

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Family Court

Robert E. Guess, Family Court Judge

Case No. 2011-DR-46-1905
Op. No. 5450 (S.C. Ct. App. filed Nov. 2, 2016)

Tzvetelina Miteva, Petitioner,

v.

Nicholas Robinson, Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tzvetelina Miteva, Appellant,

v.

Nicholas Robinson, Respondent.

Appellate Case No. 2014-002484

Appeal From York County
Robert E. Guess, Family Court Judge

Unpublished Opinion No. 5450
Heard June 16, 2016 – Filed November 2, 2016

AFFIRMED AS MODIFIED

John S. Nichols, of Bluestein Nichols Thompson &
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WILLIAMS, J.: Tzvetelina Miteva (Wife) appeals the family court's divorce decree, arguing the family court erred in: (1) denying her request for a divorce on the ground of Nicholas Robinson's (Husband) habitual drunkenness; (2) identifying and apportioning the marital estate on a fifty-fifty basis; and (3) requiring her to pay Husband's attorney's fees. We affirm as modified.

FACTS

Wife and Husband married on November 25, 2007. After almost four years of marriage, Wife filed for divorce on August 30, 2011. The parties had no children during the marriage, but Wife had a minor child and Husband had two adult children from their respective prior marriages. In Wife's complaint, she sought a divorce on the ground of Husband's habitual drunkenness and requested equitable division of the marital assets and attorney's fees. Husband answered and counterclaimed, denying Wife's allegations and seeking equitable division of the marital estate and attorney's fees.

The family court held a final hearing on May 8 and 9, 2013. At the final hearing, Husband and Wife submitted evidence and testimony to substantiate their claims to the family court, specifically addressing each party's claim to several properties that were bought, improved, and sold during their marriage. The family court subsequently issued its final order and denied Wife a divorce on the ground of habitual drunkenness. Because Wife failed to prove by a preponderance of the evidence that she was entitled to a divorce on this ground, the family court granted both parties a divorce on the ground of one-year's separation.

The family court also held the following: (1) the parties transmuted certain properties that were bought and sold during the marriage; (2) Husband's retirement account and mobile homes were nonmarital property; and (3) the family court did not have jurisdiction to divide real property that was not titled in the name of either party. The family court concluded Wife's removal of \$115,521 from marital funds was financial misconduct and assigned that amount to Wife. After considering the factors for apportioning marital property as required by section 20-3-620(B) of the South Carolina Code (2014), the family court apportioned 50% of the marital estate to Wife and 50% to Husband. Finally, the family court required Wife to pay all of Husband's attorney's fees, which totaled \$27,561.29. Wife submitted a motion to alter or amend the family court's ruling, which the family court denied. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues *de novo*." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[T]his [c]ourt has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Epperly v. Epperly*, 312 S.C. 411, 414, 440

S.E.2d 884, 885 (1994). Although the appellate court retains the authority to make its own findings of fact, "we recognize the superior position of the family court . . . in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Therefore, the appellant bears the burden of convincing this court that the family court committed error or the preponderance of evidence is against the court's findings. *Id.*

I. HABITUAL DRUNKENESS

Wife argues the family court erred in denying her request for a divorce on the ground of habitual drunkenness. We disagree.

"Section 20-3-10(4) of the South Carolina Code . . . provides that habitual drunkenness is grounds for divorce. Habitual drunkenness is the fixed habit of frequently getting drunk; it does not necessarily imply continual drunkenness." *Lee v. Lee*, 282 S.C. 76, 78-79, 316 S.E.2d 435, 437 (Ct. App. 1984). "In order to prove habitual drunkenness, there must be a showing that the abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce." *Epperly*, 312 S.C. at 414, 440 S.E.2d at 885.

Wife testified Husband was unemployed for half of the marriage. Moreover, Wife claimed, while Husband was unemployed, he would get drunk every day and abuse prescription medication. Wife testified Husband's alcohol consumption and drug use worsened throughout the marriage and caused the marriage to deteriorate.

Wife introduced four police reports to support her testimony. A police report dated April 17, 2010, indicated Wife called police but reported everything was "10-4." On December 5, 2010, Wife again called police and said "Husband ha[d] gone crazy," but she then stated she did not need help. On April 9, 2011, police responded to a call from Wife, but when they arrived, Wife claimed she was fine and would not provide a reason for calling. At the hearing, Wife stated Husband hid in the basement and instructed her to tell police everything was okay. In the final police report, dated October 21, 2012, Wife reported Husband walked around their house naked in front of her daughter. However, on cross-examination, Wife acknowledged she separated from Husband in 2011, but she waited until October 2012 to file the final police report. Wife claimed she did not know the process for making an allegation, but she then conceded she had contacted police on prior occasions. Additionally, Wife admitted that, on April 30, 2009, she wrote a note indicating if something happened to her, she would like her daughter to stay with Husband.

Zlatka Miteva, Wife's mother, testified she lived in Bulgaria, but stayed with the parties for a few months every year. She stated Husband had a problem with alcohol before the parties married. Zlatka claimed Husband got drunk every day and took prescription medication, which caused him to shake and become aggressive.

Several other witnesses testified regarding Husband's alcohol consumption. Husband's ex-wife, Nasrin Robinson, and one of Husband's daughters, Sophie Robinson, testified they had observed Husband consume alcohol, but they had never seen him drunk. Additionally, both claimed they had never seen Husband become angry when drinking. Nasrin admitted she only saw Husband several times a year. Nasrin and Sophie both acknowledged Husband paid for Sophie's undergraduate and graduate school tuition. Don Pierman, Husband's friend, testified he had known Husband for twenty-five years, but he had never seen him drunk. However, Pierman admitted he had only seen Husband once a year during the past few years.

Husband also testified at the final hearing about his alcohol consumption. Husband admitted he drank alcohol but denied drinking in excess or using drugs. Moreover, Husband asserted he was not intoxicated when police came to the parties' home. Husband testified he was employed as a system auditor when the parties married, and he sometimes worked from home during the marriage. He claimed he was laid off because of a change in management. According to Husband, Wife's daughter saw him naked once when walking from his bedroom to his bathroom; however, he stated he was not expecting to see her.

After considering the foregoing testimony, the family court concluded Wife failed to prove by a preponderance of the evidence that she was entitled to a divorce on the ground of Husband's habitual drunkenness. The family court stated Nasrin and Sophie might not be disinterested witnesses because of Husband's support obligations but found Pierman's testimony should be given more weight. Additionally, the family court found Husband's appearance and professional accomplishments suggested he was a person of considerable self-control. The family court noted there was no mention of alcohol in any of the police reports and determined the incident report regarding nudity in the presence of Wife's daughter was generated after the separation to create corroboration for the grounds for divorce when no other significant corroboration existed. Furthermore, the family court ascertained Wife's letter, stating she wished for her daughter to stay with Husband, was written half-way through the marriage and occurred during

Husband's unemployment when, according to Wife and Zaltka, Husband's drinking was the most evident.

Aware of our de novo standard of review, we concur with the family court's decision on this issue. Because the parties presented conflicting evidence about the nature of Husband's drinking, we find the family court was in the best position to determine the credibility of the witnesses. *See Bodkin v. Bodkin* 388 S.C. 203, 214, 694 S.E.2d 230, 236 (Ct. App. 2010) (affirming the family court's finding that husband failed to establish wife's habitual drunkenness when parties presented conflicting evidence as to how much wife drank and whether it was a problem because "the family court was in the better position to see the witnesses and judge their credibility"). The family court found Pierman's testimony that Husband did not drink in excess was credible. Similarly, it found Husband's appearance and professional accomplishments were indicative of self-control. Based upon these findings as well as the fact that none of the police reports mentioned alcohol, we affirm the family court's finding that Wife did not meet her burden of proof. Furthermore, because the granting of a divorce to Wife on the ground of habitual drunkenness would not have dissolved the marriage any more completely, we find Wife suffered no prejudice by the family court's ruling. *See Mick-Skaggs v. Skaggs*, 411 S.C. 94, 101–02, 766 S.E.2d 870, 873–74 (Ct. App. 2014) (finding the family court acted within its discretion in awarding parties a no-fault divorce, even though wife presented sufficient evidence to establish a fault-based ground for divorce). Thus, we affirm the family court's decision on this issue.

II. IDENTIFICATION AND APPORTIONMENT OF THE MARITAL ESTATE

Wife argues the family court erred in its identification and apportionment of the marital estate. We disagree.

A. Identification of the Marital Estate

Marital property consists of "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation as provided in [s]ection 20-3-620 regardless of how legal title is held" S.C. Code Ann. § 20-3-630(A) (2014). Property acquired prior to the marriage and property acquired by inheritance, devise, bequest, or gift from a party other than the spouse is nonmarital property. *Id.* "The [family] court does not have jurisdiction or authority to apportion nonmarital property." S.C. Code Ann. § 20-3-630(B) (2014).

Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property.

Wilburn v. Wilburn, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988).

1. Mobile Homes

Wife first contends the family court erred in classifying several mobile homes as nonmarital property. We disagree.

In support of her position, Wife claimed she gave Husband \$50,000 in cash and \$52,500 in checks to pay off credit card debt he incurred prior to the marriage when he purchased several mobile homes. However, when questioned, Wife acknowledged the checks paid to Husband during the marriage only totaled \$21,000. Conversely, Husband asserted he purchased the mobile homes in 2006 with money from stocks and did not have any outstanding credit card debt when the parties married. The family court determined the mobile homes were purchased by Husband prior to the marriage with cash from the sale of stock, and there was no indication that Husband intended to transmute them into marital property. The family court noted Wife did not provide credit card statements or payments made directly to pay off credit cards to support her allegation.

We agree with the family court and find Wife failed to prove the parties intended to transmute the mobile homes into marital property. After reviewing the record, we conclude Wife did not present any evidence specifically proving she paid off Husband's credit card debt associated with the mobile homes and did not prove the parties regarded the mobile homes as common properties of the marriage. *See Jenkins*, 345 S.C. at 98, 545 S.E.2d at 537 ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."); *see*

also Murray v. Murray, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (finding wife failed to produce objective evidence showing that real estate purchased by husband prior to the marriage was regarded by the parties as common property during the marriage). Accordingly, we affirm the family court's decision on this issue.

2. Ferguson Meadow and Montibello Drive

Wife also claims the family court erred in concluding Ferguson Meadow and Montibello Drive were marital properties. We disagree.

Wife stated she purchased all the properties that were bought and sold during the marriage with money she received from her family in Bulgaria and \$200,000 Husband repaid her by taking out a home equity line of credit (HELOC). Wife asserted she loaned Husband over \$200,000 during the marriage to pay off his credit card debt; to pay the mortgage on the home he purchased before the parties' marriage; and to fulfill obligations he owed from his previous separation agreement. Wife claimed she initially purchased a home on Ferguson Meadow in York, South Carolina (Ferguson Meadow), and another property located in Rock Hill, South Carolina. Wife stated she sold the property located in Rock Hill and used the proceeds to remodel another property she purchased in Lake Wylie, South Carolina, which she subsequently sold. Wife claimed she continued to buy and sell various properties in South Carolina and North Carolina using proceeds from prior sales, including a home on Montibello Drive in Charlotte, North Carolina (Montibello Drive).

According to Wife, Husband had no involvement with the purchased properties; however, she conceded: (1) Husband's name was listed as the purchaser on the Lake Wylie property settlement statement; (2) Husband and Wife's names were listed as the purchasers on the settlement statement of Ferguson Meadow; and (3) Husband's name was listed as the landlord on the lease for Ferguson Meadow. When Husband emailed Wife to inquire about the location of the HELOC money, Wife acknowledged responding that "the \$200K [was] in Montibell[o]."

William Brice—the closing attorney for four of the properties—testified Wife told him the money for the properties came from her family and specified the properties were investments for her daughter. Brice said most of the properties were purchased in Wife's name, but one might have been titled in Husband's name.

Conversely, Husband testified he and Wife began jointly investing in real estate for their mutual benefit. Husband claimed Nadejda and Pavel Bolt worked with the parties to buy, renovate, and resell the acquired properties. In this venture, Husband stated he researched properties; Nadejda acted as their real estate agent; he and Wife financed the purchases; and then he and Pavel renovated the properties. Husband introduced emails to substantiate their professional relationship. Husband also introduced his email correspondence with York County Planning and Development Services regarding property inspections and permits.

Husband claimed he found the first property, and Wife financed the purchase price. He testified he had the first property painted; installed a refrigerator, microwave, and range; and "[brought] it up to spec[.]" Husband also stated he found a tenant and managed the first property before it was sold. According to Husband, he then found Ferguson Meadow, and Wife also financed this purchase price. Husband explained he rented and managed Ferguson Meadow, and in support of his claim, he introduced a lease on which he was listed as the landlord. Husband testified he then found the Lake Wylie property and financed the \$216,000 purchase price by taking out a HELOC. Husband claimed he and Pavel performed extensive remodeling before selling this property. He recalled Nadejda found the next property in Fort Mill. According to Husband, the parties sold the Fort Mill property, and the proceeds went to purchase another property in Waxhaw, North Carolina. Husband admitted he did not perform any physical labor on the Waxhaw property. The parties used the proceeds of the Waxhaw property to purchase Montibello Drive, which Wife managed and rented before residing there.

The family court found Ferguson Meadow was transmuted into marital property because it was purchased by the parties in the joint enterprise of buying and selling distressed properties. Additionally, the family court concluded Montibello Drive was marital property because it was financed with the proceeds generated from a number of real estate sales by Husband and Wife and by Husband's HELOC.

We agree that Montibello Drive was marital property and Ferguson Meadow was transmuted into marital property. Along with Husband's testimony that he and Wife jointly invested in real estate for their mutual benefit, Husband also introduced the following: (1) emails sent between him and York County Planning and Development Services regarding housing inspections and permits; (2) emails demonstrating a work relationship between Husband, Wife, Pavel, and Nadejda; and (3) a Ferguson Meadow lease with Husband's name listed as the landlord. Husband also introduced multiple emails demanding Wife tell him the location of the money from his HELOC, and Wife's response that "the 200K are in

Montibello." We find Husband's persistent inquiries and Wife's response tend to establish that the HELOC was not meant to repay Wife, but was a source of capital for the parties' real estate investments. Although the parties agree that Wife financed Ferguson Meadow, we find Husband put forth evidence that he and Wife regarded the purchased real estate as common property of the marriage. *See Jenkins*, 345 S.C. at 98, 545 S.E.2d at 537 ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."). Accordingly, we affirm the family court's finding that Ferguson Meadow and Montibello Drive were marital property.

B. Apportionment of the Marital Estate

Next, Wife asserts the family court failed to consider the evidence and appropriately apply the equitable apportionment factors when it divided the marital estate. Specifically, Wife asserts: (1) she contributed significantly more to the acquisition of property; (2) Husband's income was higher; (3) she did not commit financial misconduct; (4) Husband received significant nonmarital property; (5) Husband had a vested retirement account while Wife had none; and (6) the parties were not awarded homes of equal value. We disagree.

"The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion." *Wooten v. Wooten*, 364 S.C. 532, 542, 615 S.E.2d 98, 103 (2005). Section 20-3-620(B) of the South Carolina Code (2014) provides fifteen factors the family court must consider in apportioning marital property and affords the family court the discretion to weigh each factor as it finds appropriate. "On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court." *Doe v. Doe*, 370 S.C. 206, 213-14, 634 S.E.2d 51, 55 (Ct. App. 2006).

Wife testified at the hearing regarding the parties' assets at the time of the marriage. She indicated she had \$38,230.76 in the bank; \$50,000 or \$60,000 in cash from family in Bulgaria; and additional money wired from her mother in Bulgaria. Wife testified Husband did not have any liquid assets, but he owned a house on Messina Road in Clover, South Carolina (Messina Road), which had a mortgage of over \$200,000. Additionally, Wife contended Husband was unemployed for half of the marriage, and she paid Messina Road's mortgage when he was unemployed.

According to Wife, over the course of the parties' marriage, she gave Husband over \$200,000. She stated she regularly received money from her family in Bulgaria, claiming she received around \$50,000 prior to the marriage and over \$200,000 during the marriage. According to Wife, the funds came from her parents, rental income from Wife's investment properties, and her daughter's father. Wife claimed family and friends visiting from Bulgaria would bring money into the United States in \$10,000 increments. She stated she expected Husband to repay her the money she gave him during their marriage, but she could not provide the exact amount of money he owed her. Wife also admitted that when she responded to an interrogatory asking her to list any loans, gifts, advances, or subsidies from family members that she had received in the past five years, she only listed \$57,000. Zlatka also testified she gave Wife around \$230,000 during the marriage.

Wife claimed she invested over \$100,000 in a solar panel company in June 2011, but she lost the money because the business was unsuccessful. She stated one of the partners in the solar panel company previously performed work on Montibello Drive. According to Wife, the partner in the solar panel company forgave \$50,000 or \$60,000 that was owed to him for his work on Montibello Drive after she lost her investment.

Husband claimed he and Wife kept their finances separate because they had preexisting properties and obligations. He testified Wife never paid Messina Road's mortgage. Husband stated he was terminated from his job in January 2009 because of a change in management, and he received \$1,200 per month in unemployment benefits for the next fourteen months. During this time, he became an independent consultant and also began researching the real estate market. According to Husband, he used savings and rental income from his mobile homes to financially support his daughter and pay Messina Road's mortgage, taxes, and utilities.

In response to Wife's claim that she invested \$100,000 in a solar panel company in June 2011, Husband testified he believed Wife withdrew \$115,000 and gave the money to Pavel to purchase a home on Caldwell Rush Circle in Cornelius, North Carolina (Caldwell Rush) under the trade name, Powerhightech. He stated Wife told him about another property prior to June 2011, and he expressed concerns about whether the investment would be profitable. Husband introduced a deed dated June 22, 2011, indicating: (1) Powerhightech was the purchaser of Caldwell Rush; (2) Pavel signed the deed as President of Powerhightech, Inc.; and (3) the purchase price was \$114,486. He stated Wife began excluding him from transactions and decision-making, and he introduced emails he sent to Wife,

Nadejda, and Pavel expressing his frustration and asking where his HELOC money was located. Husband claimed he had not seen any of the proceeds from the properties.

The family court noted that as of the final hearing, Husband's gross monthly income was \$15,450 and Wife's gross monthly income was \$11,000. After receiving the foregoing evidence and testimony, the family court considered all the applicable factors provided in section 20-3-620(B) and determined the marital property should be divided evenly between Wife and Husband.

After reviewing the record, we find the family court's apportionment was fair, and it did not abuse its discretion by apportioning 50% of the marital estate to Wife and 50% to Husband. *See Wooten*, 364 S.C. at 542, 615 S.E.2d at 103 ("The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion."). In response to Wife's allegation of error, we find Wife failed to provide satisfactory evidence that she contributed \$200,000 of her own funds toward the acquisition of marital property. Wife did not present any bank statements to verify the source of her funds, with the exception of two withdrawals of \$56,149 and \$55,342, which were used to purchase the parties' two initial properties. Because we concur with the family court's finding that these two properties were transmuted into marital property, we find the funds used to purchase those properties also to be marital. Additionally, we find the family court's conclusion that Wife was in a better financial position than Husband was not an abuse of discretion. Although Husband's income was higher than Wife's on the date of the final hearing, we concur with the family court's finding that Wife had no debt, possessed significant nonmarital properties, and had more time before retirement to acquire assets.

As to the family court's finding that Wife committed marital misconduct regarding the parties' finances, we, too, question whether Wife invested \$115,000—almost the exact amount invested to acquire Caldwell Rush—in a solar panel company owned by the same person who worked for her flipping properties. We hold the family court thoroughly considered the parties' nonmarital assets, including Husband's 401K retirement account, and available evidence on the income from the parties' nonmarital properties. Finally, as to Wife's argument that the houses awarded to each party were not of equal value, we find the family court's equitable apportionment worksheet accounted for the differing home values in its fifty-fifty division of the marital assets. Therefore, we find the fifty-fifty division as a whole was fair. *Doe*, 370 S.C. at 213–14, 634 S.E.2d at 55 ("On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might

have weighed specific factors differently than the family court."). Accordingly, we affirm the family court's decision on this issue.

III. ATTORNEY'S FEES

Last, Wife argues the family court erred in requiring her to pay all of Husband's attorney's fees. We agree and accordingly modify the family court's order.

"The award of attorney's fees in a domestic action rests within the sound discretion of the family court." *Reiss v. Reiss*, 392 S.C. 198, 210, 708 S.E.2d 799, 805 (Ct. App. 2011). When deciding whether to award attorney's fees, the family court must consider: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). After finding an award is appropriate, the family court should next consider the amount of attorney's fees to award. *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010). In determining reasonable attorney's fees, the family court should consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). "Ordinarily, unless otherwise provided for by contract or statute, the responsibility of paying attorney[']s fees falls upon the party contracting for the services." *Anderson v. Tolbert*, 322 S.C. 543, 545, 473 S.E.2d 456, 457 (Ct. App. 1996).

In its final order, the family court found Husband was entitled to recover his attorney's fees from Wife. Citing to *E.D.M.*, the family court determined: (1) both parties had the ability to pay their own attorney's fees, but Husband's debt "may" limit his ability; (2) Husband's attorney obtained more beneficial results, and Wife's position toward equitable division was unreasonable; (3) the parties would be in relatively equal financial conditions after the equitable division; and (4) Wife's standard of living would not be significantly affected by her payment of Husband's fee, but Husband's standard of living "could be" reduced if he had to pay his own fees. The family court then reviewed the *Glasscock* factors and determined Wife should pay all \$27,561.29 of Husband's attorney's fees.

