the $4.2 million settlement paid to Carrier to hold in trust until further order of the commission. The single commissioner then ordered Dr. Weed, Breeden's life care plan expert, to update the life care plan and provide it to an insurance annuities expert. The expert was ordered to determine the cost to annuitize future benefits, including future medical expenses, using rated age costs and an installment refund feature. The single commissioner then directed that this information would be utilized to determine the present value of future benefits. Carrier would be allowed to retain that amount and the balance would be paid to Breeden.

Breeden appealed to the full commission which reversed virtually every holding by the single commissioner. The full commission found that it would

be appropriate under the statutory scheme to utilize the concept of total cognizable damages and determined them to be $13.5 million. The commission then found that the lien should be reduced, applying the factors from Kirkland v. Allcraft Steel Co., 329 S.C. 389, 496 S.E.2d 624 (1998). Using these factors, the full commission reduced the Carrier's lien to 31% of what it found its current value to be, applied the same reduction to future compensation, and held that Carrier's lien did not apply to future medical expenses. Carrier appealed to the circuit court which affirmed the full commission.

ISSUES

Employer/Carrier's Appeal

I. Did the full commission err in its application of the Kirkland factors when it determined that Carrier's lien should be reduced?

II. Did the full commission err in applying the lien reduction to future compensation?

III. Did the full commission err in determining that under section 42-1-560 Carrier's lien did not include future medical expenses not yet incurred at the time of the third party settlement?

IV. Did the full commission err in freezing the lien to its current amount of $801,713.81?

Breeden's Cross-Appeal

Did the circuit court have jurisdiction to hear Employer's and Carrier's appeal because their notice of intent to appeal was defective?

LAW/ANALYSIS

Breeden's Cross-Appeal

Jurisdiction of the Circuit Court

In his cross-appeal, Breeden asserts the circuit court did not have jurisdiction to address the order of the full commission because Employer's and Carrier's notice of intent to appeal was deficient. We find this argument to be without merit.

Breeden contends Employer's and Carrier's notice of intent to appeal did not comply with the requirements of the Administrative Procedures Act because the grounds listed for alleged error did not reflect a complete explanation of the alleged error. As support for this contention, Breeden cites Pringle v. Builder's Transport, which provides:

> A petition for circuit court review pursuant to the Administrative Procedures Act (APA) must direct the court's attention to the abuse allegedly committed below, including a distinct and specific statement of the rulings of which appellant complains. The circuit court lacks jurisdiction of the appeal if the notice is insufficient.

298 S.C. 494, 495, 381 S.E.2d 731, 732 (1989) (citations omitted).

The notice of intent to appeal contains twelve exceptions to the order of the commission. We have reviewed these twelve exceptions and hold that they were sufficient to satisfy the requirements of the APA. They are clear as to what the commission ordered and as to the error assigned to the provisions of the order. Therefore, we hold the notice of appeal was sufficient and the circuit court had jurisdiction over this appeal.

Employer/Carrier's Appeal

I. Kirkland Factors

Employer and Carrier argue the commission erred in incorrectly applying the Kirkland factors when it determined Carrier's lien should be reduced. We agree.

In all cases involving the distribution of third party proceeds, the threshold issue is whether the carrier's lien should be reduced. Section 42-1-560(f) provides in relevant part:

> Notwithstanding other provisions of this item, where an employee or his representative enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of such settlement in the proportion that such settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law. Any such reduction shall be based on a determination by the commission that such reduction would be equitable to all parties concerned and serve the interests of justice.

S.C. Code Ann. § 42-1-560(f) (1985).

In Kirkland, our supreme court recognized that the commission may reduce the carrier's lien in the manner set forth in the above statute, but the reduction is not automatic. 329 S.C. at 394, 496 S.E.2d at 626. In Kirkland, the court listed four factors the commission should consider in deciding whether or in what amount to reduce the lien. The court held that "[i]n considering whether or not to reduce the lien, the commission may consider factors such as the strength of the claimant's case, the likelihood of third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to a settlement." Id. These factors all focus on the circumstances surrounding the third party settlement.

Employer and Carrier contend that in determining whether to authorize a reduction of Carrier's lien, the commission erred in failing to properly analyze the factors set out in Kirkland. To an extent, we agree.

The first Kirkland factor analyzed by the commission was the likelihood of third party liability. The commission found:

> Kirkland provides no guidance as to how this factor is to be considered. However, it is only appropriate that the strong likelihood of Third Party's liability lends support to reducing the Carrier's lien. The weaker the case of third party liability, it is more likely it would be that any portion of the third party monies actually received by the Claimant would be a windfall to him. Conversely, the stronger the Claimant's case, the more equitable it would be for he or his family to receive a greater portion of the economic consequences of his tragic injury.

We believe this rationale to be the opposite of the court's intent in Kirkland. In actuality, the stronger the likelihood of third party liability, the less weight the commission should give to the claimant's request for a reduction in the lien. The employer should not have to shoulder an undue proportion of the burden of liability for claimant's damages when a third party has unquestioned liability for the claimant's injuries. Therefore, as the likelihood of the liability of a third party increases, the justification for reducing the carrier's lien is proportionately reduced. Since there is little if any question as to Piggly Wiggly's liability in this case, we find this factor's weight militates against a reduction in the lien.

The next factor in Kirkland is the strength of claimant's case. We hold the full commission also applied this factor in a manner opposite to that intended in Kirkland.

The commission found this factor weighed toward reduction because Breeden's total cognizable damages were great. Because liability was clear, damages were the primary issue in Breeden's case against Piggly Wiggly. Breeden had a strong case against Piggly Wiggly with excellent proof of

substantial damages. However, Breeden settled his third party claim much lower than his actual provable damages. The fact that he had a strong case, yet settled for such a relatively low amount, militates against lien reduction. The Employer/Carrier, having no right to involve itself in the third party action, should not be penalized because the case was undervalued or for whatever other reason, valid or not, was not aggressively pursued. Again, this factor's weight militates against a reduction in the lien.

The third Kirkland factor addressed by the full commission is the claimant's desire to settle. This factor relates to the need or desire of the claimant to settle his claim against the third party, not against the employer or its carrier. Testimony was presented that it was desirable for Breeden to settle his third party claim against Piggly Wiggly because his "family was coming apart at the seams." Therefore, we find that while Breeden settled for an amount substantially smaller than he possibly could have obtained, this factor weighs favorably toward a reduction in the lien.

The fourth and final Kirkland factor is whether the carrier is unreasonably refusing to consent to the settlement. The commission interpreted this factor to mean whether the carrier is unreasonably refusing to settle its lien against the proceeds of the third party settlement. This is incorrect. As pointed out above, the factors in Kirkland focus on the circumstances surrounding the third party settlement, not the workers' compensation lien. This factor actually relates to a provision in section 42-1-560(f) that provides: "[t]he carrier shall not unreasonably refuse to approve a proposed compromise settlement with the third party." S.C. Code Ann. § 42-1-560(f) (1985). It is clear from the record that Carrier interposed no objection to the settlement of the third party claim. Therefore, the weight of this factor also militates against a reduction in the lien.

In addition to the Kirkland factors, the full commission included three other factors in its analysis of whether to allow a lien reduction and to what degree to reduce Carrier's lien. These factors were: (1) Carrier's conduct in fulfilling its statutory obligations; (2) the extent of Breeden's injuries; and (3) whether Carrier has an actual exposure. While we are certain the four factors set forth in Kirkland are not exclusive, the additional factors analyzed by the commission are not mentioned in Kirkland.

However, we find two of the three additional factors utilized by the commission are not relevant to the consideration of the lien reduction. Carrier's conduct in fulfilling its statutory obligations has no bearing on settlement of the third party claim. There has been no evidence presented that any act or omission of Carrier prejudiced Breeden's settlement in any manner. Likewise, whether Carrier has an actual exposure is not relevant to the determination of a lien reduction and has no bearing on the third party settlement. The fact that a carrier is re-insured on a claim has nothing to do with the third party settlement. Furthermore, a carrier has a right to purchase reinsurance and be covered by it without that bearing upon the determination of whether a claimant is entitled to a lien reduction.

We do, however, find that the extent of Breeden's injuries should be considered as a factor in determining whether he is entitled to a reduction in the lien. There is no doubt that Breeden is severely injured both mentally and physically, and the damages he has suffered will run into the millions of dollars. This factor could, of course, be considered as a subset of the analysis as to the strength of claimant's case. To the extent that it is considered as a separate factor, we hold it should be analyzed in the same fashion as the strength of claimant's case factor.

