The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

N O T I C E

IN THE MATTER OF THOMAS McCOY RICHARDSON, PETITIONER

On October 27, 1997, Petitioner was indefinitely suspended from the practice of law, retroactive to May 10, 1996. In the Matter of Richardson, 328 S.C. 161, 492 S.E.2d 788 (1997). He 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 December 27, 2001.

Columbia, South Carolina

October 24, 2001

The Supreme Court of South Carolina

In the Matter of Dallas
Dale Ball, Respondent.

ORDER

By opinion dated October 15, 2001, respondent was indefinitely suspended from the practice of law in this State. In the Matter of Ball, Op. No. 25367 (S.C. Sup. Ct. filed October 15, 2001). The Office of Disciplinary Counsel now petitions this Court to appoint an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

accounts respondent may maintain that are necessary to effectuate this appointment.

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina

October 18, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

October 29, 2001

ADVANCE SHEET NO. 37

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(York, Judge Henry F. Floyd)

2001-UP-443 Reaves v. First Federal Savings
(Marion, Judges James R. Barber, III)

2001-UP-444 State v. Eric Samuel Minter
(Clarendon, Judge R. Markley Dennis, Jr.)

2001-UP-445 State v. Leroy Frazier, Jr.
(Orangeburg, Judge Diane S. Goodstein)

2001-UP-446 State v. Tracy Jenkins
(Charleston, Judge B. Hicks Harwell, Jr.)

2001-UP-447 State v. Henry Reese
(Aiken, Judge Marc H. Westbrook)

2001-UP-448 Associates Home Equity Services v. Reid
(Richland, Joseph M. Strickland, Master-in-Equity)

2001-UP-449 Gibbs v. First Union National Bank of SC
(Florence, Judge Sidney T. Floyd)

2001-UP-450 Bennett v. Roberts
(Charleston, Judge Kenneth G. Goode)

2001-UP-451 Chickasaw Association, Inc. v. Pappas
(Oconee, Judge J. C. Nicholson, Jr.)

2001-UP-452 Bowen v. Modern Classic Motors, Inc.
(Beaufort, Thomas Kemmerlin, Jr., Master-in-Equity)

2001-UP-453 State v. David L. Sprunger, Jr.
(Greenville, Judge Lee S. Alford)

2001-UP-454 Greenville National Bank v. Simmons
(Greenville, Judge Thomas J. Ervin)

2001-UP-455 Stone v. Roadway Express, Inc.
(Greenville, Judge Charles B. Simmons, Jr.)

2001-UP-456 Ray v. SC State University
(Orangeburg, Olin D. Burgdorf, Special Circuit Court Judge)

2001-UP-457 State v. Tony Forrest
(Charleston, Judge Daniel F. Pieper)

2001-UP-458 SCDSS v. Carroll
(Oconee, Judge Barry W. Knobel)

2001-UP-459 Clark v. Clark
(Greenville, Judge Stephen S. Bartlett)

2001-UP-460 City of Aiken v. Cannon
(Aiken, Judge J. C. Nicholson, Jr.)

2001-UP-461 Storage Trailers, Inc. v. Proctor
(Anderson, Judge J. Nicholson, Jr.)

2001-UP-462 McKenith v. Huggins
(Horry, J. Stanton Cross, Jr., Master-in-Equity)

PETITIONS FOR REHEARING

3263 - SC Farm Bureau v. S.E.C.U.R.E.	(2) Pending
3343 - Langehans v. Smith	Pending
3362 - Johnson v. Arbabi	Pending
3367 - State v. James E. Henderson, III	Pending
3382 - Cox v. Woodmen	Pending
3383 - State v. Jon Pierre LaCoste	Denied 10-17-01
3385 - Cothran v. Brown	Granted 10-18-01
3386 - Bray v. Marathon Corporation	(2) Denied 10-17-01
2001-UP-212 - Singletary v. La-Z-Boy	HIA Pending Settlement
2001-UP-390 - Hunter's Ridge v. Patrick	Denied 10-17-01
2001-UP-391 - State v. Jerome Hallman	Denied 10-25-01

2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Denied 10-18-01
2001-UP-396 - Jarrell v. Jarrell	Denied 10-17-01
2001-UP-397 - State v. Brian Douglas Panther	Denied 10-18-01
2001-UP-398 - Parish v. Wal-Mart Stores	Denied 10-18-01
2001-UP-399 - M.B. Kahn Construction v. Three Rivers	Denied 10-18-01
2001-UP-401 - State v. Keith D. Bratcher	Denied 10-17-01
2001-UP-403 - State v. Eva Mae Moss Johnson	Denied 10-17-01
2001-UP-409 - State v. David Hightower	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-421 - State v. Roderick Maurice Brown	Pending
2001-UP-425 - State v. Eric Pinckney	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Pending
3271 - Gaskins v. Southern Farm Bureau	Pending
3289 - Olson v. Faculty House	(2) Pending
3292 - Davis v. O-C Law Enforcement Comm.	Denied 10-24-01
3297 - Silvester v. Spring Valley Country Club	Denied 10-25-01
3299 - SC Properties & Casualty Guaranty Assn. v. Yensen	(2) Pending
3307 - Curcio v. Caterpillar	Pending
3310 - Dawkins & Chisholm v. Fields, et al.	Pending
3314 - State v. Minyard Lee Woody	Pending
3319 - Breeden v. TCW, Inc.	(2) Granted 10-25-01

3321 - Andrade v. Johnson	Pending
3324 - Schurlknight v. City of N. Charleston	Denied 10-24-01
3327 - State v. Peake	Pending
3329 - S. C. Dept. of Consumer Affairs v. Rent-A-Center	Pending
3330 - Richard Bowen v. Ann Bowen	Pending
3332 - SC Farm Bureau Mutual Ins. Co. v. Kelly	Pending
3333 - State v. Dennis Zulfer	Pending
3335 - Joye v. Yon	Pending
3337 - Brunson v. SLED	Denied 10-25-01
3338 - Simons v. Longbranch Farms	Pending
3344 - Henkel v. Winn	Pending
3345 - Cunningham v. Helping Hands	Pending
3346 - State v. Thomas Ray Ballington	Pending
3348 - Thomas v. Thomas	Pending
3351 - Chewning v. Ford Motor Co.	Pending
3352 - Ex Parte Moore v. Fairfield	Pending
3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - State v. Leroy Wilkes	Pending
3356 - Keeney's Metal v. Palmieri	Pending
3358 - SC Coastal Conservation v. SCDHEC	Pending
3361 - State v. Tommy Lee James	Pending
3364 - SCDSS v. Mrs. H and Mr. H	Pending

