

RECEIVED

Oct 11 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM FLORENCE COUNTY FAMILY COURT  
Timothy H. Pogue, Family Court Judge

---

Court of Appeals Case No.: 2021-000030  
Opinion No.: 6065, filed June 20, 2024

---

Kathleen S. Carter.....Respondent,

v.

Joseph R. Carter.....Petitioner.

---

PETITION FOR A WRIT OF CERTIORARI

---

Rebecca West  
HARLING & WEST, LLC  
South Carolina Bar # 68405  
203 West Main Street, Suite B  
Post Office Box 2485  
Lexington, South Carolina 29071  
(t) (803) 957-0889  
Attorney for Petitioner

Other Counsel of Record:

Michele Dahl Sturkie  
STURKIE LAW, LLC  
South Carolina Bar # 70234  
1506 W. Palmetto Street  
Florence, South Carolina 29501  
(t) (843) 799-1000  
msturkie@sturkielaw.com  
Attorney for Petitioner

Marian Dawn Nettles, Esquire  
NETTLES TURBEVILLE & REDDECK  
South Carolina Bar # 4197  
PO Box 699  
Lake City, SC 29560  
(843) 374-8511  
Attorney for Respondent

Brendan P. Barth, Esquire  
BARTH, BALLENGER & LEWIS, LLP  
South Carolina Bar # 78337  
P.O. Box 107  
Florence SC 29503  
(843) 662-6301  
Attorney for Respondent

INDEX

Certificate of Counsel.....ii

Questions Presented.....1

    1. Should the Court of Appeals have valued the marital home mortgage debt as of the date of filing?

    2. Should the Court of Appeals have valued the IHG credit card debt as of the date of filing?

    3. Is the amount of alimony awarded to Wife equitable and justified given the evidence?

Statement of the Case .....1

Argument .....4

    1. The Court of Appeals should have applied the active/passive distinction adopted in *Burch v. Burch* and valued the marital home mortgage debt as of the date of filing.....4

    2. The evidence does not support the Court of Appeals’ finding that Wife’s use of the IHG credit card after the date of filing was for marital purposes.....6

    3. The amount of alimony awarded to Wife is not equitable or justified given the evidence .....6

Conclusion .....7

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 11, 2024.

## QUESTIONS PRESENTED

1. Should the Court of Appeals have valued the marital home mortgage debt as of the date of filing?
2. Should the Court of Appeals have valued the IHG credit card debt as of the date of filing?
3. Is the amount of alimony awarded to Wife equitable and justified given the evidence?

## STATEMENT OF THE CASE

Petitioner (“Husband”) requests review of the Court of Appeals’ June 20, 2024, decision ignoring the active/passive appreciation analysis explicitly adopted in *Burch v. Burch*, 395 S.C. 318, 717 S.E.2d 757 (2011), and valuing the marital home mortgage balance as of the date of trial rather than the date of filing. The Court of Appeals also improperly characterized Respondent’s (“Wife”) use of an IHG credit card which led the Court to incorrectly value this debt as of the date of trial rather than the date of filing. Husband also requests review of the Court of Appeals’ decision to affirm an alimony award that is punitive, not equitable, and not justified by Husband’s ability to pay or by Wife’s need for financial support.

The parties were married for almost twenty years when Wife moved out of the marital home and filed for separate maintenance and support. R. pp. 1-3; p. 131, lines 3-5; p. 135, lines 13-15. According to Wife, the marriage permanently changed in 2009 when Husband’s mood and temperament worsened after he suffered a traumatic head injury in an auto accident. R. p. 71, line 1-p.73, line 14. Neither party alleged a fault ground for divorce.

The parties’ financial partnership was traditional in the sense that Husband worked outside the home and provided the family’s financial support while Wife worked as a homemaker and cared for the parties’ children. R. p. 56, line 14-p. 57, line 5. Three of the parties’ four children, all of whom were adopted, emancipated in the years prior to Wife filing this case. R. p.