Due to the seriousness of Breeden's injuries and his legitimate desire to settle for the sake of his family, we find a reduction of Carrier's lien is warranted. However, we believe the analysis employed by the full commission in connection with the Kirkland factors to be erroneous and most probably resulted in an excessive reduction. Therefore, we remand this issue to the full commission to make a determination on the percentage by which the lien should be reduced in light of the total cognizable damages, applying the Kirkland factors as set out above.[1]

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[1] We offer no opinion as to what relative weight the commission may give to any of the factors employed, and we do not believe it is necessary to give equal weight to each applicable factor.

II. Application of Lien Reduction to Future Compensation

Additionally, Employer and Carrier contend the full commission erred in applying the lien reduction to future compensation. They assert that because distribution of third party proceeds is governed by section 42-1-560(g), section 42-1-560(f) does not apply and a lien reduction may not be made to future compensation. We disagree.

Section 42-1-560(f), in pertinent part, speaks in terms of "estimated total damages" and "total cognizable damages at law." S.C. Code Ann. § 42-1-560(f) (1985). Section 42-1-560(g) provides:

> When there remains a balance of five thousand dollars or more of the amount recovered from a third party by the beneficiary or carrier after payment of necessary expenses, and satisfaction of the carrier's lien and payment of the share of any person not a beneficiary under this Title, which is applicable as a credit against future compensation benefits for the same injury or death under either subsection (b) or subsection (c) of this section, the entire balance shall in the first instance be paid to the carrier by the third party. The present value of all amounts estimated by the Industrial Commission to be thereafter payable as compensation, with the present value to be computed in accordance with a schedule prepared by the Industrial Commission, shall be held by the carrier as a fund to pay future compensation as it becomes due, and to pay any sum finally remaining in excess thereof to the beneficiaries.

S.C. Code Ann. § 42-1-560(g) (1985).

Employer and Carrier assert that these sections cannot be read together because section 42-1-560(g) only specifically incorporates sections (b) and (c). They further contend there is a conflict between these sections and the rules of statutory construction require the subsequent provision, (g), to prevail over the prior one, (f). See Nat'l Adver. Co. v. Mount Pleasant Bd. of Adjustment, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994) (stating where conflicting statutory provisions exist, the most recent or last in order of arrangement prevails).

However, we see no conflict in these provisions. "If the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." In the Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980). Section 42-1-560(f) provides for a lien reduction if a claimant "enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages." Section 42-1-560(g) governs the method of distributing excess proceeds from a third party judgment or settlement when future compensation will be owed to the claimant. The carrier retains the present value of future compensation and establishes a fund by which it pays future compensation benefits as they come due. Nothing in the distribution scheme set out in section (g) conflicts with the ability of the commission to reduce the entire carrier's lien. Section (g) may still be applied after a lien reduction under section (f) has been ordered. Furthermore, the clear language of section (f) indicates that the lien reduction should apply to future compensation benefits because it refers to the "employee's estimated total damages." The fact that these damages are to be estimated clearly contemplates that at least some of them have not yet accrued but will in the future. Therefore, the lien reduction is based on the whole of the damages that the claimant has and will suffer—past, present, and future—and should be applied as such.

III. Future Medical Expenses

Next, Employer and Carrier argue the commission erred in determining that under section 42-1-560 Carrier's lien does not encumber future medical expenses which have not been incurred at the time of the third party settlement. We agree.

Employer and Carrier contend "compensation" as it appears in section 42-1-560(g) means both income benefits and medically related benefits. Therefore, they assert that under section 42-1-560(g) medical expenses yet to be incurred by Breeden should also be considered part of Carrier's lien for the purpose of establishing a fund from settlement proceeds to pay future medical expenses. As support for this argument, Employer and Carrier point to the fact that the third party recovery statute, 42-1-560, was adopted from the Model Act which includes future medical expenses in its definition of compensation, and that for the purposes of section 42-1-560 the legislature expanded the definition of

"compensation" to conform with the Model Act. Additionally, they argue it would be inequitable to allow Breeden to receive all of his medical expenses from Carrier on the one hand and use the same medical expenses to justify recovery from the third party on the other.

Breeden argues, and the commission found, that this argument is incorrect as the word "compensation" is specifically defined by the legislature in section 42-1-100 as "the money allowance payable to an employee or to his dependents as provided for in this Title and includes funeral benefits provided in this Title." S.C. Code Ann. § 42-1-100 (1985). He contends this definition, and not the definition found in the Model Act, is controlling and further notes that in section 42-1-560 (a), (b), and (c), the statute refers to "the right to compensation and other benefits under this Title." Therefore, he argues, the legislature meant to specifically exclude those "other benefits" from section 42-1-560(g) because it failed to mention them as it did in other provisions of the same section.

We agree with Employer and Carrier that the legislature intended future medicals to be included in the calculation of the value of Carrier's lien for the purpose of establishing a fund from excess third party settlement proceeds to pay future medical compensation benefits. We hold this to be so for two compelling reasons.

First, the language employed by the legislature in adopting the third party liability section of our Act, closely paralleling the language of the Model Act, leads us to the conclusion that the legislative intent was for compensation as used in section 42-1-560(g) to include both monetary benefits and medical benefits as it does in the definition section of the Model Act. While it is true that upon adopting the portions of the Model Act the legislature did not amend the definition of compensation as contained in section 42-1-100, it did specifically provide, in subsection (b), that the carrier's lien shall extend to the proceeds of recovery "to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier . . ." S.C. Code Ann. § 42-1-560(b) (1985). Therefore, the legislature clearly intended for the carrier's lien to extend to medical expenses "to be paid in the future." "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington

County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998).

Second, as a matter of policy, it would be inequitable to allow a claimant to recover an award from a third party based on damages including future medical expenses and then require the carrier to pay those same medical expenses which claimant has already recovered without contribution from the third party proceeds. This would result in a double recovery for the claimant. Our courts have consistently held that there can be no double recovery for a single injury. See Collins Music Co. v. Smith, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998).

This conclusion comports with the views of Professor Larson in his well-respected and oft-quoted work on workers' compensation wherein he stated that this "is the correct result even if the reimbursement provision speaks only of 'compensation' paid." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 117.03 (2000).

For these reasons, we find that the legislature intended future medicals to be included in the calculation of the value of Carrier's lien for the purpose of establishing a fund from excess third party settlement proceeds to pay future medical benefits. The circuit court erred in affirming the full commission's determination that under section 42-1-560(g) Carrier's lien does not include future medical expenses which have not yet been incurred at the time of the third party settlement.

This case should be remanded for a determination by the full commission as to the present-day value of future benefits, including medical expenses, for the purpose of establishing a fund from excess third party settlement proceeds to pay future compensation benefits. Additionally, in light of our finding that a lien reduction applies to future damages as well as past and present damages, the full commission should, upon determining the value of Carrier's future lien, reduce that lien by a percentage not to exceed the percentage by which it determines to reduce Carrier's current lien.

IV. Value of Current Lien

Finally, Employer and Carrier assert the full commission erred in freezing the current lien amount at $801,713.81. In light of our disposition of the above issues, we agree.

Breeden's damages are ever increasing. They have certainly increased since the time of the full commission's hearing. Because we are remanding this case to the full commission to determine the proper amount for the lien reduction based on the Kirkland factors and to include future medical expenses in Carrier's lien, the full commission should bring the amount of Carrier's current lien up to date to reflect this increase.

CONCLUSION

Based on our determination that the circuit court erred in affirming the full commission's order which improperly analyzed the factors for lien reduction in Kirkland and failed to include future medical expenses in determining the value of Carrier's lien, we affirm in part, reverse in part, and remand this case to the full commission to determine the amount by which Carrier's lien should be reduced, include future medical expenses in the value of Carrier's lien, and bring the value of Carrier's present lien up to date.

For the foregoing reasons, the order of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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South Carolina Department of Social Services,

Respondent,

v.

Paula Cummings, John Doe, and Christopher Cummings,

Defendants,

In the Interest of: Alexia Nickola Bruce, DOB: 9/22/97: A Minor Child Under the Age of 18 years,

of whom:

Paula Cummings is the

Appellant.

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Appeal From Horry County
Hugh E. Bonnoitt, Jr., Family Court Judge

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Opinion No. 3336
Submitted February 22, 2001 - Filed April 30, 2001

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AFFIRMED

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William Isaac Diggs, of Myrtle Beach, for appellant.

Charles E. Parrish, of the South Carolina Department of Social Services, of Conway, for respondent.

