The Supreme Court of South Carolina

Re: Hurricane Florence

ORDER

On September 10, 2018, the Governor of South Carolina issued two executive orders in anticipation of the arrival of Hurricane Florence. The first order directed the mandatory evacuation of portions of eight counties beginning at noon on September 11, 2018.[1] The second order directed the closure of all state government offices in twenty-six of the forty-six counties beginning on September 11, 2018, to facilitate the evacuations.[2] As a result, several hundred thousand South Carolina citizens evacuated their homes, and impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. The Governor subsequently issued several executive orders rescinding the mandatory evacuations and closures, with the last remaining portion being rescinded effective at 9:00 a.m. on September 16, 2018.[3]

Hurricane Florence caused significant damage and resulted in six reported deaths in South Carolina. As of the date of this order, there are over 16,000 reported power outages in South Carolina, and five counties remain closed. The impact of Hurricane Florence will adversely affect the ability of many lawyers and litigants to comply with deadlines, even though the evacuation and closure orders have been rescinded.

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[1] Executive Order 2018-29.

[2] Executive Order 2018-30.

[3] Executive Orders 2018-31, 2018-32, 2018-34, 2018-35 and 2018-36.

Accordingly, this Court finds it appropriate to declare the days of Tuesday, September 11, 2018, through Friday, September 21, 2018, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules; Rule 6 of the South Carolina Rules of Civil Procedure; Rule 35 of the South Carolina Rules of Criminal Procedure; and Rule 3 of the South Carolina Rules of Magistrates Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
September 17, 2018

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

In the Matter of James Marshall Biddle

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

While a hearing on the petition for reinstatement was scheduled for September 13, 2018, that hearing was cancelled due to Hurricane Florence. The Committee on Character and Fitness has now rescheduled the hearing for September 25, 2018, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 17, 2018

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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N O T I C E

In the Matter of James L. Bell

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

While a hearing on the petition for reinstatement was scheduled for September 13, 2018, that hearing was cancelled due to Hurricane Florence. The Committee on Character and Fitness has now rescheduled the hearing for September 25, 2018, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

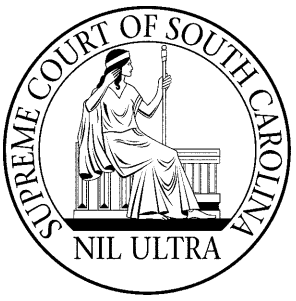
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 17, 2018

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
September 19, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

27693 - The State v. Michael V. Beaty, Jr. Pending

27754 - The State v. Luzenski Cottrell Pending

27723 - City of Columbia v. Marie-Therese Assa'ad-Faltas Pending

27768 - The State v. Lamont Samuel Pending

27774 - The State v. Stepheno J. Alston Pending

Order - Juan C. Vasquez v. State Pending

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

2018-000208 - The State v. Raymond L. Young Granted until 9/16/2018

PETITIONS FOR REHEARING

27826 - The State v. Tyrone King Pending

27827 - SCDOT v. David Franklin Powell Pending

27834 - The State v. Shannon Scott	Pending
27835 - The Callawassie Island v. Ronnie Dennis	Pending
2018-MO-029 - Hector Fragosa v. Kade Construction	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5573-Skydive v. Horry County	Pending
5574-State v. Jeffrey D. Andrews	Pending
5578-In Re: The Estate of James Brown	Pending
5579-State v. Nathaniel Wright	Pending
5581-Nathan Bluestein v. Town of Sullivan's Island	Pending
5582-Norwest Properties v. Michael Strebler	Pending
5583-Leisel Paradis v. Charleston County	Pending
5585-Superior Construction Corp. v. The Muhler Co. Inc.	Pending
5586-The State v. Sha"Quille Washington	Pending
5587-In the matter of Tynslee Elizabeth Fields	Pending
5588-Brad Walbeck v. The I'On Company	Pending
5589-State v. Archie M. Hardin	Pending
5590-State v. Michael L. Mealor	Pending
5591-State v. Michael Smith	Pending
5592-State v. Aaron S. Young, Jr.	Pending
2018-UP-178-Callawassie Island Members Club v. Gregory Martin	Pending
2018-UP-179-Callawassie Island Members Club v. Michael Frey	Pending
2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-244-Albert Henson v. Julian Henson	Pending
2018-UP-249-Century Capital v. Midtown Development	Pending
2018-UP-274-Corey Ross v. Carolina Adventure World, LLC	Pending
2018-UP-317-Levi Thomas Brown v. State Farm	Pending

2018-UP-318-Theresa Catalano v. Jack Catalano	Pending
2018-UP-323-Cheryl Burch v. Thomas Burch	Pending
2018-UP-327-State v. Joe Ross Worley	Pending
2018-UP-329-John Alden Bauer, III v. Beaufort County Sch. Dist.	Pending
2018-UP-331-Basil Akbar v. SCDPPPS	Pending
2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending
2018-UP-335-State v. Samuel Edward Alexander, Jr.	Pending
2018-UP-338-John Rakowsky v. Law Office of Adrian Falgione	Pending
2018-UP-339-State v. James Crews	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-343-State v. Benjamin C. Hernandez	Pending
2018-UP-348-Frederick Tranfield v. Lily Tranfield	Pending
2018-UP-349-Verma Tedder v. Darlington County	Pending
2018-UP-351-Rachael Dain v. HCDSS	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5511-State v. Lance L. Miles	Pending
5535-Clair Johnson v. John Roberts (MUSC)	Pending
5537-State v. Denzel M. Heyward	Pending
5542-S. C. Lawyers Weekly v. Scarlett Wilson	Pending
5546-Paul Boehm v. Town of Sullivan's Island	Pending