3. There was no dispute that the parties' twenty-two year old daughter suffered from bipolar disorder and required her parents' ongoing support. R. p. 50, line 18-p. 51, line 15; p. 65, lines 20-24. This marriage was Wife's second and Husband's third. R. p. 135, line 21-p. 136, line 11. At the time of trial, Wife was sixty-seven years old and Husband was sixty-five. R. p. 53, lines 9-11; p. 171, lines 19-24. Husband worked as a self-employed chiropractor prior to and throughout the marriage. R. p. 172, lines 10-22.

The facts regarding the marital home mortgage balance are not disputed. Husband remained in the marital home after Wife filed the underlying case and he paid the first mortgage and line of credit during the pendency of the action.<sup>1</sup> R. p. 136, line 23-p. 138, line 11; p. 179, lines 9-14; p. 238, lines 4-24. Between the date of filing and the date of trial Husband reduced the first mortgage principal balance by \$45,243.19. R. p. 179, line 9-14; p. 180, lines 4-19; p. 671; p. 677. Wife did not contribute to the mortgage payments after the action was filed. R. p. 238, lines 12-18. During the pendency of the action, Wife and the parties' daughter lived with Wife's mother and paid rent of approximately \$1,600 per month. R. p. 113, lines 2-19. The family court valued the marital home mortgage balance as of the date of trial, thereby depriving Husband of credit for equity created by money he earned after Wife filed for separate maintenance and support. In affirming the family court, the Court of Appeals relied on *Barrow v. Barrow*, 394 S.C. 603, 716 S.E.2d 302 (Ct.App.2011), a case decided two months before the Supreme Court held that the spouse who actively contributes to the appreciation of an asset after filing is entitled to the value created as a result of his contributions. *Burch v. Burch*, 395 S.C. 318, 328, 717 S.E.2d 757,762-763 (2011) (formally adopting the active and passive distinction

---

<sup>1</sup> The first mortgage payment was \$2,660.84 per month and the home equity line of credit interest-only payment was roughly \$433.95 per month for a total monthly payment of approximately \$3,094.79. R. pp. 179, line 22-p. 181, line 6; pp. 669-678.

and valuing an asset that appreciated during the pendency of the action because of one's active contribution as of the date of filing).

Throughout the pendency of the case, Husband supported Wife and their daughter by giving Wife cash and by paying various expenses for Wife's and daughter's benefit. R. pp. 36-37.<sup>2</sup> In the nineteen months between the filing of the case and the temporary hearing, Husband voluntarily paid Wife \$1,300.00 per month in spousal support along with various other expenses for Wife's benefit. R. p. 116, line 17-p. 118, line 20; pp. 757-779. Husband also continued to pay for Wife's health insurance, car insurance and cell phone through his business as he had done during the marriage. R. p. 200, line 23-p. 201, line 24. Husband's financial obligations to Wife and their daughter were memorialized in the parties' December 3, 2019, temporary agreement. R. pp. 35-37.

At the time of trial, Husband earned approximately \$58,000.00 per year. R. p. 173, line 2-p. 176, line 25. Wife's income of \$18,535.00 per year was made up of her social security benefit and their daughter's disability benefit. R. p. 114, lines 12-21; pp. 736-741.

The Court of Appeals affirmed the family court's order imputing \$80,000 in annual income to Husband and awarding Wife \$2,700 per month in alimony. The Court of Appeals found that "the family court was justified in imputing income to Husband because of the dramatic fluctuations in his reported income over the years." Opinion, Section IV(A). The \$2,700 per month alimony award is 40% of the \$6,666 per month income imputed to Husband by the family court. As a result, Wife has the benefit of \$278 per month more disposable income than Husband.<sup>3</sup> The Court of Appeals justified the amount of alimony by citing Husband's role throughout the marriage as the breadwinner and Wife's need for husband's financial support.

---

<sup>2</sup> Additional citations to the Record are contained in Husband's final brief on pages 25-28.

<sup>3</sup> Calculations and citations to the Record are contained in the Petition for Rehearing, p. 7, footnote 4.