Guardian ad Litem: George M. Hearn, Jr., of Hearn, Brittain & Martin, of Conway.

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ANDERSON, J.: The Family Court terminated the parental rights of Paula Cummings. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

Paula Cummings gave birth to a daughter, Alexia Nickola Bruce. Paula and the baby tested positive for cocaine while in the hospital. Though grounds for removal, the Family Court permitted the baby to remain with Paula because there was an adult in Paula's home, Terry Bruce, who was willing to assume the role of father and initially appeared suited to help care for Alexia. The Department created a treatment plan for the family, which required Paula and Terry to: participate in alcohol and drug assessment; follow the recommendations given to them during this assessment; undergo random drug screenings; take parenting skills classes; and submit to supervised visitation.

Within two months of Alexia's birth, Terry tested positive for drugs. The Department removed Alexia from the home and placed the child in foster care.

Soon after, the Family Court held a judicial review hearing. The court

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

ordered Paula and Terry to complete their treatment plan. Additionally, the judge mandated the couple to each pay $15.00 a week in child support.

Seven months later, the Department sought termination of Paula's parental rights. The Department alleged, inter alia, Paula continued to abuse cocaine and had wilfully failed to pay child support. Citing these grounds and the best interests of Alexia, the Family Court found by clear and convincing evidence that termination of Paula's rights was warranted. Paula sought post-trial relief fashioned as a "Motion for Relief from Judgment by Defendant Paula Cummings/To Stay the Final Order and To Enjoin Any Adoption of the Minor Child Pending this Action." Paula's motion was denied.

ISSUES

I. Did the Family Court err by concluding termination of Paula's parental rights was warranted upon the grounds of § 20-7-1572(2)?

II. Did the Family Court err by concluding termination of Paula's parental rights was warranted upon the grounds of § 20-7-1572(4)?

III. Did the Family Court err by concluding termination of Paula's parental rights was warranted upon the grounds of § 20-7-1572(1)?

IV. Did the Family Court err by concluding Paula had "conflict-free" representation for the TPR proceedings?

V. Did the Family Court err by concluding termination of Paula's parental rights was in the best interests of her child?

STANDARD OF REVIEW

Grounds for termination of parental rights must be proved by clear and

convincing evidence. Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999); see also Santosky v. Kramer, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92, 71 L.Ed.2d 599 (1982), cited in South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992) (The United States Supreme Court held: "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

In a termination of parental rights case, the appellate court has jurisdiction to examine the entire record to determine the facts according to its view of the evidence. Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 496 S.E.2d 864 (1998). This Court may review the record and make its own findings whether clear and convincing evidence supports termination. South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 519 S.E.2d 351 (Ct. App. 1999). Our broad scope of review does not require us to disregard the findings below or ignore the fact the trial judge was in a better position to assess the credibility of the witnesses. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996), cited in Jean Hoefer Toal et al., Appellate Practice in South Carolina 187 (1999).

LAW/ANALYSIS

Section 20-7-1572 provides for termination of parental rights:

> The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child:

. . . .

> (2) The child has been removed from the parent pursuant to Section 20-7-610 or Section 20-7-736, has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the

removal;

. . . .

> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support;

. . . .

I. Section 20-7-1572(2): Paula's Failure to Correct Conditions that Warranted Alexia's Initial Removal

An "abused" or "neglected" child may be removed from the home pursuant to §§ 20-7-610 or -736. An "abused" or "neglected" child is, inter alia, a child whose physical or mental welfare is harmed or threatened with harm by the acts or omissions of the child's parent. S.C. Code Ann. § 20-7-490(2) (Supp. 1998). The legal presumption exists that a newborn child is "abused" or "neglected" upon proof that a blood or urine test of either the mother or child shows the presence of a controlled substance such as cocaine. S.C. Code Ann. 20-7-736(G)(3) (Supp. 1998). This presumption may be overcome by proof that the father or other adult who will assume the role of father is available and suitable to provide care for the child in the mother's home. S.C. Code Ann. 20-7-736(G) (Supp. 1998).

Paula tested positive for cocaine when Alexia was born. Terry was

willing to assume the role of father and help Paula care for her daughter.[2] Because of Terry's presence, the Family Court did not order Alexia's removal and instead let her go home with Terry and Paula. This was a second chance for the couple. Nevertheless, Terry was found to be using cocaine within two months of Alexia's birth. The presumption that Alexia was not an "abused" or "neglected" child was consequently destroyed.

In the following months, the Department worked earnestly to help Paula overcome her use of cocaine. Paula, however, did not reciprocate with diligent efforts of her own. The evidence presented by the Department showed she had enrolled in five different drug abuse counseling courses, but failed to complete even one. Further, she tested positive for cocaine use on three occasions and either refused or did not make herself available for drug screenings seven other times.

Paula admitted using cocaine shortly before the child's birth. She did not complete the court-ordered drug counseling and treatment. The Department provided clear and convincing evidence that Paula failed to remedy the cause for Alexia's removal. The Family Court did not err in approving termination upon this ground. See South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992) ("We cannot condone appellant's failure to seek available treatment by allowing her to seek refuge in the existence of a condition which likely would have been remedied had she complied with the order of the court.").

II. Section 20-7-1572(4): Paula's Wilful Failure to Support

In its Judicial Review Order, the Family Court mandated:

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[2] Paula and Terry were living together when Alexia was born. Paula believed Terry to be Alexia's birth father. A subsequent blood test revealed Terry was not the birth father. He was not a defendant when the TPR proceedings were held.

> AND IT IS FURTHER ORDERED that **Paula Cummings** shall pay child support in the amount of $15.00 weekly, plus 3% court costs, for a total of $15.45 weekly. These payments are to begin March 27, 1998 and each Friday thereafter, and are to be paid through the Horry County Clerk of Court, Support Division.

(emphasis added).

Almost fourteen months separated the judicial review order and TPR hearing. During that time, Paula paid support on only one occasion. At the TPR hearing, Paula claimed she did not pay because she was confused:

> See, at first, when they told us we had to pay it in court, I thought they were talking about Terry had to pay it, 'cause when I called the child support office, they did not have my name down, and that's when I called DSS and they said that I was suppose to pay, too, because they didn't have my - - they didn't have my name down at first at the child support office.
>
> They just had Terry [Bruce's] down to pay child support.

Paula had notice about her weekly child support obligation in the form of the court's written order issued after the judicial review hearing — there is no evidence in the record showing Paula was not sent a copy of the order. Notwithstanding this, nothing in § 20-7-1572(4), requires a parent be "notified" of her duty to support her child before failure to discharge this duty may serve as grounds for termination of parental rights. South Carolina Dep't of Soc. Srvs. v. Parker, 336 S.C. 248, 519 S.E.2d 351 (Ct. App. 1999).

Paula owed $490 in child support by the date of the TPR hearing. On that day, she paid $457 to the court. Paula avers this payment demonstrates her willingness to support Alexia. We disagree.

A parent's earlier failure to support may be cured by the parent's subsequent repentant conduct. See Abercrombie v. LaBoon, 290 S.C. 35, 348

S.E.2d 170 (1986). Once conduct constituting a failure to support is shown to have existed, the court must then determine whether the parent's subsequent conduct was of a sufficient nature to be curative. See id. A parent's curative conduct after the initiation of TPR proceedings may be considered by the court on the issue of intent; however, it must be considered in light of the timeliness in which it occurred. Id. Rarely does judicially-motivated repentance, standing alone, warrant a finding of curative conduct. Id. It must be considered together with all the relevant facts and circumstances. Id.

In the instant case, Paula was under a court order to pay a nominal amount in weekly child support. Despite this order, Paula paid only one installment in thirteen months. Paula provided no reasonable excuse at the TPR proceedings for her failure to support. Therefore, the Family Court was correct in concluding that Paula's conduct was a manifestation of her conscious indifference to Alexia's rights to receive support. In other words, Paula's failure to support was "wilful." We affirm the Family Court's ruling on this issue.

III. Section 20-7-1572(1): Existence of Harm

In its TPR petition, the Department pled termination was warranted pursuant to § 20-7-1572(1). The Family Court did not make a finding on this ground in its written order. The Department did not request a ruling during post-trial proceedings. The issue was therefore not preserved. Thus, this Court need not address Paula's third exception: "The lower court committed error when it terminated Appellant's parental rights in reliance on S.C. Code Ann. 20-7-1572(1), when Respondent failed to carry its burden of proof on this ground."

IV. Conflict of Interest Claim

Paula contends she was unduly prejudiced by her TPR attorney's dual representation of her and the other defendants.