5548-James Dent v. East Richland County	Pending
5554-State v. Antwan J. Jett	Pending
5556-BLH by parents v. SCDSS	Pending
5557-Skywaves v. Branch Banking	Pending
5559-Commissioners v. City of Fountain Inn	Pending
5561-Innovative Waster v. Crest Energy	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2017-UP-425-State v. Esaiveus F. Booker	Pending
2017-UP-427-State v. Michael A. Williams	Pending
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending
2018-UP-031-State v. Arthur William Macon	Pending
2018-UP-074-Edward W. Miller v. SCPEBA	Pending
2018-UP-078-David Wilson v. John Gandis	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-081-State v. Billy Phillips	Pending
2018-UP-083-Cali Emory v. Thag, LLC	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-109-State v. Nakia Johnson	Pending
2018-UP-111-State v. Mark Lorenzo Blake, Jr.	Pending
2018-UP-121-State v. James W. Miller	Pending
2018-UP-147-State v. Courtney Ray Mitchell	Pending
2018-UP-150-Cedric E. Young v. Valerie Poole	Pending

2018-UP-169-State v. Marquez Glenn	Pending
2018-UP-176-State v. Terry Williams	Pending
2018-UP-182-Bank of America v. Carolyn Deaner	Pending
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending
2018-UP-187-State v. Rodney R. Green	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-193-Mark Ostendorff v. School Dt .of Pickens Cty.	Pending
2018-UP-201-Knightsbridge Property Owners v. Paul Nadeau	Pending
2018-UP-211-Hamilton Duncan v. Roy Drasites	Pending
2018-UP-216-Nicholas Geer v. SCDPPPS	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending

The Supreme Court of South Carolina

In the Matter of Mark E. Schnee, Respondent.

Appellate Case No. 2018-001608

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rules 17(b) and (c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

September 10, 2018

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Florence County. Effective October 2, 2018, all filings in all common pleas cases commenced or pending in Florence County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Clarendon	Colleton
Dorchester	Edgefield	Fairfield	Georgetown
Greenville	Greenwood	Hampton	Horry
Jasper	Kershaw	Lancaster	Laurens
Lee	Lexington	McCormick	Newberry
Oconee	Orangeburg	Pickens	Richland
Saluda	Spartanburg	Sumter	Union
Williamsburg	York	**Florence - Effective October 2, 2018**	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
September 6, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Schaefer Bojilov, Respondent/Appellant,

v.

Blago Metodiev Bojilov, Appellant/Respondent.

Appellate Case No. 2015-000991

Appeal From Berkeley County
Wayne M. Creech, Family Court Judge

Opinion No. 5595
Heard December 5, 2017 – Filed September 19, 2018

AFFIRMED IN PART AND REVERSED IN PART

T. Ryan Phillips, of the Law Office of T. Ryan Phillips, of Charleston, for Appellant/Respondent.

Gregory S. Forman, of Gregory S. Forman, P.C., of Charleston, for Respondent/Appellant.

WILLIAMS, J.: In this domestic relations matter, Blago Metodiev Bojilov (Husband) appeals the family court's final divorce decree, arguing the court erred in (1) awarding Susan Schaefer Bojilov (Wife) $200 per month permanent periodic alimony, (2) awarding Wife sole legal and physical custody of the parties' minor child (Son), (3) awarding Wife discretion in obtaining a passport for Son, (4) classifying Husband's Bulgarian Fibank account as a marital asset, (5) apportioning Husband insufficient equity in the marital residence, and (6) awarding Wife $30,000 for attorney's fees. Wife cross-appeals, asserting the family court erred in (1) apportioning Wife insufficient equity in the marital residence; (2) not including

Husband's unaccounted-for funds in the equitable distribution; (3) making Wife pay Husband his equitable distribution in post-tax, non-retirement assets; and (4) not awarding Wife attorney's fees incurred while defending Husband's motion to reconsider. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in Berkeley County, South Carolina, on August 8, 1998. When the parties married, Husband was a Bulgarian citizen and sought asylum in the United States. In lieu of asylum, Husband voluntarily returned to Bulgaria in February 1999 and returned to the United States in March 2001. Wife remained in South Carolina and resided at 104 Duncan Court—a residence Wife purchased from her previous husband in 1988. In February 2001, Wife paid the remaining $36,000 she owed on the 104 Duncan Court mortgage with inheritance Wife received from her father.[1] In October 2006, Wife sold 104 Duncan Court and utilized $100,000 of the sale proceeds towards the down payment for the parties' new residence.

Wife obtained an associate's degree in Automotive Technology and in the Arts. Wife worked throughout the marriage, except for periods of unemployment for fourteen months in 2010 and 2011, and for two months in 2013. Husband received some post-secondary education in Bulgaria and obtained various certificates in South Carolina. Husband earned the majority of the parties' income during the marriage. However, due to income from a trust that represented the majority of Wife's inheritance from her parents (the nonmarital Brown Advisory accounts), the parties' net incomes were similar. Throughout the marriage, Husband's Bank of America bank statements exhibited numerous deposits in the $400 to $1,000 range, all of which were unreported in Husband's financial declarations. In 2011, Husband opened a bank account with Fibank in Bulgaria. Husband contended the opening deposit of $32,120 was a nonmarital gift from his parents to hold in trust for his parents' care. Husband failed to disclose the Fibank account in his initial interrogatory answers and financial declaration.

The couple had one child from the marriage; Son was twelve years old at the time of the divorce hearing. Due to his autism spectrum disorder (autism) and attention deficit hyperactivity disorder (ADHD), Son required substantial care and thrived on stability. Despite Son's considerable care needs, Husband traveled to Bulgaria

[1] Throughout his voluntary departure, Husband contributed no financial support to Wife.

annually, leaving Wife and Son for three or more weeks at a time.[2] Husband also engaged in an extra-marital affair including overnight stays with his paramour.

On August 13, 2013, Wife filed an action in family court, seeking a divorce on the grounds of adultery;[3] alimony; sole legal and physical custody of Son; child support; equitable division of the marital estate; certain restraining orders; and an award of attorney's fees and costs. Husband answered and counterclaimed, seeking joint custody; Wife's cooperation in obtaining a passport for Son to go to Bulgaria; equitable division of the marital estate; certain restraining orders; and an award of attorney's fees and costs.