Reviewing the record de novo, we find a modification of the attorney's fees award is warranted. Although we are mindful of the family court's discretion in awarding

attorney's fees, we conclude a more equitable apportionment is to require Wife to pay a portion—as opposed to the entirety—of Husband's attorney's fees. In modifying the family court's order, we emphasize that three of the four *E.D.M.* factors to consider in whether to award attorney's fees pertain to the financial positions of the parties.¹ *See E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816 ("In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living.") Taking this into consideration, we note the financial equities between the parties. Husband and Wife both have the ability to pay their own attorney's fees, are in relatively equal financial positions following the family court's equitable distribution award, and can maintain their current standard of living if held responsible for their own attorney's fees. Further, although Husband was unemployed for a portion of the parties' marriage, his monthly income exceeded that of Wife by the date of the final hearing. We are cognizant of the family court's findings that Wife had no debt, possessed significant nonmarital properties, and had more time before retirement to acquire assets. However, we do not believe Wife's lack of debt should be used against her in the assessment of attorney's fees, particularly considering Husband's income and earning potential.

We recognize Husband achieved greater beneficial results than Wife. Husband successfully established the mobile home and his retirement account were nonmarital property and several pieces of real estate acquired during the marriage were marital property, despite Wife's claims they were acquired with her nonmarital funds. However, Wife successfully argued Messina Road was transmuted into marital property. Although we acknowledge Husband prevailed on more issues than Wife, the beneficial results factor is only one of several factors to consider in deciding whether or not to award attorney's fees. *See Wooten v. Wooten*, 358 S.C. 54, 65, 594 S.E.2d 854, 860 (Ct. App. 2003), *aff'd in relevant part, rev'd in part*, 364 S.C. 532, 615 S.E.2d 98 (2005) (holding "[e]ven though Husband prevailed on two of the equitable division issues in this appeal, the

¹ Wife does not appeal the reasonableness of Husband's attorney's fees. Accordingly, we need not consider the factors enunciated in *Glasscock* pertaining to the reasonableness of attorney's fees. *See Simpson v. Simpson*, 377 S.C. 527, 539, 660 S.E.2d 278, 285 (Ct. App. 2008) (addressing only whether the wife was entitled to attorney's fees pursuant to *E.D.M.* and declining to address the reasonableness of attorney's fees when the husband only appealed the family court's ruling requiring him to pay half of the wife's attorney's fees).

beneficial results obtained are only one of several factors to be considered by the family court in deciding whether or not to award attorney's fees"). Further, although the family court declined to grant Wife a fault-based divorce, we find its decision to grant the parties a no-fault divorce should not work a detriment to Wife in the beneficial results analysis as neither ground would have dissolved the marriage any more completely. See *Mick-Skaggs*, 411 S.C. at 105, 766 S.E.2d at 876 (finding family court's decision to grant parties a no-fault divorce, despite the wife's claims of the husband's adultery, was neither beneficial nor harmful to either party in an *E.D.M.* analysis of whether to award attorney's fees).

Further, the family court briefly stated that "[t]he entries in [Husband's] fee affidavit indicated that discovery was resisted initially by [Wife] or her previous attorneys," but we find little evidence in the record that Wife was uncooperative or hindered litigation. Husband testified Wife resisted discovery and unnecessarily delayed the case; however, he submitted no proof that Wife's actions amounted to actual misconduct sufficient to warrant the imposition of all of Husband's attorney's fees against Wife. Accordingly, we find that requiring Wife to pay all of Husband's attorney's fees was improper. Cf. *Simpson*, 377 S.C. at 539–40, 660 S.E.2d at 285 (upholding fee award due to husband's lack of candor with the family court and his failure to fully cooperate throughout the litigation process); *Taylor v. Taylor*, 333 S.C. 209, 216–17, 508 S.E.2d 50, 54–55 (Ct. App. 1998) (finding the family court properly required husband to pay all of wife's attorney's fees when husband was overly litigious, uncooperative, and largely disorganized throughout the discovery and litigation process). Reiterating our de novo standard of review and the equities inherent in family court proceedings, we modify the family court's attorney's fees award and require Wife to contribute \$15,000 toward Husband's attorney's fees.

CONCLUSION

For the foregoing reasons, the family court's order is

AFFIRMED AS MODIFIED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Family Court

Robert E. Guess, Family Court Judge

Case No. 2011-DR-46-1905
Op. No. 5450 (S.C. Ct. App. filed Nov. 2, 2016)
Appellate Case No. 2014-002484

Tzvetelina Miteva, Petitioner,

v.

Nicholas Robinson, Respondent.

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Tzvetelina Miteva (Wife) petitions the Court for rehearing regarding its decision in *Miteva v. Robinson*, Op. No. 5450 (S.C. Ct. App. filed Nov. 2, 2016) (Shearouse Adv. Sh. No. 42 at 47). Wife asserts the Court overlooked or misapprehended the following points in affirming the family court's order as modified.

I. Denial of Divorce for Husband's Habitual Drunkenness

In agreeing with the family court that Wife failed to prove Husband's habitual drunkenness, the Court stated "[b]ecause the parties presented conflicting evidence about the nature of Husband's drinking, we find the family court was in the best position to determine the credibility of the witnesses." Op. at 51. The Court focused on the testimony by Mr. Pierman, Husband's appearance displaying "self-control," and the lack of any reference to alcohol in the police reports in deferring to the family court. In upholding the family court's decision, the Court overlooked or misapprehended the preponderance of the evidence in the record, Wife's arguments on this point, and the applicable law.

To prove habitual drunkenness, there must be a showing that the abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce. *Epperly v. Epperly*, 312 S.C. 411, 440 S.E.2d 884 (1994). "Habitual drunkenness" is the fixed habit of frequently getting drunk; it does not necessarily imply continual drunkenness. *Rooney v. Rooney*, 242 S.C. 503, 505, 131 S.E.2d 618, 619 (1963). Based on this definition, one need not be an alcoholic to be guilty of habitual drunkenness; it is sufficient if the use or abuse of alcohol causes the breakdown of normal

marital relations. *Curry v. Curry*, 402 S.C. 488, 741 S.E.2d 558 (Ct. App. 2013); *Lee v. Lee*, 282 S.C. 76, 316 S.E.2d 435 (Ct. App. 1984).

All of the evidence on this point established that Husband drank frequently, even daily, at or near the time Wife filed for divorce. Even Husband's own witnesses testified that they saw Husband drink frequently, although they claimed that they *never* saw him "drunk." The witness who tipped the scale in the eyes of the family court (and apparently this Court) was Mr. Pierman (R. p. 12), but Mr. Pierman saw Husband *at most* once per year at the time the parties were married and had not been to their home at or near the time of filing. (R. p. 164, ll. 19 - p. 165, l. 3; p. 170, ll. 19-21). Husband's ex-wife, Nasrin Robinson, had been to the parties' home, but the duration was at most a total of 10 hours spread out over a 5-year period. (R. p. 153, l. 24 - p. 154, l. 2). As for the police reports, the record demonstrated that Husband hid in the basement and refused to talk to the police because he was afraid he would be arrested. (R. p. 61, l. 20 - p. 62, l. 10; p. 94, l. 21 - p. 95, l. 2; p. 95, ll. 13-15; p. 96, l. 19 - p. 97, l. 1; S. R. p. 1).

Husband's habitual drunkenness and his behavior that resulted "at or near the time of the divorce" caused the breakdown of the marriage. The overwhelming evidence, far beyond the preponderance of the evidence, demonstrated his daily use of alcohol, often to excess, impacted his employability and his participation in the home flipping enterprise.

The Court also stated "Wife admitted that, on April 30, 2009, she wrote a note indicating if something happened to her, she would like her daughter to stay with Husband." Op. at 50. Like the family court, this Court overlooked that Wife made the

statement in 2009 or nearly *two years* prior to the separation. By the time she left the home, however, “life was unbearable.” (R. p. 60, ll. 1-3). Wife testified Husband’s alcohol consumption got worse during the marriage and Husband’s consumption of alcohol and abuse of prescription drugs resulted in the termination of the marriage. (R. p. 66, l. 12-25).

The Court also concluded “Wife suffered no prejudice by the family court’s ruling” since “granting of a divorce to Wife on the ground of habitual drunkenness would not have dissolved the marriage any more completely....” Op. at 51. The Court overlooked that the family court granted the divorce on the no-fault ground of one-year separation while habitual drunkenness is a fault based ground, and Husband’s fault impacted the parties’ economic circumstances so as to be relevant in apportionment of the marital estate. *See* S.C. Code Ann. § 20-3-620(B) (2) (2014) (the family court “must give weight in such proportion as it finds appropriate to...marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage”). Therefore, although it is true that Wife would not be divorced “more completely,” it is *not* true that she suffered no prejudice from the family court’s rejection of her evidence of Husband’s habitual drunkenness.

The Court erroneously relied upon *Mick-Skaggs v. Skaggs*, 411 S.C. 94, 766 S.E.2d 870 (Ct. App. 2014) as further supporting its ruling that this issue does not matter. Op. at 51. The Court overlooked that in *Mick-Skaggs*, both parties committed adultery so

there was no evidence Husband's adultery caused the breakup of the marriage. Although this Court noted its *de novo* review, the Court deferred to the family court in *Mick-Skaggs* "under the circumstances." *Id.* at 101, 766 S.E.2d at 874.

For the reasons stated this Court should grant this Petition and issue a new decision reversing the trial court on this issue.

II. Identification of Marital Estate

The Court affirmed the family court's identification of the marital estate, rejecting Wife's contention that the mobile homes had been transmuted and that Ferguson Meadow and Montibello Drive were not marital. In so ruling, the Court overlooked or misapprehended several arguments Wife made in support of her positions.

A. The Mobile Homes

In rejecting Wife's argument, the Court concluded "Wife did not present *any* evidence specifically proving she paid off Husband's credit card debt associated with the mobile homes and did not prove the parties regarded the mobile homes as common properties of the marriage." Op. at 53 (emphasis added). In so holding the Court overlooked the evidence Wife did, in fact, present on this point.

Wife testified that at the time of the marriage Husband owned these mobile homes titled solely in his name. (R. p. 76, ll. 4-8). There were no mortgages on the properties. (R. p. 76, ll. 9-10). Husband told her he purchased the mobile homes with credit cards, and he brought this credit card debt into the marriage. (R. p. 76, ll. 11-17; p. 117, l. 16 - p.

118, l. 8). Wife listed the properties at their tax value. (R. p. 76, ll. 18-20). Wife provided Husband with the funds to pay the credit cards and to pay for repairs to the properties. (R. p. 76, ll. 21-24; p. 77, ll. 15-19; S. R. p. 25). Wife acknowledged that some of the checks predated their marriage. (R. p. 77, ll. 6-14). Some of the checks were for Husband to repay his debt, including obligations from his previous separation agreement. (R. p. 77, ll. 17-24). After they married the amount was about \$30,000. (R. p. 77, l. 25 - p. 78, l. 2).

Wife testified the four mobile homes were marital property. (R. p. 79, ll. 19-21; p. 91, ll. 6-8). Wife primarily satisfied the debt on the properties. (R. p. 79, ll. 22-24). Husband was not working during this time. (R. p. 79, l. 25 - p. 80, l. 2). Wife was the sole source of income for the house. (R. p. 80, ll. 3-4).

Contrary to this Court's opinion, the testimony was *some* evidence that Wife paid off the credit card debt associated with the mobile homes.

The Court also failed to consider that Husband admitted the *only* property he listed on his financial declaration as non-marital was the Messina Road property. (R. p. 253, l. 10 - p. 255, l. 17; p. 259, ll. 21-23). He did not list the mobile homes. (R. p. 255, ll. 6-7; p. 282, l. 3 - p. 283, l. 20; S. R. p. 306). This is some evidence that Husband did not view the mobile homes as his separate property, which would support Wife's claim that the property was transmuted.

The Court should grant this petition, withdraw its opinion, and issue a new decision reversing the family court as to the identity of the mobile homes as Husband's separate property that was not transmuted.

B. Ferguson Meadow and Montibello Drive

The Court agreed with the family court that Montibello Drive was marital property and Ferguson Meadow was transmuted into marital property. Op. at 55. In so ruling, the Court misapprehended or overlooked several points.

(1) Ferguson Meadow

The family court held that 3222 Ferguson Meadow was transmuted into marital property even though it was purchased with non-marital funds. (R. pp. 16-17, ¶ I(1)). The court stated the property was transmuted “when it was purchased,” apparently a reference to the fact that both parties’ names were on the settlement statement. (S.R. 36). Both Wife and Mr. Brice explained why that was done, and that Husband merely acted for Wife at the foreclosure sales.

Wife paid cash for property at Ferguson Meadows in 2009 that “was solely to be for [A], her daughter.” (R. p. 86, ll. 3-11; S. R. p. 36). The funds for the purchase came from Bulgaria. (R. p. 86, ll. 16-18; p. 129, ll. 18-23). The settlement statement listed the buyers as both Husband and Wife. (R. p. 115, ll. 6-11; S. R. p. 121). The agreement to purchase lists only the seller, Dion Evans, and Husband as the buyer. (R. p. 116, ll. 9-14; S. R. p. 127). Husband was listed as the landlord on the residential lease for the property. (R. p. 115, l. 18 - p. 116, l. 1; S. R. p.123).

The evidence does not establish that Wife intended to transmute this property, which all parties agreed was purchased with the funds Wife received from Bulgaria.

(2) Montibello Drive

The family court found 5017 Montibello Drive, which was titled in Wife's name, was marital property. The evidence reveals the proceeds for the funds stemmed from buying and selling but always originated from Wife's Bulgarian money and Wife considered the property to be nonmarital. (R. p. 85, ll. 19-24; p. 91, ll. 13-15). Husband conceded that he did not object when Wife put Montibello and all the other properties in her name only. (R. p. 280, ll. 3-5).

Although there was evidence that \$200,000 from the HELOC went to Wife and she stated those funds went into Montibello, the funds were repayment to her for Bulgarian money and Wife's savings that she had given to Husband. (R. p. p. 78, ll. 3-6; p. 79, ll. 10-18; p. 81, ll. 14-16; p. 118, l. 9 - p. 119, l. 21). Wife expected Husband to repay those funds. (R. p. 119, l. 24 - p. 120, l. 2). Husband offered to pay the funds back from accounts he had, and he eventually did pay her back \$200,000 from the HELOC. (R. p. 81, l. 17 - p. 82, l. 3; p. 110, ll. 21-25).

Wife considered this to be partial repayment of the money she advanced to him. (R. p. 82, ll. 4-6). Wife was surprised when Husband asked her in 2011 where the \$200,000 had gone. (R. p. 111, ll. 1-13). She admitted that he asked in an email and she responded that the money went into Montibello. (R. p. 111, l. 17 - p. 112, l. 2; S. R. p. 113). She estimated the "ballpark" figure to be \$200,000 to \$300,000. (R. p. 120, ll. 9-17).

The evidence does not establish Wife intended to transmute those funds or the

property purchased with them into marital property, or that Montibello be part of the marital estate. The Court should grant this Petition, withdraw its opinion, and issue a new decision reversing the family court's holding that Montibello Road was marital property and that the record demonstrated Wife intended for Ferguson Meadow to be transmuted into marital property.

III. Apportionment of Marital Estate

The Court held the family court's apportionment of the property of this marriage of short duration was "fair, and it did not abuse its discretion by apportioning 50% of the marital estate to Wife and 50% to Husband." Op. at 58). The Court held Wife failed to provide satisfactory evidence that she contributed \$200,000 of her own funds toward the acquisition of the marital property, and held the funds were "marital" because the Court agreed the properties were transmuted. The Court also affirmed the family court's conclusion that Wife was in a better financial position than husband, describing that finding as a matter of discretion. The Court next affirmed the family court's finding of "marital misconduct" related to the \$115,000 investment in the solar panel company. These decisions overlooked or misapprehended several points.

First, Wife outlined the relevant factors under Section 20-3-620, set forth the evidence under each factor and why those factors mitigated in favor of an apportionment favoring her rather than a 50-50 split. (App. Br. pp. 35-48). For example, (a) the marriage was less than 4 years long, (b) the family court erroneously considered Husband's age so

as to require Wife to support him, (c) the marital misconduct factor favored Wife given Husband's drunkenness and the court's erroneous finding against Wife regarding the \$115,000, (d) Wife's contention as to error regarding identification of marital property, (e) the flaws in the family court's findings regarding relevant contributions by the parties, (f) the error regarding Husband's higher income over Wife's, that is, not a "wash," (g) the errors regarding the nonmarital property of each party, (h) the error in treating the imbalance in the existence of retirement benefits, (i) the family court's tacit award to Husband of support in the form of higher apportionment due to age differential, (j) the error in the disparity of values of homes awarded each where the family court viewed them as "equal," (k) the family court's erroneous view of the "support obligation" factor, (l) the family court's erroneous identification and treatment of debt, (m) the family court's erroneous view of the custody factor, and (n) the family court's erroneous violation of *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990) and *McDavid v. McDavid*, 333 S.C. 490, 496 n. 5, 511 S.E.2d 365, 368 n. 5 (1999) by accounting for a perceived waste of marital funds that no longer existed.

The Court also overlooked the errors in the manner in which the family court treated the payments for education of [A] and Husband's children. The family court also erroneously penalized Wife for bringing the funds into the Country as she did even though there was no evidence of illegality or impropriety.

For the reasons outlined in Wife's briefs and in this Petition, the Court should grant the Petition, withdraw its opinion, and enter a new opinion reversing the 50-50

division. The Court should either adjust the division according to its view sua sponte, or should remand the matter to the family court for it to reconsider this issue.

IV. Payment of a Portion of Husband's Attorney's Fees

The Court agreed with Wife that the family court erroneously ordered her to pay all of Husband's attorney's fees. However, the Court disagreed with Wife that each party should have been required to pay his or her own fees. Instead the Court merely reduced the amount Wife had to pay, even though the Court agreed there was little evidence to support the family court's determination that Wife was not cooperative in discovery.

Wife reiterates her argument that the factors relevant to an award of fees dictated that each party pay his or her own fees. Furthermore, Wife raises this point in the event this Court, or the Supreme Court in later review, agrees that the overall results should be modified. *Srivastava v. Srivastava*, 411 S.C. 481, 499 n. 6, 769 S.E.2d 442, 452 n. 6 (Ct. App. 2014) (attorney fee award reversed where substantive results achieved by counsel reversed on appeal).

CONCLUSION

For the reasons stated the Court should grant this Petition, withdraw its prior opinion, and issue a new opinion reversing the family court's order and remanding the matter for further proceedings consistent with that ruling.

Respectfully submitted,



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December 12, 2016

The South Carolina Court of Appeals

Tzvetelina Miteva, Appellant

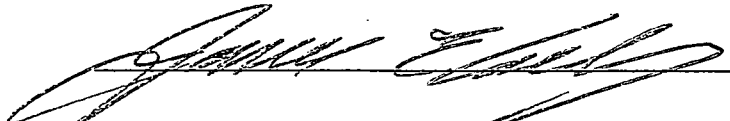

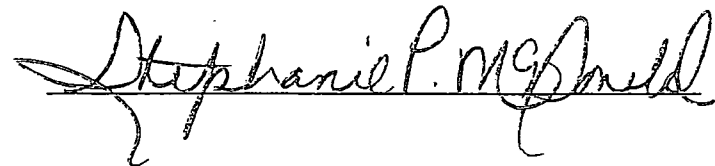
v.

Nicholas Robinson, Respondent.

Appellate Case No. 2014-002484

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
John S. Nichols, Esquire
Jennifer M. Creech, Esquire
Thomas Franklin McDow, IV, Esquire
Erin K Urquhart, Esquire

FILED

January 20, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Family Court

Robert E. Guess, Family Court Judge

Case No. 2011-DR-46-1905
Appellate Case No. 2014-002484

Tzvetelina Miteva, Appellant,

v.

Nicholas Robinson, Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the family court err in denying Wife's request for divorce on the ground of habitual drunkenness because the preponderance of the evidence established Wife's entitlement to a divorce on that ground?
- II. Did the family court err in its identification of the marital estate and its apportionment of the estate on a 50-50 basis?
 - A. Did the family court err in refusing to find the 4 lots with mobile homes which Husband owned prior to the marriage were transmuted into marital property?
 - B. Did the family court err in finding the property at 3222 Ferguson Meadows was transmuted into marital property?
 - C. Did the family court err in identifying the property at 507 Montibello Road, Charlotte, North Carolina as marital property?
 - D. Did the family court err in finding the \$115,521.00 in cash paid to Pavel Boldt to represent marital misconduct assigned to Wife so as to apportion that amount to her portion of the equitable apportionment, thereby reducing her interest in the marital property by a portion of that amount?
 - E. Did the family court err in making a 50-50 distribution of the marital estate where the evidence demonstrates Wife's contributions to the acquisition of marital property and the retirement of marital debt during the marriage vastly exceeded Husband's?
- III. Did the family court err in requiring Wife to pay Husband's attorney fees and costs?

STATEMENT OF THE CASE

This is a domestic relations case involving a marriage of very short duration. The parties were married on November 25, 2007 and on August 30, 2011, Wife filed an action for divorce. Husband filed his response.

Following discovery the matter was tried to the family court on May 8 and May 9, 2013. On September 12, 2013, the family court entered an order granting the divorce and equitably apportioning the marital estate.

Wife filed a motion for reconsideration which the family court denied. This appeal follows.

FACTS

Appellate courts review appeals from the family court *de novo*. *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014); *Simmons v. Simmons*, 392 S.C. 412, 414-15, 709 S.E.2d 666, 667 (2011). Thus, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Buist v. Buist*; *Dickert v. Dickert*, 387 S.C. 1, 5-6, 691 S.E.2d 448, 450 (2010). The appellant retains the burden to demonstrate the error in the family court's findings of fact. *Buist v. Buist*; *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011). With this broad scope of review in mind, the evidence in the record is as follows.

Wife is Bulgarian and Husband is British. (R. p. 54, ll. 16-17). The parties married on November, 25, 2007. (R. p. 56, ll. 17-18; p. 58, ll. 1-5). They separated in August 2011. (R. p. 56, l. 18; p. 59, ll. 23-24). Wife filed the action at the end of August 2011.