A TPR respondent is guaranteed the assistance of counsel. S.C. Code Ann. § 20-7-110(2) (Supp. 1998). Where counsel is guaranteed, the client also has the right to conflict-free representation. Cuyler v. Sullivan, 446 U.S. 335,

100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Violation of this principle is grounds for reversal. Id.

Unless the defendant demonstrates her counsel actively represented conflicting interests, she has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Id. In this case, Paula's counsel apparently also initially represented Terry. By the time the hearing was held, Terry was no longer a named defendant. The other defendants, Christopher Cummings[3] and John Doe,[4] did not appear and were adjudged to be in default. Therefore, the only person represented by Paula's counsel was Paula. The transcript shows Paula's counsel zealously represented Paula's interests throughout the proceedings. This Court finds counsel's representation of Paula was not affected by any conflict of interest.

V. Best Interests of Alexia

In her post-trial motion, Paula argued termination was not warranted because, inter alia: she had substantially complied with all court-ordered mandates and completed at least two drug-abuse recovery programs; she was neither a heavy nor habitual cocaine user; and she had a "strong and close knit" extended family who were "completely supportive of her and her daughter" and "willing to continue to help her in terms of assisting her with establishing and providing a suitable home for the child." While these contentions are compelling on their face, Paula's history of relapse and demonstrated failure to financially support Alexia weigh heavily against reuniting mother and child. The best interests of the child are paramount when adjudicating a TPR case. South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 519 S.E.2d 351 (Ct. App. 1999). In the instant action, Alexia's best interests lie with placement in a family setting devoid of drugs and uncertainty.

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[3] Paula's husband at the time Alexia was born.

[4] The unidentified birth father.

CONCLUSION

We recognize the importance of the "deferential reliance" principle in regard to Family Court judges and the decision-making realm of "credibility." In the case sub judice, the Family Court judge analyzed the facts and relevant precedent with specificity. This Court defers to his findings. See South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 134, 538 S.E.2d 285, 287 (Ct. App. 2000) (quoting Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991) ("[W]here the evidence presented in the record adequately supports the findings of the trial judge, due deference should be given to his judgment based on his superior position in weighing such evidence. This is especially true in cases involving the welfare and best interests of children."). We affirm the order of the Family Court in its entirety.

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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James R. Brunson,

Respondent,

v.

Chief Robert Stewart in his official capacity as Director of the South Carolina Law Enforcement Division,

Appellant.

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Appeal From Richland County
Costa M. Pleicones, Circuit Court Judge

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Opinion No. 3337
Submitted April 2, 2001 - Filed April 30, 2001

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AFFIRMED

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Attorney General Charles M. Condon, Senior Assistant Attorney General Nathan Kaminski, Jr. and Assistant Attorney General Christie Newman Barrett, all of Columbia, for appellant.

Lourie A. Salley, III, of Lexington, for respondent.

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HUFF, J.: James R. Brunson brought this declaratory judgment action against Chief Robert Stewart in his official capacity as Director of the South Carolina Law Enforcement Division (SLED). Brunson sought an order declaring that his right to purchase, own, and possess a firearm was restored when he received a pardon of his conviction of a crime of violence. The circuit court judge determined that a conviction for a crime of violence does not serve as an impediment to gun ownership if the conviction has been pardoned, and reversed SLED's decision to deny Brunson's application for the purchase of a pistol. SLED appeals. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1984, Brunson was convicted of criminal sexual conduct with a minor, in violation of S.C. Code Ann. § 16-3-655 (1985). He was sentenced to twenty years imprisonment suspended upon service of six years, with five years probation. On November 19, 1991, the South Carolina Department of Probation, Parole, and Pardon Services pardoned Brunson for the conviction.

On August 19, 1996, Brunson attempted to purchase a .25 caliber pistol at a gun store in Aiken, South Carolina. He completed an application for the purchase of a pistol in accordance with S.C. Code Ann. § 23-31-140 (1976). The Firearms Transaction Center at SLED received a telephone call from the gun store, checked Brunson's criminal record, and denied Brunson's application to purchase the pistol on the ground that, having been convicted of a violent crime, he was legally prohibited from possessing a handgun pursuant to S.C. Code Ann. § 16-23-30 (1985). Thereafter, Brunson brought this action. By order dated March 13, 2000, the circuit court reversed SLED's decision to deny Brunson's application. This appeal followed.

LAW/ANALYSIS

On appeal, SLED argues the trial court erred in finding that any

impediment to Brunson's right to possess a firearm, resulting from his conviction of a violent crime, was removed by his receipt of a pardon for that crime. We disagree.

South Carolina Code Ann. § 16-1-60 (Supp. 2000) includes the offense of second degree criminal sexual conduct with a minor among those crimes statutorily defined as violent. Section 16-23-30 prohibits the sale or delivery of a pistol to and possession of a pistol by certain persons including, but not limited to, any person who has been convicted of a crime of violence. § 16-23-30 (1985). As defined in S.C. Code Ann. § 24-21-940(A) (1989), "'[p]ardon' means that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." See also S.C. Code Ann. § 24-21-930 (Supp. 2000) ("An order of pardon must be signed by at least two-thirds of the members of the [Probation, Parole, and Pardon Services Board]. Upon the issue of the order by the board, the director, or one lawfully acting for him, must issue a pardon order which provides for the restoration of the pardon applicant's civil rights."). South Carolina Code Ann. § 24-21-990 (Supp. 2000) provides:

> A pardon shall fully restore all civil rights lost as a result of a conviction, which shall include the right to:
>
> (1) register to vote;
> (2) vote;
> (3) serve on a jury;
> (4) hold public office, except as provided in Section 16-13-210;
> (5) testify without having the fact of his conviction introduced for impeachment purposes to the extent provided by Rule 609(c) of the South Carolina Rules of Evidence;

> (6) not have his testimony excluded in a legal proceeding if convicted of perjury; and
> (7) be licensed for any occupation requiring a license.

Determination of the issue before us requires statutory interpretation and reconciliation. It is well settled that the cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The precise issue before us is one of first impression in South Carolina. Our supreme court has, however, dealt with a similar issue. In State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000), the court held that the term "any conviction" as used in S.C. Code Ann. § 56-5-2940 (1991 & Supp. 2000), which provides for enhanced punishment for each subsequent driving under the influence (DUI) conviction, does not include pardoned convictions because enhancement of a subsequent sentence is a collateral legal consequence of the pardoned convictions and the plain language of section 24-21-940(A) absolves an individual of "all the legal consequences of his crime and of his conviction, direct and collateral." Baucom, 340 S.C. at 344, 531 S.E.2d at 924. Thus, the defendant's two pardoned DUI convictions could not be used to enhance the sentence for the defendant's third DUI offense.

In reaching its holding in Baucom, the court reasoned that the DUI statute was enacted subsequent to the pardon statutes and "the legislature is charged with knowledge that a pardon relieves the convict of all the consequences of his conviction." Id. at 344, 531 S.E.2d at 924 (citing Berkebile

v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.")). As well, the Baucom court found its interpretation was supported by the specific exceptions found in S.C. Code Ann. §§ 24-21-990 and 16-13-210 (Supp. 2000) and Rule 609(c), SCRE. These exceptions apply to the general rule that a pardon relieves an individual of all legal consequences of his conviction. The Court noted: "These exceptions are noteworthy because they demonstrate the General Assembly's readiness to expressly address pardons in situations where the legislature does not wish them to have full effect." Baucom, 340 S.C. at 345, 531 S.E.2d at 924.

Applying the reasoning employed in Baucom, we specifically note that § 16-23-30 was enacted prior to the pardon statutes such that, had the legislature so intended, it could have expressly excluded gun possession from those rights restored upon receipt of a pardon of a crime of violence. While we share SLED's concern as to the safety of the public in allowing those previously convicted but later pardoned of a violent crime to possess a firearm, we are constrained to hold that SLED's denial of Brunson's application for ownership of a handgun constituted an impermissible collateral legal consequence of his pardoned conviction for a violent crime, in contravention of the pardon statutes. It is beyond this Court's power to effect a change in the statutes enacted by the Legislature. State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (the Court does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly)).

Accordingly, the decision of the trial court is

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Wynonie Simons, as Personal Representative of the Estate of Wynonie Q. Simons, Deceased,

Appellant,

v.

Longbranch Farms, Inc. a/k/a Long Branch Farms,

Respondent.