At trial, witness testimony revealed Husband and Wife often disagreed on the appropriate schooling and medical treatment for Son's special needs. Husband advocated for completely mainstreaming Son in school and discontinuing Son's ADHD medications. Conversely, Wife agreed with educational and health provider suggestions that Son remain in certain special needs classes and continue his ADHD medications. Husband claimed that he and Wife also disagreed on the appropriate diet, exercise, and sleep regimen for Son. However, Husband did not adhere to the diet he proposed for Son, nor did he maintain Son's sleep schedule. Dr. Poon, Son's developmental behavioral pediatrician, testified medical staff reported that Husband tried to intimidate them by showing up at the medical facility without an appointment. The guardian ad litem (GAL) also testified that Son's medical and educational providers reported to the GAL that on certain occasions Husband was confrontational when he disagreed with them.

On January 29, 2015, the family court issued a final divorce decree, granting Wife a divorce on the ground of Husband's adultery. The court found Husband's testimony was not credible and believed Husband consistently presented false evidence through his affidavits, financial declarations, deposition testimony, and trial testimony. With the exception of the marital residence, the court awarded a 50/50 equitable apportionment of the marital estate. With regard to the marital residence, the court apportioned 60% to Wife and 40% to Husband. Moreover, the court awarded Wife exclusive use, possession, and ownership of the marital residence; sole legal and physical custody of Son; and instructed that Wife was not required to obtain a passport for Son.

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[2] Husband's parents resided in Bulgaria.

[3] Husband stipulated that his adultery was grounds for Wife to obtain a divorce.

Wife reported a gross income of $2,882.17 per month from wages with a total gross monthly income of $3,990.07 when adding Wife's inheritance interest from the nonmarital Brown Advisory accounts. The court noted Wife had invaded the nonmarital Brown Advisory accounts during the last few years of the marriage for household expenses, and Wife's interest in the accounts would continue to decline if she had to invade them post-separation. The court found that Husband grossly overstated his post-separation monthly expenses, and as evident from Husband's bank statements, that Husband earned at least $200 per month in additional income from odd side jobs that he failed to list on his financial declarations.[4] After imputing an additional income of $200 per month to Husband, which brought Husband's monthly gross income to $3,420.53, the court ordered Husband to pay $200 per month to Wife in permanent periodic alimony. In addition, the court ordered Husband to pay $512 per month in child support. Further, the court awarded Wife $30,000 in attorney's fees and costs related to the divorce action.

Thereafter, Husband and Wife each filed a motion to alter or amend the judgment. The family court denied both motions on March 30, 2015. The family court also denied Wife's request for attorney's fees and costs for defending Husband's motion to alter or amend. This cross-appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

[4] Husband testified he occasionally worked odd jobs, such as doing repair work at friends' homes.

LAW/ANALYSIS

I. Husband's Appeal

On appeal, Husband argues the family court erred in (1) awarding alimony to Wife, (2) awarding Wife sole custody of Son, (3) awarding Wife discretion in obtaining a passport for Son, (4) apportioning Husband insufficient equity in the marital residence, (5) classifying Husband's Bulgarian bank account as a marital asset, and (6) awarding Wife attorney's fees. We address each argument in turn.

A. Alimony

First, Husband contends the family court erred in ordering him to pay Wife $200 per month in permanent periodic alimony. We disagree.

"Permanent[] periodic alimony is a substitute for support which is normally incidental to the marital relationship." *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009). "Alimony should ordinarily place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Hinson v. Hinson*, 341 S.C. 574, 577, 535 S.E.2d 143, 144 (Ct. App. 2000) (per curiam). The family court has a duty to formulate an alimony award that is "fit, equitable, and just if the claim is well[-]founded." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

In making an alimony award, the family court must consider the following statutory factors: (1) the duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014).

Specifically, Husband argues the family court erred in (1) failing to consider Wife's nonmarital property and (2) failing to make a finding of Wife's need for alimony and Husband's ability to pay.

We find the family court did not err in awarding alimony to Wife. The family court analyzed the statutory factors extensively in determining its award. Among them, the family court stated Husband and Wife were in a marriage of about sixteen years, and found Husband's adultery and habitual deceit contributed to the demise of the marriage. The court found that, after 2010, Husband earned a majority of the parties' income, with a net income of $2,334.21. However, the parties' net monthly incomes were similar due to Wife's $1,942.53 net income from wages and Wife's $1,107.90 income from the nonmarital Brown Advisory account. The family court found Wife's monthly expenses were reasonable and that Wife's September 2013 and November 2014 financial declarations reflected a post-separation reduction in her monthly expenses to $4,874.84. Conversely, the family court found Husband grossly overstated his monthly expenses and failed to report consistent income of at least $200 per month from side jobs. As a result, the court imputed $200 per month to Husband in additional income.

Regarding Husband's claim that the family court erred in failing to consider Wife's nonmarital property, we find the court explicitly considered Wife's nonmarital Brown Advisory accounts in finding the parties had similar incomes. Moreover, the court found Wife invaded, and effectively reduced the value of, her nonmarital Brown Advisory accounts to cover pre-separation household expenses, and if Wife were required to continue invading her nonmarital property post-separation, her anticipated income would decline. The court also stated that Wife should not have to liquidate her nonmarital Brown Advisory accounts to pay ongoing expenses. Thus, we find competent evidence in the record that demonstrates the family court considered Wife's nonmarital property in awarding alimony. *See Lewis*, 392 S.C. at 392, 709 S.E.2d at 655 (providing the appellant bears the burden of convincing the appellate court that the preponderance of the evidence is against the family court's findings).

Based on our de novo review of the evidence, we find the family court's alimony award is appropriate. *See id.* at 384, 709 S.E.2d at 651 (holding the appellate court may find facts in accordance with its own view of the preponderance of the evidence); *Allen*, 347 S.C. at 184, 554 S.E.2d at 424 (stating the family court has a duty to formulate an alimony award that is "fit, equitable, and just if the claim is well[-]founded"). Accordingly, we affirm the family court's alimony award.

B. Custody

Husband contends, based upon the evidence presented, the family court erred in not awarding the parties joint legal custody of Son because (1) the record did not

support the negative findings against Husband and (2) the finding that Husband repeatedly intimidated and bullied caretakers was based on inadmissible hearsay and improper pitting of witnesses. We address each argument in turn.

i. Negative Findings Against Husband

Husband argues the record does not support the family court's findings that Husband was "unwilling to accept other's viewpoints," that he was a "disruptive influence" at meetings, and that the parties would be unable to effectively co-parent so as to foreclose the possibility of joint legal custody. We disagree.