Tzvetelina Miteva (Wife)

Wife was living in Mecklenburg County, North Carolina, at the time of trial. (R. p. 57, ll. 24-25). She was employed with Wells Fargo Bank. (R. p. 58, ll. 20-25). Husband was living in York County, South Carolina. (R. p. 58, ll. 14-16).

Wife had a 15-year old child, [A], from a prior marriage. (R. p. 59, ll. 14-17). [A] attended Providence Day School, which had a tuition of about \$25,000 per year. (R. p. 125, l. 23 - p. 126, l. 1). Wife makes payments to the School in August and February of each year. (R. p. 126, ll. 2-5). A payment was due in August 2011 while Wife was in Bulgaria, so Husband made the payment of over \$10,000. (R. p. 126, ll. 6-17). Wife did not pay him back because they "were still a family." (R. p. 126, ll. 18-21).

Husband was employed at the time of the marriage (R. p. 66, ll. 18-19), although he did not work throughout the entire marriage. (R. p. 64, ll. 6-8). He was without a job at least twice and was unemployed at least half the marriage. (R. p. 64, ll. 9-13). He was fired from a job around Christmas and New Years 2008-2009. (R. p. 64, ll. 18-25). He called Wife and said he had been escorted from the bank where he worked. (R. p. 65, ll. 1-5; p. 117, ll. 2-5).

Wife learned about a second termination when she read the discovery. (R. p. 65, ll. 6-9). Husband was out of work for over a year. (R. p. 65, ll. 12-14). When he worked he did information technology work. (R. p. 64, ll. 14-15). His income would be comparable to Wife's income. (R. p. 64, ll. 16-17). When he was out of work he "was just lying around and drinking." (R. p. 65, ll. 15-17). Husband received unemployment compensation and was collecting rents from his rental properties. (R. p. 117, ll. 6-15).

Wife left the home because "life was unbearable." (R. p. 60, ll. 1-3). The parties engaged in daily arguments and shouting, and Husband abused Wife and her daughter. (R. p. 60, ll. 4-7). Husband drank frequently and his behavior would be unpredictable. (R. p. 60, ll. 8-15). Husband drank every day, beginning in the mornings and he would be drunk when she returned home. (R. p. 60, ll. 12-22). On occasion he would call her as she was heading home from work and ask her to purchase beer because he was too drunk to go to the store for himself. (R. p. 60, l. 23 - p. 14, l. 12). When he was drunk he would become angry and argumentative, and at times tried to become physically violent. (R. p. 61, ll. 13-17). Husband would shout at [A] and would be aggressive toward her. (R. p. 62, ll. 2-7).

Wife called the police on two occasions but Husband would hide in the basement and ask her to tell the police everything was okay so they would not arrest him. (R. p. 61, l. 20 - p. 62, l. 10; p. 94, l. 21- p. 95, l. 2; p. 95, ll. 13-15; p. 96, l. 19 - p. 97, l. 1; S. R. p. 1). Husband was never arrested for public intoxication, DUI or CDV, nor was he ever treated for substance abuse. (R. p. 94, ll. 4-14; p. 96, ll. 17-21).

Around Christmas 2010, the parties took a trip to Myrtle Beach. (R. p. 63, ll. 1-8). Wife rented an apartment in the area and [A] took a friend, Jenna, with her. (R. p. 63, ll. 10-16). One evening they went to visit Husband's friend, who lived in the area, and on the way Husband got into an argument with Jenna. (R. p. 63, ll. 20-22). [A] and Jenna both started crying so the group went back to the hotel. (R. p. 63, ll. 23-24). The argumentative behavior continued and Jenna called her parents in Charlotte to ask them to come get her. (R. p. 63, l. 24 - p. 64, l. 1). Wife then saw Husband take the car keys

and try to sneak out the door but she confronted him. (R. p. 64, ll. 1-3). Wife's mother was also there, and everyone was crying, so they all left. (R. p. 64, ll. 4-5).

Husband also took medication which he told her was for ADD. (R. p. 65, ll. 18-23). He would drink along with the medication. (R. p. 65, l. 24 - p. 66, l. 1). This would cause him to become more aggressive. (R. p. 66, ll. 2-7). Husband's alcohol consumption got worse during the marriage. (R. p. 66, ll. 12-13). Had Wife known that Husband drank like he did toward the end of the marriage she would not have married him. (R. p. 66, ll. 14-17). Wife stated Husband's consumption of alcohol and abuse of prescription drugs resulted in the termination of the marriage. (R. p. 66, l. 20-25). She was seeking a divorce on the grounds of habitual intoxication. (R. p. 91, ll. 3-5). Wife admitted Husband drank and took ADD medication prior to the marriage. (R. p. 93, ll. 14-17). She first noticed the issues with his behavior around 2010. (R. p. 93, ll. 18-20).

Husband walked around naked in front of [A]. (R. p. 62, ll. 6-7). Wife did not report the incident, however, until October 29, 2012, after the parties separated, because she did not understand the process or how to make the report. (R. p. 95, l. 23 - p. 96, l. 13).

Wife acknowledged she signed a document in 2009 that if something happened, she wanted Husband to take care of [A]. (R. p. 97, ll. 2-25; S. R. p. 96). Wife signed the document even though [A] has a living father and grandmother in Bulgaria whom she visits every summer. (R. p. 98, ll. 1-7).

Wife made contributions to assist Husband in payment of his debts. (R. p. 67, ll. 1-4). Wife also paid money for support of Husband's children from his prior marriage.

(R. p. 67, ll. 5-17). She gave him the money because they “were a family.” (R. p. 67, ll. 16-19).

Wife received the money from Bulgaria. (R. p. 67, ll. 20-22). She also took some money from her savings. (R. p. 67, ll. 23-25). The money from Bulgaria came to her in cash. (R. p. 68, ll. 1-6). Her family had been living under a communist regime and did not keep money in the bank. (R. p. 68, ll. 7-13; p. 98, ll. 11-13). Wife would give Husband cash or checks. (R. p. 68, ll. 16-17). She gave him over \$50,000 in checks and another \$50,000 in cash. (R. p. 68, ll. 16-21). Husband stipulated that roughly \$100,000 came from Bulgaria. (R. p. 56, ll. 11-13).

Wife described assets she brought into the marriage. (R. p. 68, l. 22 - p. 71, l. 14 ; S. R. p. 6). This included money in the bank, about \$50,000-60,000 in cash from Bulgaria, and funds from her mother in Bulgaria by wire transfers. (R. p. 69, l. 10 - p. 70, l. 1; S. R. p. 10).

Husband did not bring any liquid assets into the marriage. (R. p. 71, ll. 7-9). Husband owned the “Messina” house, which had mortgage debt of over \$200,000. (R. p. 71, ll. 10-17). The property was in Husband’s name alone, although the parties refinanced it and Wife’s name was placed on the mortgage. (R. p. 71, l. 18 - p. 72 - l. 1). Wife was listed as the primary borrower. (R. p. 72, ll. 2-9; S. R. p. 15). The financing application reflected Wife was earning \$8,900 per month while Husband was earning zero. (R. p. 72, ll. 10-18). Although they both paid the mortgage, Husband paid with funds he took from Wife. (R. p. 72, l. 24 - p. 73, l. 2). In response to discovery Wife listed the debt on the property at \$231,637.77. (R. p. 103, ll. 5-23).

Husband gave Wife an undivided one-half interest in the Messina home by a deed. (R. p. 73, ll. 6-16; S. R. p. 20). The home was used in support of the marriage. (R. p. 73, ll. 24-25). Wife believed his gift and the refinancing constituted transmutation of the Messina home into marital property. (R. p. 74, ll. 1-4). Based upon the tax records Wife believed the value of the Messina home to be \$500,000. (R. p. 74, ll. 5-10; S. R. p. 23). As of the time of filing the mortgage balance was \$232,720. (R. p. 74, ll. 18-25; S. R. p. 24). Wife sought to have the Messina home declared marital. (R. p. 91, ll. 6-8).

Wife identified a marital asset addendum of property she contended was marital. (R. p. 75, ll. 15-23; p. 91, ll. 9-12). This included (A) a mobile home and Lot 15, Golden Pond Road; (B) mobile home and Lot 41, New Port Acres; (C) mobile home and Lot 26, Chandler Woods; and (D) mobile home and Lot C, Liberty Hill Road. (R. p. 75, l. 24 - p. 76, l. 3). At the time of the marriage Husband owned these mobile homes titled solely in his name. (R. p. 76, ll. 4-8). There were no mortgages on the properties. (R. p. 76, ll. 9-10); Husband told her he purchased the mobile homes with credit cards, and brought this credit card debt into the marriage. (R. p. 76, ll. 11-17; p. 117, l. 16 - p. 118, l. 8). Wife listed the properties at their tax value. (R. p. 76, ll. 18-20).

Wife provided Husband with the funds to pay the credit cards and to pay for repairs to the properties. (R. p. 76, ll. 21-24; p. 77, ll. 15-19; S. R. p. 25). Wife acknowledged that some of the checks predated their marriage. (R. p. 77, ll. 6-14). Some of the checks were for Husband to repay his debt, including obligations from his previous separation agreement. (R. p. 77, ll. 17-24). After they married the amount was about \$30,000. (R. p. 77, l. 25 - p. 78, l. 2). Wife believed the four mobile homes were marital

property. (R. p. 79, ll. 19-21; p. 91, ll. 6-8). Wife primarily satisfied the debt on the properties. (R. p. 79, ll. 22-24). Husband was not working during this time. (R. p. 79, l. 25 - p. 80, l. 2). Wife was the sole source of income for the house. (R. p. 80, ll. 3-4).

Wife gave Husband over \$200,000 in cash above the amounts listed in the checks. (R. p. 79, ll. 10-16; p. 81, ll. 14-16; p. 118, l. 9 - p. 119, l. 21). These funds were from the money she received from Bulgaria as well as her own savings. (R. p. 78, ll. 3-6; p. 79, ll. 17-18). Wife did not keep a record of the payments she gave to Husband. (R. p. 120, l. 18 - p. 121, l. 3). Wife gave Husband the funds because "we were living together and we were a family and he asked me to." (R. p. 79, ll. 7-9; p. 119, ll. 17-19). Wife expected Husband to repay those funds. (R. p. 119, l. 24 - p. 120, l. 2). Husband offered to pay the funds back from accounts he had, and he eventually did pay her back \$200,000 from a home equity line on the family home. (R. p. 81, l. 17 - p. 82, l. 3; p. 110, ll. 21-25). She considered this partial repayment of the money she advanced to him. (R. p. 82, ll. 4-6). Wife was surprised when Husband asked her in 2011 where the \$200,000 had gone. (R. p. 111, ll. 1-13). She admitted that he asked in an email and she responded that the money went into Montibello. (R. p. 111, l. 17 - p. 112, l. 2; S. R. p. 113). She estimated the "ballpark" figure to be \$200,000 to \$300,000. (R. p. 120, ll. 9-17).

Wife testified regarding her nonmarital property. At the time of the hearing she was living in Charlotte, North Carolina in a home with a tax value of \$401,900. (R. p. 80, ll. 6-14; p. 81, ll. 6-10). Wife bought the home on April 18, 2011 for \$293,000 in cash. (R. p. 80, ll. 19-24). The money was part of the "investment money from Bulgaria." (R. p. 80, l. 25 - p. 81, l. 1).

Wife purchased property at 1543 Tiana Way in Rock Hill in 2009 for \$56,000 with money from Bulgaria. (R. p. 82, ll. 13-22). Wife sold the property in 2010 for \$82,000. (R. p. 82, l. 23 - p. 83, l. 1). She put the money into the remodeling of the property at 362 Squirrel Lane in Lake Wylie. (R. p. 83, ll. 2-7).

Wife bought the Squirrel Lane property in December 2009 for \$200,000 cash and titled it in her name. (R. p. 83, ll. 5-14; p. 130, ll. 6-10). She agreed the settlement statement indicated the buyer was Husband. (R. p. 112, ll. 14-22; p. 114, l. 20 - p. 115, l. 2; S. R. p. 115). She identified a deed from Husband to her in February 2010 regarding the property. (R. p. 113, l. 11 - p. 114, l. 6; S. R. p. 60; R. p. 130, ll. 11-18; S. R. p. 117).

Wife sold the Squirrel Lane property in 2010 for over \$300,000. (R. p. 83, ll. 15-18). She used the proceeds to purchase property at 2053 Sugar Pond Court for which she paid \$400,000 in cash. (R. p. 83, l. 19 - p. 84, l. 3). Sugar Pond was also titled in her name only. (R. p. 84, ll. 7-8). She sold Sugar Pond for \$590,000 and used the proceeds to buy property at 1000 High Brook Drive in Waxhaw, North Carolina and 5017 Montibello Drive in Charlotte. (R. p. 84, l. 20 - p. 85, l. 8).

Wife paid \$196,000 for High Brook, titled it solely in her name, and sold it for \$267,000 in 2011. (R. p. 84, l. 22 - p. 85, l. 6). She purchased Montibello for \$292,000, titled it solely in her name, and was occupying that residence at the time of the hearing. (R. p. 84, ll. 7-13). Wife valued the property at \$401,900 based on tax records. (R. p. 85, ll. 14-16). The proceeds for the funds stemmed from buying and selling but always originated from her Bulgarian money. (R. p. 85, ll. 19-22). Wife considers the property to be nonmarital. (R. p. 85, ll. 23-24; p. 91, ll. 13-15).

Wife paid cash for property at Ferguson Meadows in 2009 that “was solely to be for [A], her daughter.” (R. p. 86, ll. 3-11; S. R. p. 36). The funds for the purchase came from Bulgaria. (R. p. 86, ll. 16-18; p. 129, ll. 18-23). The settlement statement listed the buyers as both Husband and Wife. (R. p. 115, ll. 6-11; S. R. p. 121). The agreement to purchase lists only the seller, Dion Evans, and Husband as the buyer. (R. p. 116, ll. 9-14; S. R. p. 127). Husband was listed as the landlord on the residential lease for the property. (R. p. 115, l. 18 - p. 116, l. 1; S. R. p. 123).

All of the purchases arose from money from Bulgaria and money given to her as repayment. (R. p. 84, ll. 9-13). The purchases were made at foreclosure auctions. (R. p. 128, ll. 5-11; p. 130, ll. 19-22). Husband attended the auctions because Wife was working but he was not. (R. p. 128, ll. 12-19). That is why he was listed as the purchaser. (R. p. 128, ll. 20-25). Husband would then immediately transfer the property solely to Wife. (R. p. 129, ll. 1-3; S. R. p. 60). She asked the court to declare this property to be nonmarital. (R. p. 91, ll. 13-15).

At the time of the marriage Wife had \$50,000 in cash from Bulgaria. (R. p. 87, ll. 1-7). Over the course of the marriage over \$200,000 was transferred to her from Bulgaria. (R. p. 87, ll. 8-10). The money came from parents and grandparents to invest and for Wife’s retirement. (R. p. 87, ll. 13-15). The money came in \$10,000 increments and would be brought over by her mother, her friends, or when [A] would travel to Bulgaria. (R. p. 87, ll. 16-23; p. 88, ll. 21-23). The amount of \$10,000 was the limit set for cash transfer without declaration. (R. p. 87, l. 24 - p. 88, l. 4; p. 99, l. 25 - p. 100, l. 1). Wife and Husband also went to Bulgaria and brought cash back. (R. p. 88, ll. 5-12). Wife’s

mother came over every year and [A] traveled to Bulgaria every summer. (R. p. 88, ll. 13-16; p. 98, l. 20 - p. 99, l. 1). Wife estimated each traveled five times for \$50,000 each, or \$100,000 total (as Husband stipulated). (R. p. 100, ll. 2-13). Wife acknowledged that in her responses to discovery she listed money given to her from her mother and from [A]'s father totaling \$57,000. (R. p. 101, ll. 1-21; S. R. p. 97).

Wife stated the funds came from several sources. (R. p. 88, l. 24 - p. 89, l. 1). The money came from her parents as savings given to them as part of inheritance. (R. p. 89, ll. 1-3). Money also came from [A]'s grandparents and [A]'s father as well as proceeds from Wife's investment property in Bulgaria. (R. p. 89, ll. 3-4). Wife's mother manages Wife's property in Bulgaria and send the rental money to Wife. (R. p. 89, ll. 5-10). The funds came from cash and wire transfers. (R. p. 89, ll. 14-16). Husband was aware of all of these funds coming from Bulgaria. (R. p. 89, ll. 11-13).

Towards the end of the marriage Wife invested over \$100,000 in a solar panel company. (R. p. 89, l. 17 - p. 90, l. 1; p. 108, ll. 7-12; p. 125, ll. 11-22). The investment "went down," however, and the money was lost. (R. p. 90, ll. 5-8; p. 108, ll. 10-12). The person with whom she invested also did \$50,000 to \$60,000 in work on Montibello and he excused the debt so as to repay the money lost in the investment. (R. p. 90, ll. 11-25).

On her financial declaration, Wife listed a debt she owed to Cotswold Homes with a balance of \$40,000. (R. p. 105, l. 17 - p. 106, l. 7). Cotswold is owned by Pavel Boldt. (R. p. 107, ll. 23-24). Mr. Boldt and his partner are the same persons who forgave the debt done on Montibello. (R. p. 107, l. 25 - p. 108, l. 3). She was still expected to repay the \$40,000. (R. p. 108, ll. 13-15).

Mr. Boldt is a friend of Wife. (R. p. 109, ll. 9-16). He is married to Nadejda Boldt. (R. p. 109, l. 22 - p. 110, l. 4). Mrs. Boldt is a real estate agent. (R. p. 110, ll. 5-6). Wife used Mrs. Boldt in the purchase of properties. (R. p. 110, ll. 7-11; p. 131, l. 1 - p. 132, l. 1). Husband had no involvement with the Boldts in the purchase of these properties. (R. p. 110, ll. 11-18).

Wife withdrew \$115,521 from a Wachovia account on June 22, 2011. (R. p. 121, l. 7 - p. 122, l. 1; S. R. p. 134). She used these funds to invest in the solar power company. (R. p. 122, ll. 5-23). She denied that Husband used the funds to purchase property through Mr. Boldt in Cornelius, North Carolina. (R. p. 122, l. 24 - p. 123, l. 22).

Wife had to hire an attorney to represent her regarding the marital issues. (R. p. 91, ll. 18-22). Wife initially paid Matthew Neimic \$3,000 to represent her. (R. p. 91, l. 23 - p. 92, l. 2; S. R. p. 38).

William "Mac" Brice

Mr. Brice is a real estate attorney. (R. p. 135, ll. 1-6). He has done a number of closings for Wife and Husband, but mostly for Wife. (R. p. 135, ll. 9-13). He was involved in the closings of Tiana Way, Ferguson Meadows, Squirrel Lane and Sugar Pond. (Tr. p. 88, ll. 14-21). All four of the properties ended up in Wife's name. (R. p. 140, l. 21 - p. 141, l. 2).

Some of the purchases were from foreclosures. (R. p. 137, l. 22 - p. 138, l. 4). The funds used for closing the transactions came to Mr. Brice in the form of cashier's checks. (R. p. 135, l. 24 - p. 136, l. 1; p. 143, l. 25 - p. 144, l. 3; p. 144, ll. 22-23). He understood that the funds came from Wife's family from overseas for the benefit of Wife's daughter.

(R. p. 136, ll. 2-11; p. 137, ll. 1-19). Brice had no doubt that Wife purchased the properties for [A]'s benefit. (R. p. 142, l. 16 - p. 143, l. 8; p. 143, ll. 19-22). She was concerned about protecting her family's money for her daughter. (R. p. 145, ll. 5-6).

Some of the purchases may have gone through Husband's name first, but most of them were in Wife's name. (R. p. 138, l. 21 - p. 139, l. 2). It is not unusual for someone to send another person to the auction to bid on their behalf. (R. p. 139, l. 5 - p. 140, l. 1).

Regarding Squirrel Lane, the master issued the deed to Husband for \$216,000. (R. p. 140, ll. 2-6). The deed to Husband was recorded December 7, 2009, and a quit claim deed from Husband to Wife was recorded 2 ½ months later on February 1, 2010. (R. p. 140, ll. 14-20).

Brice handled the refinance of the Messina home. (R. p. 141, ll. 3-7). Wife was the principal borrower. (R. p. 141, ll. 12-14). She was the only person the lender would qualify for the loan. (R. p. 141, ll. 18-20; p. 142, ll. 7-14).

Zlatka Miteva (*de bene esse* deposition; S. R. pp. 62-94).

Wife proffered the *de bene esse* deposition of her mother, Zlatka Miteva. (R. p. 146, ll. 2-24; S. R. p. 65, ll. 14-16). The deposition provided corroboration on the fault based grounds for divorce. (R. p. 147, ll. 4-8). Ms. Miteva testified through an interpreter.

Ms. Miteva is from Bulgaria. (S. R. p. 65, ll. 7-8). She has known Husband since 2006. (S. R. p. 65, ll. 17-18). Ms. Miteva came to the United States every year to visit the parties and from 2006 and through 2010. (S. R. p. 65, ll. 19-23; p. 80, l. 3 - p. 82, l. 19). One year she came twice. (S. R. p. 81, ll. 20-21).