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Appeal From Richland County
L. Henry McKellar, Circuit Court Judge
J. Derham Cole, Circuit Court Judge

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Opinion No. 3338
Heard April 4, 2001 - Filed April 30, 2001

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REVERSED AND REMANDED

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Hammond A. Beale, of Palmetto Law Center; and John F. Koon, of Koon & Cook, both of Columbia, for appellant.

F. Barron Grier, III, of the Grier Law Firm; and Deborah Harrison Sheffield, both of Columbia, for respondent.

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HUFF, J.: In this wrongful death and survival action, Wynonie Simons (Simons), Personal Representative of the Estate of Wynonie Q. Simons, appeals the trial court's ruling it lacked subject matter jurisdiction to hear the action due to the exclusivity provision of the Workers' Compensation Act. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

R.C. McEntire, Inc. is a wholesale produce company. As part of its business, R.C. McEntire buys produce such as lettuce and tomatoes from around the country and then trims, cores, cuts, washes, dries, and packages the produce for distribution to fast food restaurants. This process generates a large amount of waste product, which proved to be problematic and costly to the company in terms of disposal. R.C. McEntire discovered that the waste could be fed to cattle and Long Branch Farms, a cattle farm, thus evolved as a means of disposing of the waste.

On June 21, 1993, fourteen year old Wynonie Q. Simons (Wynonie) was killed while operating a forklift at Long Branch. He had been hired to work on the farm only a week to ten days prior to his death.

Simons filed this wrongful death and survival action alleging his son, Wynonie, was killed while operating the forklift without proper instruction, supervision, or safety features. Long Branch answered asserting, among other things, the matter fell within the purview of the Workers' Compensation Act and, therefore, the circuit court lacked subject matter jurisdiction to hear the case. Thereafter, Long Branch moved to dismiss pursuant to Rule 12(b)(1), SCRCP, on the ground the Workers' Compensation Act afforded the exclusive remedy. The circuit court agreed and dismissed the case. Simons appealed the

dismissal, and this court reversed and remanded for further proceedings, finding the evidence insufficient at that stage to determine whether an agricultural exemption applied to remove Wynonie from the Act. Simons v. Longbranch Farms, Inc., Op. No. 97-UP-301 (S.C. Ct. App. filed May 12, 1997).

On remand, Long Branch renewed its motion to dismiss and requested an evidentiary hearing on the jurisdictional issue. Long Branch asserted the circuit court lacked subject matter jurisdiction, because any remedy provided to Simons was within the exclusive jurisdiction of the workers' compensation Act. Simons opposed the motion asserting: (1) Wynonie was an agricultural employee and therefore exempt from workers' compensation coverage by virtue of S.C. Code Ann. § 42-1-360(5) and (2) (1985) Long Branch failed to obtain workers' compensation coverage and therefore, pursuant to S.C. Code Ann. § 42-5-40 (1985), could not claim exclusivity of the Act.

The issues were bifurcated and, in March 1998, the circuit court held an evidentiary hearing on the issue of whether Wynonie was an agricultural employee. By order dated April 10, 1998, the circuit court determined Wynonie was not an agricultural employee within the meaning of the Act. Subsequently, the circuit court held a hearing on the remaining issue and determined Long Branch provided workers' compensation coverage through a policy issued to R.C. McEntire, Inc., and thus was not precluded from claiming exclusivity of the Act pursuant to § 42-5-40. Accordingly, the circuit court found Simons' exclusive remedy fell under the Workers' Compensation Act and dismissed the case for lack of subject matter jurisdiction.

LAW/ANALYSIS

Simons raises two issues on appeal. He contends the circuit court erred in determining Long Branch complied with the provisions of § 42-5-20 by providing workers' compensation coverage through a policy issued to R.C. McEntire. He further asserts the circuit court erred in ruling Wynonie was not an agricultural employee, which would exempt him from coverage under the Act pursuant to § 42-1-360(5). We agree with Simons that Wynonie was an

agricultural employee and, thus, was exempt from inclusion within the Workers' Compensation Act.

Where jurisdictional issues under the Workers' Compensation Act are involved, our review is governed by the preponderance of the evidence standard. S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995). This court has the power and duty to consider all the evidence and reach our own conclusion. Dawkins v. Capitol Constr. Co., 250 S.C. 406, 158 S.E.2d 651 (1967).

Simons argues that Wynonie was an agricultural employee exempt from the Workers' Compensation Act by § 42-1-360. This section provides in pertinent part:

> This Title shall not apply to:
> * * *
> (5) Agricultural employees; unless the agricultural employer voluntarily elects to be bound by this Title, as provided by § 42-1-380.[1]

S.C. Code Ann. § 42-1-360(5) (1985).

The circuit court found, because Long Branch was an essential and integral part of the operation of R.C. McEntire, Wynonie was not an agricultural employee within the meaning of the Workers' Compensation Act. We disagree.

The term agriculture is defined as "the science or art of cultivating the soil, producing crops and raising livestock and in varying degrees the preparation of these products for man's use and their disposal." Webster's Ninth New Collegiate Dictionary 65 (9th ed. 1990). The general definition of

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[1] Long Branch does not contend it was an agricultural employer that elected to be bound by the Act, but rather that it was not an agricultural employer.

agriculture "includes the rearing, feeding, and management of livestock." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 75.03[1] (1999).

Controversial cases involving the scope of an agricultural employment exemption tend to fall into two categories: (1) those involving the classification of activities performed in the employment between old-fashioned farming and commercial production or processing related to agricultural commodities and (2) those which involve employees whose work shifts between agricultural and nonagricultural pursuits. Id.

Some agricultural activities may be merely one stage in a commercial operation. However, in all such cases, the decisive question is the nature, not of the employer's business, but of the employee's employment. 4 Larson, supra § 75.03[2] (1999). Thus, if the employee's work is agricultural in nature, it is no less so because the employer happens to be engaged in another form of business. Id.

The focus of an agricultural exemption is the status of the employee, not the total activities of the employer. J & C Poultry v. Reyes-Guzman, 489 S.E.2d 853 (Ga. Ct. App. 1997). The nature of the employment of the employee must be determined from the whole character of his employment, and coverage is dependent upon the character of the work he is hired to perform, not upon the nature and scope of the employer's business. Rieheman v. Cornerstone Seeds, Inc., 671 N.E.2d 489 (Ind. Ct. App. 1996). Only when the character of the employee's work is ambiguous are the scales tipped by the nature of the employer's business. 4 Larson, supra § 75.03[2] (1999). Further, if an employee is generally engaged in ordinary farming duties, he does not leave the exempted class by engaging in other activities that are associated with the normal routine of running a farm. 4 Larson, supra § 75.04 (1999).

In the case at hand, the preponderance of the evidence shows the nature of Wynonie's employment was agricultural. Carl Howard, who ran the farm, testified that on the day Wynonie was hired, he instructed Wynonie and another boy to mow the lawn and use a weed-eater around a mobile home on the

property. Other than this one occasion, however, Howard could not recall what work Wynonie performed on the farm. Howard further testified everyone who worked on the farm "had the responsibility to . . . do everything that [had] to be done there." Employee Terry Bennett testified Wynonie's job activities included feeding the cattle, cleaning the stalls, and performing whatever chores that needed to be done. Larry Skinner, another young boy who worked alongside Wynonie, testified Wynonie drove tractors, pulled feeders and fed the cattle. On the day Wynonie was killed, the two of them were on their way to perform the work they were instructed to do by their supervisor.

CONCLUSION

We find the lower court erroneously relied on the nature of the employer's business instead of the nature of Wynonie's employment. The whole character of Wynonie's employment was clearly agricultural in nature, and any incidental activities he was involved in were associated with the normal routine of running a farm. Based on the evidence of record, we hold Wynonie was an agricultural employee within the meaning of the Workers' Compensation Act, and thus was exempt from coverage pursuant to § 42-1-360(5). Because we find Wynonie was exempt from the Act on this basis, we need not address the remaining issue raised by Simons.

REVERSED AND REMANDED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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William T. Brown, III,

Appellant,

v.

Amy Malloy, James F. Thompson, d/b/a Thompson & Sinclair, and John and Jane Doe, of whom Amy Malloy and Jane and John Doe are,

Respondents.

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Appeal From Anderson County
Robert S. Armstrong, Family Court Judge

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Opinion No. 3339
Heard February 6, 2001 - Filed April 30, 2001

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AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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Dianne S. Riley, of Greenville, for appellant.

Edgar H. Long, of Long & Smith, of Anderson; J. Franklin McClain, of Glenn, Haigler, Maddox & McClain, of Anderson; and Susan B. Lipscomb, of

Nexsen, Pruet, Jacobs & Pollard, of Columbia, all for respondents.

