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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Family Court

Timothy H. Pogue, Family Court Judge

APPELLATE CASE NO. 2021-000030

Kathleen S. Carter. . . . . Respondent,

v.

Joseph R. Carter,. . . . . Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Wife filed an action for Separate Maintenance and Support on April 12, 2018 seeking alimony, equitable apportionment of the marital estate, an order prohibiting the parties from selling or disposing of marital assets, and attorney fees. (R. P. 41-46) Husband responded seeking a divorce on the ground of one year's continuous separation, equitable division of the marital estate and an award of attorney fees. (R. P. 47-49)

The first substantive order in the case resulted from Wife's December 3, 2019, Motion for Temporary Relief (R. P. 35-40). The merits hearing was continued twice. The first time the matter was continued because the Judge discovered a conflict. (Order filed December 12, 2019) The second time the case was continued due to the Covid Crisis. (Order filed March 18, 2020). The case was heard on June 15 and June 16, 2020.

Immediately before the merits hearing, the parties were able to settle the issues of their adult disabled daughter's custody and support and they also agreed to place the marital home on the market for sale. (Final Divorce Decree, R. p. 3-5) After a two day trial, the family court granted the parties a divorce on the ground of one year's continuous separation. (Final Divorce Decree, R. p.30.) The remaining issues were tried before the Court which issued its Final Divorce Decree filed August 13, 2020.

Husband filed a Motion for Reconsideration on September 1, 2020. After a December 9, 2020, hearing, the family court denied Husband's motion and awarded Wife additional attorney fees of $1,200.00. (Order Denying Defendant's Motion to Alter or Amend Judgement and/or Motion for Reconsideration (R. P. 33-34)

This Appeal follows.

STATEMENT OF FACTS

The Husband and the Wife were married on May 15, 1999. (R. p. 53 line 3-4) The Husband was forty- four years old and the Wife was forty-six years old. (R.p.53 lines 5-8) At the date of trial, the parties were sixty-five and sixty-seven respectively. (R.p.53 lines 9-13) The parties adopted four children from Russia early in the marriage . (R.p. 53 line 21-p. 54 line 4) At the time of the trial "Nick" was 23, "Bea" was 22, "ZZ" was 22 and Blaine was 21. The Husband worked as a chiropractor in Florence, specializing in acupuncture, during the entire marriage. (R. p. 56 lines 18-22.) He owns his own business. (R. p.56 lines 23-25) The Wife has a degree in psychology from Francis Marion University. (R.p.54 lines 15-20). The parties agreed that the Husband would be the breadwinner and the Wife would be the homemaker and caretaker of the children. (R. p. 54 lines 15-20) The Husband testified that these were the roles they had discussed and agreed to. (R. p. 233 lines 3-6). The Wife never earned an income during the marriage. (R. p. 232 lines 6-8) She did however help the Husband to a very limited degree in his practice on a non-paid basis. (R. p.56 lines 14-16) Raising the four adopted children presented a real challenge from the beginning. (R. p. 59 line 9-31 line 15) The Wife testified that she considered her job as Mother to be "more than a full time job" (R. p. 60 lines 16-18) Her responsibilities toward the children prevented outside employment. (R. p. 60 lines 19-21) She home schooled one or more of the children for over four years. (R. p. 60 line 25-p.61 line 20.) The home schooling began when Nick was in third grade. He was constantly in trouble at school. It was extremely difficult when all four children were being home-schooled. The parties even had to hire a retired teacher to assist. The teacher quit because the children had too many

problems. (R. p.61 line 21 - p. 62 line 4.) The Wife testified that the Husband once remarked that it was always a good day to come home from work and the police were not in the front yard. (R. p.70 lines 11-13.) The Husband agreed that there were recurring issues with the children and that there were "tough times". (R. p.232 lines 22-24) He agreed that the Wife was good in her job as a mother and homemaker. (R. p. 232 line 12- p. 233 line 6) The Husband felt that the parties did well together in their respective roles as breadwinner and homemaker. R. p. 234 lines 6-7.)

By far the most significant challenge the parties faced as parents was the mental health issues of their daughter ZZ. She was uncontrollable at times. She would scream throw things and threaten others. It was determined that she was a danger to herself and to others. (R. p.62 lines 15-25). In 2009 the parties decided that serious action needed to be taken. They placed ZZ in Wolf Creek Academy, a therapeutic boarding school, in Asheville North Carolina. This placement disrupted at six months due to her threats and attempts at suicide . Wolf Creek discharged her because they were not equipped to handle children with such serious issues. (R. p. 63 lines 1- p. 64 line3.) Following her discharge from Wolf Creek, there was a series of admissions to short-term care facilities. The Wife also researched the programs offered by the National Institute of Health for Bi-Polar Disorder. After several trips to Washington D.C., it was determined that ZZ did not qualify for their study because of "comorbid conditions". (R. p. 64 line 4-19) In 2014, an incident occurred wherein ZZ grabbed the steering wheel from the Wife in an effort to steer them into oncoming traffic. (R. p. 65 lines 1-19)

Following this incident, ZZ had to be placed at Palmetto Behavioral Health in

Summerville, a long-term care facility. She was a patient there from 2014 to 2017. (R. p. 65 lines 1-6)

ZZ is diagnosed with Bi-Polar Disorder, Reactive Attachment Disorder, Anxiety Disorder, Post Traumatic Stress Disorder, General Anxiety Disorder and Attention Deficit Disorder. (R. p. 65 lines 21-24) She was released on June 27, 2017. (R. p. 66 lines 1-5.) ZZ takes extensive medications. (Plaintiff's Ex. #2 R. p. 288) While ZZ was inpatient, the Wife handled sessions with therapists and team treatment meetings while the Husband took care of his responsibilities as breadwinner for the family. (R. p. 66 lines 6- p.67 line 4) Due to the serious disabilities of ZZ, and upon recommendation of the healthcare providers, the Husband and Wife decided for the Wife to Petition the Probate Court for an Order for Appointment of a Conservator and Guardian prior to ZZ's eighteenth birthday. The Wife petitioned for appointment, because between herself and the Husband she had the time to handle these responsibilities and she had traditionally handled ZZ's special needs. (R. p.68 lines 14- p. 69 line 1). The Husband appeared and fully participated in the Probate Proceedings . The Probate Court declared ZZ incapacitated by clear and convincing evidence. The Wife was appointed her Conservator and Guardian. (Plaintiff's Ex #1 R. p.281-283). The Husband concedes that ZZ lives with the Wife who takes care of her on a daily basis. (R. p. 237 line 9-19) The Wife describes ZZ as a "full time job." (R. p. 115 lines 9-11). The parties stipulated that at the time of trial ZZ remained incapacitated. (Final Divorce Decree p. 4 paragraph a R. p. 4) The Wife testified that it is unrealistic to expect that ZZ will ever be able to live on her own. (R. p. 70 lines 2-6)

The Final Divorce Decree notes the Agreement of the parties related to ZZ:

a. The parties agreed that their daughter, namely E.A.C., born xx/xx/1998, know as "ZZ", remains incapacitated at this time by virtue of her diagnosed disabilities and that said disabilities prevent her from financially providing for herself. As such, ZZ shall continue to reside with the Plaintiff, who was previously appointed by the Probate Court as "ZZ's" Conservator/Guardian, and the Plaintiff shall continue to receive ZZ"s SSI check to be utilized towards ZZ's support. (R. p. 126 line 8-p. 127 line 3)

(Final Decree of Divorce p. 4) Furthermore,

> The Court finds that the each of the parties understands that the terms of limited Agreement related to their daughter, "ZZ", are modifiable in the future based upon a substantial and material change in circumstances. (Final Divorce Decree R p. 5 paragraph 12 R. p.5)

The Wife testified that she is unable to work because she has to "watch ZZ". (R. p.119 lines 16-20) ZZ is very naive and subject to being taken advantage of. She is young, attractive, and gets lots of attention from young men. The Wife has to prepare ZZ's medications for her. She has to help take care of her personal hygiene needs on a monthly basis (R. p.119 line 16- p. 121 line 6.)