3365 - State v. Laterrance Ramon Dunlap	Pending
3366 - Crafton v. Brown	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs	Pending
3372 - Dukes v. Rural Metro	Pending
3376 - State v. Roy Johnson, #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
2001-UP-069 - SCDSS v. Taylor	Denied 9-28-01
2001-UP-085 - Curcio v. Caterpillar	Pending
2001-UP-092 - State v. Robert Dean Whitt	Denied 10-25-01
2001-UP-123 - SC Farm Bureau v. Rabon	Pending
2001-UP-124 - State v. Darren S. Simmons	Pending
2001-UP-125 - Spade v. Berdish	Pending
2001-UP-156 - Employer’s Insurance of Wausau v. Whitaker’s Inc., of Sumter	Pending
2001-UP-159 - State v. Darnell Hunter	Pending
2001-UP-160 - State v. Elijah Price, Jr.	Pending
2001-UP-167 - Keels v. Richland County	Denied 9-27-01
2001-UP-192 - State v. Mark Turner Snipes	Pending
2001-UP-193 - Cabaniss v. Pizza Hut of America, Inc.	Pending
2001-UP-200 - Cooper v. Parsons	Denied 10-15-01
2001-UP-232 - State v. Robert Darrell Watson, Jr.	Pending

2001-UP-238 - State v. Michael Preston	Pending
2001-UP-239 - State v. Billy Ray Jackson	Pending
2001-UP-248 - Thomason v. Barrett	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Owners Association v. Miller	Pending
2001-UP-269 - Wheeler v. Revco	Denied 10-25-01
2001-UP-292 - Franzello v. Bankhead	Pending
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-315 - Joytime v. Orr	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending
2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-325 - Hessenthaler .v Tri-County	Pending
2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-365 - Gaither v. Blue Cross Blue Shield	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-383 - Rivera v. Columbia OB/GYN	Pending

2001-UP-384 - Taylor v. Wil Lou Gray Pending

2001-UP-385 - Kyle & Associates v. Mahan Pending

2001-UP-389 - Clemson v. Clemson Pending

PETITIONS - U. S. SUPREME COURT

2000-UP-738 State v. Mikell Anthony Pinckney Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Albert Garvin, Petitioner

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Luke N. Brown, Jr., Circuit Court Judge

ORDER WITHDRAWING AND SUBSTITUTING OPINION

PER CURIAM: It is ordered that the opinion heretofore filed, Memorandum Opinion No. 2001-MO-059, filed October 11, 2001, be withdrawn and the attached Opinion be substituted therefore.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 29, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Albert Garvin, Petitioner

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25369
Heard October 9, 2001 - Filed October 29, 2001

DISMISSED AS IMPROVIDENTLY GRANTED

Assistant Appellate Defender Tara S. Taggart, of the Office of Appellate Defense of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson,

Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

PER CURIAM: This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in *State v. Garvin*, 341 S.C. 122, 533 S.E.2d 591 (Ct. App. 2000). After careful consideration, we now dismiss as improvidently granted.

DISMISSED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Christopher E.A. Barton, Respondent.

Opinion No. 25370
Submitted October 2, 2001 - Filed October 29, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Wilburn Brewer, Jr., of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and publicly reprimand respondent. The facts as set forth in the agreement are as follows.

Facts

Continuing a longtime practice of the city solicitor's office, respondent sent out juror questionnaires to prospective members of the jury venire selected to hear misdemeanor cases in municipal court. The

questionnaires were printed on municipal court stationary and initially sent out with the municipal court's notice to jurors of their selection for jury duty.

After a discussion with the municipal court judge, the questionnaires were sent to jurors by the solicitor's office separately, with a cover letter from respondent stating that the questionnaire should be returned to the solicitor's office. However, the questionnaires continued to be printed on municipal court stationary. This arrangement was approved by the municipal court judge.

Upon receipt of inquiries from the Office of Disciplinary Counsel, respondent realized the impropriety of the questionnaires and immediately ceased the practice.

Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 3.5(b) (a lawyer shall not communicate ex parte with a juror except as permitted by law); Rule 8.4(a) (knowingly violating or attempting to violate the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice). By violating the Rules of Professional Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Conclusion

We find that respondent's misconduct warrants a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie Mathis Newton,

Appellant,

v.

Progressive Northwestern Insurance Company,

Respondent.

Appeal From Saluda County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3395
Heard September 13, 2001 - Filed October 29, 2001

AFFIRMED

Deborah R.J. Shupe, of Louthian & Louthian, of Columbia, and Robert J. Harte, of Aiken, for appellant.

J. R. Murphy and J. J. Gentry, both of Murphy & Grantland, P.A., of Columbia, for respondent.

GOOLSBY, J.: By this declaratory judgment action, William Mathis Newton seeks reformation of an automobile liability policy issued him by Progressive Northwestern Insurance Company to include uninsured motorist coverage. The trial court granted Progressive summary judgment. Newton appeals. We affirm.

FACTUAL/PROCEDURAL HISTORY

On October 13, 1996, Progressive issued Newton, a resident of Augusta, Georgia, an automobile liability insurance policy. Newton purchased the policy through the Affordable Insurance Agency in Martinez, Georgia. Because he rejected uninsured motorist coverage, which is optional in Georgia, Progressive issued its policy without uninsured motorist coverage.

Several months later, on March 3, 1997, Newton was involved in an automobile accident while traveling in South Carolina. The at-fault driver of the other car had no liability insurance. At the time of the accident, Newton was still covered under the policy issued by Progressive.

According to Newton's brief before this court and as required by this state's Motor Vehicle Financial Responsibility Act,[1] Newton received a form requesting verification of liability insurance coverage.[2] Progressive completed the form for Newton, verifying he had automobile liability insurance on the date of the accident.

Newton brought suit against the at-fault driver. He also served Progressive. The latter, however, denied coverage because the policy issued Newton did not provide uninsured motorist coverage.

---

[1] S.C. Code Ann. §§ 56-9-10 to -630 (1991).

[2] Id. § 56-9-350.

Newton later brought the instant action, contending the Motor Vehicle Financial Responsibility Act required reformation of his policy to include the minimum uninsured motorist coverage required by South Carolina law. When granting Progressive's motion for summary judgment, the trial court held the Motor Vehicle Financial ResponsibilityAct did not require reformation of Newton's policy.