The controlling considerations in child custody cases are the welfare and the best interests of the child. *Woodall v. Woodall*, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996). In making its custody determination, "[t]he family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," and it should also consider "the psychological, physical, environmental, spiritual, educational, medical, family, emotional[,] and recreational aspects of the child's life." *Id.* "[A]ll the conflicting rules and presumptions should be weighed together with all of the circumstances of the particular case, and all relevant factors must be taken into consideration." *Id.* "Although there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker." *Patel v. Patel*, 359 S.C. 515, 527, 599 S.E.2d 114, 120 (2004).

In the instant case, the family court considered a wide range of issues when determining the welfare and best interests of Son, including: each parent's character, fitness, attitudes, attributes, and resources; the opinions of third parties; and the age and health of Son. The family court found that Wife was Son's primary caretaker and that Wife was more active in overseeing and arranging Son's autism treatment and more involved in Son's educational development. Further, Son's teacher testified Son made substantial improvement since Husband and Wife separated in September 2013, and the family court awarded Wife primary physical custody of Son. Employees of Son's daycare also recalled Husband only coming once or twice a year to pick Son up, which was consistent with testimony of other witnesses' accounts regarding Husband's daily parental duties. The family court considered Husband's conduct, including: annually traveling to Bulgaria, leaving Son and Wife for three or more weeks at a time; sometimes staying out late at night; and leaving Son and Wife alone overnight when he met with his paramour.

In considering the totality of the circumstances in this case, we find the preponderance of the evidence supports the view that it is in Son's best interest to award Wife sole legal and physical custody of Son. *See Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 ("The welfare and best interests of the child are paramount in custody disputes."); *Parris v. Parris*, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995) ("In making custody decisions the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed."). Accordingly, we affirm the family court's finding on this issue.

ii. Admission of the GAL's Testimony

Husband further argues the family court erred by admitting the GAL's testimony over Husband's objections on the grounds of inadmissible hearsay and improper pitting of witnesses. We disagree.

"Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted." *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997). Pitting of a witness refers to a question that asks one witness to comment on the veracity or truthfulness of another witness. *See Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (stating it is improper for a solicitor to ask a defendant "to comment on the truthfulness or explain the testimony of an adverse witness" such that "the defendant is in effect being pitted against the adverse witness"). Witnesses are generally not allowed to testify as to whether another witness is telling the truth. *Id.* However, to warrant reversal based on the erroneous admission or exclusion of evidence, the complaining party must show both error and resulting prejudice. *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970). When evidence is merely cumulative to other evidence, its admission is harmless and does not constitute reversible error. *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 140, 538 S.E.2d 285, 290–91 (Ct. App. 2000); *see also Burgess*, 329 S.C. at 91, 495 S.E.2d at 447 (holding the petitioner was not prejudiced by improper witness pitting in light of the other evidence presented in the case).

Husband contends Wife tried to pit the GAL's testimony—regarding statements that witnesses made to the GAL concerning Husband's intimidating behavior—against in-court statements made by the same witnesses. Specifically, Husband objected to Wife asking the GAL whether Dr. Poon's testimony at trial, regarding Husband's intimidating and bullying behavior, was more or less damaging to Husband than previous statements Dr. Poon made to the GAL regarding Husband.

Husband contends the GAL's testimony was inadmissible hearsay because Wife offered the testimony to prove Husband was aggressive and disruptive.

Regarding Husband's hearsay argument, we find the GAL's testimony was not inadmissible hearsay. A GAL's testimony and report, which contains evidentiary materials such as hearsay statements from persons interviewed by the GAL, is admissible if the report is made available to the parties and the testifying witnesses are subject to cross-examination. *See Richmond v. Tecklenberg*, 302 S.C. 331, 334, 396 S.E.2d 111, 113 (Ct. App. 1990) (admitting the GAL's testimony and report over hearsay objections when the GAL interviewed forty-one witnesses, twenty of whom testified; the names of all persons interviewed were made available to counsel; each could have been deposed by the mother's counsel; and counsel had the full right to cross-examine the testifying witnesses); *Collins v. Collins*, 283 S.C. 526, 530, 324 S.E.2d 82, 85 (Ct. App. 1984) ("[W]he[n] the [GAL's] report contains statements of fact, the litigants are entitled to cross-examine the [GAL] and any witnesses whose testimony formed the basis of the [GAL's] recommendation."). The GAL interviewed sixteen witnesses; seven of the sixteen testified, including Dr. Poon. The GAL's report and the names of the witnesses were available to Husband. Husband had the opportunity to cross-examine the GAL and the testifying witnesses who formed the basis of the GAL's opinion. We find no reversible error.

Regarding Husband's pitting argument, we find Wife's line of questioning was an improper pitting of witness testimony.[5] Wife improperly asked the GAL to comment on the veracity of Dr. Poon's testimony by asking the GAL to compare Dr. Poon's in court testimony against Dr. Poon's previous statements to the GAL. Nonetheless, we find that Husband was not unfairly prejudiced by this testimony. *See State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (stating that although it is improper for counsel to question a witness in such a manner as to force the witness to attack the veracity of another witness, "improper 'pitting' constitutes reversible error only if the accused was unfairly prejudiced"). The GAL's testimony was cumulative to other properly-admitted evidence illustrating that Husband was aggressive and disruptive. *See Smith*, 343 S.C. at 140, 538 S.E.2d at 290–91 (stating when evidence is merely cumulative to other evidence, its admission is harmless and does not constitute reversible error). Without objection, the GAL's report was placed into evidence; the report included accounts from numerous witnesses that stated Husband physically intimidated medical and

[5] The appellate court review's evidentiary and procedural rulings of the family court for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2

educational providers. In addition, without objection, the GAL testified she observed the same behavior that other witnesses complained of—"the overbearing physical presence; standing up during meetings; authoritative assertion of his position"—at Husband's deposition. Dr. Poon testified medical staff at the facility reported that Husband tried to intimidate them by showing up without an appointment. We find that any error in regard to pitting was not unfairly prejudicial to Husband and find no reversible error.