The Wife describes the first ten years of the parties' marriage as the happiest time of her life despite the stress and challenges related to the children's special needs. (R. p.75 lines 1-13) The Husband was in a serious automobile accident in 1999. The Wife felt that after the accident the Husband's disposition changed. (R. p. 71 lines 12-20). The Husband denied this claiming there was no medical evidence to support her position. (R. p. 234 lines 9-19) The Wife testified that before the accident, the husband was more patient and tolerant with the children . The Wife felt that the Husband developed a temper and got too rough with them following the accident. She began to fear that somebody might get hurt. (R. p.71 72 line 18-p.72 line 15) The Wife testified that following the accident she felt it was her job to keep conflict between the Husband and the children in check. (Tr. p. 72 lines 10-15)

The Husband testified to an incident which occurred in February 2019 between himself and ZZ. ZZ was having a manic episode. He admits that he got "more physical with her than "[he]" should have". He states that he "manhandled" her. While he denies dragging her down he admits that "she got drug". He explained that he was justified in keeping them from killing one another. (R. p. 235 lines 4 - p. 237 line 5). ZZ was treated at the emergency room after the incident, for an abrasion to her right buttocks, a head contusion, and a wrist sprain. (R. p. 269 lines 5-11) At the time of the final hearing, the Husband had not seen ZZ in over a year. (Tr. p. 235 lines 1-6) Late in the marriage the Wife, felt that the Husband basically "checked out of parenting". (R. p. 72 line 18-p.76 line 20) The Wife became very concerned about her safety because their son Nick dropped out of school and became involved in serious criminal activities. Nick moved out of the home but would break into their house and the homes of others. The Wife was concerned that Nick would get their guns. The Husband disregarded her concerns. In any event, the son did steal a weapon from the home. He became the subject of two week manhunt. Eighty police officers were involved, dog teams and helicopters were deployed. Ultimately, Nick was arrested on numerous charges. He was incarcerated at the South Carolina Department of Corrections. Nick was released from SCDC a short time before the final hearing. (R. p.77 line 9- p. 79 line 23.) The Wife felt that the final straw in their marriage occurred when the Husband took another woman on vacation with the other children. The Wife left the marital home in April 2018. (R. p. 79 lines 15-p. 80 line 1) The parties were divorced by Final Divorce Decree filed August 13, 2020, based upon the ground of one year's continuous separation. (Final Divorce Decree R. p. 30 p. 1)

STANDARD OF REVIEW

In *Lewis v. Lewis 392 SC 381, 709 SE 2d 650 (2011)* The Court reaffirmed that the Appellate Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. The Court in *Lewis* further explained that while retaining the authority to make its own findings of fact, the Appellate Court recognizes the superior position of the Family Court Judge in making credibility determinations. Despite the *de novo* standard of review, the Appellant still has the burden of demonstrating error in the Family Court's findings of fact. Therefore, the findings of the Family Court will be affirmed unless Appellant proves that the prepondance of evidence is against the findings of the Family Court. *Lewis*

ARGUMENT

I. The Family Court did not err in allocating to the Wife a share of three Stifel accounts.

The Husband complains that the Family Court erred in awarding $40,000.00 from Stifel Accounts numbered 6209, 8368 and 2994, to the Wife. At trial, the Husband introduced Defendant's Exhibit #10 (R. p. 424), a Pension Plan Certificate showing that the Husband was a participant in GMI of Florence, a Money Purchase Pension Plan and that as of December 31, 1996 his vested interest in that plan was $219,619.17. The Exhibit also reflects that as of December 31, 1996, he was a participant in a profit Sharing Plan in GMI of Florence, Inc. and that his vested balance in that plan was $309,907.99. The total value of these two plans as of December 31, 1996, was $529,527.16. (Defendant's Exhibit #10 R. p. 424) Before the marriage of the parties, these plans were terminated. (R. p.192 lines 7-21) The Husband managed these plans himself before rolling them over into Independent Retirement Accounts managed by Edward Jones several years after the marriage. (R. p.193 lines 5-p. 194 line 12) Eventually, during the terms of marriage, the Husband testified that these monies ended up in the three Stifel accounts numbered 6209, 8368 and 2494. (R. p.193 lines 5-p. 194 line 12) The Husband was unable to trace the flow of this Profit Sharing Plan and Pension plan accounts to the three Stifel IRAs (R. p.262 line 20-p.263 line 2). The parties stipulated that as of the date of filing, these three accounts had a total value of $767,910.51. (R. p.191 line 2-p. 193 line 2, Defendant's Exhibit #9 R. p.410) and $757, 058.96 as of the date of trial (R. p.191 line 2- p. 193 line 2, Defendant's Exhibit 9 R. p.410). The Husband testified that he did not make any contributions to the initial accounts or to the successor accounts after the plans were terminated in 1997. (R. p.192 lines 11-13,

Tr. P. 253 lines 23-25) The Husband did not indicate what losses might have occurred in these plans between the termination of the plans in 1997, during the period he managed the funds himself. He testified that he believed these three accounts were non-marital . (R. p.194 line 15- p.195 line 5) The Wife testified that the Husband was in charge of their retirement plans and that they often had discussions about their plans to move to The Methodist Manor, a local retirement community. Based upon their discussions, she understood that they were contributing toward the three accounts. (R. p. 88 lines 21- p.89 line 25.) The record contains no documentation as to the value of the accounts on the date of marriage. (Final Divorce Decree p.16 paragraph 33 R. p. 16) The Wife testified that despite the issuance of a subpoena she was unable to obtain account statements during the marriage. (R. p. 90 line 15- p. 91 line 9) The account statements would certainly have shown whether or not any contributions were made during the term of marriage. The Wife accepts that the three Stifel Nicholaus accounts do contain proceeds of the pre-marital retirement accounts of the Husband. However, her understanding was that marital money/income was deposited into and contributed to these (3) Stifel accounts during the parties' long term marriage and that those contributions are marital in nature. (R. p. 88 line 6- p. 89 line 21) Despite the Husband's inability to trace his pre-marital retirement accounts to the three Stifel Nicholaus accounts, the Court found that the accounts were originally non-marital , but that any contribution made during the marriage would be marital. (Decree R. p. 16 paragraph 34- p.17). The Court noted in its Order denying Defendant's Motion to Alter or Amend judgement and/or Motion for Reconsideration that "The Court was swayed by the Plaintiff's testimony that during the marriage she was assured by the Defendant that the parties were

depositing and contributing marital money/income into those three (3) Stifel Accounts." (Order Denying Defendant's Motion to Alter or Amend Judgement and/or Motion for Reconsideration R. p. 33) Furthermore, the Court concluded that "the Defendant presented no documentary evidence to confirm his assertion that he did not make any contributions to these accounts during this nineteen (19) year marriage. Also the Court noted that although this litigation went on for over two (2) years and that the documents be claimed would support his position were burned and destroyed in a fire shortly before the case went to trial. (R. p. 33-34). The Court awarded $40,000.00 of the $227,531.80 increase in value from the inception of the Husband's plan to the trial value of the account to the Wife. (Final Decree p. 17 paragraph 35)