LAW/ANALYSIS

Newton appeals, arguing because South Carolina law required Newton to supply the Department of Public Safety with proof of financial responsibility in connection with the accident[3] and because Progressive undertook to verify liability coverage for him, the terms of the policy had to be reformed to comply with South Carolina liability policy requirements. In support of his argument, Newton points to the following policy provision in effect at the time of the accident:

> When **we** certify this policy as proof of financial responsibility, this policy will comply with the law to the extent required. **You** must reimburse **us** if **we** make a payment that **we** would not have made

---

[3] S.C. Code section 56-9-350 (1991) provides in pertinent part:

> The . . . owner of a motor vehicle involved in an accident resulting in property damage of four hundred dollars or more, or in bodily injury or death, must be furnished a written request form at the time of the accident . . . by the investigating officer for completion and verification of liability insurance coverage . . . .
>
> The completed and verified form must be returned by the . . . owner to the Department within fifteen days from the date the form was delivered by the officer. . . .

if this policy was not certified as Proof of Financial Responsibility.

(Emphasis in original).

At most, by completing the request form given Newton pursuant to S.C. Code Ann. section 56-9-350 (1991), Progressive would have merely confirmed that Newton had liability insurance coverage on his vehicle and could answer to a judgment obtained by a third party up to the policy limits. If this action had the effect of rendering Progressive liable to Newton for uninsured motorist coverage and thus having to pay Newton any amount he obtained by way of a judgment, Newton would have to return the money under the clear terms of the policy. The reason is because Progressive would not have had to make the payment if it had not verified the policy as proof of financial responsibility to the State of South Carolina. The law requires a lot of things, but doing a useless act is not one of them[4] — at least ordinarily, it is not.

Newton cites S.C. Code Ann. section 56-9-351 (Supp. 2000)[5] in support of his position that Progressive's verification of liability insurance coverage for him added uninsured motorist coverage to his policy. All the statute does, however, is compel the creation of a fund from which one might satisfy a

---

[4] Orange Bowl Corp. v. Warren, 300 S.C. 47, 386 S.E.2d 293 (Ct. App. 1989).

[5] S.C. Code Ann. section 56-9-351 (Supp. 2000) provides in pertinent part:

> Within sixty days of receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in the amount of two hundred dollars or more, . . . [i]f the . . . driver is a nonresident, the privilege of operating a motor vehicle within this State . . . is suspended unless the . . . driver or owner, . . . , deposits security in a sum not less than two hundred dollars or an additional amount as the department may specify that will be sufficient to satisfy a judgment that may be recovered for damages resulting from the accident which may be recovered against the operator or owner.

judgment obtained against an operator or owner for damages resulting from a motor vehicle accident involving the operator's or owner's motor vehicle.

Newton maintains that Progressive certified proof of financial responsibility pursuant to S.C. Code Ann. section 56-9-560 (1991).[6] The record before us shows no such thing occurred. For instance, nothing in the record shows that Progressive executed a power of attorney that designated the Department as its agent to accept service of process or that it agreed in writing that its policy would be construed to conform to South Carolina law regarding financial responsibility.

Moreover, section 56-9-560 is not applicable in the instant case. Progressive need not have certified proof of financial responsibility pursuant to

---

[6] S.C. Code Ann. section 56-9-560 (1991) states in pertinent part:

> The nonresident owner of a motor vehicle not registered in this State may give proof of financial responsibility by filing with the Department written certificates of an insurance carrier authorized to transact business in the state in which the motor vehicle . . . described in the certificate is registered . . . , provided the certificate otherwise conforms with the provisions of this chapter, and the Department shall accept it upon condition that the insurance carrier complies with the following provisions with respect to the policies certified:
>
> > (1) The insurance carrier shall execute a power of attorney authorizing the Department to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this State; and
> >
> > (2) The insurance carrier shall agree in writing that the policies shall be construed to conform with the laws of this State relating to the terms of motor vehicle liability policies issued in this State.

section 56-9-560. Article 5 of Chapter 9 of Title 56 within which section 56-9-560 falls concerns those against whom judgments have already been obtained, residents and nonresidents alike.[7] Nothing in the record shows that Newton had been involved in an earlier accident in this state and had failed to satisfy a judgment prior to the accident at issue here. Similarly, the record does not indicate Newton had been in an accident and failed to satisfy a judgment after the effective date of submitting proof of his ability to respond to damages for liability on account of an accident arising out of the ownership or use by him of a motor vehicle.[8]

Perhaps the biggest hurdle Newton faces is the limited reach of S.C. Code Ann. section 38-77-150 (Supp. 2000), the statute that mandates uninsured motorist coverage be included in an "automobile insurance policy." S.C. Code Ann. section 38-77-30(10.5) (Supp. 2000) expressly defines the latter term as used in Chapter 77 to mean "a policy . . . issued or delivered in this State . . . ." S.C. Code Ann. section 38-77-30(1) (Supp. 2000) further limits "automobile insurance" to "liability insurance, including . . . uninsured motorist coverage, . . . written or offered by automobile insurers." S.C. Code Ann. section 38-77-30(2) (Supp. 2000) defines the term "automobile insurer" as "an insurer licensed to do business in South Carolina and authorized to issue automobile insurance policies."

Section 38-77-150 does not affect policies issued in other states, including

---

[7] See e.g., S.C. Code Ann. § 56-9-410 (1991) (requiring reports of unpaid judgments to be made to the Department); id. § 56-9-420 (requiring the Department to report unpaid judgments against nonresidents to the nonresident's home state).

[8] See Reyes v. Travelers Ins. Co., 553 N.E.2d 301 (Ill. 1991) (holding Illinois resident involved in an accident in Indiana was not subject to Indiana's Financial Responsibility law because he had not been involved in a prior accident in that state); cf. S.C. Code Ann. § 56-9-20(11) (Supp. 2000) (defining "proof of financial responsibility" to mean the "ability to respond to damages for liability . . . on account of accidents occurring after the effective date of such proof, arising out of the ownership . . . or use of a motor vehicle . . . .").

Georgia. A policy issued and delivered outside of South Carolina is not "a policy issued or delivered in this State." As noted above, Progressive issued its policy in the State of Georgia to a Georgia resident through a Georgia insurance agent.

Furthermore, the policy in question is not one written or offered by a licensed South Carolina insurer. Progressive, a licensed Georgia insurer, wrote or offered it. "The fact that an accident which is within the risk covered by an accident policy occurred in a certain state does not make the contract one of that state." [9]

The trial court, therefore, properly held this State's financial responsibility law did not require the reformation of the Georgia policy to include uninsured motorist coverage.[10]

AFFIRMED.

HUFF and STILWELL, JJ., concur.

---

[9] 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 24.15, at 24-24 (1997).