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HOWARD, J.: William T. Brown III brought this suit against Amy Malloy, James F. Thompson, Thompson & Sinclair, and John and Jane Doe (collectively, "Respondents") to set aside the order terminating his parental rights and granting the adoption of his daughter by John and Jane Doe ("the adoptive parents"). Brown asserts, among other things, that he was not provided adequate notice of the proceedings through publication of a "John Doe" Notice of Adoption. The family court determined the Order of Publication in the adoption proceeding was not procured by fraud or collusion, and the affidavit in support of the order was not defective on its face. Based upon this conclusion, the court upheld the adoption. Brown appeals, asserting the family court erred in its factual determinations and in limiting the scope of the hearing to the issue of whether the Order of Publication was procured by fraud or collusion, or was based upon a facially defective affidavit. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

Brown is a resident of Orange County, California. In 1997, Brown and Malloy were employed at a chain restaurant in Los Angeles County, California. They began an intimate relationship in June 1997 and for a short time lived together in Brown's residence. During her stay, Malloy became pregnant with Brown's child and advised him of this fact. She then left Brown's residence and resumed living with her fiancé in Los Angeles County in August or September 1997. Malloy returned to her parents' South Carolina residence in January 1998 and began working at another restaurant in the same chain.

A daughter was born to Malloy on March 11, 1998. Two days later, Malloy relinquished her parental rights and consented to the adoption of the child. She signed an affidavit in which she refused to name the father but stated that he resided in Los Angeles County, California. Malloy averred that the

biological father had neither openly held himself out to be the father of the child nor offered support for the child during the six months preceding her birth.

Brown claims he was unable to locate Malloy until June 1998, at which time she led him to believe their daughter lived with her. She sent him pictures of the child and requested $1,000 for child support. Brown sent Malloy $400.

In the meantime, unbeknownst to Brown, the adoptive parents had filed adoption proceedings on April 13, 1998. By order dated April 17, 1998, the family court directed that service on the father be accomplished by publication of the notice of adoption proceedings in a newspaper of general circulation in Los Angeles County. The notice referred to all parties only by fictitious names. Brown did not appear at the hearing to defend. On August 13, 1998, the family court terminated the parental rights of the biological parents and approved the adoption of the child.

Brown learned of the adoption in January 1999 and filed this action to set the adoption aside, claiming that he had not been properly served. The family court ultimately held a hearing on October 19,1999, but limited its inquiry to the validity of the Order of Publication. The court allowed limited testimony from both Malloy and Brown to determine if the Order of Publication was procured by fraud, or whether the affidavit in support of the order was facially defective. By order dated January 11, 2000, the family court ruled the Order of Publication was neither procured by fraud nor based upon a facially defective affidavit. It further ruled the resulting notice was adequate to satisfy statutory requirements. See S.C. Code Ann. § 20-7-1734 (Supp. 2000).

On April 4, 2000, the court denied Brown's motion to alter or amend the January 11, 2000 order. This appeal followed.

ISSUES PRESENTED

I. Did the family court err in finding that the Order of Publication was not procured through fraud or collusion or based upon a facially defective affidavit?

II. Did the family court err by limiting the scope of the October 19, 1999 hearing to the validity of the Order of Publication?

III. Did the notice of adoption comport with due process?

IV. Did the notice of adoption comply with section 15-9-740 and the requirements of the Order of Publication?

LAW/ANALYSIS

In an appeal from the family court, an appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Mazzone v. Miles, 341 S.C. 203, 207, 532 S.E.2d 890, 892 (Ct. App. 2000). However, this broad scope of review does not require this Court to disregard the family court's findings. Id. "Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Id.

I. Fraud or Collusion

Brown argues the family court erred by finding the Order of Publication was not based upon a facially defective affidavit or procured by fraud or collusion. We disagree.

Generally, absent fraud or collusion, once the issuing officer is satisfied with the supporting affidavit, the decision to order service by publication is final unless the order of publication is premised upon a facially defective affidavit. Wachovia Bank of S.C. v. Player, 334 S.C. 200, 204, 512 S.E.2d 129, 131 (Ct. App. 1999), rev'd on other grounds, 341 S.C. 424, 535 S.E.2d 128 (2000); Yarbrough v. Collins, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987); Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997); Miles v. Lee, 319 S.C. 271, 274, 460 S.E.2d 423, 425 (Ct. App. 1995).

Brown contends Malloy made fraudulent statements in her affidavit by designating Los Angeles County as the place of his residence and the child's

conception and by claiming that Brown did not hold himself out as the father of the child.

The testimony reflects that Orange and Los Angeles counties are adjacent. Seal Beach, where Brown resides, is near the county line. Malloy testified that Brown's residence was only ten minutes from where they both worked in Los Angeles County and that she never realized it was in a different county. Brown admitted Malloy worked with him in Los Angeles County and that she resided in Los Angeles County both before and after staying in his home.

The family court concluded Malloy did not intentionally misrepresent the location of the child's conception and Brown's residence. The court reasoned that if Malloy had intended to deceive Brown and the court she would have named a place far away from Brown's location.

We conclude this decision is heavily dependant upon credibility. The family court saw the witnesses, heard the testimony delivered from the stand, and "had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character." Lee v. Lee, 237 S.C. 532, 535, 118 S.E.2d 171, 172-73 (1961). Therefore, we defer to the family court's determination of credibility and conclude that evidence in the record amply supports this conclusion.

The family court also determined Malloy did not intentionally misrepresent Brown's failure to accept parental responsibility for the child. Malloy stated in her affidavit that Brown did not provide support or hold himself out as the father of the child. She testified Brown told her she could remain in his residence, but she voluntarily chose to leave. Brown confirmed in his testimony that he made no other attempts to provide support for Malloy during her pregnancy. According to Brown's testimony, he considered it too early to buy anything for the child. The only amount he provided to Malloy was $400 four months after she signed the affidavit in question. Although Malloy acknowledged Brown told some of their co-workers about her pregnancy, she did not consider his behavior to rise to the level of holding himself out to be the father.

The family court determined Malloy's statements were not intentional misrepresentations, and, again deferring to the family court's determination of credibility, we concur in this finding. However, it is important to note that the court's determination is limited to the conclusion that Malloy's statements were not intentional misrepresentations amounting to fraud which undermined the validity of the Order of Publication. The court did not reach a conclusion that Malloy's representations were true.

Having determined that the Order of Publication was not procured through fraud or collusion or premised on a facially defective affidavit, we cannot look beyond the decision to order service by publication. See Wachovia Bank of S.C. v. Player, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000).

II. Scope of October 19, 1999 Hearing

Brown next asserts the family court erred in limiting the scope of the October 19, 1999 hearing to the issue of the validity of the Order of Publication. Brown contends that Malloy's statements in the affidavit are false and that he offered support and intended to assume his parental responsibilities for his child. He argues that his consent to the adoption was required because he assumed parental responsibilities as outlined in section 20-7-1690 and that to the extent his actions fell short of the literal requirements of section 20-7-1690, it was a result of Malloy's deception. See S.C. Code Ann. § 20-7-1690 (Supp. 2000).

The sufficiency of the blind "John Doe" notice is premised upon the assumption that Brown's parental rights did not attach pursuant to section 20-7-1690 and that he was not entitled to full constitutional protection under the Due Process Clause. Evans v. S.C. Dep't of Soc. Servs., 303 S.C. 108, 111, 399 S.E.2d 156, 157-58 (1990) ("The mere existence of a biological link does not merit constitutional protection of due process rights. An unwed father must accept the responsibilities of parenthood before he acquires this constitutional protection." (citation omitted)). Therefore, Brown argues he was entitled to a hearing to determine the sufficiency of the notice.

Although we may not examine the propriety of the issuance of the Order of Publication, whether the information contained in a notice by publication is sufficient to meet the requirements of due process is an issue separate and distinct from the validity of the order allowing service by publication. See Montgomery, 325 S.C. at 506, 480 S.E.2d at 470 (distinguishing between attack on the issuance of the order of publication and attack on whether the publication took place within a reasonable period of time, which was allowed); see also Wachovia, 341 S.C. at 428-29, 535 S.E.2d at 130 (ruling separately upon due process issue after determining order of publication was not procured by fraud or based upon facially defective affidavit).

Thus, we hold the family court erred in failing to determine whether the particular publication in this case afforded Brown adequate notice of the adoption proceedings.