The Husband claims that the Wife has failed to meet her burden of proof that any portion of the three Stifel accounts was marital. (R. p. 190 line 22- p. 192 line 2 Defendant's Exhibit 9 R p. 680.) The Husband testified that the Stifel accounts were opened during the term of the marriage in 2004, 2005, or 2006. (R. p. 193 lines 5- p. 194 line 12 Defendant's Exhibit #10 R. p. 681). The Husband testified that he had not made any contributions towards the Stifel accounts since they were established or to the predecessor retirement accounts since they were terminated in 1997 prior to the marriage of the parties. (R. p. 192 line 8- p. 194 line 14)

A party claiming an equitable interest in property upon divorce hears the burden of proof that the property is marital. *Wilburn v. Wilburn 403 SC 372, 743 SE2d 734 (2013)* The Wife testified as to the conversations the parties had about saving for retirement. The Court believed the Wife's testimony. (Order Denying Defendant's Motion to Alter or

Amended p. 1 paragraph 1 R. p. 33-34) The Wife met her burden of proof. The three accounts were established during the term of the marriage and were in existence on the date of filing. The burden then shifts to the Husband to prove his contention that no portion of the accounts is marital. The Husband's proof consisted of his testimony that he did not recall having the conversations with the Wife about contributing towards the retirement accounts. (R. p. 195 lines 6-10) He presented no documentary evidence. Basically it was a he said she said proposition. The Court believed the Wife and expressed concerns about the Husband's failure to provide the documentation in support of his position. (Order denying Defendant's Motion to Alter or Amend filed December 18, 2020, R. p. 33)

The Court stated in the Final Decree of Divorce that the Defendant acknowledged that this case was originally scheduled to be tried in March 20, 2020, but testified that his records were destroyed by fire in May 2020, a few weeks before the trial (R. p. 16) Due to the hotly contested nature of this claim, it does seem suspicious that the documents the Husband claimed he had which would have allegedly supported his position, would not have been in the possession of his attorney long before May 2020, and disclosed when subpoenas were issued by opposing counsel attempting to gain possession of this information.

In *Roberts v. Roberts* 299 SC 315, 384 SE 2d 719 (1989) the Court noted that the party who carries the burden of proof, sometimes referred to as the burden of persuasion, or the burden of evidence, on a given issue is the party having the risk of non-persuasion and is the one upon whom falls the duty of going forward with the evidence on the issue. Husband had the burden of proof because he sought to show that accounts opened during the marriage fit within a statutory exception and were therefore non-marital.

II. The Family Court did not err in valuing certain asset and debts

The Husband challenges the decision of the Court regarding the dates on which certain assets and debts were valued. The general rule is that marital assets and debts are valued as of the date of filing of marital litigation. *S.C. Code Ann §20-3-630 (A)* However, the Court in *Moore v. Moore* 414 SC 490, 779 SE2d 533 (2015) held that "certain circumstances" may justify using a trial date value. The burden of proof for use of the trial date value is on the party seeking deviation from the statutory filing date. *Burch v. Burch 395SC 318,717 SE2d 757 (2011)*. In *Burch* the Court noted that the use of the filing date value may not necessarily result in a fair outcome if the value changes during the pendency of the action.

(A) Mortgage debt on the marital home.

The Court valued the mortgage debt on the marital home as of the date of trial. (Final Divorce Decree R. p. 15) The Husband paid the mortgage payments on the home during the pendency of the action. (R. p. 136 lines 19- p.137 line 10, p. 183 lines 5-22, R p. 238 lines 1-24 and Temporary Order p. 2 paragraph 6 (a) R. p. 36) He also had exclusive possession of the home during the pendency of this action. (Temporary Order p. 2 paragraph 6 (a) R.p.36). He failed to place the home on the market as agreed in Mediation. (See Plaintiffs's Exhibit 12 .) (Tr. p. 262 lines 9-16)

Husband cites the cases of *McDavid v. McDavid 333 SC 490, 511 SE2d 365* (1999) and *Burch v. Burch* 395 SC 318, 717 SE2d 757 (2011) as authority for the proposition that under an active appreciation/passive appreciation analysis the Husband's request for credit for the reduction in the principle balance during the pendency of the action should be

granted. The case of *Barrow v. Barrow 394 SC 603, 716 SE2d 302 (Ct. App. 2011)* is authority for the proposition that the active versus passive analysis is not the sole criterion for justifying a deviation from the filing date valuation. In *Barrow*, the Court found that the Husband was not entitled to a credit for mortgage payments he made post separation. The Court considered that each party had housing expenses post separation. In this case the Court concluded that, "These were the parties' living expenses post-separation and do not entitle Husband to any special credit". The Trial Court stated in paragraph 27 of the Decree(R.p. 27):

> The Court does not "agree" with the Defendant's position. As stated above, and testified to numerous times by the parties at trial, the Defendant was the breadwinner and sole financial provider for this family. This was the *status quo*. This is what the parties had agreed to at the temporary hearing in December of 2019. This is what the parties "agreed" to from the time of their separation in 2018. The parties operated under this "agreement" and understanding for over one and a half years before ever scheduling the temporary hearing. This is what has been the *status quo* for all of the years of the parties' marriage. In its Temporary Order, the Court noted in paragraph eight (8) on page four (4) that his case has been pending way too long and is not that complicated, but that, in any event, the purpose of a temporary order is to maintain the *status quo* between the parties. If the Defendant had not been living in the marital home during the pendency of this action, he would have had to pay rent somewhere else for which he would have received no equity. Therefore, the Court is rejecting the Defendant's request that he receive $45,000.00 out of the net proceeds of the sale of the marital residence. The Court does not believe that the Defendant receiving the same would be fair or equitable. (Final Divorce Decree p.14 paragraph 27)

The Husband acknowledges the concept that "The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership." citing *Bodkin v. Bodkin* 388 SC 203 694 SE2d 230 (Ct. App. 2010) (Final Brief of Appellant p. 20) Furthermore, it is acknowledged that Courts protect a homemaker's interest by

considering and assigning a value to the indirect contributions to a marriage from caring for the parties' home which enables the other spouse to work outside the home and accumulate wealth for the parties' mutual benefit. *Johnson v. Johnson 296 SC 289, 372 SE2d 107 (Ct. App 1988).* (Final Brief of Appellant, p. 20) Husband argues that the Wife's services as homemaker ended at the time of separation. (Final Brief of Appellant p. 21). In this particular case this is not true. By Agreement of the parties entered into the record:

> a. The parties agreed that their daughter, namely E.A.C., born XX/XX/1998, known as "ZZ", remains incapacitated at this time by virtue of her diagnosed disabilities and that said disabilities prevent her from financially providing for herself. As such, ZZ shall continue to reside with the Plaintiff, who was previously appointed by the Probate Court ZZ's Conservator/Guardian, and the Plaintiff shall continue to receive ZZ's SSI check to be utilized towards ZZ's support. (Final Decree of Divorce R. p.4 paragraph A.)