[10] See Galford v. Nicholas, 167 A.2d 783 (Md. 1961) (holding the law that controls is the law where the automobile insurance contract was entered into); accord Cotton v. State Farm Mut. Auto. Ins. Co, 540 So.2d 1387 (Ala. 1989); Fortune Ins. Co. v. Owens, 526 S.E.2d 463 (N.C. 2000).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vera Brown, Carl Brown, Jr., Tiffany Brown and Latoya Brown,

Respondents,

v.

Julie Brown Butler,

Appellant.

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 3396
Heard September 6, 2001 - Filed October 29, 2001

AFFIRMED

Robert L. Gailliard, of Charleston, for appellant.

Charles S. Goldberg and Tiffany R. Spann, both of The Steinberg Law Firm; and Harold A. Oberman, of Oberman & Oberman, all of Charleston for respondents.

GOOLSBY, J.: By this action, the respondents Vera Brown and her children, Carl Brown, Jr., Tiffany Brown, and Latoya Brown, sought to set aside a deed by which Carl Brown, Sr., Vera's estranged husband and the children's father, conveyed certain Charleston County property to Julie Brown Butler. The master-in-equity set aside the deed on the ground that the conveyance violated the Statute of Elizabeth.[1] Butler appeals. We affirm.

Vera Brown and Carl Brown, Sr., were married in 1976 and had three children, the other named respondents. Carl acquired the subject property in 1978 when his siblings deeded him the three-acre parcel for a stated consideration of five dollars. Carl and Vera constructed a shell home on the property, giving a note and mortgage to the builder Jim Walters. Working together, they finished the home.

In 1996, Carl contracted cancer. On February 10, 1996, Carl gave Vera a handwritten note ordering her to move out of the house by the "end of March." On being given the note, Vera told Carl she would seek the advice of a lawyer and would undertake to get what rightfully belonged to her and their children.

On February 22, 1996, Carl deeded the property to his sister Julie Brown Butler for a stated consideration of one dollar and love and affection. The deed, however, was not recorded until April 5, 1996. Sometime during that same month, Vera and Latoya, the only child then living at home with Vera and Carl, moved out.

Butler did not learn about the conveyance until January 1998, almost two years later, when Carl gave the deed to her. Butler valued the property at $49,000, based on prior tax assessments.

---

[1] S. C. Code Ann. § 27-23-10 (Supp. 2000).

Vera sought legal counsel, both to protect whatever interest she had in the property and to obtain a separation from Carl. She went first to Legal Aid and later, in late February or early March 1997, to attorney F. Henderson Moore, Jr. Moore began work on Vera's case and had her sign a blank verification form and return it to him. Subsequently, Moore lost his privilege to practice law in South Carolina.[2] In August 1998, Vera retrieved her file and sought legal assistance elsewhere. As of that time, Moore had not brought suit against Carl.

Carl died intestate in June 1998, leaving Vera and the children as his sole heirs. On November 17, 1998, Vera filed an action against Carl and Butler requesting that the deed from Carl to Butler be set aside. This action was dismissed without prejudice by consent order. On February 23, 1999, Vera and the children filed another action requesting similar relief; this time, however, the complaint named only Butler as a defendant.

The master-in-equity to whom the circuit court referred the action ordered the deed set aside, finding the transfer of the property by Carl to Butler was in violation of the Statute of Elizabeth. The master also accorded no merit to Butler's laches defense.

I.

Butler first argues the master's order is void because jurisdiction to determine whether the property constituted an asset of Carl's estate lay solely with the probate court. We disagree.

Butler relies upon South Carolina Code section 62-1-302(a)(1), which provides in pertinent part:

---

[2] The supreme court issued an opinion dated December 16, 1997, suspending Moore from the practice of law for one year. In re Moore, 329 S.C. 294, 494 S.E.2d 804 (1997).

> (a) [E]xcept as otherwise specifically provided hereinafter, the court has exclusive original jurisdiction over all subject matter related to:
>
> (1) estates of decedents, including the contest of wills, construction of wills, and determinations of heirs and successors of decedents and estates of protected persons.[3]

The action here, however, is not against Carl. It is against Butler. It is neither an action to contest or construe a will, to determine heirs and successors of a decedent, nor to determine the estate of a protected person. Rather, the action is one to set aside a deed, and it is brought against one who is very much alive and litigating.[4]

The case relied on by Butler, Parker v. Shecut,[5] does not aid her. There, the property in question formed part of the decedent's estate. Here, Butler received legal title to the property as a result of an inter vivos conveyance and held title for several months before the transferor's death.[6]

---

[3] S.C. Code Ann. § 62-1-302(a)(1) (1987 and Supp. 2000) (emphasis added).

[4] Vera did not name Carl's estate as a party, nor was she required to do so in order to proceed. See Powell v. Green, 281 S.C. 358, 315 S.E.2d 183 (Ct. App. 1984) (holding the grantor in an allegedly fraudulent conveyance is not a necessary party in an action to set aside the transfer because she was deemed to have parted with all interest in the subject property).

[5] 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), cert. granted (Jan. 11, 2001).

[6] Cf. Shelley v. South Carolina Dep't of Mental Health, 283 S.C. 344, 322 S.E.2d 687 (Ct. App. 1984) (holding that, under the former probate code, the statutory grant of jurisdiction "in all matters testamentary and of administration" to probate courts does not embrace jurisdiction in an equitable action to dissolve a lien of a health-care provider for care given to a deceased).

II.

Butler next argues the master erred in holding Carl violated the Statute of Elizabeth[7] when he conveyed the property to her. More specifically, she attacks the finding that undergirded the master's holding, namely that Vera fell within the class of those protected by the statute. As we understand Butler's argument, she contends that a wife must have an interest in the property conveyed at the time of the conveyance to be so protected and that, because Carl alone held title to the property and because Vera had not brought a divorce action against him before he conveyed it away, Vera had no interest protected by the Statute of Elizabeth.

We hold, however, an estranged wife in Vera's position has a sufficient interest in property titled in her husband's name to set aside a conveyance that could adversely affect her claims for separate support and maintenance, for alimony, or for an equitable division of the marital property.[8] Even if not a

---

[7] The present version of the statute reads in pertinent part as follows:

> Every . . . feoffment, gift, grant, alienation, . . . of lands . . . by writing . . . which may be had . . . for any intent or purpose to . . . defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures shall be deemed . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10 (Supp. 2000) (emphasis added). This version took effect June 10, 1997, which was after Carl executed the deed in question but before he delivered it to Butler.