## ARGUMENT

1. The Court of Appeals should have applied the active/passive distinction adopted in *Burch v. Burch* and valued the marital home mortgage debt as of the date of filing.

Husband requests review of the Court of Appeals' decision to value the marital home mortgage balance on the date of trial pursuant to Rule 242(B)(3), SCACR. The Court of Appeals' reliance on *Barrow v. Barrow* to deprive Husband the value he created by his active contributions to an asset during the pendency of the case directly conflicts with the active/passive distinction adopted in *Burch v. Burch*.

Marital property is valued as of the date of filing. *Burch*, 395 S.C. at 329, 717 S.E.2d at 763 (citing S.C. Code Ann. §20-3-630 (Supp.2010)). A spouse seeking to use the value of an appreciated asset on the date of trial must show that the increase in the asset's value is due to passive, or market, forces. *Teeter v. Teeter*, 408 S.C. 485, 499, 759 S.E.2d 144, 151 (Ct.App.2014). The only activities relevant to the passive/active analysis are those which occur after the date of filing. *Burch*, 395 S.C. at 327-328, 717 S.E.2d at 762. *See also Moore v. Moore*, 414 S.C. at 522-523, 779 S.E.2d at 550 (affirming that husband's contributions to the company during the marriage were accounted for in the value of the company at the date of filing and further finding that wife's active management of the company after the date of filing was the primary factor in the company's growth during the pendency of the action).

In *Barrow*, the Court of Appeals only cited one reason for denying husband's request for credit for mortgage payments he made while the case was pending:

“[W]e affirm the family court's decision not to credit Husband with his ongoing mortgage payments since Wife vacated the marital home. Husband and Wife were living separate and apart and paying approximately \$1,600 per month in mortgage payments and rent respectively. These were the parties' living expenses post-separation and do not entitle Husband to any special credit.” *Barrow v. Barrow*, 394 S.C. at 617, 716 S.E.2d at 309.

By affirming the trial court based on the *Barrow* case, the Court of Appeals endorsed an analysis that conflicts with more than twenty-five years of legal precedent awarding the increase in a value's asset to the spouse whose efforts caused the increase. See *McDavid v. McDavid*, 333 S.C. 490, 497 n.7, 511 S.E.2d 365, 369 n. 7 (1999) (wife entitled to the increase in home equity resulting from her payment of the mortgage after the case was filed); *Burch v. Burch*, 395 S.C. at 327, 717 S.E.2d at 762 (2011) (distinguishing between a spouse's active efforts to increase an asset's value from passive appreciation furthers equity and public policy); *Abbas-Ghaleb v. Ghaleb*, 2024 WL 1854458 (Ct.App.2024) (applying the active/passive appreciation distinction and citing supporting cases dating from 1996 through 2011).

If left to stand, the Court of Appeals' decision in this case will be the first case decided after *Burch* to eschew the active/passive distinction. In addition to conflicting with *Burch*, the Court of Appeals' opinion in this case expands the application of the thinly reasoned *Barrow* ruling to facts that do not resemble those in *Barrow*. The *Barrow* marriage only lasted for five years, the parties had no children together, both parties earned substantial incomes throughout the marriage and both parties were financially irresponsible. *Barrow v. Barrow*, 394 S.C. at 607-608, 716 S.E.2d at 305. Neither party in *Barrow* paid any financial support to the other during the pendency of the action. The parties in *Barrow* paid approximately the same amount for housing while they were separated. *Id.* at 617. Here, Husband not only financially supported Wife and their daughter throughout the litigation by paying alimony and other expenses for their benefit, he spent approximately \$3,100 per month for mortgage payments compared to Wife's rent expense of \$1,600 per month.

Not only does the Court of Appeals' decision in this case conflict with *Burch*, the decision conflicts with the Supreme Court's decision in *McDavid v. McDavid*, 333 S.C. 490, 497, 511

S.E.2d 365, 369 (“Absent evidence Husband contributed to the payments on the mortgage between the time of separation and the time of trial, he is not entitled to share in the increased equity.”).