The Wife was never the breadwinner during the marriage by agreement of the parties. She did not have the money to contribute toward the mortgage debt. Her contribution to the care of their incapacitated daughter did not end on the date of separation. But for the Wife's continued contributions to the adult child's care, the Husband would not have been able to continue to fulfill his role as breadwinner either before or after the marriage. Wife's full time care of the adult disabled daughter prevented her from contributing cash toward the payment of the mortgage. However, her services were in fact valuable to the parties. She deserves credit for her indirect contributions which enabled the Husband to continue to reduce the mortgage debt during the pendency of this action.

(B) Stifel Account #2412.

The Court was justified in using the date of filing value for Stifel account #2412. After the Judge ordered the Husband to pay $5,000.00 in Temporary Attorneys Fees to the Wife at the Temporary Hearing, the Husband testified that he withdrew $40,000 from this account. (Tr. P. 152 line 18-p.153 line 13). He concedes that this account was marital. (Tr. P. 152 lines 18-21) The Temporary Order provided that:

> Each of the parties shall be restrained and enjoined from disposing of, placing liens upon, hiding, injuring, selling, alienating, liquidating, or otherwise decreasing, in value any assets, pending a final hearing on the merits, unless the parties mutually agree otherwise in writing. (Temporary Order filed January 15, 2020 p. 3 paragraph H. R. p. 37)

To use the trial date for valuing this account would amount to rewarding the Husband for willfully violating the Temporary Order. The Courts have consistently held parties chargeable where there is willful misconduct concerning dissipation of marital assets. *McDavid v. McDavid* 333 SC 490, 511 SE2d 365 (1999) and *Dixon v. Dixon* 334 *SC 222,512 SE2d 539* (Ct. App. 1999).

The Husband withdrew these funds from a marital account in direct violation of the Temporary Order, at his own risk. (Final Divorce Decree R. p. 18-19 paragraph 41)

(C) IHG Credit Card

In his motion for reconsideration, the Husband concedes that a debt incurred after filing but before the divorce can be considered a marital debt. The test is whether the charges were incurred for marital purposes. *Wooten v. Wooten* 364 SC 532, 615 SE2d 98 (2005). The balance on the IHG occurred during the pendency of this action. (R. p. 146 line 16- p.

147 line 2.) The Wife testified that the parties agreed that she would continue to utilize this card for charges for the psychologist for ZZ, trips to visit the other children, gas, and food. (R. p. 146 line 16- p. 148 line 19). The parties operated by agreement concerning the IHC credit card. The Husband initially paid $500.00 on this account for a period of time after the separation and before the Temporary Hearing, then paid less and finally quit making payment prior to the temporary hearing. The husband would make payments and the Wife would get a text alert when he made the payments. (R. p. 156 line 24- p. 130 line 23.) During the marriage the Husband typically paid $500.00 on this account per month. (R. p. 147 lines 3-9)

Based upon the foregoing, the Husband does not deny that prior to the Temporary Hearing he was aware of this account and that he made payments on this account. But for his doing so, the parties would have had a Temporary Hearing earlier. The Temporary Order continued the $500.00 per month payment arrangement on this account (Temporary Order filed January 15, 2020 R. p. 39 paragraph 11 and p. 40 paragraph 4.) The Court found as a fact in the Decree that:

> 47. As to the IHG Credit Card, the Court finds that the current balance on the IHG Credit Card is marital in nature. Although the Defendant testified that this card had a balance of zero at the time of filing, there was ample testimony and evidence at trial that the Plaintiff continued to utilize this card during the pendency of this case in a similar manner to how the parties had always utilized this card- including for medical bills and gas. There was also evidence and testimony that the parties had agreed during this case that the Plaintiff could utilize this card for certain charges and expenses during the pendency of this action. Taking all of this evidence and testimony into consideration, the Court finds that the current balance of $6,120.00 is a marital debt. Per the attached worksheet, the Defendant shall be solely responsible for paying this debt, and he shall hold the Plaintiff harmless as to the same. Once the Defendant pays off the balance of this IHG card, the parties shall work together to remove the Defendant's name from this credit card or, in the event his name cannot be removed, cancel and

close the account. (R. p. 20 paragraph 47)

III. The values of the Wife's vehicle and jewelry were supported by the record.

The Family Court is tasked with the responsibility of identifying the marital property and determining its fair market value when making an equitable division of marital property. *Cannon v. Cannon* 321 SC 44, 467 SE2d 132 (Ct. App. 1996). The Court's valuation will be affirmed on appeal if the valuation is within the range of values presented by the parties. *Woodward v. Woodward* 294 SC 210, 363 SE2d 413 (Ct App 1987). When a party is knowledgeable about the property, realistic in his opinion of value and is credible, a party's own opinion of value is sufficient to support a finding by the Court. *Nelson v. Nelson* 428 SC 15, 833 SE2d 432 (Ct App 2019)

A. Toyota Land Cruiser.

The husband herein takes the position on his Equitable Division Worksheet that the Wife's 2003 Toyota Land Cruiser was worth $6,800.00 (Defendant's Exhibit 6 R. p. 666). The Wife took the position that the vehicle was worth $3,000.00 (Plaintiff's Exhibit 4 R. p. 32) The Court found that the vehicle was worth $3,000.00. (Equitable Apportionment Worksheet attached to the Final Decree of Divorce Item #2 (R.p. 32.) The Wife arrived at her valuation by reviewing the *Kelly Blue Book* value and subtracting necessary repairs. She also obtained a repair estimate from Creel Tire Company. She noted that the vehicle had 317,000 miles on the odometer. The rotors were warped, the air conditioning system leaks and she needs a new compressor. (R. p. 92 lines 2-p. 93 line 7) The Wife's evaluation of this asset is very detailed. The Husband's unexplained assessment of this asset's value on his Equitable Division Worksheet is unpersuasive. This is particularly true when the Husband

conceded on cross examination that the Wife would be in a better position to know about the extensive maintenance issues she testified about. (R. p. 250 lines 9-24) The record supports the Trial Court's determination of the value of the 2003 Land Cruiser.

B. Jewelry

The Court determined that the Wife's jewelry was worth $4,500.00 and allocated this asset to her. (Final Decree of Divorce, Equitable Division Worksheet R. p. 32). The Husband testified that he had one receipt for one piece of jewelry he bought for the Wife for their first Christmas in 1999. This receipt reflected payment of $4,734.00 and was marked "paid in full". (Defendant's Exhibit 8 R. p. 679). The Husband claimed that the receipt only reflected payment of the balance due of $4,734.00 and that he had actually paid twice that much for the necklace. (R. p. 188 line 1-15) The Husband was asked about the Wife's jewelry being covered by a rider on the homeowner's insurance policy. He was unsure whether the rider covered the Wife's premarital engagement ring. The Husband testified that he did not know whether the ring was covered or not because "she [the wife] took care of all of these things". (R. p. 189 lines 10-17).