[8] See S.C. Code Ann. § 20-3-130(C)(8) (Supp. 2000) (requiring the family court to consider both marital and nonmarital properties of the parties in making an award of alimony or separate support and maintenance); id. § 20-7-471(recognizing a spouse's acquisition of a vested special equity and ownership in marital property); cf. Smith v. Smith, 327 S.C. 448, 458, 486 S.E.2d 516, 521

"creditor," an estranged wife would fall within the phrase "and others," a phrase that the statute also uses and refers to "persons who, like creditors, have causes of action which may be prejudicially affected by a transfer of assets by one against whom the right of action exists."[9]

III.

We find no merit to Butler's argument that the family court had sole jurisdiction to apportion marital property and the action was therefore improperly before the master. The master did not undertake in this case to apportion marital property between a husband and wife, but merely set aside a deed by which a husband conveyed away property titled in his name.

IV.

Butler faults Vera for waiting until March 1997 to seek legal assistance and until November 1998, after Carl had died, to bring suit. She argues laches should bar this action. We find no reversible error.

(Ct. App. 1997) (holding the family court, in dividing the marital property, properly considered actions taken by the husband before the parties' actual separation, including "substantial steps to make the tracking of marital assets difficult"); Rush v. Smith, 394 S.W.2d 613, 616 (Ark. 1965) ("A husband's colorable disposition of assets to defeat his wife's property rights in pending or anticipated divorce suit may be found to be fraudulent.") (emphasis added); Wallace v. Wallace, 291 S.E.2d 386, 389 (W. Va. 1982) ("[C]ourts have recognized that a spouse has a right to protect a potential alimony award or property settlement from improper transfers before marriage, . . . or in contemplation of divorce . . . .") (emphasis added); 41 C.J.S. Husband and Wife § 12, at 308 (1991) ("Conveyances of real property made by one spouse during marriage for the purpose of defeating the rights of the other spouse are fraudulent and void, or at least voidable.").

[9] 37 Am. Jur. 2d Fraudulent Conveyances § 118, at 618 (2001).

The determination of whether laches has been established is largely within the discretion of the trial court.[10] Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice.[11] The question of whether a claim is barred by laches is to be determined in light of the facts of the particular case.[12]

We hold the master did not abuse his discretion in declining to make a finding of laches. After Carl ordered her to leave the marital residence, Vera first sought representation from Legal Aid and, later, in February or March 1997, from attorney Moore. After dismissing without prejudice an action brought in November 1998 challenging Carl's secret conveyance of the property to Butler, Vera and her children brought the present action in February 1999. What delay there was in bringing this action can be laid principally at the feet of attorney Moore and somewhat to the dismissal without prejudice of the earlier action brought by Vera's second attorney. Under the circumstances, we do not consider the delay in bringing suit unreasonable.

We do not overlook Butler's argument, citing Citizens' Bank v. Heyward,[13] and Bank for Savings and Trusts v. Towe,[14] that the acts and omissions of Vera's attorney are attributable to her. But this is not a hard and fast rule. Rather, it is one that is "to be applied rationally, with a fair recognition that justice to the litigants is always the polestar."[15] Vera and her children could

---

[10] Grossman v. Grossman, 242 S.C. 298, 130 S.E.2d 850 (1963).

[11] Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988).

[12] Id. at 198-99, 371 S.E.2d at 527.

[13] 135 S.C. 190, 133 S.E. 709 (1925).

[14] 231 S.C. 268, 98 S.E.2d 539 (1957).

[15] 7A C.J.S. Attorney & Client § 181, at 284 (1980); cf. Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978) (holding the general rule that an attorney's neglect is attributable to the client does not apply if there has

not have anticipated attorney Moore would not have promptly brought suit against Carl after Vera signed and returned the verification to him. Neither could they have anticipated Moore would later lose his privilege to practice law before suit was brought, thus necessitating their obtaining new counsel to bring an action.[16]

Finally, as to prejudice, Butler argues only that Carl died before Vera's second action was filed. This fact in and of itself is insufficient to support a finding of prejudice to bar an action on the ground of laches.[17] "As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right."[18] Although this is an equity matter, for which laches can be a viable defense even if the statute of limitations does not apply, we hold that Butler failed to meet the heightened burden of proof placed on one asserting the defense of laches in a situation, such as this one, in which the underlying action was brought within the applicable limitations period. She has not directed our attention to anything

---

been a wilful and unilateral abandonment of client by counsel); 27A Am. Jur. 2d Equity § 148, at 626 (1996) ("Fairness will bar application of laches where the result would be unjust; laches does not operate harshly, as may a statute of limitation. Statutes of limitation, further, may work great practical injustice–the doctrine of laches, never.").

[16] "[T]he general rule that a client is bound by the acts and omissions of his attorney may not apply . . . where the conduct of counsel is outrageously in violation of . . . his implicit duty to devote reasonable efforts in representing his client." 7A C.J.S. Attorney & Client § 181, at 285 (1980).

[17] See 27A Am. Jur. 2d Equity § 189, at 666-67 (1996) ("For laches to apply in cases where real property is in dispute, there generally must be prejudice arising from some change in the condition or relation of the property or parties such that it would be unfair to allow maintenance of the claim.").

[18] Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994).

in the record suggesting that the delay in filing suit was accompanied either by a failure on the plaintiffs' part to perform a legal duty or by a negligent act on their part that misled her to the extent that it would be inherently unfair to allow Vera and the children to proceed on their cause of action.[19]

AFFIRMED.

HUFF and STILWELL, JJ., concur.

---

[19] The supreme court, discussing the burden of proof on one asserting the defense of laches in a lawsuit filed within the applicable limitations period, stated as follows:

> In order to constitute laches, there must be shown, not merely neglect for a time to enforce a legal or equitable right, where such neglect is for a period short of that which is a bar under the statute of limitations, but it must further be made to appear that such delay was accompanied either by a failure to perform some legal duty, whereby prejudice has resulted to the person pleading such neglect, or that such delay was accompanied by some act on the part of the person so negligent, which operated to mislead the person pleading such neglect, to his prejudice to such an extent that it would be unjust and inequitable thereafter to permit such negligent party to enforce such right.

Edwards v. Johnson, 90 S.C. 90, 103-104, 72 S.E. 638, 644 (1911).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Anya Lafay Bell,

Appellant.

Appeal From Abbeville County
John W. Kittredge, Circuit Court Judge

Opinion No. 3397
Submitted October 1, 2001 - Filed October 29, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant

Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor W. Townes Jones, IV, of Greenwood, for respondent.