Husband consumed alcohol in her presence all the time. (S. R. p. 66, ll. 1-3; p. 91,

l. 23 - p. 92, l. 12). He also took prescription medication when he was drinking. (S. R. p. 67, ll. 9-14). He started the day with alcohol and drank the entire day. (S. R. p. 66, ll. 4-10). She saw Husband intoxicated on many occasion. (S. R. p. 66, ll. 11-14). She described him as "evil," "aggressive," "very mad," and "angry," and if someone said something to him "he might get ready to hit them." (S. R. p. 67, ll. 3-8). The combination of medication and alcohol caused him to be "very nervous, agitated" and his whole body would shake. (S. R. p. 67, ll. 15-19). When Husband was drunk he changed altogether and yelled at Wife and [A]. (S. R. p. 67, ll. 15-22). This occurred every night Ms. Miteva was there. (S. R. p. 66, l. 23 - p. 6, l. 2). Ms. Miteva always thought that Husband had a problem with alcohol. (S. R. p. 92, ll. 13-15).

Husband was unemployed during the times Ms. Miteva visited. (S. R. p. 67, ll. 20-21). Ms. Miteva believed Husband did not look for a job because of all the alcohol he consumed. (S. R. p. 67, l. 22 - p. 68, l. 1).

During the course of the marriage Ms. Miteva provided cash funds to Wife. (S. R. p. 68, ll. 2-4). She gave the money to Wife to invest in [A]'s education and Wife's IRA. (S. R. p. 68, ll. 5-10; p. 72, ll. 1-3). Every time Ms. Miteva came to the US she would bring \$10,000 in cash, which was the amount they were allowed to bring without declaring the funds. (S. R. p. 68, ll. 11-18; p. 80, ll. 13-14; p. 83, l. 19 - p. 84, l. 7; p. 87, ll. 8-9).

[A] would visit Ms. Miteva in Bulgaria every year and every time Ms. Miteva gave [A] cash from family savings and investments to bring back. (S. R. p. 69, l. 25 - p. 70, l. 4; p. 85, ll. 10-24; p. 86, ll. 2-23). [A] also met with her father in Bulgaria in Ms.

Miteva's presence and "her father's side also gave her money." (S. R. p. 70, ll. 15-25; p. 86, l. 24 - p. 87, l. 6). Ms. Miteva also gave money to Wife's acquaintances to give to Wife at the airport for Wife to bring to the US. (S. R. p. 71, ll. 3-21). In 2008, Wife and her family went to Bulgaria and they were given \$28,000 to take on the return trip. (S. R. p. 75, l. 23 - p. 76, l. 3).

Ms. Miteva also transferred funds to Wife through wire transfers. (S. R. p. 68, l. 24 - p. 69, l. 15). She identified one wire transfer of \$29,780 and a transfer of \$37,000. (S. R. p. 69, ll. 22-24; R. pp. 325-327). Throughout the marriage Wife received between \$200,000 and \$230,000. (S. R. p. 68, ll. 19-23; p. 71, ll. 22-25; p. 93, l. 14 - p. 94, l. 13). Ms. Miteva stated that Wife invested the money in property in the United States, including the marital home and the trailers. (S. R. p. 73, l. 24 - p. 75, l. 22).

Wife owns rental property in Bulgaria. (S. R. p. 72, ll. 4-10). Wife gave Ms. Miteva a power of attorney so Ms. Miteva could manage the rental properties and cash funds in Bulgaria for Wife. (S. R. p. 72, l. 11 - p. 73, l. 5; R. pp. 328-331).

Wife stayed with the parties at the Messina Way home when she visited. (S. R. p. 76, ll. 4-7). When she came the first time the home "looked terrible." (S. R. p. 76, l. 8 - p. 77, l. 4). On subsequent trips it looked like the whole house had been remodeled to the point that it looked "like a brand new house." (S. R. p. 77, l. 5 - p. 78, l. 1). Wife first saw Messina in 2006 or 2007, when there were tenants residing in the home. (S. R. p. 91, ll. 3-13).

Ms. Miteva went with the family to Myrtle Beach in 2010. (S. R. p. 78, ll. 2-4). [A] took her friend, Jenna, with them. (S. R. p. 78, ll. 5-6). The first morning they were

there Jenna was upset because Husband yelled at her for walking into the bedroom where Husband and Wife were staying without knocking. (S. R. p. 78, ll. 7-13). They went for a walk and Jenna was better. (S. R. p. 79, ll. 4-5). They all went to dinner with Husband's friends and on the way back Jenna started crying because of something Husband was saying to her. (S. R. p. 79, ll. 5-15). Jenna wanted to call her parents to come pick her up. (S. R. p. 79, ll. 15-17). Husband was intoxicated at the time. (S. R. p. 79, ll. 18-19).

Ms. Miteva was acquainted with Nadia and Pavel Boldt, but she never looked at investment properties with the Boldts. (S. R. p. 88, l. 12 - p. 90, l. 18).

Nasrin Robinson

Ms. Robinson met Husband 34 or 35 years prior and was married to him for 13 years. (R. p. 147, ll. 14-19). They had two children who were 22 and 24 years old at the time of the hearing. (R. p. 147, ll. 20-23). Husband drank during the entire marriage and in the 34 or 35 years she has known him she has never seen him drunk. (R. p. 148, l. 21 - p. 149, l. 1; p. 156, ll. 16-18). They divorced in 1995. (R. p. 147, ll. 24-25).

Ms. Robinson also knew that Husband took prescription medication for ADD. (R. p. 151, ll. 7-12). Husband was drinking at the time. (R. p. 151, ll. 13-14). Ms. Robinson stated she did not notice any impact or any change in Husband's behavior or demeanor as a result. (R. p. 151, ll. 15-17).

Ms. Robinson still sees Husband at family functions. (R. p. 148, ll. 6-10). Husband drinks alcohol at these functions but she has never seen him drunk. (R. p. 148, ll. 13-18). She stated that Husband becomes more quiet when he drinks and he was never argumentative or angry. (R. p. 149, ll. 2-7). She stated she has been in the parties' home

about 5 times over a 5-year period. (R. p. 1152, ll. 15-19). She would be there about 2 hours each time. (R. p. 153, ll. 11-12). She agreed that she has not been in their home for more than 10 hours over a 5-year period. (R. p. 153, l. 24 - p. 154, l. 2). She agreed her opinion about Husband's drinking is based largely on what others have told her. (R. p. 154, ll. 3-23).

Ms. Robinson knows Wife. (R. p. 149, ll. 14-15). She agreed that Wife paid a part of the expenses for their children. (R. p. 155, ll. 2-22).

Sofie Robinson

Sofie is Husband's oldest daughter. (R. p. 157, ll. 9-10). She attended the University of North Carolina at Chapel Hill and graduated in 2011. (R. p. 157, ll. 16-17). She had finished her first year of optometry school at Nova Southeastern University in Florida. (R. p. 157, ll. 11-15). Husband paid completely for her college education. (R. p. 161, ll. 10-15; p. 161, ll. 10-15).

Sofie has seen her father drink alcohol ever since she knew what alcohol was. (R. p. 159, ll. 2-6; p. 161, ll. 1-4). Her only concern for him is her knowledge about how alcohol is generally not good for a person's health. (R. p. 159, ll. 7-14). She has seen no shift in his behavior when he drinks. (R. p. 159, ll. 15-17; p. 160, ll. 3-5). She has never seen him drunk. (R. p. 160, ll. 1-2).

Don Pierman

Mr. Pierman is an electronic technologist and self employed engineer. (R. p. 163, ll. 17-19). He has known Husband for 25 years. (R. p. 163, ll. 20-21). Mr. Pierman sponsored Husband in his immigration to the United States. (R. p. 164, ll. 8-10). The

process took 6 years. (R. p. 164, ll. 11-14). He considers himself a very good friend of Husband. (R. p. 170, ll. 14-16).

Mr. Pierman interacted with Husband every 4-6 months which became once a year. (R. p. 164, ll. 19 - p. 165, l. 3; p. 170, ll. 19-21). When they socialized there would be alcohol involved. (R. p. 165, ll. 4-10). Mr. Pierman never saw Husband drunk and was never concerned about Husband's drinking. (R. p. 165, ll. 14-18).

Mr. Pierman described the visit the parties made to visit with him at the beach for his birthday party. (R. p. 167, ll. 12-14; p. 169, ll. 4-8). Wife's mother, [A] and [A]'s friend were also with them. (R. p. 167, ll. 15-17). There was tension between the parties that "you can cut with a knife." (R. p. 167, ll. 19-20). He did not think there was arguing. (R. p. 167, ll. 22-24). Husband was not being aggressive or belligerent towards Wife. (R. p. 167, l. 25 - p. 168, l. 2). Pierman also did not observe any tension or anger from Husband towards [A] or her friend. (R. p. 168, ll. 3-5). He did not scold them but tried to "pull them into the adult conversation." (R. p. 168, ll. 14-18). Husband was drinking but did not become drunk. (R. p. 168, ll. 21-24). He did not become angry or obnoxious. (R. p. 168, l. 25 - p. 169, l. 1). The parties did not attend the birthday party. (R. p. 169, ll. 9-13).

Nicholas Robinson (Husband)

The parties met in 2005 when both were working at Wachovia Bank. (R. p. 171, ll. 13-17). Husband was living in the Messina Road property. (R. p. 171, ll. 18-19). The parties dated for about 18 months before they got married. (R. p. 171, l. 20 - p. 172, l. 2). The parties were living together at the Messina Road property at the time. (R. p. 172, ll.

5-10).

In 2007, Husband worked for Ernst and Young. (R. p. 176, ll. 13-14). Husband claimed the company lost a contract in which Husband worked "on-site," so Husband worked from home doing on-line training, obtaining additional certification, and catching up on administrative work. (R. p. 176, l. 18 - p. 177, l. 8). The next assignment was back in Charlotte, which is why the parties moved there. (R. p. 177, ll. 11-16). Husband claimed he was receiving compensation and income the entire time from Ernst and Young. (R. p. 177, ll. 17-25).

Husband agreed he became unemployed in January 2009. (R. p. 178, ll. 1-2). He was escorted out of the building, which is the normal process for "corporate America." (R. p. 178, ll. 3-20). Husband received unemployment compensation as a result of losing the job. (R. p. 178, ll. 21-23). He was not terminated for misconduct and his unemployment application was approved. (R. p. 179, ll. 3-16; S. R. p. 150). Husband was unemployed for 13 to 14 months. (R. p. 180, ll. 1-3). He received \$1,200 monthly in unemployment benefits. (R. p. 180, ll. 4-6).

Husband is a certified information system auditor. (R. p. 190, l. 1). He helps Fortune 500 companies across the country ensure compliance with regulations. (R. p. 190, ll. 1-3). Husband is also registered with Reuters as an expert witness and writes periodicals for the Dow Jones and the American Bar Association. (R. p. 190, ll. 3-6; S. R. p. 166).

Husband purchased the Messina Road property in July 1999 for \$270,000. (R. p. 172, ll. 11-16). The home was just over 1,000 square feet. (R. p. 172, ll. 14-15). Husband

almost tripled the size of the home prior to the marriage. (R. p. 172, ll. 17-22). Husband asserted any improvements to the home after the marriage were relatively minor. (R. p. 172, l. 23 - p. 173, l. 6). He claimed Messina was not marital property. (R. p. 245, ll. 19-20). He valued the property at \$590,000. (R. p. 262, ll. 22-25). He agreed that during the marriage they put down hardwood floors, new windows, a new stairway, structural modifications, and painted the home. (R. p. 263, l. 1 - p. 264, l. 5). He denied they used marital funds. (Tr. p. 217, ll. 6-9). He agreed, however, that the funds came out of an account containing funds he acquired during the marriage. (R. p. 264, ll. 10-12; p. 264, l. 24 - p. 265, l. 1).

Husband identified checks he made out to Andromanic Construction and to someone named "Eddie" for improvements to the marital home. (R. p. 174, ll. 3-10; p. 218, ll. 2-11). He also identified a check he wrote for [A]'s school. (R. p. 174, ll. 10-12). These checks were written on Husband's account. (R. p. 174, l. 13-24). Husband contended the parties "never co-mingled money." (R. p. 174, l. 25 - p. 175, l. 1; S. R. p. 135). Husband conceded Wife paid for "the minor remodeling" but asserted she did not contribute the majority and in fact refused to do so when asked. (R. p. 176, ll. 1-8).

Husband claimed he continued to pay all expenses of Messina Road, including the mortgage, taxes and utilities. (R. p. 180, ll. 7-11). He also had expenses related to his daughter that he paid. (R. p. 180, ll. 12-13). He asserted he paid these expenses out of the savings he had in his checking account and the \$2,400 to \$2,600 in monthly income he received in rent from the trailers. (R. p. 180, ll. 14-23). Husband identified a statement from his bank demonstrating a \$32,000 balance in his account. (R. p. 180, l. 24 - p. 181, l.

5; S. R. p. 153). The balance on February 17, 2010 just before he found a new job was \$9,000. (R. p. 181, ll. 6-11; S. R. p. 158).

The accounts listed an automatic withdrawal in January 2009 and in February 2010 for a mortgage payment to Chase, which was the mortgage in Husband's name prior to the refinance. (R. p. 183, ll. 4-17; S. R. pp. 153, 158). Husband identified a third statement of September 19, 2011 that showed payments associated with Messina Road for electricity and telephone. (R. p. 183, ll. 18-22; p. 184, ll. 14-17; S. R. p. 161). This was just after the divorce action was filed. (R. p. 184, ll. 18-21). Husband denied that Wife ever paid the mortgage. (R. p. 184, ll. 20-24). He also did not recall that Wife deposited funds into his account for the mortgage payment. (R. p. 184, l. 25 - p. 185, l. 2).

Husband agreed that in 2009 he granted a one-half interest to Wife in the Messina Road property as a gift. (R. p. 265, ll. 16-24). He agreed he signed the deed. (R. p. 265, l. 25 - p. 266, l. 1). When asked why he transferred a one-half interest in the home to Wife, Husband stated:

At the time, I didn't realize that I had. It was just tactical move to basically I wanted to reduce the mortgage. And at that time, unfortunately, I didn't have an income adequate enough to justify the mortgage so it was her income came in to supplement mine to get the mortgage. He (sic) was also kind of part payment I had – And this was kind of unspoken, but I had help her get her green card and it was like a balancing thing.

(R. p. 185, ll. 8-15; p. 266, ll. 6-9). Husband claimed he had an income, unemployment, but believed he could not list the benefits as income on the mortgage application he signed under oath. (R. p. 267, ll. 5-16; p. 285, l. 15 - p. 286, l. 5). Wife was listed as the borrower on the application. (R. p. 267, ll. 17-19). Husband claimed he paid the \$1,400

monthly mortgage payment with his unemployment benefits of \$1,200 per month. (R. p. 268, ll. 7-14). He claimed he paid out of his savings from \$32,000 down to \$9,000. (R. p. 268, l. 15 - p. 269, l. 1). He agreed all of the repairs in 2011 were done after he gave her an outright gift of one-half of the property. (R. p. 269, ll. 2-5).

Husband denied it was his intent to transform the property into marital property, saying that based upon a communication from the broker it was necessary to do a quit claim deed to Wife to "put Lina on the property." (R. p. 185, l. 24 - p. 187, l. 7). He claimed he did not give her half of the property. (R. p. 266, ll. 2-4, ll. 13-14). He agreed that the "end result" of the deed was to give Wife half of the property. (R. p. 266, ll. 15-17; p. 272, ll. 11-16). Husband never made a claim to an interest in Wife's property in Bulgaria or the Deerwood property. (R. p. 187, ll. 8-15). Husband agreed that although he claimed Messina Road was non-marital, he also claimed the debt associated with Messina Road was marital. (R. p. 256, l. 1 - p. 258, l. 18; p. 259, ll. 12-20).

When he became unemployed, Husband decided he wanted to become an independent contractor. (R. p. 190, l. 19 - p. 191, l. 2). He stated he "split the week half and half between looking at real estate and...actually setting myself up as an independent consultant and finding a pipeline of work." (R. p. 191, ll. 3-9; p. 266, l. 21 - p. 267, l. 2). Husband asserted he continued to certify himself and began to look at real estate foreclosure and flipping properties. (R. p. 189, ll. 14-23; p. 191, ll. 10-23). Husband denied his role was "minimal," claiming he actually found the majority of the properties and worked with Mr. Boldt doing plumbing and electrical work on the properties. (R. p. 192, ll. 2-11; p. 225, l. 25 - p. 226, l. 22). Husband asserted it was his idea to start

purchasing property. (R. p. 196, l. 24 - p. 197, l. 1).

The first property he bought was "Tiana Way." (R. p. 192, ll. 12-14; S. R. p. 169). The deed was filed February 23, 2010. (R. p. 193, ll. 6-7). Wife was given title in the deed because she provided all of the funds for the purchase. (R. p. 193, ll. 8-12). The cost was around \$55,000 and Husband did not have any funds available. (R. p. 193, l. 13 - p. 194, l. 2; p. 195, ll. 12-24; S. R. p. 171). The property needed some improvement, including painting and installing new appliances. (R. p. 197, l. 19 - p. 198, l. 3). The property was rented to one tenant before the parties sold it. (R. p. 198, ll. 4-6). The parties sold Tiana Way for \$90,000. (R. p. 196, ll. 4-10; S. R. p. 207).

Following Tiana Way, the parties engaged in a series of buying and selling transactions. (R. p. 194, ll. 13-20; S. R. p. 174). The next property was Ferguson Meadow. (R. p. 198, ll. 7-9). Husband found the property, negotiated the purchase, and Wife provided the money for the purchase. (R. p. 198, ll. 12-14). Husband managed the property and found tenants for it. (R. p. 198, ll. 15-16). The parties had not sold the property at the time of the hearing. (R. p. 198, ll. 18-19).

The next property was 362 Squirrel Lane. (R. p. 198, ll. 20-21). The parties paid \$216,000 and Husband claimed the funds came solely from him. (R. p. 198, l. 22 - p. 199, l. 6; S. R. p. 212). Husband stated that before leaving Bank of America he had applied for a home equity loan line of credit (HELOC) of about \$220,000. (R. p. 199, ll. 16-17). To purchase the property Husband went to Bank of America and got a cashier's check to pay the purchase price. (R. p. 199, ll. 18-20; p. 269, ll. 6-11). Husband identified email exchanges among him, Wife and the Boldts regarding his frustration that he was not

being included in the transaction. (R. p. 228, l. 7 - p. 234, l. 3; p. 281, ll. 16-23; S. R. pp. 271-280). Husband, Wife and Mr. Boldt all attended the sale at the master's court and they celebrated after Husband bought the property. (R. p. 199, ll. 20-22). They closed on the purchase on December 4, 2009. (R. p. 201, ll. 4-6).

The HELOC statement shows the last advance date was November 25, 2009. (R. p. 199, l. 23 - p. 200, l. 4; S. R. p. 213). Husband also identified a cashier's check for \$208,000 that he used. (R. p. 200, l. 17 - p. 201, l. 2; S. R. p. 214). Husband denied the proceeds from the HELOC were used to repay Wife for the funds she had advanced from Bulgaria. (R. p. 270, ll. 12-16).

Three weeks after the purchase Husband signed a quit claim deed transferring all of his interest in the property to Wife. (R. p. 269, ll. 18-21; p. 270, ll. 4-11). The parties did extensive remodeling. (R. p. 201, ll. 12-17). They sold the property on May 14, 2010 for \$285,000. (R. p. 201, ll. 18-24; S. R. p. 215). They used the funds for the next property flipping transaction. (R. p. 202, ll. 8-19).

The next property was Sugar Pond. (R. p. 203, ll. 7-8). Mrs. Boldt found the property and the purchase was placed in Wife's name. (R. p. 203, ll. 10-18; S. R. p. 220). Husband asserted this was "solely logistic consideration" because he was focused on building his independent consulting business. (R. p. 203, ll. 19-24). They paid \$412,000 for Sugar Pond. (R. p. 204, ll. 16-20; Def. Ex. 26). The parties sold Sugar Pond on August 5, 2010, for \$590,000. (Tr. p. 156, l. 25 - p. 157, l. 10; p. 158, ll. 4-8; S. R. p. 226).

The next property they bought was High Brook Drive in Waxhaw, North Carolina,

found by the Boldts. (R. p. 206, ll. 11-14; S. R. p. 230). The purchase was on November 5, 2010 and the parties paid \$195,480. (R. p. 209, ll. 1-7; S. R. p. 234). Husband had minimal involvement with this property. (R. p. 206, ll. 15-20). The parties sold the property on April 29, 2011 for \$267,500. (R. p. 209, ll. 16-22; S. R. p. 239). The deed reflected both of their names. (R. p. 207, l. 22 - p. 208, l. 1; S. R. p. 232). The court took judicial notice that North Carolina recognizes tenancy by its entirety so that both parties were required to be on the deed. (R. p. 208, ll. 5-20).

The next property they purchased was 5017 Montibello Drive. (R. p. 210, ll. 5-7). The parties paid \$291,900 for the property on July 21, 2011. (R. p. 210, ll. 14-20; S. R. p. 247). The funds came from the HELOC as well as the proceeds from the prior sale. (R. p. 212, ll. 14-16). The deed was dated April 21, 2011. (R. p. 211, ll. 4-12; S. R. p. 250). The property was rented at one time and Wife handled the renting. (R. p. 212, ll. 1-4). Wife was living at the property at the time of the hearing. (R. p. 210, ll. 8-10; p. 212, ll. 5-7). The parties insured Montibello for around \$450,000, and Husband valued it at \$430,000. (R. p. 213, ll. 6-12; p. 215, ll. 2-3; S. R. p. 254). Husband asserted Montibello was marital property. (R. p. 245, ll. 16-18).

The next property they purchased was 1733 Caldwell Rush Circle. (R. p. 215, ll. 9-11). Husband was unaware of the purchase until just prior, and voiced concerns about profitability. (R. p. 216, l. 1 - p. 217, l. 3). Husband proffered a deed dated June 22, 2011 for the Caldwell Rush property. (R. p. 219, l. 19 - p. 220, l. 8; S. R. p. 263). The deed was from Mr. Boldt to Power High Tech, Inc. (R. p. 220, ll. 10-20). Husband proffered a deed from Power High Tech, Inc. to Dennis Schurt (R. p. 221, l. 1 - p. 222, l. 23; S. R. p. 267).