The Wife testified that there were only two pieces of marital jewelry of any consequence. She estimated the total value of those pieces at $1,000.00 (R. p. 145-line 8-p.146 line 14). One piece was the estate piece the Husband had given to her for their first Christmas in 1999. (Defendant's Exhibit #8 R. p. 679). The other piece was a gift from the Husband to the Wife for the work she had done on the jewelry he inherited from his father's estate. She itemized the estate jewelry and obtained values for them. The Husband allowed her to select one item for herself. Having performed this function, she was in a position to

know the value of the item she selected. (R. p. 97 line 14). She selected a ring. Both items were displayed for the Court. (R. p. 97 line 14- p. 98 line 14). The Wife testified that these two items of jewelry would not, in her opinion be easily marketable. (R. p. 98 lines 13-23).

On cross examination, the Wife testified that the jewelry listed on the jewelry schedule to the homeowner's policy included her engagement ring. From her point view, the ring was more valuable than the Husband suggested. The Wife testified that this ring alone was worth $20,000.00. (Tr. p. 145 lines 4- p. 146 line 14). She described the engagement ring as a handmade piece made out of platinum with diamonds on the sides. The center stone was not an actual diamond but also was not a cubic zirconia. The Wife believes that the non-marital engagement ring was probably listed on the jewelry rider for $20,000.00 (R. p. 145 line 4- p. 146 line 14). If the value of the engagement ring were subtracted from the jewelry schedule of $25,000.00 then the remaining value would be $5,000.00 for the necklace gifted to the Wife for Christmas 1999.

Based upon the record the Court was given, the Court's determination of the value of the Wife's jewelry is justified.

IV. The Alimony award to the Wife was not excessive

Appellant argues that the Alimony award herein is excessive. The determination of whether a spouse is entitled to alimony and the amount thereof is a matter vested in the sound discretion of the Family Court. *Smith v. Smith 264 SC 624, 216 SE 2d 541 (1975.)* The Family Court only abuses its discretion when its determination is controlled by an error of law or is based upon factual findings which have no support in the record. *Degenhart v. Burriss 360 SC 497, 602 SE 2d 96 (Ct. App. 2004)* The goal in the award of alimony is to

place the supported spouse, as nearly as possible, in the same position of support established during the marriage. *Johnson v. Johnson 296 SC 289, 372 SE 2d 107* (Ct. App. 1988). If the supported spouse shows that the claim for alimony is justified, the Family Court must make "an alimony award that is fit, equitable, and just". *Allen v. Allen 347 SC 177, 554 SE 2d 421 (Ct. App. 2001).* According to *S.C. Code of Laws §20-3-130 (c) (1976, as amended)* the Court is required to consider and give weight in such proportion as the Family Court deems appropriate, to the following statutory factors:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties;
> (2) the physical and emotional condition of each spouse;
> (3) the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential of each spouse;
> (4) the employment history and earning potential of each spouse;
> (5) the standard of living established during the marriage;
> (6) the current and reasonably anticipated earnings both spouses;
> (7) the current and reasonably anticipated expenses and needs of both spouses;
> (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action;
> (9) Custody of the children, particularly where or circumstances render it appropriate that the custodian not be required to seek employment outside the home, or where the employment must be limited nature;
> (10) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage, except that no

evidence of personal conduct which may otherwise be relevant and material for the purpose of this subsection may be considered with regard to this subsection if the conduct took place subsequent to the agreement or (b) entry of a permanent order of separate maintenance and support or a permanent order approving a property or marital settlement agreement between the parties;
(11) the tax consequences to each party as a result of the particular form of support awarded;
(12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and
(13)such other factors the court considers relevant.

In this case, the Family Court detailed its position as to each of the statutory factors. (Final Divorce R. p. 21-25 and 8-13) In the decision of *Reiss v. Reiss 392 SC 198, 708 SE 2d 799 (Ct. App 2011)* the Court of Appeals noted:

> In reviewing an award of alimony, we do not reweight the statutory factors; rather our review is limited to determining whether the family court abused its discretion. See *Bodkin v. Bodkin, 388 S.C. 203, 217, 694 S.E. 2d 230, 238 (Ct. App. 2010).* Here, the family court listed each factor it was required to consider pursuant to section 20-3-130 (C) and made findings of fact supported by evidence in the record and conclusions of law regarding each factor. Accordingly, we find the family court did not abuse its discretion in awarding alimony or in determining the amount of alimony. *Id.* (finding the family court did not abuse its discretion in awarding alimony when it "made findings of fact on all of the relevant factors, and the record contained evidence to support each of those findings).

Appellant takes issue with the Court's factual findings as to his income. (Final Brief of Appellant p. 32) The Court found as a fact that "in the several years prior to 2018, the Defendant was earning an average (wage) of over $86,000.00." (Final Divorce Decree R. p. 23 paragraph F and p. 10 paragraph 21.) In its order on reconsideration the Court determined that the Husband's "minimum income" was $80,000.00 per year. (Order Denying

Motion for Reconsideration paragraph 2. R. p. 34) Appellant's own trial exhibit #12 covering the period 1999 to 2017 provides support for the Court's factual findings. (Defendant's Exhibit 12 p. 3 R. p. 686) Defendant's Exhibit #3 reflects Medicare income ranging from $68,809.00 as the low in 2004 to a high of $160,000.00 in 2006 (R. p. 686) Based upon this exhibit, Appellant's average Medicare Income from 1999 (year of marriage) to 2017 was $112,294.57. Appellant testified that in 2018 he earned $70,300.00, in 2018 he earned $70,300.00, and in 2019 he earned $57,038.00. (R. p. 174 line 10) He supported his testimony with Defendant's Exhibit 4 and Defendant's Exhibit 5, his personal income tax returns. (Defendant's Exhibit 4 and Defendant's Exhibit 5 R. p. 656-665) Appellant testified that there had been a general downturn in business due to medical reimbursements for his older medicare patients, and that, as he has aged, he does not work as hard as he used to. (R. p. 175 lines 1-11). The Court's factual findings that the Appellant had earned an average income of $86,000.00 in the several years before this action was filed in 2018, is supported by his Social Security Wage Earner's Statement (Defendant's Exhibit 12 p.3. R. p. 686) The average medicare income from 2014-2017 is $87,062.50. If the incomes alleged by Appellant for 2018 and 2019 are added into the equation the average income would be $79,264.66. (R. p. 174 lines 15-21)

The Appellant is the president and sole owner of his chiropractic business. (Defendant's Exhibits 2 and 3 CR. P. 635-655). As such he, he is free to set his own salary. (R. p. 212 line 18- p. 213 line 8) In the year before the separation, the Appellant reported earnings of $95,350.00 (R. p. 214 line 25- line 13). The year of the separation, (2018) he reported $70,300.00 and in 2019 he reported income of $57,000.00 (R. p. 14 line 10- line

21). Appellant testified that he still works full time and has not cut his patient list. R. p. 214 lines 16-25). He testified that the gross receipts of the business have declined. (R. p. 174 lines 10-16.) Appellant paid himself $23,000.00 more in 2017 than he did in 2018 despite the alleged decline in gross receipts. (R. p. 217 lines 3- p. 218 line 17, and Plaintiff's Exhibit #9 R. p. 410 Appellant testified that normally $20,000.00 is maintained in the business account each month after payment of salaries and expenses. (R. p. 222 lines 7-13) However, as of May 2020, the balance retained in the business account was $94,000.00 (R. p. 222 lines 10-24). This case was supposed to have been tried in March 2020 but was continued due to Covid (Order of Continuance filed March 18, 2020) In April 2020, Appellant deposited $103,000.00 into the business account. (R. p. 223 line 17- p.224 line 2). The Husband argues that the award of alimony to the Wife was excessive for several specific reasons. These arguments will be addressed *seriatim:*

