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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. 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
APPELLATE CASE No.: 2024-001720

Kathleen S. Carter..... Respondent,

v.

Joseph R. Carter..... Petitioner.

RETURN TO
PETITION FOR A WRIT OF CERTIORARI

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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 issued its order denying Petitioner's motion on December 18, 2020.

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 was prescribed 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 conceded at trial that ZZ lived with the Wife who continued to take care of her on a daily basis. (R. p. 237 line 9-19) The Wife described 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 was unrealistic to expect that ZZ would ever be able to live on her own. (R. p. 70 lines 2-6) The Final Divorce Decree recognized the agreement of the parties related to ZZ in its Final

Decree. (R.p. 126 line 8- p.127 line 3) (Final Divorce Decree R. P. 5 paragraph 12)

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

The Wife described 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 had a manic episode. He admitted that he got “more physical with her than “[he]” should have”. He states that he “manhandled” her. While he denied dragging her down he admitted 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)

1. Valuation of Mortgage Debt at Date of Trial

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.

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 Respondent argued that, 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. The Court of Appeals agreed. 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 rejected 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 Court of Appeals opined that *Barrow* supports the Trial Courts’ ruling. The Husband acknowledged 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. The Court of Appeals agreed with the argument of Respondent that the *Johnson* case supports valuing the mortgage debt at the date of trial under the specific circumstances of this case.

2) Valuation of the IHG Credit Card Debt at Date of Trial.

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...

The lower courts were correct in utilizing the balance on the credit card at the time of the trial.

3) 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 thirteen statutory factors.

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 Trial 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 also 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 HHS PAYMENT 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 only \$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 Final 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)

January 2019	\$4,853.25	July 2019	\$21,099.20
February 2019	\$13,196.88	August 2019	\$15,612.28
March 2019	\$9,341.00	September 2019	\$25,855.27
April 2019	\$18,598.50	October 2019	\$26,801.29
May 2019	\$19,611.62	November 2019	\$33,050.05
June 2019	\$15,687.34	December 2019	\$26,722.97

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)

January 2020

\$ 5,000.00	Claimed income
\$ 949.42	Personal vehicle expenses paid by Corporation
<u>\$13,787.43</u>	Undrawn potential earnings
\$19,736.85	

February 2020

\$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
<u>\$ 683.38</u>	Undrawn potential earnings
\$6,632.80	

April 2020

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

May 2020

\$5,000.00	Claimed income
\$ 949.42	Personal vehicle expenses paid by Corporation
<u>\$74,842.87</u>	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 does 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)
<u>\$2,851.40</u>	(Shortfall)

The award of \$2,700.00 ALMOST satisfies the wife's estimated monthly expenses.

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 almost certainly will not be able to enjoy the standard of living she became accustomed to during the marriage.

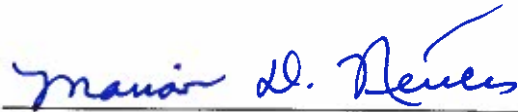
The award of alimony herein should be affirmed.

CONCLUSION

For the reasons stated the *Petition for Writ of Certiorari* should be denied.

Respectfully Submitted,

October 25, 2024.



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