Husband claimed that Wife told him they were purchasing Caldwell Rush. (R. p. 225, ll. 15-18).

Husband denied any of the funds from the property sales was used towards the outstanding balance on the HELOC. (R. p. 202, ll. 20-23; p. 206, ll. 8-10; p. 212, ll. 11-14; p. 278, ll. 10-21; p. 279, ll. 5-9; p. 280, l. 18 - p. 281, l. 12). Instead, he claimed he was making monthly payments of around \$530 on the line of credit since November 2009. (R. p. 202, l. 24 - p. 203, l. 6; p. 234, ll. 8-10). Husband agreed Wife "did put in the region of 100,000 into this joint business venture." (R. p. 196, ll. 1-3). He viewed the venture as "[w]e were jointly investing in real estate for our mutual benefit." (R. p. 197, ll. 2-6). He believed that if the parties ever divorced then they would equally split everything. (R. p. 197, ll. 7-15).

Husband contended that both parties contributed sums to the venture and with the exception of Caldwell Rush, they were both involved in the venture. (R. p. 227, l. 6 - p. 228, l. 6). Husband claimed that since the parties separated he has seen no proceeds from the sales of any of the properties. (R. p. 234, ll. 4-7). He conceded, however, that he did not object when Wife put Montibello and all the other properties in her name only. (R. p. 280, ll. 3-5).

Husband purchased the mobile homes in 2005 to 2006. (R. p. 187, ll. 16-18; S. R. p. 165). The most recent purchase was June 12, 2006, prior to the marriage in November 2007. (R. p. 188, ll. 9-14). Husband stated that as a condition of joining Ernst and Young he had to divest himself of any stock or share interest. (R. p. 188, ll. 17-19). He cashed in his Wachovia Preference stock and used those funds to buy the mobile homes. (R. p. 188,

ll. 17-21). He denied he used credit cards to purchase the trailers. (R. p. 188, ll. 22-23). He also denied there was an outstanding credit card debt at the time the parties married. (R. p. 188, l. 24 - p. 189, l. 10). Husband contended the trailers were not marital property. (R. p. 245, ll. 21-22). Husband also denied that Wife's money from Bulgaria was used to pay off the credit card debt or for repairs for the mobile homes. (R. p. 277, l. 19 - p. 278, l. 5).

Regarding the "marital asset addendum" Wife submitted, Husband asserted his 401(k) account was pre-marital and he has made no contributions to it in 10 years. (R. p. 236, ll. 1-18; p. 284, ll. 16-18). The account had a value in April 2006 of \$134,000. (R. p. 236, ll. 19-21; S. R. p. 281). The addendum listed a value of \$153,000, which reflected the growth due to investment. (R. p. 237, ll. 8-18).

Husband identified a check for \$12,000 he wrote to [A]'s school on August 6, 2011. (R. p. 237, l. 24 - p. 238, l. 3; S. R. p. 282). Wife was in Bulgaria at the time. (R. p. 238, ll. 14-16). Wife asked Husband to pay the money to save the slot for [A]. (R. p. 238, ll. 18-24). Husband asked Wife to repay the money but she never did even though she said she would. (R. p. 238, l. 25 - p. 239, l. 14).

Husband proffered an equitable apportionment worksheet as his suggestion on division of marital property. (R. p. 243, ll. 3-25; S. R. p. 283).

The parties separated in September 2011. (R. p. 246, ll. 12-19). Husband sought a divorce on the ground of one year separation. (R. p. 246, ll. 22-24). He "categorically" denied the allegations of habitual drunkenness. (R. p. 246, l. 25 - p. 247, l. 6). He was 57 years old at the time of the hearing and had been drinking for 40 years. (R. p. 247, ll. 20-

23). Husband also denied being abusive towards Wife or [A]. (R. p. 248, ll. 5-12).

Husband admitted he walked naked in front of [A], but contended:

There was one instance, not walking around, but it was early in the morning when [A] should have been actually in bed. I think it was like on a Saturday and she was watching TV and adjacent to our master bedroom is a restroom and went around no expecting to see her. That's the only time she ever saw me without clothes.

(R. p. 248, ll. 13-19).

Husband recalled the incident when Wife called the Sheriff's Department. (R. p. 248, l. 20 - p. 249, l. 5). Husband asserted he spoke with the deputies, and denied he was intoxicated. (Tr. p. 202, ll. 6-20).

Husband also testified regarding the beach trip with Wife, [A], and [A]'s friend Jenna. (R. p. 249, l. 24 - p. 250, l. 5). He admitted to confronting her but claimed it was because "she was spoiled and pretentious and disrespectful" and had made fun of his friends, Mr. and Mrs. Pierman. (R. p. 250, l. 8 - p. 251, l. 7). He denied he yelled at Jenna. (R. p. 251, ll. 18-19). He admitted he attempted to leave because Wife told him he had to do so and he had no means for getting a rental car. (R. p. 251, ll. 9-17).

On cross-examination, Husband admitted that the only property he listed as non-marital was the Messina Road property. (R. p. 253, l. 10 - p. 255, l. 17; p. 259, ll. 21-23). He did not list the mobile homes, but asserted Wife was well aware of them from "very early on." (R. p. 255, ll. 6-7; p. 282, l. 3 - p. 283, l. 20; S. R. p. 306). He stated that he determined the mobile homes were nonmarital the year prior to the hearing. (R. p. 258, ll. 19-24).

Husband did not list the 401(k) account. (R. p. 255, ll. 18-22; p. 283, l. 21 - p.

284, l. 15). He also did not list the value of the 401(k) on his financial declaration. (R. p. 255, ll. 23-25; p. 261, l. 7 - p. 262, l. 13). The account was in existence at the time of filing. (R. p. 260, l. 15 - p. 261, l. 6; S. R. p. 95). Husband claimed it was an oversight by him or his counsel. (R. p. 284, l. 19 - p. 285, l. 1).

Husband admitted that during the marriage he paid \$1,400 in monthly child support. (R. p. 273, ll. 17-23). Although he listed child support at \$1,400, he first stated he was not paying support but then said he paid \$700 per month. (R. p. 273, l. 22 - p. 274, l. 11). Husband paid for his children's private education with money he earned during the marriage. (R. p. 274, l. 22 - p. 275, l. 7; p. 276, ll. 16-17; p. 277, ll. 4-7). The expenses were about \$22,000 annually per child. (R. p. 275, l. 22 - p. 276, l. 6).

Husband went to Bulgaria in 2008, but he did not know whether he brought \$10,000 back with him. (R. p. 277, ll. 11-18). [A] went to Bulgaria with Husband and Wife at that time. (R. p. 288, ll. 1-3). Husband asserted this was [A]'s only trip to Bulgaria. (R. p. 288, ll. 10-12). It was also his only trip to Bulgaria. (R. p. 288, ll. 13-14). From 2001 to 2011, Wife's mother traveled to the United States from Bulgaria two times. (R. p. 288, l. 15 - p. 289, l. 9).

Husband reviewed the affidavit on attorney fees which demonstrated he owed over \$27,000. (R. p. 244, ll. 1-6; Def. Ex. 44). Husband contended Wife caused unnecessary delay and difficulty during discovery causing the fees to be so high, and he asked for an award toward the fees. (R. p. 244, ll. 7-21). Husband offered a settlement proposal but never received a counter-proposal from Wife. (R. p. 245, ll. 8-14).

Order

The family court denied Wife's claim for divorce on the ground of habitual drunkenness and awarded the parties a divorce on the ground of one years' separation. (R. pp. 9-13). The court also agreed with Wife's claim that 3722 Messina Road was transmuted in its entirety into marital property. (R. pp. 13-14, ¶ 1). The family court denied Wife's claim, however, that the mobile homes and associated lots were transmuted, but found the net increase in value of \$4,500 was marital. (R. pp. 14-15, ¶ 2). The family court rejected Wife's assertion that Husband's 401k account was transmuted due to continued contributions during the marriage, finding any gain in value was likely due to passive growth. (R. pp. 15-16, ¶ 3).

Next, the court found the property at 3222 Ferguson Meadows, though purchased with non-marital funds, was transmuted into marital property when purchased. That is, the property's character was changed from cash to real estate during the marriage. (R. pp. 16-17, ¶ 1). The court found 5017 Montibello Road, titled in Wife's name, was marital because it was purchased with marital funds generated by purchase and sale of properties and \$208,000 in marital funds taken from the HELOC. (R. p. 17, ¶ 2).

The family court concluded the \$115,521 paid to Mr. Boldt and the property at 17344 Caldwell Rush Circle were beyond the court's jurisdiction because of how they were titled. However, the court held Wife removed the funds without Husband's knowledge and was thus guilty of economic misconduct. (R. p. 17, ¶ 3).

The family court then found under the statutory factors that the marital estate should be divided 50-50. (R. pp. 19-32). The court also ordered Wife to pay Husband

\$5,958.00 for 50% of the interest on the HELOC. Based upon the identification, valuation and apportionment, the court ordered Wife to pay Husband \$295,183.00 to equalize the division. The court also required Wife to pay Husband \$12,438.00 as reimbursement for [A]'s tuition.

Lastly, the family court held Wife would have to pay Husband's attorney fees and costs in their entirety in the amount of \$27,561.29.

Wife sought rehearing of the order but the family court denied her motion. This appeal follows.

ARGUMENTS

I. The Family Court Erred in Denying Wife's Request for Divorce on the Ground of Habitual Drunkenness

The family court found Wife failed to prove by a preponderance of the evidence that she was entitled to a divorce on the ground of habitual drunkenness. This Court should reverse that ruling.

"Habitual drunkenness" is a ground for divorce in South Carolina. S.C. Code Ann. § 20-3-10(4) (1985). "In order to prove habitual drunkenness, there must be a showing that the abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce." *Epperly v. Epperly*, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). As this Court has held:

Habitual drunkenness is the fixed habit of frequently getting drunk; it does not necessarily imply continual drunkenness. Based on this definition, one need not be an alcoholic to be guilty of habitual drunkenness. It is sufficient if the use or abuse of alcohol causes the breakdown of normal marital relations.

Curry v. Curry, 402 S.C. 488, 741 S.E.2d 558 (Ct. App. 2013), citing *Lee v. Lee*, 282 S.C. 76, 78-79, 316 S.E.2d 435, 437 (Ct. App. 1984).

All of the evidence on this point established that Husband drank frequently, even daily, at or near the time Wife filed for divorce. Even Husband's own witnesses testified that they saw Husband drink frequently, although they added that they *never* saw him "drunk." The witness who tipped the scale in the eyes of the family court, however, was Mr. Pierman (R. p. 12), but the evidence was that Mr. Pierman saw Husband at most once per year at the time the parties were married and had not been to their home at or near the

time of filing. (R. p. 164, ll. 19 - p. 165, l. 3; p. 170, ll. 19-21). Husband's ex-wife, Nasrin Robinson, had been to the parties' home, but the duration was at most a total of 10 hours during a 5-year period. (R. p. 153, l. 24 - p. 154, l. 2).

The family court also found Wife's statement that she wanted Husband to take care of [A] in the event something happened to Wife (R. p. 97, ll. 2-25; S. R. p. 96) was inconsistent with Wife's allegation that Husband's habitual drunkenness caused the breakdown of the marriage. (R. pp. 5-6). This conclusion, however, does not flow from the premise. Wife acknowledged making the statement in 2009 or nearly two years prior to the separation. By the time she left the home, however, "life was unbearable." (R. p. 60, ll. 1-3). Wife testified Husband's alcohol consumption got worse during the marriage and Husband's consumption of alcohol and abuse of prescription drugs resulted in the termination of the marriage. (R. p. 66, l. 12-25).

This Court should take its own view of the preponderance of the evidence and find that Wife established the ground of Husband's habitual drunkenness "at or near the time of the divorce." *Epperly*. The Court should reverse the family court's denial to Wife of a divorce on this ground pursuant to Section 20-3-10(4).

II. The Family Court Erred in its Order of Equitable Apportionment of the Marital Property

Wife contends the family court erred in its order of equitable apportionment of the marital estate by its identification of the estate property as well as its 50-50 apportionment. This Court should reverse.

Equitable distribution of marital property “is based on the recognition that marriage is, among other things, an economic partnership.” *Crossland v. Crossland*, 408 S.C. 443, 759 S.E.2d 419 (2014); *Morris v. Morris*, 335 S.C. 525, 517 S.E.2d 720 (Ct. App. 1999). “Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse’s contribution to its acquisition, regardless of who holds legal title.” *Crossland*.

Code Section 20-3-620 sets forth 15 factors the family court must consider in making an apportionment of the marital estate. S.C. Code Ann. § 20-3-620(B) (2008); *Wilburn v. Wilburn*, 403 S.C. 372, 743 S.E.2d 734 (2013). In making an equitable distribution of marital property, the court must: (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the identified property; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which the distribution is to take place. *Gardner v. Gardner*, 368 S.C. 134, 628 S.E.2d 37 (2006). The family court should focus on a fair distribution of the entire marital estate. *Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005).

Each factor under Section 20-3-620(B) is analyzed below against the family court’s finding and the evidence in the record.

(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

The parties were married November 25, 2007 and Wife filed the action for divorce on August 30, 2011. The marriage was 3 years and 9 months in duration. At the time of the marriage Husband was 51 years old and Wife was 37 years old. At the time of the hearing Husband was 57 years old and Wife was 43 years old. (R. p. 19, ¶ 1, 2).

The family court stated the “age factor is given significant weight because the Husband is fourteen years older than the [W]ife and he will have correspondingly fewer years in which to acquire assets before the end of his employment by retirement.” (R. p. 19, ¶ 2). In giving “significant weight” to the age differential, however, the family court overlooked Husband’s greater earnings. The family court noted that Husband was “gainfully employed in [a] high paying job[.]” (R. p. 22, ¶ 6) and that Husband’s gross monthly income (\$15,450.00) greatly exceeds Wife’s gross monthly income (\$11,000.00) (R. p. 9, ¶ E.), or about 40% more than Wife earns. This finding is inconsistent with the family court’s conclusion that “[t]he opportunity for acquisition of capital assets would favor the Defendant Husband.” (R. p. 22, ¶ 6). This ruling forces Wife to provide support for Husband into the future, even though no alimony was sought or awarded.

The weight to be given each individual factor depends on the facts of each case, and they are only equities to be considered in reaching a fair distribution of marital property. *Johnson v. Johnson*, 296 S.C. 289, 299-300, 372 S.E.2d 107, 113 (Ct. App. 1988). The family court abused its discretion in giving “significant weight” to the age differential in this case, where the marriage was less than 4 years long and the evidence

demonstrates Husband's superior earning capacity and future ability to acquire assets.

(2) Marital Misconduct or Fault of Either or Both Parties, Whether or Not Used as a Basis for a Divorce, If the Misconduct Affects or Has Affected the Economic Circumstances of the Parties, or Contributed to the Breakup of the Marriage

As previously argued, Wife established that Husband's habitual drunkenness caused the breakup of the marriage. (Issue I, above). In addition, the family court discounted the incident report of October 29, 2012 alleging Husband was nude in front of Wife's 12-year-old daughter, characterizing the report as created to corroborate grounds for divorce "when no other significant corroboration existed." The family court failed to consider that Husband admitted at trial to the behavior. (R. p. 248, ll. 13-19).

Furthermore, the family court erroneously assigned misconduct to Wife regarding the \$115,521.00 paid to Pavel Boldt. (R. pp. 19-20, ¶ 3). The evidence demonstrated that the funds no longer existed because of a failed business venture involving the company managed by Mr. Boldt for which the funds would be used. (R. p. 121, l. 7 - p. 122, l. 1; p. 122, ll. 5-23; S. R. p. 134). The family court should not have viewed this as economic misconduct for purposes of this factor under the statute. *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990) (equitable apportionment statute prevents one spouse from resurrecting transactions at the end of the marriage to gain advantage in the equitable distribution; courts are not to be "auditing agencies for every marriage that falters."). *See also McDavid v. McDavid*, 333 S.C. 490, 496 n. 5, 511 S.E.2d 365, 368 n. 5 (1999) (noting the Court of Appeals correctly reversed the family court for including \$24,143.50 in the marital estate when the funds were no longer in existence, citing

Panhorst). Furthermore, the evidence demonstrated Wife used these funds to invest in the solar power company that failed and not to purchase property through Mr. Boldt. (R. p. 89, l. 17 - p. 90, l. 1; p. 108, ll. 7-12; p. 125, ll. 11-22; p. 121, l. 7 - p. 123, l. 22; S. R. p. 134).

This factor should weigh in favor of Wife.

(3) The Value of the Marital Property and the Contribution of Each Spouse to the Acquisition, Preservation, Depreciation, or Appreciation in Value of the Marital Property, Including the Contribution of the Spouse as Homemaker

(a) Identification. The family court identified the marital property. (R. pp. 20-21, ¶ 4). The court's identification of the marital estate is flawed for several reasons:

(i) The court correctly found 3722 Messina Road was fully transmuted despite Husband's position to the contrary. (R. pp. 13-14, ¶ (H)(1)).

(ii) The family court held the mobile homes were not transmuted but were Husband's separate property. (R. pp. 14-15, ¶ (H)(2)). The court found the properties had a net increased value during the marriage of \$4,500 and found that amount was marital. This ruling was in error in light of the evidence. Husband admitted that the only property he listed as non-marital was the Messina Road property. (R. p. 253, l. 10 - p. 255, l. 17; p. 259, ll. 21-23). Wife's testimony that Husband told Wife he purchased the mobile homes with credit cards, and brought this credit card debt into the marriage. (R. p. 76, ll. 11-17; p. 117, l. 16 - p. 118, l. 8). Wife provided Husband with the funds to pay the credit cards and to pay for repairs to the properties. (R. p. 76, ll. 21-24; p. 77, ll. 15-19; S. R. p. 25). Wife acknowledged that some of the checks predated their marriage. (R. p. 77, ll. 6-14).

Some of the checks were for Husband to repay his debt, including obligations from his previous separation agreement. (R. p. 77, ll. 17-24). After they married the amount was about \$30,000. (R. p. 77, l. 25 - p. 78, l. 2). The parties filed their income taxes jointly for the 2007 tax year, that Husband's income included rental income from the mobile homes, and that Wife paid the entirety of the 2007 taxes on that income. Wife primarily satisfied the debt on the properties (R. p. 79, ll. 22-24), Husband was not working during this time, (R. p. 79, l. 25 - p. 80, l. 2) and Wife was the sole source of income for the house. (R. p. 80, ll. 3-4).

(iii) The family court held that 3222 Ferguson Meadows was transmuted into marital property even though it was purchased with non-marital funds. (R. pp. 16-17, ¶ I(1)). The court stated the property was transmuted "when it was purchased," apparently a reference to how the property was titled. This was error.

Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property. *Wilburn v. Wilburn*, 403 S.C. 372, 743 S.E.2d 734 (2013); *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 871 (1986). Transmutation is ultimately a matter of discerning the parties' intent. *Pittman v. Pittman*, 407 S.C. 141, 754 S.E.2d 501 (2014).

Although the property was titled jointly, both Wife and Mr. Brice explained why that was done, and that Husband merely acted for Wife at the foreclosure sales. There is simply no evidence that Wife intended to transmute this property, which all parties agreed

was paid for with the funds Wife received from Bulgaria.

(iv) The family court found 5017 Montibello Road, which was titled in Wife's name, was marital property. The evidence reveals the proceeds for the funds stemmed from buying and selling but always originated from Wife's Bulgarian money and Wife considered the property to be nonmarital. (R. p. 85, ll. 19-24; p. 91, ll. 13-15). Husband conceded that he did not object when Wife put Montibello and all the other properties in her name only. (R. p. 280, ll. 3-5). Although there was evidence that \$200,000 from the HELOC went to Wife and she stated those funds went into Montibello, Wife contended these funds were repayment to her for Bulgarian money she had given to Husband. (R. p. 79, ll. 10-16; p. 81, ll. 14-16; p. 118, l. 9 - p. 119, l. 21). Again, there was no evidence Wife intended to transmute those funds or the property purchased with them into marital property, or that Montibello be part of the marital estate.

(v) The court included the \$115,521.00 in the estate and apportioned it to Wife even though those funds were no longer in existence and the property purportedly purchased with those funds was titled in someone else's name. (R. pp. 17-18, ¶ (I)(3)). As previously argued, the court violated *Panhorst* and *McDavid* by resurrecting this transaction and assigning it to Wife. As argued above, the court should not have considered this transaction to be financial misconduct on Wife's part.

(b) Contributions. The court next listed the parties' respective contributions. The family court valued Husband's total contribution to the marital estate at \$419,103.00 and valued Wife's contributions at \$511,309.65, so that the contributions favored Wife 55% to 45%. (R. pp. 21-22, ¶ 5). The proportion is flawed for numerous reasons:

(i) The family court acknowledged the existence of two wire transfers from Wife's parents in Bulgaria for \$37,000.00 and \$29,780.00. (R. p. 18, ¶ 3; p. 30, ¶ 17(d); S. R. p. 10). However, the Court overlooked these items in determining the relative contributions of the parties to the acquisition of the marital estate. (R. pp. 21-22, ¶ 5(b)). These items should have been included to increase Wife's contribution to the marital estate and affect the relative percentages the court assigned to each party.

(ii) The court also failed to consider that the parties filed their income taxes jointly for the 2007 tax year, that Husband's income included rental income from the mobile homes, and that Wife paid the entirety of the 2007 taxes on that income. This item should have been included to increase Wife's contribution to the marital estate and should have affected the relative percentages the court assigned to each party.

(iii) The court failed to account for nearly \$80,000.00 in pre-marital debt Husband brought into the marriage which the parties paid off using marital funds. (Plaintiff's Exh. C, Schedule of Debts). This item should have been included to decrease Husband's contribution to the marital estate and should have affected the relative percentages the court assigned to each party.