HOWARD, J.: Anya Lafay Bell was convicted of possession of crack cocaine and possession of crack cocaine with intent to distribute. The trial court sentenced Bell to six years imprisonment for possession of crack cocaine with intent to distribute and one year concurrent for the possession charge. On appeal, Bell argues the State improperly referred to her post-arrest silence during cross-examination, thereby warranting a mistrial. We affirm.[1]

FACTS/PROCEDURAL HISTORY

On March 12, 1999, a search warrant was issued for Bell's apartment. When the police arrived at the apartment, no one was home and the front door was open. The police searched the apartment and found a small bag of powder cocaine lying on the kitchen counter. They also found a plastic bag full of crack cocaine rocks in a pocketbook located in one of the bedrooms. The pocketbook contained a driver's license and other types of cards identifying Bell as the owner of the pocketbook.

Bell was arrested approximately one week after the search of her apartment. At trial, Bell testified the drugs found in her apartment were not hers. She testified that her boyfriend, Darrell Grant, sometimes stayed in her apartment and that he sold and used drugs. Bell also stated Grant had been in her apartment by himself on the day of the search.

During the State's cross-examination of Bell, the State asked Bell how police had responded to her story that the drugs belonged to her boyfriend. Bell answered that the police had not asked and she had not told them. Defense counsel objected to the State's reference to Bell's post-arrest silence, and the trial court sustained the objection, giving a curative instruction. However, when

---

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

cross-examination resumed, the State again tried to impeach Bell's testimony by attempting to show that she had not told the story to her family. Although Bell responded that she told several family members, defense counsel again objected to this line of questioning on the basis that it was another improper reference to her post-arrest silence. This time the trial court overruled the objection and allowed the testimony.

Bell moved for a mistrial, contending the trial court erred by allowing the State to attempt to comment upon her post-arrest silence. The trial court denied the motion, and Bell was found guilty of all charges. This appeal followed.

LAW/ANALYSIS

Bell contends the trial court erred by allowing the State to question her regarding her post-arrest silence.

In Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court ruled the prosecution could not attempt to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining him about his failure to tell the story after receiving Miranda[2] warnings. The Court held "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." Id. at 619. The Court noted Miranda warnings offer an implicit assurance to an arrested person that his silence will carry no penalty and that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In Fletcher v. Weir, 455 U.S. 603 (1982), the Supreme Court clarified the rule set forth in Doyle. Weir was arrested on charges of intentional murder stemming from a stabbing in a nightclub parking lot. At his trial, Weir took the stand in his own defense and admitted stabbing the victim, but claimed that he acted in self-defense. This was the first occasion Weir offered his version of the stabbing. The prosecutor cross-examined Weir as to why he had failed to offer

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

this explanation when he was arrested. The jury ultimately convicted Weir of first-degree manslaughter.

On appeal, the Sixth Circuit Court of Appeals held Weir was denied due process when the prosecutor used his post-arrest silence for impeachment purposes. Fletcher v. Weir, 658 F.2d 1126 (1981), rev'd, 455 U.S. 603 (1982). The court concluded that Weir could not be impeached by his post-arrest silence even if no Miranda warnings were given, stating "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." Id. at 1131.

The Supreme Court reversed, noting unlike the defendant in Doyle, there was no evidence that Weir received any Miranda warnings during the period of his post-arrest silence. Fletcher, 455 U.S. at 603. The Court found that "[i]n the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." Id. at 607.

In another post-Doyle case, the Supreme Court reiterated that the Doyle rule

> rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. The "implicit assurance" upon which we have relied in our Doyle line of cases is the right-to-remain-silent component of Miranda. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, or after arrest if no Miranda warnings are given. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.

Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (citations omitted).

In the present case, there is no evidence in the record that Bell ever received Miranda warnings, and we will not presume the warnings were given

at the time of arrest. See United States v. Cummiskey, 728 F.2d 200, 205 (3rd Cir. 1984) ("Although nothing in the Weir record indicated the time Miranda warnings were given, the Supreme Court did not presume that the warnings were given at the time of arrest. Accordingly, we do not believe that we are authorized to engage in such a presumption." (citation omitted)). Although there was testimony that Bell was arrested approximately one week after the search of her apartment, her arrest alone is insufficient to implicitly induce Bell to remain silent. See Fletcher, 455 U.S. at 603. Therefore, we find no due process violation occurred as a result of the State's cross-examination of Bell. The decision of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pamela G. Allen,

Respondent,

v.

Floyd E. Allen,

Appellant.

Appeal From Horry County
Haskell T. Abbott, III, Family Court Judge

Opinion No. 3398
Submitted September 4, 2001 - Filed October 29, 2001

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED

Irby E. Walker, Jr., of Conway and Cynthia Graham Howe, of Van Osdell, Lester, Howe & Jordan, of Myrtle Beach, for appellant.

John L. Sherrill, of Sherrill & Janes, of Surfside Beach, for respondent.

HUFF, J.: In this domestic action, Floyd E. Allen (the husband) appeals from several aspects of the family court's order, including: (1) inclusion of certain property in the marital estate for purposes of equitable distribution; (2) the court's award of alimony to Pamela G. Allen (the wife); (3) the court's order that he secure his equitable distribution and alimony obligations with a $200,000.00 life insurance policy; (4) certain factual determinations; and (5) the award of $22,500.00 in attorney fees to the wife. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

The parties were married in September of 1963 at Fort Benning, Georgia. They have three children, all of whom are emancipated.

At the time of the marriage, the husband was 27 years old and the wife was 20. The husband was on active duty in United States Army and was a licensed optometrist. The wife had completed cosmetology school. After the marriage, the husband was stationed in Ethiopia, where the parties lived for approximately 18 months. Although the wife had a job opportunity in a beauty shop while in Ethiopia, she declined because she was pregnant at the time.

In 1965, the parties relocated to Conway, South Carolina where the husband began a private optometry practice, and he continued operating the business throughout the marriage. In addition, the husband entered the United States Army Reserves and eventually retired as a Colonel.

During the marriage, the wife was employed only sporadically. She worked for the husband for a brief period shortly after he began his private optometry practice. In the mid 1970's, the wife obtained a real estate license. She attempted to sell real estate on a full time basis for approximately one year, but she completed only one sale during that time frame. In the mid 1980's, the

wife completed a nursing assistant's course. However, she never worked as a nursing assistant.

The husband left the marital home in November of 1993. The wife instituted this action in April of 1995 seeking, inter alia, a divorce on the ground of desertion, equitable distribution of marital property, and an award of alimony. The husband answered, denying the wife was entitled to a divorce on the ground of desertion.

By temporary order dated May 16, 1995, the family court granted the wife possession and use of the marital home, with the husband to be responsible for payment of all mortgage indebtedness, real estate taxes, and insurance payments on the home. The order also required the husband to pay the cost of providing the wife with automobile and health insurance. Further, the court awarded the wife $1,200.00 per month in alimony, and $4,000.00 in temporary attorney fees. Finally, the order provided the husband could continue making real estate transactions, as had been his practice during the marriage, so long as he made accountings to the wife.