III. Due Process

Respondents assert the blind "John Doe" notice was adequate because Brown never acquired constitutional protection of his parental rights. See Evans, 303 S.C. at 108, 399 S.E.2d at 156.

"Due process is flexible and calls for such procedural protections as the particular situation demands." Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998) (quoting Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Ogburn-Matthews, 332 S.C. at 562, 505 S.E.2d at 603; see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); cf. S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . .").

In Webster v. Clanton, our supreme court stated the general rule:

> It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972).

However, "the opportunity interest [of a birth father] is of limited duration as a constitutionally significant interest because of the child's need for early permanence and stability in parental relationships." Abernathy v. Baby Boy, 313 S.C. 27, 32, 437 S.E.2d 25, 29 (1993); see also Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("If [the biological father] grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . . If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (footnote omitted)); Evans, 303 S.C. at 111, 399 S.E.2d at 157-58 ("An unwed father must accept the responsibilities of parenthood before he acquires this constitutional protection."); Parag v. Baby Boy Lovin, 333 S.C. 221, 227, 508 S.E.2d 590, 593 (Ct. App. 1998) ("It is incumbent . . . upon the unwed father to demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of the child before he may acquire substantial constitutional protection . . . ."). The father must timely demonstrate his commitment to the child to be entitled to constitutional protection. Abernathy, 313 S.C. at 32, 437 S.E.2d at 29. To do so, the biological father must "undertake[ ] sufficient prompt and good faith efforts to assume parental responsibility and to comply with [section 20-7-1690]." Id.

Section 20-7-1690 provides that when the birth father is not married to the birth mother and the child is placed with adoptive parents six months or less after birth, his consent is required only if

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 20-7-1690 (Supp 2000).

In Evans, our supreme court held that

> where a father's consent is not needed for an adoption due to the father's lack of accepting any of the responsibilities of fatherhood pursuant to S.C. Code Ann. § 20-7-1690 (1989), the father's due process rights are not violated by publishing a 'John Doe' notice when the identity of the father is unknown because the mother refuses to reveal it.

303 S.C. at 111, 399 S.E.2d at 158.

In Evans, the birth mother refused to name the biological father, and a blind "John Doe" notice of the adoption action was published by the adoptive couple's attorney. The family court determined that the biological father's consent was not required because he "did not live with his child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, did not hold himself out to be the child's father, and did not contribute to the expenses incurred in connection with the mother's pregnancy or with the birth of the child." Id. at 110-11, 399 S.E.2d at 157. However, the family court also determined that the blind "John Doe" notice was insufficient, and ordered that the South Carolina Department of

Social Services ("SCDSS") must either determine the name of the birth father or reveal the name of the birth mother. Id.

SCDSS appealed, and our supreme court held that compelling SCDSS to reveal the birth mother's name would "undermine the confidentiality that is the foundation of the adoption process and would violate the mother's right to privacy." Id. at 110, 399 S.E.2d at 157. Recognizing that "[t]he mere existence of a biological link does not merit constitutional protection of due process rights," our supreme court further held that the "John Doe" notice was sufficient where the father's consent was not needed under section 20-7-1690. Id.

As in Evans, Malloy refused to name the biological father. Neither her name nor Brown's name were included in the notice. However, unlike Evans, the family court has made no determination whether Brown timely demonstrated his commitment to the child so as to be entitled to constitutional protection. Instead, Brown's parental rights were terminated because he was in default. This default, in turn, was due to his failure to respond to the "John Doe" notice of adoption. See S.C. Code Ann. § 20-7-1734(E)(3) (Supp. 2000) ("[F]ailure to file a response within thirty days of receiving notice constitutes consent to adoption of the child and forfeiture of all rights and obligations of the person or agency with respect to the child.").

Therefore, Evans is not controlling. Under section 20-7-1734(B)(3), a biological father whose consent for adoption is not required is still entitled to notice of the adoption proceeding, even though he has not timely demonstrated his commitment to the child as set forth in section 20-7-1690. Section 20-7-1736 allows the use of fictitious names, so long as service of process or notice is considered sufficient by the court. S.C. Code Ann. § 20-7-1736 (Supp. 2000).

In Evans, the family court found the notice insufficient and required SCDSS to divulge the identity of the biological mother in order to ascertain the name of the father and include it in the notice. SCDSS appealed the order. The issue on appeal was whether the family court erred by demanding the identity of the biological mother where the court had already determined the biological father was not entitled to constitutional protection. The biological father made

no appearance, and no question was raised as to the biological father's status under section 20-7-1690.

In this case, no ruling has been made as to the status of Brown's parental rights under section 20-7-1690. If, as Brown asserts, he did timely demonstrate his commitment to the child, or was significantly thwarted by Malloy in his attempts to do so, then his consent or relinquishment may have been required prior to the adoption. See Abernathy, 313 S.C. at 32-33, 437 S.E.2d at 29 ("To mandate strict compliance with section 20-7-1690(A)(5)(b) would make an unwed father's right to withhold his consent to adoption dependent upon the whim of the unwed mother."). If Brown sufficiently complied with section 20-7-1690 to be entitled to due process protection, then we find the case of Armstrong v. Manzo, 380 U.S. 545 (1965), controlling.

In Armstrong, the biological parents divorced, and the father paid $50 per month in child support. The mother remarried, and her new husband brought an adoption proceeding to terminate the father's parental rights and adopt the child. Texas law contained a statutory provision similar in its operation to South Carolina's section 20-7-1690. Under the Texas statute, if the parent had abandoned the child for a period of two years, or had not provided support for the child for a two-year period commensurate with the parent's financial ability, then written consent of that parent to the adoption of the child was unnecessary, and adoption could be granted based upon the written consent of the judge of the juvenile court in the county in which the child resided. Id. at 546-47.

The mother filed an affidavit with the juvenile court to this effect, and the court issued its consent, as a result of which the adoption was granted without notice to the father. The father filed a motion to set aside the adoption on the grounds that the affidavit of the mother was false and that he had provided adequate support. The court granted a hearing on the father's motion, and after hearing the testimony, denied the motion.

The Texas appellate court recognized that due process required notice to the father and an opportunity to be heard, but denied relief, finding that the juvenile court's hearing on the motion satisfied this requirement. The Texas Supreme Court denied an application for a writ of error.

The United States Supreme Court ruled that due process under the Constitution required adequate notice and a meaningful opportunity to be heard, both of which had been denied to the father. The Court pointed out that the post-adoption hearing was not sufficient to satisfy the second prong because the burden of proof had been shifted to the father to prove that his parental rights were entitled to due process protection.

According to Armstrong, it is not permissible to require the biological parent whose parental rights are in jeopardy to prove entitlement to meaningful notice in accordance with the Due Process Clause before the right attaches. Such a requirement impermissibly shifts the burden of proof from the party who originally shouldered it by bringing the cause of action for termination of parental rights and adoption. Furthermore, it creates a paradox by requiring meaningful notice for only those who appeared in time to establish their entitlement to it. Therefore, Evans must be limited in its application to situations in which a final determination has been made that the biological father's consent to the adoption is not required.

The adequacy of the "John Doe" notice in this case is dependent upon whether the Respondents prove that Brown did not sufficiently comply with section 20-7-1690 to require his consent or relinquishment to the adoption. To make this determination, the family court must reach the issues posed by Brown's claim that he was prevented from assuming his parental responsibilities by Malloy's deception and avoidance. See Abernathy, 313 S.C. at 32-33, 437 S.E.2d at 29.

IV. Compliance with Statute and the Order of Publication

Brown also argues the notice was defective because it did not comply with the Order of Publication or section 15-9-740.

If notice of adoption proceedings "cannot be effected by personal service, notice may be given by publication or by the manner the court decides will provide notice." S.C. Code Ann. § 20-7-1734 (Supp 2000). Section 15-9-740 provides:

> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks.

S.C. Code Ann. § 15-9-740 (1976).

The Order of Publication required that notice be published in a newspaper of general circulation in "the county where the minor Defendant was conceived and where the biological father is last known to reside." The order erroneously designated Los Angeles as the proper county. Brown alleges the publication should have been in a newspaper of general circulation in Orange County, where he actually resided and the child was in fact conceived.

The notice was published in the Daily Commerce, a newspaper which Brown contends is not generally circulated in Orange County. The proof of publication states that the Daily Commerce has been adjudged by California courts to be a paper of general circulation in Los Angeles County; however, no evidence was introduced regarding its circulation in Orange County.