Accordingly, we affirm the family court's award of sole physical and legal custody of Son to Wife.

C. Passport

Husband argues the family court erred in denying his request to require Wife to cooperate in obtaining a passport for Son. We disagree.

As an initial matter, we find Husband abandoned this issue and it is not preserved for our review. *See Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). Nevertheless, we address this issue because "procedural rules are subservient to the court's duty to zealously guard the rights of minors." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000).

Upon our de novo review of the record, we find evidence supports the family court's finding that, if Husband obtained a passport for Son and traveled to Bulgaria, Husband may not return with Son. The family court found Husband appeared to have hidden assets in Bulgaria and found witnesses' assertions credible that Husband previously stated his intentions to leave Son in Bulgaria and seek Bulgarian citizenship for Son. We also agree with the family court's finding that the harm to Son would be great if he remained in Bulgaria under Husband's control. The Son thrives on stability and long trips without Wife will negatively impact Son. *See Dobson v. Atkinson*, 232 S.C. 12, 17, 100 S.E.2d 531, 533 (1957) (allowing the custodial parent to take the minor child to a foreign country *only after* finding that the child would have adequate care and would not be subjected to any undue danger if taken by the custodial parent and her new spouse to a foreign country for a two-year period). Thus, we find the preponderance of the evidence supports granting Wife discretion in obtaining a passport for Son and affirm the family court.

D. Bulgarian Bank Account

Husband argues the family court erred by including his Bulgarian Fibank account in the marital estate and crediting it against him. We disagree.

"The family court does not have authority to apportion nonmarital property." *Gilley v. Gilley*, 327 S.C. 8, 11, 488 S.E.2d 310, 312 (1997). "The burden to show property is not subject to equitable distribution is upon the one claiming that property acquired during the marriage is not marital." *Brown v. Brown*, 379 S.C. 271, 283, 665 S.E.2d 174, 181 (Ct. App. 2008) (per curiam).

Husband argues the Fibank account, opened during the parties' marriage, constitutes a $32,120 nonmarital gift from his parents to hold in trust, and the family court should not have included the account in the marital estate. However, prior to trial, Husband failed to disclose information regarding the account and in response to Wife's motion to compel, Husband falsely claimed that he would have to go to Bulgaria to obtain the account records. Only after receiving a court order did Husband produce a three-sentence, translated document stating Husband's father withdrew $32,120 from his bank and deposited it into Husband's Fibank account for Husband to hold in trust. The evidence does not support Husband's claim that he held the Fibank funds in trust for his parents. In its factual findings, the family court noted that Husband's parents' names were not on the account; Husband was unable to produce a bank statement indicating the funds originated from his father; Husband repeatedly made withdrawals and deposits into the Fibank account while in Bulgaria; and Husband testified funds from his Bank of America account were deposited into the Fibank account.

The family court found Husband repeatedly failed to provide reliable financial documentation or testimony regarding his finances. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52 (holding de novo review does not require the appellate court to ignore the fact the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony). Upon our de novo review, we find Husband failed to carry his burden in showing the preponderance of the evidence is against the family court's findings. *See id.* at 392, 709 S.E.2d at 655 (stating the appellant bears the burden of convincing the appellate court that the preponderance of the evidence is against the family court's findings). Accordingly, we affirm the family court's inclusion of Husband's Bulgarian Fibank account in the marital estate.

E. Marital Residence

Husband claims the family court erred in awarding him only 40% of the marital residence because (1) Wife's nonmarital funds used for purchasing the marital residence transmuted into marital property; (2) both parties contributed equally to the mortgage during the years of living together in the marital residence; and (3) the court failed to consider Wife's nonmarital property. Conversely, Wife, in her cross-appeal, argues her greater contribution to the down payment on the marital residence, coupled with her greater homemaking contributions and her equal contribution to the mortgage while the parties lived together entitled her to more than 60% of the marital residence. We agree with Wife's argument.

With certain exceptions, marital property is "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 . . . regardless of how legal title is held." S.C. Code Ann. § 20-3-630(A) (2014). "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, 456, 759 S.E.2d 419, 426 (2014) (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). Moreover, "[u]pon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Id.* (quoting *Morris*, 335 S.C. at 531, 517 S.E.2d at 723).

In making an equitable apportionment of marital property, the family court must give weight in such proportion as it finds appropriate to the following factors: (1) the duration of the marriage; (2) marital fault; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value, including contributions as homemaker; (4) the income and earning potential of the parties and the opportunity for future acquisition of capital assets; (5) the parties' physical and emotional health; (6) additional training or education needed; (7) the parties' nonmarital property; (8) the existence or nonexistence of vested retirement benefits; (9) the award of alimony; (10) the desirability of awarding the family home; (11) tax consequences; (12) prior support obligations; (13) liens and any other encumbrances upon the marital property; (14) child custody arrangements and obligations; and (15) any other factors the court considers relevant. S.C. Code Ann. § 20-3-620(B) (2014).

These criteria are intended to guide the family court in exercising its discretion over apportionment of marital property. *Johnson v. Johnson*, 296 S.C. 289, 297, 372 S.E.2d 107, 112 (Ct. App. 1988). "The ultimate goal of [equitable] apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership." *King v. King*, 384 S.C. 134, 143, 681 S.E.2d 609, 614 (Ct. App. 2009).

The record reflects that Wife, using premarital funds that transmuted into marital property, contributed $100,000 of the $115,000 down payment for the acquisition of the marital residence. *See Dawkins v. Dawkins*, 386 S.C. 169, 173, 687 S.E.2d 52, 54 (2010) (per curiam) ("[A] transmutation of inherited nonmarital property into marital property [does] not extinguish the inheritor's right for special consideration upon divorce."), *abrogated on other grounds by Lewis*, 392 S.C. at 385–86, 709 S.E.2d at 651–52; *id.* at 173–74, 687 S.E.2d at 54 ("[T]he correct way to treat [an] inheritance is as a contribution by [the inheriting party] to the acquisition of marital property [and that] [t]his contribution should be taken into account in determining the percentage of the marital estate to which [the inheriting party] is equitably entitled upon distribution." (alterations in original) (quoting *Toler v. Toler*, 292 S.C. 374, 380 n.1, 356 S.E.2d 429, 432 n.1 (Ct. App. 1987))); *id.* (overruling *Cooksey v. Cooksey*, 280 S.C. 347, 312 S.E.2d 581 (Ct. App. 1984), to the extent it may be read to allow a family court to separate and subtract the inheritance amount from the marital estate and then award this "special equity" to the inheritor in addition to his or her portion of the court-ordered division of the marital estate). Post filing, Wife assumed sole responsibility for the mortgage payments and reduced the mortgage balance from $97,060.15 at the time of filing to $84,002.94 at the time of trial.