(iv) The court failed to account for \$52,000.00 Wife gave to Husband prior to marriage that Husband used for various things, including maintenance and remodeling of mobile homes. This item should have been included to increase Wife's contribution to the marital estate and affect the relative percentages the court assigned to each party.

(v) The court failed to account for \$38,230.76 the Wife had in various bank accounts at the commencement of the marriage. This item should have been included to

increase Wife's contribution to the marital estate and should have affected the relative percentages the court assigned to each party.

(vi) In disregarding the testimony that Wife brought significant cash into the marriage, the family court overlooked the evidence that even though Husband was unemployed for a significant period of this brief marriage, he provided approximately \$45,000.00 per year to his children for education and living expenses. This evidence supported Wife's testimony that her family was the source of significant financial support during the marriage. Furthermore, these payments eroded the marital estate by nearly \$180,000.00. This fact should have been considered and resulted in an increase in Wife's percentage of apportionment of the marital estate.

(vii) In finding Wife's nonmarital property would produce income of between \$230,000 to \$300,000, the family court overlooked that the testimony was that these funds were from her parents, not from income produced by nonmarital property. (R. p. 24, ¶ 9).

(viii) The family court failed to properly credit Wife with the remaining \$200,000 in funds the parties received from Bulgaria.

These errors in identification of property and assessment of each party's contribution resulted in a skewed apportionment of the estate. Wife contributed vast sums of money to the accumulation of property, retirement of debt, and payment for the education of Husband's children. Husband was unemployed for part of this brief marriage and used funds Wife provided to pay off the debt he incurred in purchasing the mobile homes and lots. The Court should review the evidence presented and either adjust the

equitable apportionment accordingly or remand the matter for the family court to enter a new order in accordance with this Court's mandate.

(4) The Income of Each Spouse, the Earning Potential of Each Spouse, and the Opportunity for Future Acquisition of Capital Assets

The family court found the factor of "income and earning potential" was a wash, but that the opportunity for acquisition of capital assets favored Husband because his age and debt load and Wife's "significant non-marital assets, no debt, and access to sources of cash...." (R. pp. 22-23, ¶ 6). The family court failed to consider that Husband's earnings are significantly higher than Wife's earnings, that Husband is being awarded significant property found to be non-marital and not transmuted, and that Husband has a significant retirement account (401k) while Wife has none. The court also failed to consider that Wife does, in fact, have significant debt as set forth in her Financial Declaration. The family court should have used this factor to favor an increase percentage for Wife, not Husband.

(5) The Health, Both Physical and Emotional, of Each Spouse

The family court found there is no evidence of any physical or emotional health problems that would impact equitable apportionment. (R. p. 23, ¶ 7). There was no contrary evidence.

(6) The Need of Each Spouse or Either Spouse for Additional Training or Education in Order to Achieve That Spouses's Income Potential

The family court found both parties were highly educated and did not appear to need additional education or training to achieve their earning potentials. (R. p. 23, ¶ 8). There was no contrary evidence.

(7) The Nonmarital Property of Each Spouse

The family court found this factor favored Husband. (R. pp. 23-24, ¶ 9). The court noted Wife's testimony regarding her non-marital property in Bulgaria, but noted there was no evidence of the property's value or the precise amount of income generated by that property. (R. p. 24, ¶ 9). Wife testified that money came from [A]'s grandparents and [A]'s father as well as proceeds from Wife's investment property in Bulgaria that Wife's mother manages. (R. p. 89, ll. 3-10). Wife's mother confirmed that Wife owns rental property in Bulgaria and Ms. Miteva had a power of attorney to manage the rental properties and cash funds in Bulgaria for Wife. (S. R. p. 72, l. 4 - p. 73, l. 5; R. pp. 328-331). Wife also had a vehicle and funds in a bank account that the court valued at about \$38,000.00. (R. p. 23, ¶ 9).

The family court also identified Husband's 401k account with a value of \$155,087.11 and the mobile homes valued at \$204,500.00. (R. p. 24, ¶ 9). The court found the mobile homes produce income of \$2,600.00 per month. (*Id.*).

Assuming the identity of the property remains as found, this fact, at best, is a wash. And given the lack of proof regarding the identity, value or income generated by Wife's property in Bulgaria, this fact should favor Wife.

(8) The Existence or Nonexistence of Vested Retirement Benefits for Each or Either Spouse

The family court noted Husband had \$155,087.11 in his 401K account. (R. p. 24, ¶ 10). Wife had no vested retirement benefits. The court found this factor would favor Wife "but she has considerably more time than [Husband] in which to accumulate assets

for retirement.” (R. p. 24, ¶ 10). This statement ignores Husband’s higher income and the significant assets the court awarded him. The family court should have weighed this factor in favor of Wife without minimizing it because of the parties’ age differential.

(9) Whether Separate Maintenance or Alimony Has Been Awarded

Alimony and separate maintenance were not expressly provided and the family court found this was “not a factor.” (R. p. 24, ¶ 11). However, the family court tacitly provided Wife had to support Husband into the future by giving “significant weight” to the fact that he is 14 years older than Wife. (See discussion, above). That is, by weighing the parties’ age differential to favor Husband significantly, the family court awarded him a higher percentage of the estate which effectively requires Wife to support him past his retirement age. This Court should reverse this finding.

(10) The Desirability of Awarding the Family Home as Part of Equitable Distribution or the Right to Live Therein for Reasonable Periods to the Spouse Having Custody of Any Children

The family court found this was not a factor since “each party will be leaving the marriage with a home of approximate equal value.” (R. p. 24, ¶ 12). The family court overlooked, however, that the home awarded to Husband has a value of \$500,000 while the home awarded to the Wife has a value of \$401,900, which is nearly \$100,000 less in value. That is, the home awarded to Husband is 25% more valuable than the home awarded to Wife, which is far from an equal value. Although Wife was not seeking possession of the marital home to raise a child (the parties had no children from the marriage), this finding was not a wash but should have favored the Wife.

(11) The Tax Consequences to Each or Either Party as a Result of Any Particular Form of Equitable Apportionment

As the family court found, the parties presented no evidence of any tax consequences impacting the equitable apportionment. (R. p. 24, ¶ 13).

(12) The Existence and Extent of Any Support Obligations, from a Prior Marriage or for Any Other Reason or Reasons, of Either Party

In determining the division of marital property the court found that the support obligations of each party “are balanced” between the parties. (R. p. 25, ¶ 14). In making this finding, the court failed to consider that Husband’s two children are emancipated adult children but that Wife has custody of her minor child. Furthermore, the family court made findings regarding Husband’s obligations to his children without sufficient documentation or evidence to support those findings. The court inappropriately viewed this factor as “balanced” and should have viewed it as favoring Wife.

(13) Liens and Any Other Encumbrances upon the Marital Property, Which Themselves must Be Equitably Divided, or upon the Separate Property of Either of the Parties, and Any Other Existing Debts Incurred by the Parties or Either of Them During the Course of the Marriage

The court stated it assigned all of the debt to Husband and “neither party has any other significant debt to be considered in the equitable division.” (R. p. 25, ¶ 15). The court failed to identify debt Wife listed on her financial declaration owed to Cotswold Homes with a balance of \$40,000 that she is expected to repay. (R. p. 105, l. 17 - p. 106, l. 7; p. 108, ll. 13-15). The court failed to account for nearly \$80,000.00 in pre-marital debt Husband brought into the marriage which the parties paid off using marital funds. (R. pp. 333-342). Accordingly, this factor should favor Wife.

(14) Child Custody Arrangements and Obligations at the Time of the Entry of the Order

The parties had no children during this brief marriage and the family court found this was not a factor. (R. p. 25, ¶ 16). However, Wife had custody of [A]. The court should have ruled this factor favored Wife.

(15) Such Other Relevant Factors as the Trial Court Shall Expressly Enumerate in its Order

(a) Under this factor, the court held Wife's withdrawal of the \$115,521.00 in June 2011 "was an intentional dissipation of marital assets to prevent [Husband] from receiving a fair share of marital property." (R. pp. 25-26). The court found Wife withdrew the funds without Husband's knowledge or consent. The court resurrected this amount and assigned its value to Wife in the equitable apportionment. (R. p. 27, ¶ 17(a)). This was error.

As previously stated, the evidence demonstrated that the funds no longer existed because of a failed business venture involving the company managed by Mr. Boldt for which the funds would be used. (R. p. 121, l. 7 - p. 122, l. 1; p. 122, ll. 5-23; S. R. p. 134). The family court should not have included these funds and assigned them to Wife. *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990); *McDavid v. McDavid*, 333 S.C. 490, 496 n. 5, 511 S.E.2d 365, 368 n. 5 (1999). Also, the evidence demonstrated Wife used these funds to invest in the solar power company that failed and not to purchase property through Mr. Boldt, and Husband presented no evidence to the contrary. (R. p. 89, l. 17 - p. 90, l. 1; p. 108, ll. 7-12; p. 125, ll. 11-22; p. 121, l. 7 - p. 123, l. 22; S. R. p. 134).

(b) The family court accounted for \$12,438.00 that Husband paid for [A]'s school in August 2011 while Wife and [A] were in Bulgaria. (R. pp. 27-28, ¶ 17 (b)). The court found Wife intended to deprive Husband "of the benefit of this asset" and ordered Wife to reimburse these funds. This expenditure, however, occurred during the marriage, and that Husband testified this was the result of a joint decision by both parties. (R. p. 237, l. 24 - p. 238, l. 3; R. p. 238, ll. 14-24; ; S. R. p. 282). Wife asked Husband to pay the money to save the slot for [A] which he did. (R. p. 238, ll. 18-24).

This finding also ignores that Wife subsidized Husband's payment of nearly \$180,000 for the education of his daughters during the parties' brief marriage. (R. p. 157, ll. 11-17; p. 161, ll. 10-15; p. 161, ll. 10-15; p. 275, l. 22 - p. 276, l. 6). Furthermore, this transaction should not have been resurrected at the point of equitable apportionment. *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990).

(c) The family court only credited Wife with funds of \$56,149.00 and \$55,342.00 brought from Bulgaria. (R. pp. 28-30, ¶ 17(c)). The evidence, however, demonstrated various parties brought in between \$230,000 and \$300,000 over the course of the marriage. (R. p. 79, ll. 10-16; p. 81, ll. 14-16; p. 118, l. 9 - p. 119, l. 21). These funds were from the money Wife received from Bulgaria as well as her own savings. (R. p. 78, ll. 3-6; p. 79, ll. 17-18).

The court then stated Wife could not bring the funds into the United States in a manner in which declaration was not required and then rely on the existence of those funds as contributions to the marriage. (R. pp. 28-30). There was no evidence of any illegality or impropriety in the manner in which the funds were transferred to the United

States and the evidence demonstrated Husband knew of and participated in bringing these funds into the country in this manner. Further, (1) the court itself relied upon these figures in holding Wife's nonmarital property generated income (Order, p. 17, ¶ 9) and (2) Husband conceded the existence of at least \$111,491.00 of these funds in purchasing two properties. (R. p. 56, ll. 11-13; p. 29-30). The court should have credited Wife with contributing much more than it did.

In apportioning the marital property 50-50 between the parties, the family court failed to consider the evidence or appropriately apply the equitable apportionment factors. For instance, the marriage was of relatively short duration (less than 4 years), Wife contributed significantly more to the acquisition of property and money, Husband's earning potential and ability to acquire assets is in fact higher than Wife's, the court's findings on relative misconduct are not supported by the evidence, Husband received significant non-marital property in the division of assets, Husband has a vested retirement account while Wife has none, and the parties were not awarded homes "of approximately equal value." This Court should take its own view of the preponderance of the evidence and either adjust the equitable apportionment or remand to the family court with instructions to enter an order consistent with this Court's ruling.

III. The Family Court Erred in Requiring Wife to Pay Husband's Attorney Fees

The family court ordered Wife to pay \$27,561.29 to Husband for the entirety of the amount Husband sought for attorney fees and costs. Based upon the relative financial circumstances of each party, the fact that Wife prevailed on some issues, and the

significant award to Husband in the equitable apportionment, the family court should have required that each party be responsible for his or her own fees and expenses. This Court should reverse that award.

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce. S.C. Code Ann. § 20-3-130(H) (2014); *Crossland v. Crossland*, 408 S.C. 443, 759 S.E.2d 419 (2014). In determining *whether* an attorney's fee should be awarded, the following factors should be considered: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) effect of the attorney's fee on each party's standard of living. *Crossland; E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992). In determining the *amount* of reasonable attorney's fees, a court should take six factors into consideration: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Crossland; Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

Furthermore, where beneficial results in a divorce action are reversed on appeal, the case should be remanded for reconsideration of attorney's fees awarded. *Crossland; Srivastava v. Srivastava*, 411 S.C. 481, 499 n. 6, 769 S.E.2d 442, 452 n. 6 (Ct. App. 2014) (attorney fee award reversed where substantive results achieved by counsel reversed on appeal).

CONCLUSION

For the reasons stated the Court should reverse the family court's refusal to award Wife a divorce on the ground of habitual drunkenness. The Court should also reverse the family court's rulings on equitable apportionment and should either adjust the equitable apportionment accordingly or remand the matter to the family court for further proceedings. The Court should also reverse the award of attorney fees to Husband.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

Robert E. Guess, Family Court Judge

Case No. 2011DR4601905

Tzvetelna Miteva,

Appellant,

versus

Nicholas Robinson,

Respondent

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I Where the trial court grants a divorce on one ground from which there is no appeal, the trial court did not err in denying a divorce on another ground.
- II The family court did not err in its apportionment of the marital estate on a 50-50 basis. The family court did not err in its identification of the marital estate.
- III The family court did not err in requiring appellant to pay respondent's attorney fees and costs.

STATEMENT OF THE CASE

On August 30, 2011, the appellant-plaintiff-wife commenced this case seeking a divorce on the ground of habitual drunkenness or in the alternative a decree of separate maintenance and support, alimony and/or temporary support, an equitable apportionment of property and debts acquired by the parties during their marriage, injunctive relief, attorney's fees, and discovery.¹ The respondent-defendant-husband asserted two defenses: a qualified general denial and a counterclaim seeking a decree of separate maintenance and support, and equitable apportionment of property and debts including reimbursement of \$12,480 for tuition, injunctive relief, attorney's fees, and discovery.²

The Honorable Robert E. Guess presided at the final hearing on May 8-9, 2013, and issued a Decree of Divorce dated September 11, 2013. The appellant moved for reconsideration on September 26, 2013, and Judge Guess denied that motion by Order dated October 16, 2014. The appellant appeals both orders.

The amount involved in this appeal is unclear. The appellant objects to the 50-50 apportionment but does not argue what it should be. She asserts error in the failure to transmute the four mobile homes with a value of \$204,500, the transmutation of Ferguson Meadows valued at \$56,000, identifying Montibello Road as marital property valued at \$401,900, and the inclusion of \$115,521 in the marital estate, a

¹Record 43, Complaint dated August 29, 2011.

²Record 44-47, Answer and Counterclaim dated January 2, 2012.

total of \$777,921 in transmutation issues of which approximately one-half or \$388,960.50 is at issue on this appeal. She also appeals the award of \$27,561.29 to the respondent as attorney's fees, making \$416,521.80 the approximate amount involved in this appeal.

The footnotes in this Brief of Respondent refer only to the record on appeal and to authorities cited in the Table of Authorities. No fact, not even a parenthetical fact, is included in the footnotes.

FACTS

Bill Klem, the major league umpire, when asked whether a pitch was a ball or a strike famously replied, "It ain't nothin' till I call it." The appellant recites twenty-eight pages of testimony under the heading Facts.³ Testimony does not become fact until the judge says it does.

The facts are those facts found by Judge Guess in the Decree of Divorce. The respondent cites to the record on appeal in his factual arguments in this brief.

³Brief of Appellant, pages 2-29.

ARGUMENT

I

Where the trial court grants a divorce on one ground from which there is no appeal, is it error to deny a divorce on another ground?

Former Chief Judge Alex Sanders was fond of writing “whatever doesn't make any difference, doesn't matter.”⁴ The appellant offers no reason why this issue makes a difference—although the respondent does—it goes to the issue of the credibility of the witnesses. She wanted a divorce. She got one. No harm, no foul. “Only a party aggrieved by an order, judgment, sentence or decision may appeal.”⁵ The appellant is not an aggrieved party on the issue of divorce.

Major premise: Once the trial court grants a divorce on one ground, the court need not consider alternate grounds.⁶ *Minor premise:* The trial judge granted both parties a divorce on the ground of a one year separation.⁷ *Conclusion:* The trial

⁴*McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987); *Miles v. Miles*, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct. App. 1990); *S. Carolina Dep't of Soc. Servs. v. Father & Mother*, 294 S.C. 518, 521, 366 S.E.2d 40, 42 (Ct. App. 1988); *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991); and *Royster Co. v. E. Distribution, Inc.*, 298 S.C. 51, 53, 378 S.E.2d 71, 73 (Ct. App. 1989) rev'd, 301 S.C. 18, 389 S.E.2d 863 (1990).

⁵Rule 201(b), SCACR.

⁶*Smith v. Smith*, 294 S.C. 194, 197, 363 S.E.2d 404, 406 (Ct. App. 1987).

⁷Record 36, Decree of Divorce, paragraph 1.

court did not “err in denying Wife’s request for divorce on the ground of habitual drunkenness.”⁸

The appellant asserts error in refusing the divorce on the ground of habitual drunkenness. The Supreme Court definitively resolved this issue in 1987:

As we noted above, the trial court held the wife entitled to a divorce on the ground of twelve-months separation, a holding which the husband does not question. Because the granting of a divorce to the husband on the ground of adultery would not have dissolved the marriage any more completely, we need not consider the husband’s contention that he should have been awarded a divorce on his counterclaim. 27B C.J.S. *Divorce* § 286 at 64-65 (1986).⁹

The Court of Appeals not only follows *Smith*, but separates the ground for divorce from economic relief, affirming the grant of a divorce on the ground of the separation of the parties without cohabitation for a period of one year while affirming the denial of alimony because of adultery.¹⁰

The appellant correctly states, “Thus, an appellate court may find facts in accordance with its own view of the preponderance of the evidence.”¹¹ Two problems: First, there was no credible evidence. Second, whether the appellant is entitled to a divorce on an alternate ground is not a question of fact; it is a question of law. *Smith* controls. The grant of the divorce to the parties on the ground of the

⁸Brief of Appellant, page 32.

⁹*Smith v. Smith*, 294 S.C. 194, 197, 363 S.E.2d 404, 406 (Ct. App. 1987).

¹⁰*Mick-Skaggs v. Skaggs*, 411 S.C. 94, 766 S.E.2d 870 (Ct. App. 2014).

¹¹Brief of Appellant, Facts, page 2.

separation of the parties without cohabitation for a period of one year should be affirmed.

Relevance

The appellant's arguments on this issue relate to the primary issue in every case: the credibility, believability, and truthfulness of the witnesses. The appellant's arguments regarding the ground of the divorce may be irrelevant regarding divorce but Judge Guess' findings regarding the appellant's credibility are quite relevant.

The appellant devotes about twenty-seven pages to reciting the testimony of each witness.¹² The question is not who testified to what but what testimony the trial judge found credible.

The trial court judges the credibility of the witnesses.¹³ The appellate courts frequently "defer to the discretion of the family court to judge [the witness'] credibility."¹⁴ "A jury tests a witness' credibility by using their experience in the past as to similar utterances of persons in a like position."¹⁵ The jury's "test will be not only as to credibility, but as to common sense and observations in the ordinary,

¹²Brief of Appellant, pages 2-29.

¹³*Ferguson v. Ferguson*, 300 S.C. 1, 6, 386 S.E.2d 267, 270 (1989).

¹⁴*South Carolina Department of Social Services versus Holden*, 319 S.C. 72, 78-79, 459 S.E.2d 846, 850 (1995).

¹⁵*State v. Cherry*, 361 S.C. 588, 599, 606 S.E.2d 475, 481 (2004) quoting from Judge Learned Hand from *State v. Adcock*, 310 N.C. 1, 35, 310 S.E.2d 587, 606-607 (N.C. 1983).

commonplace affairs of life.”¹⁶ It follows that a judge, sitting as the trier of the facts, should test credibility in the same manner.

Judge Guess specifically found the testimony of the appellant and her mother contradictory regarding the respondent’s drinking.¹⁷ By implication, he found the appellant and her witnesses incredible and the respondent and his witnesses credible. When the appellant said he was unemployed and drinking,¹⁸ she wrote a note asking for him to be the guardian of her daughter, should something happen to her.¹⁹ This is contradictory to her statements about his habitual drunkenness.

The appellant’s most credible statement on this issue is found in her argument on the equitable apportionment of property: “The family court found there is no evidence of any physical or emotional health problems that would impact equitable apportionment. (Order, p. 16, ¶ 7). *There was no contrary evidence.*” (Emphasis added). The appellant says what she needs to say for any particular moment or issue, regardless of what she said during other moments regarding other issues.

Burden of Proof

Appellant cites *Epperly* and *Curry* for the notions that one need not be an alcoholic or guilty of being habitually drunk,²⁰ rather than the abuse of alcohol

¹⁶*Jones v. Fitzpatrick*, 47 S.C. 40, 24 S.E. 1030, 1031 (1896).

¹⁷Record 9-13, Decree of Divorce, paragraph G.

¹⁸Record 178, lines 1-4.

¹⁹Defendant’s Exhibit 1; Record, 97 line 2 through 98 line 4.