Superimposed upon the requirements of the Order of Publication is the mandate of section 15-9-740, which requires publication in a newspaper "most likely to give notice to the person to be served." See S.C. Code Ann. § 15-9-740 (1976).

Although these issues were not addressed by the family court, we conclude they are subsumed within the due process analysis, provided the adoptive parents must continue to bear the burden they assumed in their petition for adoption of proving that Brown did not acquire parental rights in accordance with section 20-7-1690. If Brown did acquire parental rights and was thus entitled to full Constitutional protection, then clearly the "John Doe" notice is insufficient. See Armstrong, 380 U.S. at 550 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.").

On the other hand, if Brown did not acquire parental rights and was not entitled to that protection, then any defect in the publication of the notice is harmless under the circumstances because the purpose of the notice required by section 20-7-1734 will have been fulfilled without shifting the burden of proof to Brown or placing any impermissible limitation on his right to be heard. See S.C. Code Ann. § 20-7-1734(E) (Supp. 2000) (allowing person or agency thirty days to provide reasons to contest, intervene, or otherwise respond is the purpose of the notice).

CONCLUSION

The family court did not err in ruling that the Order of Publication was properly issued. However, the court erred in limiting the hearing to a determination of the validity of the Order of Publication. Therefore, this case must be reversed and remanded, with instructions to hold a hearing on the merits of Brown's claim that the notice as published was inadequate because it failed to meet the requirements of due process.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CONNOR and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

Isaac Randall Russell,

Appellant.

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Appeal From York County
Alison Renee Lee, Circuit Court Judge

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Opinion No. 3340
Heard April 4, 2001 - Filed April 30, 2001

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AFFIRMED

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Richard G. D'Agostino, of Roberts & D'Agostino, of York, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Harold M. Coombs, Jr., all of

Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

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HOWARD, J.: Isaac Randall Russell appeals his conviction for Driving Under the Influence of alcohol (DUI) in violation of S.C. Code Ann. § 56-5-2930 (Supp. 2000), arguing the trial court erred in failing to direct a verdict of acquittal and in admitting his extra-judicial statements without sufficient corroboration. We affirm.

FACTS

On the night of December 12, 1998, Russell consumed alcoholic beverages while celebrating his birthday at a friend's house. Russell and two other people left the party in his car, although Russell claims he was riding in the back seat. Around 2:30 a.m. the following morning, Russell and his companions arrived at the home of a friend. They left after the friend's wife, Vicky Puckett, explained he was not at home.

The State presented evidence of the following additional facts: At approximately 7:15 a.m., Randy Dean Parker was driving to work and observed Russell's car in a ditch on the side of the road. Parker, who was a corrections officer, stopped to offer assistance. Russell jumped out of the back seat. Parker did not see anyone else at the scene. According to Parker, Russell at first told him he had been driving but later denied driving the vehicle.

State Trooper Oliver Millhouse arrived at the scene at 7:50 a.m. Russell responded to Trooper Millhouse's questions by again stating he had been driving the car at the time of the accident. Millhouse observed that Russell appeared to be drunk and placed him under arrest. Millhouse searched Russell and found the ignition key in Russell's jacket pocket. After being advised of his rights, Russell changed his story again, telling Millhouse he had not been driving the car.

Russell was given a Breathalyzer test by State Trooper Timothy Yarborough, and he registered a .25 percent blood alcohol level. Russell also made the same conflicting statements to Yarborough.

DISCUSSION

Russell first argues he was entitled to a directed verdict because the State failed to establish the *corpus delicti* of DUI independent of his statements to police.

The State argues this issue is not preserved because Russell failed to assert this as a ground for directed verdict at the close of the State's case. "[I]ssues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), aff'd on other grounds, 337 S.C. 617, 524 S.E.2d 839 (1999).

Although Russell did not use the exact words "*corpus delicti*" in his request for a directed verdict, it is clear from the argument presented in the record that the motion was made on this ground. The State, in opposing the motion, used the words "*corpus delicti*" and cited the relevant case law. Therefore, we find the argument was raised to the trial court and is preserved.

However, there is no merit to Russell's contention. "It is well-settled law that a conviction cannot be had on the extrajudicial confessions of a defendant unless they are corroborated by proof *aliunde* of the *corpus delicti*." State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999) (footnote omitted). The corroboration rule applies to statements whether those statements are confessions or admissions. Id. at 177-78, 516 S.E.2d at 203-04. "[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extrajudicial statements and, together with such statements, permits a reasonable belief that the crime occurred." Id. at 180, 516 S.E.2d at 205. Corroboration requires "substantial independent evidence," which is sufficient "if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." Id.

at 179, 516 S.E.2d at 204 (quoting Opper v. United States, 348 U.S. 84, 93 (1954)).

If the statement is independently corroborated, then the combination of the statement and the State's remaining evidence may be considered by the trial court to determine if there is any evidence tending to establish the *corpus delicti*. Id. at 180, 516 S.E.2d at 205. For this reason, we focus on Russell's second argument, which is that the State failed to present sufficient independent evidence to corroborate the essential fact contained within Russell's often repeated statement; that is, that Russell was driving the car.

We conclude the independent evidence presented by the State supported the trustworthiness of Russell's statements. The following independent facts were established, taking the evidence in a light most favorable to the State. First, the car belonged to Russell. Second, at the time Parker and Millhouse arrived, Russell was the only occupant present at the scene. Third, the keys to the car were in Russell's pocket. Fourth, the hood of the car was still warm. These facts, taken together, provide a foundation independent of Russell's statements to justify a jury inference that Russell was driving the car. Consequently, Russell's statements to this effect were sufficiently corroborated to allow their admission. See id. at 180, 516 S.E.2d at 205.

Russell next asserts that his extra-judicial statements should not have been admitted because, under the circumstances, they were inherently untrustworthy. The State asserts this argument is not preserved. We agree.

Russell argues that the trustworthiness of confessions or admissions must be examined before the statements are admitted into evidence. He contends his statements were not trustworthy or reliable because he was highly intoxicated at the time they were made. Russell cites State v. Saxon, for the proposition that, if an "accused's intoxication was such that he did not realize what he was saying," a confession may be inadmissible as a matter of law because it was involuntary. 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973).

However, this issue was not raised to the trial judge, nor was it ruled upon. Issues not raised to and ruled upon in the trial court will not be considered on appeal. State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999). A party cannot argue one ground for an objection at trial and an alternative ground on appeal. State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995); see also State v. Kerr, 330 S.C. 132, 147, 498 S.E.2d 212, 219 (Ct. App. 1998) (holding that because appellant never requested a ruling on the voluntariness of his statement, the issue was not preserved for appellate review).

At trial, Russell did not argue his statements were involuntary or untrustworthy because of his intoxication. Russell's objection on the record to the admission of the statements was that the *corpus delicti* of the crime of DUI had to be independently proved before his statements were admitted. Therefore, the objection did not preserve this assignment of error.

Finally, we conclude the evidence presented by the State was sufficient to establish the *corpus delicti* of the crime, if believed. The *corpus delicti* of DUI based upon alcohol is: (1) driving a motor vehicle; (2) within this state; (3) while under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired. See S.C. Code Ann. § 56-5-2930 (Supp. 2000); State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001); see also Osborne, 335 S.C. at 180, 516 S.E.2d at 205 (quoting State v. Townsend, 321 S.C. 55, 58, 467 S.E.2d 138, 140 (Ct. App. 1996)). Russell admits that he was highly intoxicated from the time of the party through his arrest, such that his faculties were materially and appreciably impaired. We have already determined there was substantial independent evidence corroborating the fact that he was driving the car. The position and condition of the vehicle provides substantial circumstantial evidence that it was being operated in South Carolina. Therefore, the *corpus delicti* of the crime has been established. Furthermore, taking the evidence in a light most favorable to the State, a factual issue was presented as to Russell's guilt, precluding a directed verdict.[1]

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[1]In support of his arguments, Russell refers to testimony presented during his defense. Vicky Puckett stated that when Russell appeared at her house at

AFFIRMED.

CONNOR and HUFF, JJ., concur.

2:30 a.m. he was intoxicated in the back seat of his car and was not driving. A person who passed by the scene of the accident stated she saw someone other than Russell standing outside of Russell's car waving his arms for her to stop. However, the court's rulings on the admissibility of Russell's statements and Russell's directed verdict motion were made before Russell's defense was presented and were, of course, limited to a consideration of the evidence presented in the State's case. In any event, contradictory evidence merely raises a factual issue for the jury to determine. It is well settled that in resolving a motion for directed verdict, the evidence must be taken in a light most favorable to the State. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000).