Additionally, the record reveals that the parties were married for fifteen years; lived in the marital residence for seven years; and Husband engaged in marital misconduct, which caused the breakup of the marriage. Wife was the primary homemaker and the primary caregiver of Son. Both parties made similar income contributions during the marriage. The family court found that Wife's nonmarital accounts decreased throughout the marriage and continued to decrease post-filing, and Husband failed to provide reliable financial documentation or testimony regarding his finances. After de novo review, we find the family court's 60/40 split of the marital residence, in favor of Wife, resulted in an unfairly low apportionment to Wife in light of the aforementioned circumstances. *See Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 55 (Ct. App. 2006) ("Even if the family court commits error in distributing marital property, that error will be deemed

harmless if the overall distribution is *fair*." (emphasis added)); *see also* S.C. Code Ann. § 20-3-620(B) (2014) (listing factors the family court must consider when making an equitable apportionment of marital property); *Fredrickson v. Schulze*, 416 S.C. 141, 149, 785 S.E.2d 392, 397 (Ct. App. 2016) (finding the wife's substantial down payment on the marital residence with premarital funds should be taken into account in determining the equitable distribution of the martial estate and affirming the $60,000 consideration given to the wife).

Based on our view of the preponderance of the evidence, the more equitable division of the marital residence would be 70% to Wife and 30% to Husband. *See Lewis*, 392 S.C. at 384–85, 709 S.E.2d at 651–52 (holding that, in appeals from the family court, the appellate court reviews factual issues de novo and may find facts in accordance with its own view of the preponderance of the evidence); *Fredrickson*, 416 S.C. at 157, 785 S.E.2d at 401 (affirming the family court's 70/30 equitable distribution of the marital estate in favor of the wife when the parties' marriage lasted seven years, the wife contributed 84% of the parties' income, the wife was the primary homemaker and caregiver to the parties' son, the wife brought significant nonmarital property into the marriage, and the wife's wealth decreased during the marriage); *Brandi v. Brandi*, 302 S.C. 353, 357–58, 396 S.E.2d 124, 126–27 (Ct. App. 1990) (per curiam) (affirming a 70/30 division in equitable distribution).

F. Attorney's Fees

Last, Husband asserts the family court erred by giving too much weight to Husband's conduct during trial in awarding Wife attorney's fees. We disagree.

In determining whether to award attorney's fees, the family court should consider the following factors: "(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." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). To determine the amount of an award of attorneys' fees, the 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). When a party's uncooperative conduct in discovery and litigation increases the amount of the other party's fees and costs, the court can use this as an additional basis to

award the other party attorney's fees. *Spreeuw v. Barker*, 385 S.C. 45, 72–73, 682 S.E.2d 843, 857 (Ct. App. 2009).

In the instant case, the family court ordered Husband to pay $30,000 of the $46,407.01 that Wife requested for attorney's fees and costs at the time of trial.[6] First, upon de novo review we find the family court considered the appropriate factors in awarding Wife attorney's fees, including that Wife prevailed on the issues of primary custody of Son and equitable distribution. *See E.D.M.*, 307 S.C. at 476, 415 S.E.2d at 816 (noting the family court should consider, among other things, the beneficial results obtained by the attorney). Additionally, during its discussion of attorney's fees in the final order, the family court specifically found Husband was uncooperative during discovery, in settlement negotiations, and at trial. *See Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010) ("This court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees."); *Spreeuw*, 385 S.C. at 72–73, 682 S.E.2d at 857 (affirming the family court's award of attorney's fees and costs based on the appropriate factors and taking into account the father's uncooperative conduct in discovery and his evasiveness in answering questions with respect to his finances). Thus, we affirm the family court's award of $30,000 to Wife for attorney's fees at the time of trial.[7]

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[6] Wife incurred $59,071.81 in fees and costs, $12,664.80 of which the family court awarded to Wife prior to trial.

[7] We note that Husband lists additional grounds in his brief for overruling the family court, including: (1) for purposes of calculating alimony and child support, the record does not support imputing $200 per month in additional income to Husband; (2) in determining alimony, the family court improperly considered the impact of Son's special needs on Wife's ability to work under subsection 20-3-130(C)(9) of the South Carolina Code (2014); and (3) Wife is not entitled to attorney's fees because the family court did not consider (i) the income-to-attorney's fee ratio, (ii) Wife's ability to pay her own fees, and (iii) the parties' respective incomes and the effect a fee award would have on their respective standards of living.

We decline to address the three aforementioned issues as these issues are not preserved for our review. We find that, by failing to substantiate issues one and two with supporting case law, Husband abandoned both issues on appeal. *See Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (holding the appellant bears the burden of convincing the appellate court that the preponderance

II. Wife's Cross-Appeal

On cross-appeal, Wife asserts the family court erred in (1) apportioning Wife insufficient equity in the marital residence;[8] (2) not including Husband's unaccounted-for funds in the marital estate; (3) making Wife pay Husband his equitable distribution in post-tax, non-retirement assets; and (4) not awarding Wife attorney's fees incurred in defending Husband's motion to reconsider. We address each remaining argument in turn.

A. Unaccounted-for Funds

Wife contends the family court erred in its equitable distribution award by not crediting Husband with funds for which he could not account. We disagree.