In June of 1995, the wife petitioned the family court for a rule to show cause why the husband should not be held in contempt for failure to comply with the provisions of the temporary order concerning, inter alia, payment of attorney fees and mortgage expenses. The wife subsequently agreed to dismiss the rule.

In July of 1995, the wife sought further temporary relief due to the husband's alleged failure to timely advise her of his intention to sell marital assets. By order dated July 19, 1995, the family court ordered the husband to deliver to the wife monthly accountings with details concerning sales of marital property. The court also required the husband to deliver to the wife copies of sales contracts contemporaneously with the execution of the contracts. As well, the order specifically provided the parties were to divide all net sales proceeds as per their agreement, or if no agreement was reached, the proceeds would be divided at the final hearing on the matter.

In September of 1995, the wife was diagnosed with breast cancer. As a result, in November 1995, the case was continued indefinitely by order of the family court.

The family court held a final hearing on August 6, 1998. At this hearing, the wife withdrew her plea for divorce, and instead sought an order of separate maintenance and support. By order dated July 13, 1999, the family court granted the wife an order of separate support and maintenance. The family court awarded the wife $2,000.00 per month in alimony, $22,500.00 in attorney fees, and a 40% interest in the marital estate, to which the court assigned a value of $1,220,078.17. In addition, the court ordered the husband to continue paying the wife's health insurance premiums until she reached 65 years of age, for which he would receive a credit toward his alimony payments. Finally, the court ordered the husband to maintain a $200,000.00 life insurance policy with the wife as beneficiary.

The husband moved for reconsideration. In a modified final order dated September 9, 1999, the family court ordered the husband to maintain the $200,000.00 life insurance policy to secure the award of alimony and equitable distribution to the wife. The court also instituted changes not pertinent to this appeal, but otherwise declined to grant the husband relief on his post-trial motion. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). However, this broad scope of review does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). 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. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

I. Predistributed Property

The husband first argues the family court erred in including in the marital estate $104,002.57 worth of property which was sold during the pendency of litigation. We agree.

During the pendency of this matter, the husband sold two of the parties' real estate investment properties. The parties agreed to divide the proceeds equally and that the proceeds "may be considered as an advancement of any equitable distribution award." Each party received approximately $52,000.00 from the transaction, and thereafter utilized the funds at their discretion.[1] The wife conceded it would be unfair for her to "share again" in the husband's $52,000.00 distribution.

Despite the prior distribution of the proceeds from the sales to the parties, and the parties agreed upon division of the assets, both the original and modified final orders include the value of the real estate transaction in the value of the marital estate. The court provided an award to the wife of $41,601.03 (40% of the total amount realized from the real estate transactions) and $62,401.54 (60% of the total) to the husband. The transactions were included in the modified final order despite the husband's inclusion of the issue in his motion for reconsideration and the family court judge's express intention to delete the real estate transactions from the marital estate. In a June 7, 1999, letter to the attorneys, the judge stated: "I did not include the [wife's] checking

[1] The wife testified she spent most of her $52,000.00 on medical bills, attorney fees, home repairs and living expenses, but she had the $4,000.00 remaining balance in her checking account. The husband testified he placed all of his $52,000.00 in his business savings account.

account as a marital asset due to the balance being derived from the advances made from real estate closings during the pendency of the action. I have also deleted the amount derived from the closings from [the husband's] business account as well."

Further, although the family court included the value of the real estate transactions in the marital pot, it did not require the parties to pay these previous distributions back into the pot. Indeed, the wife has apparently spent all but $4,000.00 of the $52,000.00 distribution to her. Thus, while the court effectively credited the wife with only 40% of the total $104,000.00 transaction, it did not require her to account for the full $52,000.00 that she actually received. The court ordered the husband to pay the wife an additional $27,600.39 to effect a 40% distribution to the wife, inclusive of these funds that had already been divided by the parties per their agreement. Thus, it appears the family court included the value of the real estate transactions in its final valuation of the marital assets, although this asset had already been divided. Moreover, we think the parties' agreement, as well as general notions of fairness, require that the case be remanded for redivision of the marital estate excluding the value of the real estate transactions.[2] Accordingly, we reverse so much of the order as includes these transactions, and remand the case for further proceedings as to this issue, consistent with this opinion.

II. Alimony

Next, the husband asserts the family court erred in awarding the wife $2,000.00 per month in alimony. More specifically, the husband contends

---

[2] We note it also appears the court may have deducted the $52,000.00 proceeds the husband realized from the transactions from the husband's business account when valuing the marital assets. However, this asset should include the full value of the business asset as of the date of commencement of marital litigation, regardless of whether the husband later used this account to deposit the $52,000.00 proceeds. Likewise, any funds in the wife's checking account at the time of commencement of marital litigation, prior to deposit of her $52,000.00 in proceeds, should be included in the marital estate as well.

the family court based its decision on erroneous and/or unsupported findings of fact and failed to impute any income to the wife. We find no error.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Williams v. Williams, 297 S.C. 208, 210, 375 S.E.2d 349, 350 (Ct. App. 1988). "Alimony is a substitute for the support which is normally incident to the marital relationship." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage. Id. It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded. Woodward v. Woodward, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App.1987).

Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2000). No one factor is dispositive. Lide v. Lide, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981).

The family court found this was a marriage of nearly 36 years. The husband argues this was an erroneous finding of fact inasmuch as the parties were married on September 15, 1963, separated on November 15, 1993, and commenced this litigation on April 18, 1995. According to husbands' calculations, the marriage was one of 31½ years. The husband's argument presupposes the duration of a marriage should be calculated from the date of marriage to the date of commencement of marital litigation. We note however, a marriage is not terminated as of the date the parties separate, or even the commencement of marital litigation. In fact, the parties herein are still married,

having not yet obtained an adjudication of divorce. Thus, as of the date of the final order, the family court's finding as to the length of the marriage was correct. Further, the court specifically noted the marriage had endured for 35 years, and the "parties continued to reside together until the 30th year of their marriage." Therefore, the court clearly considered that the parties had not lived together for the last several years. Accordingly, in regard to the husband's concern that the family court placed too much emphasis on the long duration of the marriage in determining the alimony award, we note the court was well aware of the date of the parties' separation, as well as of the date marital litigation commenced.