²⁰*Curry v. Curry*, 402 S.C. 488, 499-500, 741 S.E.2d 558, 564 (Ct. App. 2013).

caused the breakdown of the marriage.²¹ It was appellant's burden to show that respondent's alcohol consumption caused the breakdown of the marriage. A "breakdown" suggests a change from something better to something worse. However, the appellant does not present any evidence of the better. She alludes to the fact that things get worse "towards the end"²² but does not provide any specifics of when this happened or what "worse" looks like. She fails to show the breakdown of the marriage or even to link that breakdown to the respondent's behavior. When appellant rests her case, the Court specifically points out to appellant's attorney that they have failed to "present any corroboration on the fault grounds for divorce."²³ Even if there were no other ground for divorce, she failed to meet her burden of proof that the drinking caused the demise of the marriage.

²¹*Epperly v. Epperly*, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994).

²²Record 66, lines 8-13.

²³Record 147, lines 3-4.

II

Did the family court err in its apportionment of the marital estate on a 50-50 basis? Did the family court err in its identification of the marital estate?

The appellant may phrase this as a single question but there are two distinct issues, what is a fair apportionment and what property constitutes the marital estate. This is akin to the attorney's fees issue where first the court must determine entitlement and then determines the amount.²⁴ The respondent first addresses the percentage and then the estate.

50-50 Apportionment

Major premise: "An issue conceded in a lower court may not be argued on appeal."²⁵ *Minor premise:* In response to the trial judge's request for proposed orders,²⁶ the appellant's proposed order included as a finding of fact "I find that each party is entitled to a fifty percent division of the marital estate."²⁷ *Conclusion:* The appellant may not complain on appeal that the trial court adopted the appellant's proposed percentage for equitable apportionment of the marital estate.

From this logical conclusion, the appellant's arguments regarding the equitable apportionment of property factors relating to the percentage of distribution are

²⁴*Anderson v. Tolbert*, 322 S.C. 543, 547, 473 S.E.2d 456, 458 (Ct. App. 1996).

²⁵*TNS Mills, Inc. v. S. Carolina Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998).

²⁶Record 289, lines 21-25.

²⁷Record 360, proposed Decree of Divorce.

irrelevant. The appellant, citing *Johnson*,²⁸ correctly states "The weight to be given each individual factor depends on the facts of each case, and they are only equities to be considered in reaching a fair distribution of marital property;"²⁹ however, *once the appellant requests a 50-50 division which the court grants, the "equities" and "fair distribution" are not issues.* While the respondent responds to those arguments to avoid the appearance of conceding any point, the headings for those arguments include the note "(irrelevant)," below.

The late Judge David N. Wilburn, one of the smartest, most profane, most perceptive, and most outrageous family court judges, frequently said, "No judge ever got reversed for a 50-50 division." The Court of Appeals said it more elegantly, "While there is certainly no recognized presumption in favor of a fifty-fifty division, we approve equal division as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage."³⁰ Respondent admits this marriage failed to qualify as long term because the appellant left.

Doe stands for the proposition that "The division of marital property is in the family court's discretion and will not be disturbed absent an abuse of that discretion."³¹ The appellant asserts an "abuse of discretion" only one time: "giving

²⁸*Johnson v. Johnson*, 296 S.C. 289, 299-300, 372 S.E.2d 107, 113 (Ct. App. 1988).

²⁹Brief of Appellant, page 35.

³⁰*Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 56 (Ct. App. 2006).

³¹*Doe v. Doe*, 370 S.C. 206, 213, 634 S.E.2d 51, 55 (Ct. App. 2006).

'significant weight' to the age differential."³² Referring to S. C. Code Ann. § 20-7-472, the Court of Appeals puts this in perspective: "The statute grants the family court discretion to decide what weight to assign various factors."³³

"Although statutory factors provide guidance, there is no formulaic approach for determining an equitable apportionment of marital property."³⁴ Despite this guidance from the Court, the appellant incorporates a formulaic approach arguing "This factor (fault) should weigh in favor of Wife,"³⁵ "contributions favored Wife 55% to 45%,"³⁶ "the family court should have used this factor (ability to acquire capital assets) to favor an increase percentage for Wife,"³⁷ nonmarital property "should favor Wife,"³⁸ "the court found this factor (retirement benefits) would favor Wife,"³⁹ "should have viewed it (other support obligations) as favoring Wife,"⁴⁰ liens and encumbrances "should favor Wife,"⁴¹ and "the court should have ruled this factor

³²Brief of Appellant, page 35-36.

³³*Greene v. Greene*, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002).

³⁴*Sanders v. Sanders*, 396 S.C. 410, 417, 722 S.E.2d 15, 18 (Ct. App. 2011).

³⁵Brief of Appellant, page 37.

³⁶Brief of Appellant, page 39.

³⁷Brief of Appellant page 42.

³⁸Brief of Appellant, page 43.

³⁹Brief of Appellant, page 43.

⁴⁰Brief of Appellant, page 45.

⁴¹Brief of Appellant, page 45.

(child custody) favored Wife.”⁴² (despite the absence of children from the marriage). The appellant’s approach suggests putting the factors in a grid, checking respondent or appellant, totaling the checks, and awarding the property. However that does not work here: all factors do not get equal weight. The discretion to determine what weight is given each factor is solely with the province of the trial judge, not the parties.

Age as a Factor (irrelevant)

While both the alimony⁴³ and the equitable apportionment statutes⁴⁴ refer in identical terms to age as a factor, there is little appellate guidance. In affirming an award of alimony for a wife fourteen years older than her husband, the same age difference as the parties here,⁴⁵ the Court of Appeals states “Wife was close to retirement age.”⁴⁶ Three apportionment cases refer to parties approximately the same age.⁴⁷ In affirming an award of alimony, the Court of Appeals observed “Wife’s

⁴²Brief of Appellant, page 46.

⁴³S.C. Code Ann. § 20-3-130(C)(1).

⁴⁴S.C. Code Ann. § 20-3-620(B)(1).

⁴⁵Record 19, Decree of Divorce, paragraph 2.

⁴⁶*Pittman v. Pittman*, 395 S.C. 209, 218, 717 S.E.2d 88, 92 (Ct. App. 2011) aff’d as modified, 407 S.C. 141, 754 S.E.2d 501 (2014).

⁴⁷*Barrow v. Barrow*, 394 S.C. 603, 716 S.E.2d 302 (Ct. App. 2011); *Brandi v. Brandi*, 302 S.C. 353, 396 S.E.2d 124 (Ct. App. 1990); *Harlan v. Harlan*, 300 S.C. 537, 389 S.E.2d 165 (Ct. App. 1990).

education and age appear to cap her future earning potential,"⁴⁸ which is likely true of the respondent in the present case. The Supreme Court does quote but does not comment on the statement, "Husband is older than Wife and has less time left in his work life,"⁴⁹ although the difference in ages was less than one year. The appellant cites no authority for the proposition that the trial court abused its discretion in the weight it accorded the age factor.

The trial court stated: "This age factor is given significant weight because the Husband is fourteen years older than the Wife and he will have correspondingly fewer years in which to acquire assets before the end of his employment by retirement."⁵⁰ Considering the appellate decisions relating to age, this is consistent where the respondent had nine years before reaching the normal retirement age of sixty-six while the appellant had twenty-three years before reaching that age.

The appellant focused on the monthly income of each party to show that the respondent earns more money than her.⁵¹ She fails to recognize that when the gross monthly incomes and the ages of the parties are considered together collectively, the appellant has the far greater "opportunity for acquisition of capital assets." Based on present incomes, the respondent will earn an additional \$1,668,600 before his

⁴⁸*Wannamaker v. Wannamaker*, 395 S.C. 592, 598, 719 S.E.2d 261, 264 (Ct. App. 2011).

⁴⁹*Dearybury v. Dearybury*, 351 S.C. 278, 284, 569 S.E.2d 367, 370 (2002).

⁵⁰Record 19, Decree of Divorce, paragraph 2.

⁵¹Brief of Appellant, page 35.

retirement at age sixty-six while the appellant will earn \$3,036,000 before her retirement at age sixty-six.

By focusing solely on present income rather than income over the remaining working life of each party, the appellant fails to "see the forest for the trees."

Fault (irrelevant)

The appellant continues to pound her allegations of habitual drunkenness that were rejected because of her lack of credibility and the lack of logic. If dead horses could sue for abuse, this one would have a great case against the appellant. Even if fault were a factor, and even had the trial court found marital fault, "this State's public policy [is] that a party's marital misconduct does not justify a severe penalty for equitable apportionment purposes."⁵²

But the appellant raises an additional issue on marital fault. She asserts that Judge Guess should not have found misconduct by her regarding the \$115,520 she paid Pavel Boldt.⁵³ Judge Guess found as fact:

The \$115,521.00 in cash paid to Pavel Boldt and the property at 17344 Caldwell Rush Circle, allegedly purchased with this sum of money would be marital property. However, because neither the money used for this purchase nor the property itself was titled in the name of either party at the date of filing and because no third party title holder is made party to the action, the Court does not have jurisdiction to divide this property in its present form. The Court does, however, consider the removal of this sum of cash from marital funds by the Plaintiff without the knowledge or consent of the Defendant to be financial misconduct which has affected the economic status of these parties and will be taken into consideration in the equitable division

⁵²*Simpson v. Simpson*, 377 S.C. 527, 534, 660 S.E.2d 278, 282 (Ct. App. 2008).

⁵³Brief of Appellant, page 36.

of the remaining marital property. The \$115,521.00 will be added to the marital assets and will be apportioned to the Plaintiff.⁵⁴

Considering the appellant's testimony and applying simple logic and common sense, this finding of economic misconduct is supported by the appellant's testimony and the record. The respondent said the \$115,000 was used to buy property. She said it went to an investment in solar panels. Consider the practices and habits of the parties. They "flipped" properties, and "flipped" them successfully. They made a lot of money in the four years of their marriage. They started out purchasing a \$56,000 house in 2009⁵⁵ and by 2010, after having bought and sold several more properties, purchased a house for \$400,000.⁵⁶ It is appellant's testimony that each subsequent house was purchased with the proceeds of the previous house.⁵⁷ They made money on every property. They created a team and each member did his or her part well. In the absence of credible, corroborated, and convincing evidence, it is difficult to believe that out of the blue appellant took \$115,000, just the right amount to buy a new property, and invested it in a solar panel start up company fronted by the guy who is her contractor in the property flipping business. It does not make sense. If this were true, the appellant should have called Pavel Boldt to corroborate and confirm it. Mr. Boldt's buying the property and then selling to

⁵⁴Record 17, Decree of Divorce, paragraph 3.

⁵⁵Record 82, lines 13-22.

⁵⁶Record 83, line 20 through 84, line 6.

⁵⁷Record 82, line 13 through 85, line 9.

someone else is supported by the testimony;⁵⁸ however, because it all happened in North Carolina, the evidence had a lot of objections.⁵⁹

The appellant failed to prove that the respondent was a drunk. But respondent proved appellant's guilt of economic misconduct. If fault should be a factor here, as appellant argues, then it favors the respondent.

Income and Earning Opportunities (Irrelevant)

When income and age are considered together, the trial court may have erred in finding that "the factor of 'income and earning potential' was a wash,"⁶⁰ as the appellant has approximately twice the income and earning potential over her anticipated remaining work life as the respondent has over his.

Health, Both Physical and Emotional, of Each Spouse (Irrelevant)

Because the appellant sought a 50-50 division and the trial judge granted a 50-50 division, this factor is irrelevant but interesting and informative where the appellant presented evidence the respondent "started the day with alcohol and drank the entire day" and "The combination of medication and alcohol caused him

⁵⁸Record 215, line 25 through 216, line 14; Defendant's Exhibit #35, North Carolina substitute trustee's deed; Defendant's Exhibit #36, North Carolina general warranty deed; Record, 225, lines 7-21; Defendant's Exhibit #39, email chain regarding North Carolina property; Defendant's Exhibit #40, second email chain regarding North Carolina property.

⁵⁹Record 217, line 4 through 219, line 12; Defendant's Exhibit #35, North Carolina substitute trustee's deed; Record 221, line 14 through 222, line 23; Defendant's Exhibit #36, North Carolina general warranty deed; Record 223, line 2 through 224, line 22.

⁶⁰Brief of Appellant, page 41.

to be 'very nervous, agitated' and his whole body would shake."⁶¹ Yet, she argues "The family court found there is no evidence of any physical or emotional health problems that would impact equitable apportionment. (Order, p. 16, ¶ 7). There was no contrary evidence."⁶² In a single sentence the appellant concedes the respondent is physically and emotionally healthy—a sharp contrast to her lengthy and prolific, if incredible, argument above that respondent was a falling-down drunk.

Contributions (irrelevant)

The appellant is Mommy Warbucks when she claims her contributions to the marital estate but is Little Orphan Annie when the small income suits her arguments, such as her ability to acquire capital assets.

The appellant complains "The court failed to account for \$52,000.00 Wife gave to Husband prior to marriage that Husband used for various things, including maintenance and remodeling of mobile homes. This item should have been included to increase appellant's contribution to the marital estate and affect the relative percentages the court assigned to each party."⁶³ The appellant cites no statute, common law, rule of court, or other authority to support her argument. The appellant's testimony was that she understood this money "is not subject to the

⁶¹Brief of Appellant, Facts, page 14.

⁶²Brief of Appellant, page 42.

⁶³Brief of Appellant, page 40.

court's jurisdiction because it was transferred prior to the marriage."⁶⁴ "An issue conceded in a lower court may not be argued on appeal."⁶⁵

The appellant cites *Panhorst*⁶⁶ for the proposition the "equitable apportionment statute prevents one spouse from resurrecting transactions at the end of the marriage to gain advantage in the equitable distribution; courts are not to be 'auditing agencies for every marriage that falters,'"⁶⁷ yet she spends most of her brief asking the Court of Appeals to do exactly that.

The appellant complains "The family court failed to properly credit Wife with the remaining \$200,000 in funds the parties received from Bulgaria."⁶⁸ Judge Guess found as fact, "She has no proof of the transfer of any money from Bulgaria to the United States other than that included in her Exhibit No. 3, showing a wire transfer of \$37,000.00 to Bank of America in the United States."⁶⁹ The appellant's basis for this contention lies in vague, incredible testimony by the appellant and her mother regarding international travel for which there was no physical evidence and about which neither could remember a single date. The court

⁶⁴Record 77, lines 6-14.

⁶⁵*TNS Mills, Inc. v. S. Carolina Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998).

⁶⁶*Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990).

⁶⁷Brief of Appellant, page 36.

⁶⁸Brief of Appellant, page 41.

⁶⁹Record 18, Decree of Divorce.

did not credit the appellant for contributions because she presented no evidence. Any failure is the appellant's failure, not the trial judge's.

Alimony (Irrelevant)

Alimony was not an issue. The appellant initially prayed for alimony,⁷⁰ but abandoned the issue before trial.⁷¹ The appellant argues "by weighing the parties' age differential to favor Husband significantly, the family court awarded him a higher percentage of the estate which effectively requires Wife to support him past his retirement age."⁷² This boggles the mind as it would make every equitable apportionment of property award to either party an award of alimony. Any apportionment factor favoring one party would be an award of alimony to that party and any apportionment fact negative to a party would be an award of alimony to the other party. The closest the appellate courts have come to addressing this issue prohibits "the family court from using equitable division of marital property to award alimony barred by adultery."⁷³

⁷⁰Record 43, Complaint dated August 29, 2011, paragraph a.

⁷¹Record 53, lines 5-11.

⁷²Brief of Appellant, page 44.

⁷³*Berry v. Berry*, 294 S.C. 334, 335, 364 S.E.2d 463, 463-464 (1988).

Did the family court err in its identification of the marital estate?

Transmutation

The appellant argues the respondent's four nonmarital mobile homes should have been transmuted but that Ferguson Meadows and Montibello Road should not have been identified as marital property.⁷⁴ The appellant correctly states the **black letter law** of transmutation. "Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property."⁷⁵

Mobile Homes. At the time of the marriage, the respondent owned these four mobile homes,⁷⁶ they were titled solely in his name,⁷⁷ and there were no mortgages on them.⁷⁸ The appellant acknowledges in her testimony that checks she contributed before the marriage "are not subject to this court's jurisdiction because it was transferred prior to the marriage,"⁷⁹ but now she seeks credit for these

⁷⁴Brief of Appellant, pages 37-39.

⁷⁵Brief of Appellant, page 38, citing *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013) reh'g granted (May 8, 2013), reh'g denied (May 8, 2013), and *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 870 (1986).

⁷⁶Record 76, lines 4-6.

⁷⁷Record 76, lines 7.

⁷⁸Record 76, lines 9-10.

⁷⁹Transcript 77, lines 9-14,

payments.⁸⁰ She claims to have “satisfied the debt on those properties,”⁸¹ yet by her admission there was no debt on those properties.⁸² The respondent, whose testimony was more credible, denied that any of the “Bulgarian money” was used to make repairs to the mobile homes.⁸³ No documentary evidence nor admission by the respondent supports the appellant’s claims she paid for repairs to the mobile homes.

Ferguson Meadows. The trial judge found: “When purchased it was titled in both names.” “[Respondent] later signed a deed conveying his interest to the [appellant].” “The [respondent] was listed as the landlord on the lease of this property.”

The appellant asserts that Ferguson Meadows “was solely to be for Anna, my daughter.”⁸⁴ Nothing in the testimony of Mac Brice refers to setting up a trust for the daughter, or appellant seeking, or him offering advice on this subject.⁸⁵ Nor is there any reference in appellant’s testimony that a trust was created, or that she sought Mr. Brice’s advice about creating a trust. The HUD statement⁸⁶ shows both

⁸⁰Brief of Appellant, pages 5, 7, 8, 37, 38, 40 paragraph (iii), and 45 paragraph (13).

⁸¹Record 79, lines 22-24.

⁸²Record 76, lines 9-10.

⁸³Record 277, lines 19-22.

⁸⁴Record 86, lines 6-7.

⁸⁵Record 134, line 23, through 98, line 19.

⁸⁶Plaintiff’s Exhibit #9, HUD Settlement Statement.

respondent and appellant as the purchasers.⁸⁷ Also, the respondent is shown as the lessor on the lease of the property.⁸⁸ This is corroborated by the agreement to purchase the property.⁸⁹

Montibello Road. The trial judge found: "This property was purchased with marital funds generated as a result of a number of purchase and sales of real estate by both Plaintiff and Defendant and included in the purchase price was \$208,000.00 in marital funds generated from a home equity loan taken out against 3722 Messina Road."⁹⁰ This finding summarizes the respondent's testimony the trial judge found credible, tracing the \$208,000 home equity loan on his originally nonmarital Messina Road property to the Montebello Road Property.⁹¹ This testimony is summarized in three lines: "Q. Where did the funds to purchase Montibello come from? A. *It was the home equity loan and basically the proceeds of the previous sales.*"⁹² (Emphasis added)

The "smoking gun" on Montibello is the appellant's e-mail message to the respondent. On June 16, 17, and 21, 2011, he asked for an account of the funds from

⁸⁷Defendant's Exhibit #6, HUD Settlement Statement.

⁸⁸Defendant's Exhibit #7, South Carolina Residential Lease Agreement; Record 115, line 18, through 116, line 1.

⁸⁹Defendant's Exhibit #8, Agreement to Buy and Sell Real Estate; Record 116, line 9-14.

⁹⁰Record 17, Decree of Divorce.

⁹¹Record 199, line 13, through 212, line 16.

⁹²Record 212, lines 14-16.

his home equity loan. She responded, "*Nick, the 200K are in Montibella* (sic)"⁹³
This fits nicely with the \$208,000 check.⁹⁴

During the marriage the parties bought and sold multiple pieces of real estate, earning a good profit. The respondent provided the original seed money from his home equity loan. The appellant provide additional money. The parties worked on the real estate ventures together. They were partners in the property purchased with money they provided together. The court's determination that they worked together on the real estate ventures undercuts and diminishes the appellant's argument that the Ferguson Road investment was for her daughter Anna and bolstered the respondent's argument that it was a marital venture. The court's determination that the respondent was not habitually drunk undercut the appellant's credibility, rippling through her other claims.

\$115,521

The appellant resumes her argument regarding the \$115,521.⁹⁵ The respondent addresses this under the fault section above, page 20.

⁹³Defendant's Exhibit #3, e-mail messages between the parties.

⁹⁴Defendant's Exhibit #23, Check dated November 30, 2009.

⁹⁵Brief of Appellant, page 39.

Premarital Debt

The appellant complains about the respondent bringing \$80,000 in premarital debt into the marriage that she asserts was paid using marital funds.⁹⁶ She did not document her claim before the trial court. She is silent on the home the respondent brought into the marriage with an equity of \$137,758.00⁹⁷ that the trial court found was transmuted.⁹⁸

Cash Brought into Marriage

The appellant's whining about the money the respondent spent on his children during the marriage is precisely the position rejected by *Panhorst*.⁹⁹ "The statute wisely prevents the other spouse from resurrecting these transactions at the end of the marriage to gain an advantage in the equitable distribution. Were it to do otherwise, human greed and vindictiveness would transform the courts into 'auditing agencies for every marriage that falters.'¹⁰⁰ Further, the appellant supported her own child during the marriage. Appellant's financial declaration lists monthly expenses for her then fifteen-year-old daughter Anna that included \$500 (children's clothing), \$2,500 (School lunches, supplies, field trips and fees), and

⁹⁶Brief of Appellant, page 40.

⁹⁷Record 21, Decree of Divorce, paragraph 5.(a)(1).

⁹⁸Record 13-14, Decree of Divorce, paragraph 1.

⁹⁹*Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990).

¹⁰⁰*Panhorst v. Panhorst*, 301 S.C.100, 105, 390 S.E.2d 376, 379 (Ct. App. 1990).

\$1,500 (Food and Household Supplies).¹⁰¹ It is unclear if these monthly expenses include the approximate \$25,000 annual tuition for her daughter Anna's private school.¹⁰² If Mr. Robinson's support of his children "eroded" the marital estate, the appellant's support of her child created greater erosion.