For the family court to properly include property within the marital estate, two factors must coincide. *Shorb v. Shorb*, 372 S.C. 623, 632, 643 S.E.2d 124, 129 (Ct. App. 2007); *see also* S.C. Code Ann. § 20-3-630(A) (2014). "First, the property must be acquired during the marriage" and "[s]econd, the property must be owned on the date of filing or commencement of marital litigation." *Shorb*, 372 S.C. at 632, 643 S.E.2d at 129. The ownership prong may present problematic issues if the family court overlooks assets that should have been included in the marital estate, but were non-existent on the date of filing due to a party's misconduct. *Id.* "Consequently, if a party attempts to unfairly extinguish ownership of marital property before the date of filing or to improperly delay ownership of marital property until after litigation is commenced, the family court must include that property in the marital estate." *Id.* Concluding otherwise would "promote fraud, reward misconduct, and contravene legislative intent." *Id.*

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of the evidence is against the family court's findings); *Tirado v. Tirado*, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct. App. 2000) (deeming an issue abandoned if the argument in the brief is not supported by authority or is only conclusory). Further, we find issue three unpreserved because Husband failed to raise the issue in his Rule 59(e) motion. *See Sweeney v. Sweeney*, 420 S.C. 69, 82, 800 S.E.2d 148, 154 (Ct. App. 2017) (finding because the husband did not raise an argument in his Rule 59(e) motion—thereby not allowing the family court the opportunity to rule upon the issue or correct any alleged mistakes in its final order—the issue was not preserved on appeal).

[8] Wife's marital estate apportionment issue is discussed *supra*, Part I.E.

(quoting *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d 654, 659 (Ct. App. 2004)). However, such property will be included in the marital estate only if the party seeking to classify the property as marital property introduces clear and convincing evidence of fraud in relation to the disposal of the property. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options."); *see also Devlin v. Devlin*, 89 S.C. 268, 272, 71 S.E. 966, 968 (1911) ("[F]raud will not be presumed, but [one] who alleges it must prove it."); *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("Fraud must be shown by clear and convincing evidence.").

Specifically, Wife argues the family court should have credited Husband with: (1) $20,000 Husband transferred to his father's account in Bulgaria on January 3, 2007; (2) $5,000 Husband transferred to his father's account in Bulgaria on July 3, 2008; (3) $5,000 Husband transferred to his mother's account in Bulgaria on April 15, 2013; (4) $29,821.37 Husband liquidated from his Bank of America certificate of deposit (CD) shortly before July 29, 2008; and (5) $10,500 Husband withdrew from his Bank of America account on October 10, 2010.

As an initial matter, we find the family court did credit Husband with (1) the $20,000 Husband transferred to his father's account in Bulgaria on January 3, 2007; (2) the $5,000 Husband transferred to his father's account in Bulgaria on July 3, 2008; and (3) the $5,000 Husband transferred to his mother's account in Bulgaria on April 15, 2013. After finding Husband's testimony not credible regarding the source of the Fibank funds, the family court equated the $30,000 in the Fibank account as funds from the three aforementioned transfers and ordered the Fibank account to be divided equally between the parties. Thus, we find the family court accounted for the three Bulgarian account transfers and affirm the family court's inclusion of these funds in the marital estate.

With respect to the $29,821.37 Husband liquidated from his Bank of America CD and the $10,500 Husband withdrew from Bank of America on October 10, 2010, we find no error in the family court's exclusion of these funds from the marital estate. We find Husband's disposal of these funds before the date of filing negated the ownership prong necessary to classify the funds as marital property. *See Shorb*, 372 S.C. at 633, 643 S.E.2d at 130 (finding the sale of stock options, which were acquired during the marriage but were sold before the date of filing, negated the ownership prong, which was necessary to classify the proceeds from the sale of the options as marital). Thus, the $29,821.37 and the $10,500 would be considered

marital property only if Wife introduced clear and convincing evidence of fraud, in relation to Husband's disposal of the funds. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options.").

In support of her assertion that Husband fraudulently disposed of the funds, Wife provided Husband's bank statements which evidenced Husband withdrew the funds and liquidated the CD. However, despite the family court's finding that Husband's financial testimony was not credible,[9] Wife failed to provide clear and convincing evidence that established how the funds were used—whether for marital or nonmarital purposes—after the funds were withdrawn and liquidated. Without further evidence to contravene Husband's assertion that he may have utilized the funds for marital purchases, we find Wife failed to provide clear and convincing evidence of Husband's fraud. *See id.* (asserting that, because the wife presented no additional corroborating evidence beyond her assertion of fraud contained in her affidavit, the court "cannot presume [the h]usband acted in a fraudulent manner" when the husband asserted the wife received money from the sale proceeds and the husband paid the wife's debts with the proceeds). Accordingly, because the ownership prong is negated by Husband's disposal of the $29,821.37 and the $10,500 before the date of filing and because no clear evidence exists that Husband committed fraud when he disposed of the funds, we affirm the family court's exclusion of the $29,821.37 and the $10,500 from the marital estate.

B. Tax Consequences

Wife argues the family court erred in apportioning Wife predominantly illiquid and pre-tax retirement assets in the equitable distribution without considering the tax consequences of a forced liquidation. We disagree.

The family court is required to consider the tax consequences to each party resulting from equitable apportionment. *See* S.C. Code Ann. § 20-3-620(B)(11) (2014). However, if the apportionment order does not contemplate the liquidation

[9] The family court found Husband's testimony was not credible regarding the source of his funds, the location of various funds after they were withdrawn from his bank accounts or liquidated from the CD, and his purpose for transferring funds to the Bulgarian bank accounts. The court also did not find credible Husband's testimony that he transferred part of the funds to his parents as repayment for a $30,000 debt when Husband produced no evidence of an actual debt obligation.

or sale of an asset, then the family court should not consider the tax consequences from a speculative sale or liquidation. *Wooten v. Wooten*, 364 S.C. 532, 543, 615 S.E.2d 98, 103 (2005); *see also Bowers v. Bowers*, 349 S.C. 85, 97–98, 561 S.E.2d 610, 617 (Ct. App. 2002) (finding no error when the family court did not expressly consider the tax consequences resulting from its award to the wife of one-half the value of the husband's 401(k) account because the court's order did not require or contemplate liquidation of the account).