A. Imputed Income

The Court imputed income of $80,000.00 to the Husband in the order denying Defendant's Motion To Alter or Amend Judgement and/or Motion for Reconsideration filed December 18, 2020 p.2 R. p. 34) During the course of the marriage, and prior to their separation, the Husband earned an average of $90,846.47 in Taxed Social Security Earnings and $112,242.05 in Medicare Earnings (Defendant's Exhibit 12 R. p. 686). In its Order Denying Defendant's Motion to Alter or Amend Judgement and/or Motion for Reconsideration, the Court specifically noted the evidence presented at trial concerning the Defendant's personal banking account statements from January 2020 to May 2020, the months immediately preceding the trial, in support of its imputation income to the

Defendant. (Plaintiff's Exhibit 10 R. p. 424-p.444). These records show deposits into the Defendant's personal banking account of $9,700.00 for January 2020, $16,357.00 for February 2020, $19,330.84 for March 2020, $11,773.72 for April 2020, and $14,232.00 for May 2020. The statements show total deposits of $71,393.56 from December 9, 2019 to April 29, 2020 for average deposits of $14,278.71 per month. (R.p. 424-444) At that rate, the Husband was positioned to make deposits into his personal account of $171,344.52 by year end. Furthermore, the Court also took into consideration the fact that the Husband admittedly pays a number of personal expenses from the business which is income that is not reported. The Defendant testified that the business pays his car insurance, health insurance, car maintenance, some gas, cellular phone bill, vehicle taxes and vehicle payment. (R. p. 227 line 10- p.228 line 10) The Husband claims that the large deposits in his personal account relate to money he "borrowed" out of his father's estate account in the amount of $20,000.00 and a $20,000.00 loan from his brother. He testified that he placed those alleged loans in a previously undisclosed personal account at Wells Fargo Bank. (R. p. 220 line 8-25) He provided no documentation of these loans. (Tr p. 220 line 8- p. 221 line 6). The loans are not set forth on his Financial Declaration (Financial Declaration of Defendant dated June 12, 2020.) (R. p. 742-745) The Husband testified that the business normally retains about $20,000.00 monthly in it's business account after disbursements. (R. p. 222 lines 7-9). This is corroborated by the corporate bank statements for 2019. (Plaintiff's Exhibit 11, R. p. 445-628). However, in the months leading up to the trial when the Husband was allegedly borrowing money from his father's estate and from his brother, he also withdrew $40,000.00 from a marital account, in violation of the restraining order contained in the Temporary

Order filed January 15, 2020. (Temporary Order p. 3 paragraph H R. p. 37). During this same period the business retained $94,000.00 in its account. That amounts to $74,000.00 in retained earnings which the Husband chose not to access. (R. p. 219 lines 22- p. 220 line 4). It would appear if the Husband's testimony is truthful that when he was borrowing all those monies, that he was avoiding taking additional monies out of the business which would been income. The Husband claimed that the Covid Pandemic had negatively impacted the gross receipts to the business in the several months before the trial. However, in April 2020 the business deposited $103,918.34 into its account. (Plaintiff's Exhibit 11 R. p. 445) A review of the bank statements for two years never reflected a deposit over $100,000.00. This was the month after the original trial was continued due to Covid. (R. p. 223 lines 17- p. 224 line 22). At trial, the Husband denied knowledge of any Federal Covid Assistance. (R. p. 212 lines 9-17) Appellant's Final Brief p. 35 concedes that the business did in fact receive Federal Covid assistance of over $17,000.00 in April 2020. The first such deposit dated April 17, 2020 denoted HHSPAYMENT US HHS STIMULUS (not a loan) in the amount of $7,161.83 is relief under the *Coronavirus Aid, Relief and Economic Security Act Public Law* 116-132. "Cares Act" for Medicare providers. The second payment dated April 23, 2020 denoted S BAD TREAS 310, in the amount of $10,000.00, represents a grant or advance from the Small Business Administration related to the Covid Pandemic. The $10,000.00 advance does not have to be repaid although any subsequent loan would have to be repaid. The Defendant had denied having received any federal relief related to the Pandemic. (R. p. 221 lines 20-22) These funds represented income replacement.

The Plaintiff as sole shareholder in his business has the ability to defer income or to

draw income based upon the availability of funds. This is corroborated by the Husband's own testimony. (R. p. 216 line 3- p. 217 line 17). In 2017, prior to the separation, the business had gross receipts of $547,000.00. In 2018 the business had gross receipts of $591,000.00. When the business had earned $44,000.00 less in 2017 he paid himself $23,000.00 more in compensation than he did in 2018. (R. p. 216 line 3- p. 217 line 18).

The Trial Court noted in the Order on Reconsideration that Plaintiff had suggested that the evidence presented at trial would easily support a higher amount of permanent periodic alimony. (R. p. 34) The evidence detailed above certainly belies the Defendant's claimed income availability of $5,000.00 per month. (R. p. 211 line 25- p. 212 line 2). The Husband testified to the monthly unreported income from personal expenses as follows:

A. Wife's Part B Medicare (Pre-Temporary Order) $163.00

B. Family Car Insurance (Pre- Temporary Order) $408.00

C. Family Cell Phone (His) $68.00

D. Husband's Vehicle Payment $517.57

(Tr. p. 200 line 23- p. 201 line 24 and Plaintiff's Exhibit 11 R. p. 445-628). It is argued in the Appellant's Brief that there is no evidence in the record regarding how much the business pays for the husband's automobile insurance, his maintenance, his personal gas or his car taxes. This is incorrect, the Corporation's 2019 tax return includes Automobile expenses of $11,393.00. (Defendant's Exhibit #3 R. p. 648). Broken down on a monthly basis this factor gives the Husband an extra $942.42 in the tax free income each month.

B. Ability to pay Alimony

The Husband argues that he does not have the ability to pay alimony in the amount

of $2,700.00.

If the Court were to endorse the Husband's position that he only earns or is capable of earning $5,000.00 per month ($60,000.00 per year), the award of $2,700.00 per month alimony might be a struggle. However, if the $11,393.00 in personal car expenses paid on the Husband's behalf by the corporation is added back, the $60,000.00 becomes $71,393.00. (Defendant's Exhibit 3 R. p. 648). If the Husband were to abide by the pre-separation standard of retaining $20,000.00 in the corporate bank account at the end of each month after payment of salaries and expenses, he would have had an additional $74,000.00 available as income in May 2020. In April 2020 he would have had $62,481.01 available as extra income. The February 2020 statement shows the Corporation retained $20,841.17 and the January statement shows the Corporation retained $27,838.60. The bank statements of the Corporation showed end of month balances for 2019 as stated: (R. p. 493-627)

December 2019	$26,722.97
November 2019	$33,050.05
October 2019	$26,801.29
September 2019	$25,855.27
August 2019	$15,612.28
July 2019	$21,099.20
June 2019	$15,687.34
May 2019	$19,611.62
April 2019	$18,598.50
March 2019	9,341.00

February 2019 $13,196.88

January 2019 $4,853.25

The average monthly retained monies in the Corporate account after payment of expenses for 2019 was $19,202.50. The retained earnings by the Corporation is a different story for the year 2020. Clearly, the Husband was attempting to minimize his true available income. (R. p. 445-489)

Husband passed off the bulk of the large payments in the Spring of 2020 as delayed payments due to Covid. In any event, the insurance reimbursements were still income for 2020.