The husband also takes exception to the family court's finding he "appeared to be in good health, for he is still involved in the practice of optometry and continues to speculate in real estate." The husband asserts that contrary to the family court's finding, he was 62 years old at the time of trial, and hoped to retire at 65 years old. Moreover, he suffered two detached retinas, requiring surgery on each eye, and had cancer surgery "for several different places" on his nose. We do not think the court's failure to specifically mention the husband's health concerns renders its consideration of the issue erroneous. The crux of the court's consideration was that the husband did not suffer from health problems which limited his ability to work. As of the time of trial, the husband continued to practice optometry on a full time basis, and continued to speculate on real estate as he had during the marriage, thereby earning a gross income of $6,075.00 per month.

The husband next argues the family court erred in finding the parties had a "very comfortable" standard of living with funds available for "vacations" and "luxury automobiles." Specifically, the husband denies the parties owned luxury automobiles. Inasmuch as the parties accumulated a marital estate valued at more than $1,000,000.00, exclusive of predistributed property, we can discern no error in the family court's conclusion the parties enjoyed a very comfortable standard of living and had funds **available** for luxury automobiles. Whether the parties actually owned luxury automobiles is of little consequence.

As a final attack on the award of alimony, the husband asserts the court failed to give proper consideration to the wife's education and ability to work. We disagree. The family court expressly considered the wife's education, including her educational pursuit during the marriage, as well as her lack of work history and the effect of her physical and emotional health on her ability to work. Our inquiry on appeal is not whether the family court gave the same weight to particular factors as this court would have; rather, our inquiry extends only to whether the family court abused its considerable discretion in assigning weight to the applicable factors. S.C. Code Ann. § 20-3-130(C) (Supp. 2000) (In making an award of alimony, the family court must consider all relevant factors and "give weight in such proportion as it finds appropriate" to these factors.). Particularly in light of the wife's lacking work history, her current age, and past medical problems, we can discern no such abuse of discretion.

III. Support/Equitable Distribution Security

The husband next contends the family court erred in requiring him to secure his alimony and equitable distribution obligations with a $200,000.00 life insurance policy. We agree.

First, we note that statutory law provides that the family court may, in some cases, require a supporting spouse to secure his **support obligation**. See S.C. Code Ann. § 20-3-130(D) (Supp. 2000) (allowing the court to provide security for the payment of alimony or separate maintenance and support) and S.C. Code Ann. § 20-3-160 (1985) (allowing the provision of security for child support obligations). There is, however, no such specific statutory provision regarding an **equitable distribution** award.

Prior to 1990, the family court was without authority to require a supporting spouse to secure periodic alimony beyond the supporting spouse's lifetime. Gilfillin v. Gilfillin, 344 S.C. 407,411, 544 S.E.2d 829, 831 (2001). In the case of Hardin v. Hardin, 294 S.C. 402, 365 S.E.2d 34 (Ct. App. 1987), this court found that a family court needed both statutory authority and a finding of special circumstances before it could require a payor spouse to secure

periodic alimony beyond the payor spouse's death. Id. In 1990, however, the Legislature amended S.C. Code Ann. § 20-3-130 (Supp. 2000) to codify the common law rule that periodic alimony terminates at death, but further provided an exception to the rule when such alimony is secured pursuant to subsection (D) of § 20-3-130. Id. at 412, 544 S.E.2d at 831. The statute now provides as follows:

> In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment of the support including, but not limited to, requiring the posting of money, property, and bonds and may require a spouse, with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant, to carry and maintain life insurance so as to assure support of a spouse beyond the death of the payor spouse.

S.C. Code Ann. § 20-3-130(D) (Supp. 2000).

Pursuant to this statute, the family court may provide for security of periodic alimony payments beyond the death of the supporting spouse through life insurance "whenever the family court [makes] factual findings concerning five factors favored requiring such insurance." Gilfillin, 344 S.C. at 414, 544 S.E.2d at 832. "[T]he use of life insurance is restricted in subsection (D) for use only after the family court makes comprehensive review of five distinct issues." Id. Because the family court failed to make a comprehensive review of the necessary factors allowing the security of alimony through life insurance pursuant to S.C. Code § 20-3-130(D) and Gilfillin, we remand this issue to the family court.

In regard to the court's order requiring the husband to secure the equitable distribution award with life insurance, we find ourselves confronted with a novel issue.[3] There is clearly no statutory authority allowing for such. As with the issue of the security of alimony through life insurance in Hardin, we now are faced with the question of whether or not an equitable division award can be secured by life insurance. In Hardin we held, in the absence of statutory authority and special circumstances, the Family Court may not require the payor spouse to secure alimony with life insurance. The rationale behind the holding was the common law rule that periodic alimony liability ceases upon the death of the supporting spouse. Subsequent to the Hardin decision, the Legislature acted to statutorily enable the Family Court to order security of alimony beyond the life of the supporting spouse in certain cases. In Gilfillin, the Supreme Court elucidated that the special circumstances as provided in the statute must be comprehensively reviewed by the Family Court before requiring such security.

While the concern regarding the common law, and now statutory, rule calling for cessation of periodic alimony upon the supporting spouse's death does not apply to this situation, we do not believe our case law will support an order of security for an equitable distribution award by way of life insurance in the absence of similar statutory authority or a finding of special circumstances which would warrant the imposition of such an obligation upon a party. Although this court can envision situations where security for an equitable distribution award may be warranted, we do not believe the family court may make such an order without justification and statutory authorization.[4] Just as the Legislature responded to the issues raised in Hardin, it is likewise within its province to address the concerns raised herein, if it so chooses. We

---

[3] Although the husband does not specifically raise the issue of the family court's authority to order him to secure the equitable distribution award with life insurance, he does assert general error in the family court's order of the same, and charges that no compelling circumstances warranted the provision.

[4] We note, however, it may be possible for the parties, by way of agreement adopted by the family court, to provide for the security of an equitable distribution award.

therefore hold, absent the requisite statutory authority and special circumstances, the court was in error to impose upon the husband the obligation to secure the equitable distribution award through life insurance.

IV. Factual Finding

Next, the husband argues the family court erred in determining he was "very evasive" in his testimony and in supplying documentation to support the figures set forth in his financial declaration. This argument amounts to a challenge to a credibility finding. On appeal, this court is not 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. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). Giving due deference to the family court's findings as to the husband's credibility, we decline to disturb the portion of the order containing this comment.

V. Attorney Fees

Lastly, the husband asserts the family court erred in awarding the wife the full amount of her attorney fees, $22,500.00, because the award was based on a conclusory affidavit of fees. Although the husband raised the issue of attorney fees in his post trial motion for reconsideration, the motion does not mention the sufficiency of the wife's attorney fee affidavit. Neither did he object to submission of the affidavit nor challenge its sufficiency at trial. Because the husband asserts this argument for the first time on appeal, the issue is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and STILWELL, JJ., concur.