2. The evidence does not support the Court of Appeals’ finding that Wife’s use of the IHG credit card after the date of filing was for marital purposes

By valuing the IHG credit card balance on the date of trial, the Court of Appeals ignores clear and detailed evidence in the record that Wife failed to carry her burden of proving the charges made after she filed the case were incurred for the joint benefit of the parties.

“When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, i.e. for the joint benefit of both parties during the marriage.” *Wooten v. Wooten*, 364 S.C. 532, 547, 615 S.E.2d 98, 105 (2005). “When a debt is incurred after marital litigation begins, the burden of proving the debt is marital rests upon the party who makes such an assertion.” *Id.* at 547, 615 S.E.2d at 105. If a debt was incurred after the date of filing for nonmarital purposes, the family court can exclude it from the marital estate and require the spouse who created the debt to pay it. *Pruitt v. Pruitt*, 389 S.C. 250, 265, 697 S.E.2d 702, 710 (Ct.App.2010) (citation omitted).

Husband craves reference to the argument and facts on this issue contained in his Final Brief. Final Brief of Appellant, pp. 24-28.

3. The amount of alimony awarded to Wife is not equitable or justified given the evidence.

By affirming the trial court’s alimony award, the Court of Appeals penalizes Husband and rewards Wife. *See Myers v. Myers*, 391 S.C. 308, 315, 705 S.E.2d 86, 90 (Ct.App.2011) (awarding permanent periodic alimony substantially in excess of a spouse’s needs is error and effectively penalizes the spouse paying alimony); *Donahue v. Donahue*, 299 S.C. 353, 362, 384

S.E.2d 741, 746 (1989) (Alimony “is not intended to penalize one spouse while rewarding the other). The clearest and most compelling evidence of the excessive nature of the award is the resulting disposable income. As a result of this award, Wife, despite not working outside the home at the time of trial, has the benefit of \$4,244 in income per month while Husband, who works full time running his own chiropractic practice at age sixty-five, only has income of \$3,966 per month.<sup>4</sup>

Husband craves reference to the law and facts on this issue cited in his Final Brief. Final Brief of Appellant, pp. 41-45.

### CONCLUSION

The Court of Appeals decision to value the marital home mortgage balance on the date of trial directly conflicts with the Supreme Court’s decisions in *Burch* and *McDavid*. If allowed to stand, the Court of Appeals’ decision would be the first published decision since *Burch* to ignore the active/passive distinction explicitly adopted in *Burch*.

Husband also respectfully requests review of the Court of Appeals’ decision to value the IHG credit card debt as of the date of trial because Wife failed to carry her burden of proving that the charges were for marital purposes. Finally, the Court of Appeals’ decision to award Wife alimony equal to 40% of Husband’s gross monthly imputed income despite there not being sufficient evidence that Husband had the ability to pay or that Wife needed this level of financial support is neither equitable nor justified.

---

<sup>4</sup> Wife receives \$874.60 per month in social security benefits and \$670 per month from ZZ’s disability benefit.  $\$874.60 + \$670 + \text{untaxed alimony of } \$2,700 = \$4244.60$  per month in disposable income. R. p. 736. Assume *arguendo* that Husband actually earns the income imputed to him of \$6,666 per month - \$2,700 in alimony that is not tax deductible = \$3,966 per month in disposable income. Husband’s stated income is only \$5,157 per month. R. p. 742.

Respectfully submitted,



---

Rebecca West  
HARLING & WEST, LLC  
South Carolina Bar # 68405  
203 West Main Street, Suite B  
Post Office Box 2485  
Lexington, South Carolina 29071  
(t) (803) 957-0889

Michele Dahl Sturkie  
STURKIE LAW, LLC  
South Carolina Bar # 70234  
1506 W. Palmetto Street  
Florence, South Carolina 29501  
(t) (843) 799-1000

ATTORNEYS FOR PETITIONER