For the period of 2020 the Husband had the following sums available as personal income: (R.p. 445-485)

<u>January 2020</u>

$ 5,000.00 Claimed income

$ 949.42 Personal vehicle expenses paid by Corporation

$<u>13,787.43</u> Undrawn potential earnings

$19,736.85

<u>February 2020</u>

$5,000.00 Claimed income

$ 949.42 Personal vehicle expenses paid by Corporation

$<u> 841.17</u> Undrawn potential earnings

$6,790.59

March 2020

$5,000.00	Claimed income
$ 949.42	Personal vehicle expenses paid by Corporation
$ 683.38	Undrawn potential earnings
$6,632.80	

April 2020

$5,000.00	Claimed income
$ 949.42	Personal vehicle expenses paid by Corporation
$62,481.01	Undrawn potential earnings
$68,430.43	

May 2020

$5,000.00	Claimed income
$ 949.42	Personal vehicle expenses paid by Corporation
$74,842.87	Undrawn potential earnings
$80,792.29	

If the Husband drew all or even a part of the retained earnings of the Corporation, the Husband could well afford $2,700.00 per month in alimony.

The Husband states that he is not able to work as hard as he used to work. (R. p. 214 line 14- p.215 line 4 and R. p. 218 lines 3-8) However, Husband testified that he was still keeping a full time schedule and he has not reduced his patient list. (R. p. 214 lines 18-25).

This does not change the financials set forth hereinabove. The Husband testified that he was diagnosed with an irregular heartbeat in 2013. (R. p. 170 lines 9-20). Fortunately, the Husband testified that by continuing his running program and the use of medication, this condition is "pretty well manageable." (R. p. 173 lines 3-9.) The rapid decline in his stated income seems to be more related to the impending divorce and the Husband's election not to draw earnings from his business.

The Husband argues that based upon his financial declaration he does not have the funds to pay Wife $2,700.00 in alimony. (Financial Declaration of Defendant filed June 17, 2020 R. p. 742-745). Even if the Defendant's stated income of $5,157.67 were true, which the Plaintiff does not concede, the legislature did not restrict the family court to awarding alimony solely from marital assets. *McMurtrey v. McMurtrey* 272 SC 118, 249 SE2d 503 (1978).

The Family Court found that the Husband had close to $1,000,000.00 in assets, mostly liquid. (Final Divorce Decree R.p. 28 paragraph. 2) The Husband can afford to pay $2,700.00 per month in alimony.

C. Wife's need for alimony

The Wife receives Social Security Income of $876.60 per month. Her Financial Declaration also notes that she receives $670.00 for the benefit of their disabled adult daughter. (Financial Declaration of Wife filed June 17, 2020 p. 1 R. p. 736) The Agreement of the parties approved by the Court and made a part of the Final Decree of Divorce, directed that the SSI benefits for ZZ would be used for ZZ's care. (Final Divorce Decree R. p. 4 paragraph a) It is persuasive that the *South Carolina Child Support Guidelines* (2014) do not

include Supplemental Security Income of a party or other household members as gross income. (See Sections 3A, 3B, p. 4). Whether the Wife's income is determined to be $876.60 or $1,546.60 she still needs a significant award of alimony to meet her estimated expenses post divorce. (Financial Declaration of Wife filed June 17, 2020 p. 2 R. p. 737) The Court made provisions in the Decree regarding payment of the IHC and the Capital One credit cards. The Husband did not appeal that portion of the Decree. (Brief of Appellant p. 47) Therefore, the Wife's expenses on page 2 of her financial declaration would be reduced from $5,841.00 to $4,398.00. It appears that the Court included the daughter's SSI in its calculation of the Wife's income, and deducted the credit card payments from her expenses.

$4,398.00	(Revised Expenses)
- $1,546.60	(Income Attributed to Wife)
$2,851.40	(Shortfall)

The award of $2,700.00 almost satisfies the wife's estimated monthly shortfall.

D. Standard of Living

The Husband takes the position that the parties did not enjoy an "upper middle class" standard of living during the marriage (Final Brief of Appellant p. 47) This is the description the Wife gave. (R. p. 110 lines 17-25)

The Court endorsed that description (Final Divorce Decree R. p. 23 paragraph E) In any event the label is subjective in nature. The objective factors in the record concerning the parties' standard of living include the fact that they lived in a home worth from $500,000.00 to $550,000.00 according to the Husband (R. p. 178 lines 13-15) The parties enjoyed a pool at their home. (R. p. 91 line 21- p.92 line 1) They traveled to Lake Geneva Wisconsin, the

mountains of Tennessee, and the islands for vacations. (R. p. 110 line 16- p. 111 line 15)

Even with an award of alimony in the amount of $2,700.00 per month, the Wife will probably not be able to enjoy the standard of living she became accustomed to during the marriage.

The award of alimony herein should be affirmed.

V. The Court properly awarded attorneys fees and costs herein.

In the Final Decree of Divorce the Court undertook a thorough analysis of the attorneys fee award herein. The Court's analysis is set forth in paragraphs 59-70 of the Final Decree. (Final Divorce Decree R. p. 27-30.) Both parties made formal requests for attorneys fees and costs in their pleadings. (Complaint R. p. 46) (Answer and Counterclaim R. p. 49) The Defendant testified that he was not really asking for attorneys fees but that he just wanted the Court to know how much he had spent in attorneys fees and possibly consider that in the equitable division award. (R. p. 202 lines 11-24, Defendants Exhibit 13 R. p. 688-736)

In making an award of attorneys fees and costs the Court must first determine entitlement to fees based upon the following factors set forth in *E.D.M. v. T.A.M. 307* SC *471, 415 SE2d 812 (1992):*

(1) The ability of a party to pay his or her own fees

The Court indicated that the Wife's ability to pay her own attorneys fees "is severely hampered in that she, once again has been out of the workforce for over twenty (20) years. Although she is receiving monies from the sale of the home, and other disbursements in equitable appointment, the Plaintiff is still almost totally dependant on the Defendant for her

financial needs." Further, "The Defendant, however has substantial funds from which to pay his own attorneys fees." The Court then noted, that the husband had acknowledged the same at trial. (See R. p. 237 lines 18-25 and R. p. 202 lines 11-p.203 line 8). The Decree awarded the Husband the three contested Stifel Retirement Accounts #6209, 8368, and #2494 valued at $767,910.51 on the date of filing and $757,058.96 on the date of trial less "40,000.00" as a small portion of the increase of value during the marriage. (Decree of Divorce R. p. 15-17) The Court noted that the Husband will have "approximately $1,000,000.00 in assets, mostly liquid from which he can draw." The Husband clearly has the financial ability to pay his own attorneys fees and contribute toward those of the Wife.