Income from Nonmarital Property

The appellant wanted the trial court, and now the Court of Appeals, to believe that she received significant money from Bulgaria from rental property and other assets.¹⁰³ Neither her testimony, her financial declaration, nor other documents support the ownership of such property as she only claimed \$600 per month in rental income with no indication of the source.¹⁰⁴ The source of the Bulgarian money seems to vary depending on what point the appellant argues.

The appellant did not report the Bulgarian property on her financial declaration or her discovery responses.¹⁰⁵ Having failed to provide this basic information, the appellant argues "And given the lack of proof regarding the identity, value or income generated by Wife's property in Bulgaria, this fact should favor Wife."¹⁰⁶

¹⁰¹Record 344, appellant's financial declaration.

¹⁰²Record 125, line 23 though 126, line 1.

¹⁰³Record 88, line 24 through 89 line 10; Record 302, line 4, through 303, line 9; Record 328-329, Deposition Exhibits #2; and Record 330-331, Deposition Exhibit #3.

¹⁰⁴Record 22, Decree of Divorce, paragraph (b); Record 343-351, appellant's financial declaration.

¹⁰⁵Brief of Appellant, page 43.

¹⁰⁶Brief of Appellant, page 43.

“Indeed, the defendant's posture reminds this Court of the old joke about the child who murders both of his parents and then asks the Court for mercy because he is an orphan.”¹⁰⁷

Other Support Obligations

The appellant asserts that her custody of her daughter Anna is a factor that should favor her in the equitable apportionment of property.¹⁰⁸ This assertion is deceptive. Appellant claims that Anna's grandparents and Anna's father provide money from Bulgaria,¹⁰⁹ but this income is not reflected on her financial declaration under Spousal or Child Support (from other marriage/relationship).¹¹⁰

Liens and Other Encumbrances

The appellant seeks credit for the Cotswold Homes debt of \$40,000.¹¹¹ This debt was appellant's post-filing loan from Pavel Boldt, owner of Cotswold Homes, that she used for personal expenses, specifically not for work on Montibello Road.¹¹² Under Premarital Debt above, page 30, we addressed the \$80,000 the appellant claims existed but for which she provided no evidence.

¹⁰⁷*Burns v. Burns*, No. 29872/99, 2001 WL 1568402, at 1 (N.Y. Sup. Ct. Sept. 7, 2001).

¹⁰⁸Brief of Appellant, page 46.

¹⁰⁹Record 89, lines 1-4; Record 87, lines 11-15.

¹¹⁰Record 343-351, appellant's financial declaration.

¹¹¹Brief of Appellant, page 45.

¹¹²Record 105-109.

The only significant debt of the parties was the mortgage debt on Messina Road, \$441,119, that the trial court assigned to the respondent.¹¹³ While the respondent does not argue "She got the goldmine. I got the shaft,"¹¹⁴ it is ironic that he ends up with the entire debt that provided most of the seed money to make the acquisition of the marital estate possible.

Other Factors

The \$115,521 is hardly an "other factor" if the appellant already addressed it in several places.

The reimbursement for the school is reasonable, especially when considering the appellant was in Bulgaria and separated upon returning. While the money was paid during the marriage, it was for tuition after the appellant left respondent, diminishing the credibility of her claim "we were still a family".¹¹⁵ On cross examination appellant said that his payment of her daughter's tuition was like her payment of his things, *for which she expects reimbursement*.¹¹⁶

When the appellant argues what the evidence demonstrated, such as the money brought from Bulgaria, she assumes the court believed the evidence. The court did

¹¹³Record 38, Decree of Divorce, Exhibit A.

¹¹⁴*She Got the Goldmine. I Got the Shaft*, written by Tim DuBois and recorded by Jerry Reed (1982).

¹¹⁵Transcript page 126 lines 15-21.

¹¹⁶Record 126, lines 16-25.

not believe much of the appellant's evidence. If the court did not believe the testimony, it is not a fact.

Failure to Call Available Witness

"It is well settled in this state that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness."¹¹⁷

If all the appellant asserts as fact were true, then Pavel and Nadejda Boldt should have been the greatest witnesses available. In appellant's Answers to Interrogatories, she said that Nadejda and Pavel Boldt:

have knowledge of the direct and indirect contributions made by the Plaintiff to the improvements on the marital home, including but not limited to loan payments paid by the Plaintiff. These witnesses have knowledge as to the money the Plaintiff has invested for her daughter, including the sources of the funds and the type of investments. These witnesses have direct knowledge regarding the Defendant's abuse of alcohol. These witnesses have knowledge regarding the investment properties of the Plaintiff."¹¹⁸

If appellant's testimony were true, Mr. Boldt and his wife could have corroborated every facet of her allegations. Further, appellant listed nine potential witnesses who have knowledge of respondent's alleged abuse of alcohol.¹¹⁹ The only witness she called was her mother. The appellant chose not to call Mr. or Ms. Boldt.

¹¹⁷*Nelson v. Coleman Co.*, 249 S.C. 652, 661-62, 155 S.E.2d 917, 922 (1967).

¹¹⁸Defendant's Exhibit #2, Plaintiff's Answers to Interrogatories.

¹¹⁹Defendant's Exhibit #2, Plaintiff's Answers to Interrogatories.

Both the trial court and the appellate court may infer that the appellant's failure to call Mr. and Mrs. Boldt as witnesses, particularly after her discovery responses as to what their testimony would be, creates suspicion of a wilful attempt to withhold competent evidence.¹²⁰ "It is a well settled rule that if a party knows of the existence of an available witness on a material issue and such witness is within his control and if without satisfactory explanation he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party."¹²¹

Considering appellant was granted the 50-50 split of the marital estate she requested, she has real chutzpah to request the Court of Appeals to reverse the lower court's ruling. Further, the trial court did not err in its determination of the marital estate. The physical evidence and the credible testimony support the court's findings on transmutation, marital and nonmarital property and the contributions of the parties of both debts and assets. The trial court's ruling should be affirmed.

¹²⁰*Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683 (1973).

¹²¹*Duckworth v. First Nat. Bank*, 254 S.C. 563, 576, 176 S.E.2d 297, 304 (1970).

III

Did the family court err in requiring appellant to pay respondent's attorney fees and costs?

The trial court, after considering the testimony, the record, and its ruling on other issues, awarded the respondent attorney's fees of \$27,561.29.

(H) The court, from time to time after considering the financial resources and marital fault of both parties, may order one party to pay a reasonable amount to the other for attorney fees, expert fees, investigation fees, costs, and suit money incurred in maintaining an action for divorce from the bonds of matrimony, as well as in actions for separate maintenance and support, including sums for services rendered and costs incurred before the commencement of the proceeding and after entry of judgment, pendente lite and permanently.¹²²

The appellant seeks an award of attorney's fees of \$23,999.81 for her second attorney, Tony M. Jones.¹²³ Interestingly, the appellant's second attorney worked on the case a year less than the respondent's attorney, but charged about the same amount of fees and costs. This supports the reasonableness of the respondent's attorney's fees.

The appellant is correct that if a beneficial result is reversed on appeal, the case should be remanded for a reconsideration of the attorney's fees awarded. The appellant cites *Srivastava*,¹²⁴ but for sentimental reasons respondent's counsel

¹²²S. C. Code Ann. § 20-130(H).

¹²³Plaintiff's Exhibit #10, Affidavit in Support of Plaintiff's Claim for Attorney's Fees, Costs, and Suit Money.

¹²⁴*Srivastava v. Srivastava*, 411 S.C. 481, 499 n. 6, 769 S.E.2d 442, 452 n. 6 (Ct. App. 2014).

prefers *Sexton*.¹²⁵ Both are correct. Appellant seems to concede, and correctly so, that if the Court of Appeals affirms the first two issues, then the award of attorney's fees should be affirmed as well.

Applying the *E.D.M.*¹²⁶ principles, the trial court appropriately awarded attorney's fees. This is bolstered by the appellant's uncooperative conduct, failure to respond to basic requests, obstruction tactics, and evasive answers¹²⁷ Even if the Court were to find that the attorney's fees were not justified by *E.D.M.*, then this case would fall into the remarkably similar case of *Anderson v. Tolbert* where Mr. Tolbert was uncooperative, prolonged the case, and hampered a final resolution requiring Ms. Anderson to file motions and obtain court orders. "***An adversary spouse should not be rewarded for such conduct.***" (Emphasis added)¹²⁸

The parties entered a Temporary Consent Order in which they agreed to specific deadlines for discovery, settlement negotiations, and mediation.¹²⁹ Despite this agreement and order, appellant failed to respond timely to respondent's discovery responses. In a Pretrial Scheduling Order, Judge Guess found, "The Defendant served his First Set of Interrogatories and Requests to Produce upon the Plaintiff on

¹²⁵*Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993).

¹²⁶*E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992); Record 6-7, Pre-Trial Scheduling Order dated July 12, 2012, paragraphs 5-11.

¹²⁷*Spreeuw v. Barker*, 385 S.C. 45, 72-73, 682 S.E.2d 843, 857 (Ct. App. 2009).

¹²⁸*Anderson v. Tolbert*, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996).

¹²⁹Record 1-4, Temporary Consent Order dated November 30, 2011.

January 2, 2012. The Plaintiff provided incomplete responses to discovery on February 24, 2012. Counsel for Defendant has repeatedly requested additional information requested in Defendant's First Set of Interrogatories and Requests to Produce."¹³⁰ The order goes on to find that as of the date of the Order, five months after the responses were due, that Plaintiff had still failed to provide certain records. In addition, mediation had to be rescheduled as a result of outstanding discovery. Yet, at the pre-trial status conference, appellant's counsel indicated the missing documents could be obtained quickly, all within two weeks. It was not that appellant could not provide the requested materials, it was that she seemed unwilling to do so.¹³¹

Applying the *Glasscock*¹³² factors, the trial court awarded an appropriate amount.

A reversal of the award of attorney's fees would reward the appellant for her obstructionist tactics. Sustaining the award of attorney's fees serves the ends of justice in this case while sending a message to potential obstructionist litigants and lawyers.

¹³⁰Record 6-7, Pre-Trial Scheduling Order dated July 12, 2012, paragraph 7.

¹³¹Record 7, Pre-Trial Scheduling Order dated July 12, 2012, paragraph 11.

¹³²*Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

CONCLUSION

Judge Guess' Decree of Divorce should be affirmed because the ground of divorce is a non issue, the appellant sought the 50-50 division of marital property the court awarded, the findings of transmutation are supported by the record including the appellant's testimony and evidence, and the attorney's fee award is consistent with *E.D.M.*,¹³³ *Anderson*,¹³⁴ *Spreewu*,¹³⁵ and *Glasscock*.¹³⁶ The trial judge acted within his discretion and got it right.

Respectfully submitted,

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By /s/Thomas F. McDow
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August 3, 2015

¹³³*E.D.M v. T.A.M*, 307 S.C. 471, 415 S.E.2d 812 (1992).

¹³⁴*Anderson v. Tolbert*, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996).

¹³⁵*Spreewu v. Barker*, 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009).

¹³⁶*Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

CERTIFICATE OF COUNSEL

The Brief of Respondent complies with Rule 211(b), SCACR.

/s/Thomas F. McDow

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August 3, 2015

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

Robert E. Guess, Family Court Judge

Case No. 2011DR4601905

Appellate Case No. 2014-002484

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Tzvetelnia Miteva,

Appellant

versus

Nicholas Robinson

Respondent

MOTION TO SUPPLEMENT FINAL BRIEF OF RESPONDENT

July 16, 2015, Respondent received Appellant's motion to release exhibits. July 23, 2015, prior to receiving any order on the Appellant's motion to release exhibits, the Respondent received the Record on Appeal, making the deadline for serving final briefs August 12, 2015, pursuant to Rule 211, SCACR. Respondent served his final briefs August 3, 2015. Subsequently, August 27, 2015, Respondent received Appellant's final briefs and Supplemental Record on Appeal, necessitating the amendment of some of the Respondent's footnotes. Reprinting the Respondent's final briefs would be costly, time consuming, and environmentally unfriendly.

The Respondent moves to supplement his final brief by adding a page amending those footnotes, Exhibit A, upon the ground that requiring him to re-file briefs would be environmentally unsound and would cause undue hardship, expense, and delay.

/s/Thomas F. McDow

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August 27, 2015

EXHIBIT A

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#	Original Footnote	Amended Footnote
19	Defendant's Exhibit 1; Record, 97 line 2 through 98 line 4.	Supp. ROA 96; Record, 97 line 2 through 98 line 4.
58	Record 215, line 25 through 216, line 14; Defendant's Exhibit #35, North Carolina substitute trustee's deed; Defendant's Exhibit #36, North Carolina general warranty deed; Record, 225, lines 7-21; Defendant's Exhibit #39, email chain regarding North Carolina property; Defendant's Exhibit #40, second email chain regarding North Carolina property.	Record 215, line 25 through 216, line 14; Supp. ROA 264-265; Supp. ROA 268-269; Record, 225, lines 7-21; Supp. ROA 275-279; Supp. ROA 280.
59	Record 217, line 4 through 219, line 12; Defendant's Exhibit #35, North Carolina substitute trustee's deed; Record 221, line 14 through 222, line 23; Defendant's Exhibit #36, North Carolina general warranty deed; Record 223, line 2 through 224, line 22.	Record 217, line 4 through 219, line 12; Supp. ROA 263-266; Record 221, line 14 through 222, line 23; Supp. ROA 267-270; Record 223, line 2 through 224, line 22.
86	Plaintiff's Exhibit #9, HUD Settlement Statement.	Supp. ROA 36-37.
87	Defendant's Exhibit #6, HUD Settlement Statement.	Supp. ROA 121-122.
88	Defendant's Exhibit #7, South Carolina Residential Lease Agreement; Record 115, line 18, through 116, line 1.	Supp. ROA 123; Record 115, line 18, through 116, line 1.
89	Defendant's Exhibit #8, Agreement to Buy and Sell Real Estate; Record 116, line 9-14.	Supp. ROA 127-133; Record 116, line 9-14.
93	Defendant's Exhibit #3, e-mail messages between the parties.	Supp. ROA 113-114.
94	Defendant's Exhibit #23, Check dated November 30, 2009.	Supp. ROA 214.
103	Record 88, line 24 through 89 line 10; Record 302, line 4, through 303, line 9; Record 328-329, Deposition Exhibits #2; and Record 330-331, Deposition Exhibit #3.	Record 88, line 24 through 89 line 10; Record 302, line 4, through 303, line 9; Record 328-334.
118	Defendant's Exhibit #2, Plaintiff's Answers to Interrogatories.	Supp. ROA 99.
119	Defendant's Exhibit #2, Plaintiff's Answers to Interrogatories.	Supp. ROA 97-99.
123	Plaintiff's Exhibit #10, Affidavit in Support of Plaintiff's Claim for Attorney's Fees, Costs, and Suit Money.	Supp. ROA 38-59.

The South Carolina Court of Appeals

Tzvetelina Miteva, Appellant

v.

Nicholas Robinson, Respondent.

Appellate Case No. 2014-002484

The Honorable Robert E. Guess
York County
Trial Court Case No. 2011DR4601905

ORDER

Counsel for the respondent filed a motion to supplement the respondent's final brief. The motion is Granted. The respondent's final brief has been received and accepted as filed.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

John S. Nichols, Esquire

Jennifer M. Creech, Esquire

Thomas Franklin McDow, IV, Esquire

Erin K Urquhart, Esquire

FILED

SF 12/1/15

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Family Court

Robert E. Guess, Family Court Judge

Case No. 2011-DR-46-1905
Appellate Case No. 2014-002484

Tzvetelina Miteva, Appellant,

v.

Nicholas Robinson, Respondent.

REPLY BRIEF

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FACTS

Husband includes an apocryphal story about a baseball umpire who says a pitch “ain’t nothin’ till I call it.” (Resp. Br., p.9). The purpose of this statement is apparently to assert that the only facts that are relevant are those found by the family court in the decree. (Resp. Br., p. 9).

This statement demonstrates, however, a basic misunderstanding of how a baseball umpire’s call of a ball or a strike is fundamentally different from a judge’s findings of fact in an equity matter, including a domestic relations case. While it is true that a participant in a baseball game may not protest an umpire’s call of a pitch as a ball or a strike, an appellant in an equity matter must present every factual matter to the appellate court for it to review the case *de novo*. *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014); *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011); *Simmons v. Simmons*, 392 S.C. 412, 414–15, 709 S.E.2d 666, 667 (2011). The Supreme Court set this rule out in *Lewis* and has not wavered in application of this broad rule of appellate review. *E.g.*, *Dickert v. Dickert*, 387 S.C. 1, 5–6, 691 S.E.2d 448, 450 (2010).

Because this Court approaches equity cases, including domestic relations cases, with a *de novo* eye, the appellant must present *all* of the testimony and evidence, not just the facts as found by the family court judge. Otherwise, the words of *Lewis* and its progeny ring hollow. See *Lewis*, 709 S.E.2d at 654-655 (“*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.”). *Cf. U.S. v. Baker*, 362 F.3d 504, 508 (8th Cir. 2004) (“‘*De novo*’ is a Latin term literally meaning ‘as new.’”); *Kinzenbaw v. Director of Revenue*, 62 S.W.3d

49, 52 (Mo. 2001) (“*de novo*” is a common Latin phrase meaning “anew”); *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (*de novo* review is independent and the appellate court looks at the matter anew “as though it had come to the courts for the first time.”).

Accordingly, the Court should decline Husband’s invitation to limit review of the family court’s order to “those facts found by Judge Guess in the Decree of Divorce.” (Resp. Br. p. 9). Instead, the Court should apply the broad scope of appellate review required by article V, § 5 of the South Carolina Constitution as set forth in *Lewis*.

ARGUMENTS

I. The Family Court Erred in Denying Wife's Request for Divorce on the Ground of Habitual Drunkenness

Wife adheres to her assertion that the family court should have awarded her a divorce on the fault-based ground of habitual drunkenness rather than the no-fault ground of one year continuous separation. Wife replies, however, to clarify Husband's misstatement of the holdings of two cases.

Husband cites to a case from this Court, *Smith v. Smith*, in asserting the ground for divorce "doesn't make any difference." (Resp. Br. p. 11).¹ See 294 S.C. 194, 363 S.E.2d 404 (Ct. App. 1987). The key to *Smith*, however, was that fault in that case made no difference to any issue on appeal. Ms. Smith was barred from seeking alimony anyway, and there was no evidence that her fault (adultery) contributed to the breakup of the marriage (the adultery occurred "well after the parties separated"). There was also no evidence Ms. Smith's adultery had any impact on the economic circumstances of the parties. In this case there was abundant evidence that Husband's misconduct (habitual drunkenness) occurred prior to the separation and contributed to the breakup of the marriage. S.C. Code Ann. § 20-3-620(2) (2008).

Husband cites to *Mick-Skaggs v. Skaggs*, 411 S.C. 94, 766 S.E.2d 870 (Ct. App. 2014) as further supporting his argument that this issue does not matter. But each case must be considered on its own circumstances, and an inspection of *Mick-Skaggs* reveals that it does not stand for the broad, sweeping principle Husband asserts. In that case, both

¹ Husband misidentifies *Smith* as a Supreme Court decision. (Resp. Br. p. 11). However, the case was authored by Judge Goolsby for this Court in 1987.

parties committed adultery so there was no evidence Husband's adultery caused the breakup of the marriage. Although this Court noted its *de novo* review, the Court deferred to the family court "under the circumstances." *Id.* at 101, 766 S.E.2d at 874.

Husband's habitual drunkenness and his behavior that resulted were the cause of the breakdown of the marriage. The evidence further demonstrates his daily use of alcohol, often to excess, impacted his employability and his participation in the home flipping enterprise. Under these circumstances the ground for divorce does make a difference and, therefore, does matter.

II. The Family Court Erred in its Order of Equitable Apportionment of the Marital Property

Wife adheres to the arguments she made in her brief. Apart from hyperbole and attempts at witticism, Husband presents merely his own view of how this Court should view the evidence. In her brief of appellant Wife pointed the Court to the relevant testimony and other evidence in arguing errors in the trial court's identification, valuation and distribution of the marital property. This Court will apply its broad *de novo* scope of review to judge whether the family court erred in each particular.

The Court should not be distracted by the tone and tenor of Husband's brief. Instead, the Court should review these matters *de novo*, apply the correct law, and reverse the apportionment as Wife contended in her brief.

III. The Family Court Erred in Requiring Wife to Pay Husband's Attorney Fees

Wife adheres to the arguments she made in her brief. Wife disputes, however, that she conceded that this issue is completely bound by this Court's rulings on the first two issues, or that Wife did not otherwise challenge the trial court's decisions regarding fees and costs.

In her brief, Wife stated:

Based upon the relative financial circumstances of each party, the fact that Wife prevailed on some issues, and the significant award to Husband in the equitable apportionment, the family court should have required that each party be responsible for his or her own fees and expenses. This Court should reverse that award.

(App. Br. pp. 48-49). Wife added, "Furthermore, where beneficial results in a divorce action are reversed on appeal, the case should be remanded for reconsideration of attorney's fees awarded." (App. Br. p. 49). Thus, contrary to Husband's assertion, Wife did challenge the merits of the award of fees apart from her challenge of the other two issues. Wife then pointed out as an additional reason to reverse that the award of fees is inextricably intertwined with the outcome of the other issues.

Accordingly, as Wife contended in her brief of appellant, the Court should review the issue of attorney fees and costs regardless of what the Court does with the other issues in the case. The Court should reverse the family court and find that under the facts of this case each party should be responsible for his or her own fees.

CONCLUSION

For the reasons stated in this Brief and the Brief of Appellant, the Court should reverse the family court's refusal to award Wife a divorce on the fault-based ground of habitual drunkenness. The Court should also reverse the family court's rulings on equitable apportionment and should either adjust the equitable apportionment accordingly or remand the matter to the family court for further proceedings. Lastly, the Court should reverse the award of attorney fees to Husband.

Respectfully submitted,



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