(2) Beneficial results obtained

The Court noted in its Decree that Wife's attorney obtained permanent periodic alimony for his client. The issue of alimony, according to the Court, was one of the main issues at trial. The Husband never offered to pay permanent periodic alimony until the last day of trial. At that point, the case was over 800 days old. (See R. p.209 line 3- p. 211 line 24) Furthermore, the Court noted that trial counsel had been successful in obtaining a 50% share of the marital property for the Wife (Final Divorce Decree R. p. 27 paragraph 61.) The Court also noted that the Husband's counsel had been successful in convincing the Court that the vast majority of the three Stifel accounts was non-marital. (Final Divorce Decree R. p. 27-28 paragraph 61.)

(3) Relative Financial Condition of the parties.

The Court noted that the Wife will receive one-half of the assets set forth on the Equitable Apportionment Worksheet of $53,912.00, plus $40,000.00 for a total of

$93,912.00 (Final Decree of Divorce R. p. 21 paragraph 49 and R. p. 17, paragraph 35) The Husband will receive $770,970.96 in marital and separate assets.[1] In addition the parties will each receive one-half of the net sales proceeds on the marital home should the marital home ever be sold. (Final Divorce Decree R. p. 18 paragraph 40 and R. p. 14 paragraph 27) He certainly is in a better position to pay the attorneys fees of both parties. The Husband admitted that he was in a better financial position than the Wife to pay their attorneys fees. (R. p. 254 lines 19-25) The Wife received $53,912.00 in personal property (See Equitable Apportionment Worksheet Final Divorce Decree attachment) (R. p. 32) plus a $40,000.00 share of the Stifel contested accounts. (Final Divorce Decree, R. p. 17 paragraph 35 and R. p. 18 paragraph 40) Clearly, the Wife does not have the liquid funds to pay attorneys fees and costs.

The fourth and final factor in determining the Wife's entitlement to attorneys fees is the impact the payment will have on the each party's standard of living. The Court noted that as set forth in the first three factors it would be a strain on the Wife to pay her fees. It noted that the same would not be true for the husband. (Final Decree of Divorce R. p. 28 paragraph 63). The Court concluded that the Wife had met her burden of proof and that she was entitled to a contribution toward attorneys fees and costs. (Final Decree of Divorce R. p. 28 paragraph 64)

Having determined that the Wife was entitled to the award of fees the Court then evaluated the amount of the award based upon the factors set forth in *Glasscock v.*

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[1] Value of contested Stifel Accounts as of date of Trial, $757,058.96 (Defendant's Exhibit 10, minus $40,000.00 to Wife (Final Decree R. p. 17 paragraph 35), plus $53,912.00 Equitable Division Worksheet attached to Decree.)

Glasscock 304SC 158, 403 SE2d 313 (1991) The Court noted that the affidavit of attorneys fees set forth counsel's qualification and experience. (Plaintiff's Exhibit 8 R. p. 399-409) The Court stated that counsel's professional standing and reputation "are outstanding above reproach." (Final Divorce Decree R. p. 29 paragraph. 67.) The Court determined that the hourly rate was reasonable and consistent with the fees charged within the community based upon this type pf case. (Final Divorce Decree R. p. 29 paragraph 68.)

Concerning the reasonableness of hours billed, the Court noted that the affidavits of attorneys fees and costs of both parties are "very similar as to the time spent on the case and the total fees". (Defendants's Exhibit 13 R. p. 688-735 and Plaintiff's Exhibit #8 R. p. 399-409). Accordingly, the Court determined that neither was in a position to question the reasonableness of the hours billed. The Court noted that the issue of permanent periodic alimony was contested until the last day of trial by Husband and that he should be required to pay for the same. Therefore, the Court determined that the Husband should be required to contribute $10,000.00 toward the Wife's fees and costs. (Final Decree R. p. 29 -30.)

The award of attorneys fees is within the discretion of the Court and will not be disturbed absent an abuse of discretion. *Doe v. Doe* 370 SC 206, 634 SE2d 51 (Ct. App. 2006) The Husband admitted that he was in a better financial position than the Wife to pay attorneys fees. (R. p. 254 lines 19-25) The Wife received $53,912.00, see Equitable Apportionment Worksheet (Final Divorce Decree attachment) R. p. 32 plus a $40,000.00 Share of the Stifel contested accounts, and one-half the net sales proceeds of the marital home should the home sell at some point in the future. (Decree R. p.13-15). Clearly, the Wife does not have the liquid funds to pay attorneys fees and costs. (Financial Declaration

of Plaintiff filed June 17, 2020 R. p. 736-740).

VI. Should the Court determine that the wife is not entitled to a share of Stifel Accounts, #6209, #8368 and 2494 this should be taken in consideration in the award of alimony herein. (Additional Sustaining Ground)

Should the Court determine that the Wife is not entitled to $40,000.00 from Stifel accounts #6209, #8368 and #2494 marital, Respondent requests that this be taken into considerations in the alimony award herein. In the award of alimony, one of the statutory consideration is §20-3-130 (8) "The marital and non-marital properties of the parties, including these apportioned to him or her in the divorce or separate maintance action." The retirement plans contained in Stifel accounts #6209, #8368 and #2494 had a total value of $767,910.51 as of the date of filing and $757,058.96 as of the date of trial. Final Divorce Decree R. p. 16 paragraph 33, Defendant's Exhibit #9 R. p. 680). The Respondent was a full time homemaker and Mother for the entire marriage. She has zero retirement. (R. p. 91 lines 10-20) At trial, the Wife requested that should the Court determine that these accounts are non-marital that this be taken into consideration in the alimony award herein. (Tr. P. 62 lines 10-20) In final argument, counsel for Wife reiterated this argument stating that the non-marital properties of the parties are taken into consideration by both the equitable division and the alimony statutes. (R. p. 273 lines 6-13) (*S.C. Code of Laws* §20-3-620 B(7) (1976, as amended), *S.C. Code of Laws* §20-3-130 C(8) (1976, as amended) The Court responded, "The Court is well aware of that and has been pondering that". (R. p. 273 lines 6-15) The Court might have been inclined to increase the alimony award if the $40,000.00 award to the Wife from these accounts is reversed. In any event, any decision which removes $40,000.00 in equitable division to the Wife would diminish the Husband's arguments for a reduction

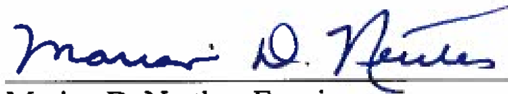
in alimony award to the Wife herein. It also would give him additional available funds to pay alimony.

CONCLUSION

For the reasons stated Appellant requests that the judgment of the Lower Court be affirmed.

Respectfully Submitted,

July 1, 2021.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Family Court

Timothy H. Pogue, Family Court Judge

APPELLATE CASE NO. 2021-000030

Kathleen S. Carter. . . . . Respondent,

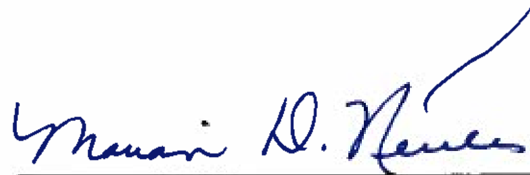
Vs.

Joseph R. Carter,. . . . . Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211, SCACR.

July 1 ,2021



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