The family court awarded Wife two major assets in the equitable distribution—the marital residence and Wife's Jones Ford 401(k). Wife argues that, because she will remain in the marital residence to accommodate Son's need for stability, she will be forced to liquidate her pre-tax retirement Jones Ford 401(k), which will result in tax consequences and penalties, in order to pay Husband's equitable distribution award. However, the order does not contemplate the sale of the marital residence or the liquidation of Wife's 401(k). We find no error and affirm the family court on this issue.

C. Attorney's Fees

Last, Wife argues the family court erred in not awarding her attorney's fees and costs for successfully defending Husband's motion to reconsider. Specifically, Wife argues she achieved successful results in defending Husband's motion that raised fifty-four issues in a cursory manner. We agree.

In light of our decision to reverse the family court's apportionment of the marital residence, we find it appropriate to reconsider the family court's denial of Wife's request for attorney's fees and costs for defending Husband's motion to reconsider. *See Woods v. Woods*, 418 S.C. 100, 124, 790 S.E.2d 906, 918 (Ct. App. 2016) ("Whe[n] beneficial results are reversed on appeal, the attorney's fee award, or lack thereof, must also be reconsidered."). The appellate court may reverse an attorney's fees award when the beneficial results achieved by trial counsel are reversed on appeal. *Myers v. Myers*, 391 S.C. 308, 321, 705 S.E.2d 86, 93 (Ct. App. 2011).

The family court awarded Wife $42,664.80 of the $59,071.81 in attorney's fees and costs that Wife incurred at the time of trial. The family court denied Wife's fee request for an additional $1,350 in attorney's fees and costs for defending

Husband's motion to reconsider.[10] Accordingly, Wife is responsible for $17,757.01 of her own attorney's fees and costs. In considering each party's ability to pay their own attorney's fees, we note the family court awarded $41,164 in liquid assets to Husband and only $6,552 in liquid assets to Wife in the equitable distribution. Moreover, throughout the parties' marriage and subsequent filing, Wife's income from her nonmarital Brown Advisory accounts decreased and will continue to decrease—creating a greater discrepancy between the parties' income—if Wife depletes her nonmarital Brown Advisory accounts to pay her attorney's fees and costs.

Consequently, given the allocation of liquid assets, the parties' respective financial conditions, each party's ability to pay their own attorney's fees, and our favorable disposition of Wife's equity in the marital residence on appeal, we reverse the family court's denial and award Wife the $1,350 in attorney's fees sought for defending Husband's motion to reconsider. *See E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816 (stating that when determining whether to award attorney's fees and costs 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) effect of the attorney's fee on each party's standard of living"); *see also Buist v. Buist*, 410 S.C. 569, 579, 766 S.E.2d 381, 386 (2014) (Pleicones, C.J., concurring) (recognizing "the threshold question of entitlement [to fees] always turns, at least in part, on the beneficial results obtained").

CONCLUSION

Based on the foregoing analysis, the family court's order is

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and MCDONALD, JJ., concur.

[10] Wife filed an affidavit seeking compensation for 4.5 hours of work billed at $300 per hour for defending Husband's motion to reconsider.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Bradley Williams and Robert Blair Kline, Jr., Appellants,

v.

Merle S. Tamsberg, Respondent.

Appellate Case No. 2016-000886

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5596
Submitted June 1, 2018 – Filed September 19, 2018

AFFIRMED

Robert A. Kerr, Jr., and Lesley Anne Firestone, both of Moore & Van Allen, PLLC, of Charleston, for Appellants.

Matthew Tillman, of Womble Bond Dickinson (US) LLP, and David M. Swanson and Jane Bouch Stoney, both of Haynsworth Sinkler Boyd, PA, all of Charleston, for Respondent.

WILLIAMS, J.: In this civil matter, James Bradley Williams and Robert Blair Kline, Jr. (collectively, Appellants) appeal the master-in-equity's order denying their motion for summary judgment and granting Merle Tamsberg's motion for

summary judgment. On appeal, Appellants argue the master erred in (1) finding the easement encumbering Appellants' property, 45 Legare Street, was an easement appurtenant rather than an easement in gross; (2) finding the 1971 restrictive covenant, given by Appellants' predecessor-in-title, was valid and runs with the land; and (3) finding Appellants' claims were barred by the statute of limitations. We affirm.[1]

FACTS/PROCEDURAL HISTORY

This appeal arises from a dispute regarding a recorded easement in Charleston, South Carolina. The easement is an eight-foot-wide alley or driveway, which encumbers the servient parcel located at 45 Legare Street (45 Legare) currently owned by Appellants. The easement benefits the adjacent, dominant parcel at 47 Legare Street (47 Legare) currently owned by Tamsberg. W.G. Hinson previously owned both parcels as one property, but in 1911, Hinson divided his property into two adjacent lots, a southern parcel, 45 Legare, and a northern parcel, 47 Legare.[2] In an April 15, 1911 deed (the 1911 Deed), Hinson conveyed 47 Legare to his niece, Julia Dill, while reserving 45 Legare for himself. The 1911 Deed included the following clause:

> Also, the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through[,] and upon the alley-way eight (8) feet wide as a drive way or carriage way, situate, lying[,] and being immediately to the south of [47 Legare], and being the southern boundary of said [47 Legare].

The easement described in the 1911 Deed was located entirely on 45 Legare and ran from Legare Street to the western lot line that bordered the Saint Peter's graveyard wall. Subsequently, title to both 45 Legare and 47 Legare passed to

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

[2] Hinson's combined property was known as 47 Legare Street before the division. Both 45 and 47 Legare are bounded on the east by Legare Street and on the west by a wall bordering the Saint Peter's Church graveyard.

different owners.[3] On April 5, 1971, the Bank—having title to 47 Legare at the time as executor of Julia's estate—and Black—owner of 45 Legare at the time—executed and recorded simultaneous documents, in which the Bank conveyed the western, rear portion of the easement to Black by deed and in which Black executed a restrictive covenant (the Covenant) that sought to reaffirm the existence of the original easement, "to the extent as agreed upon by the parties,[4] by execution of the within covenant." In their respective documents, both Black and the Bank provided verbatim descriptions of the original easement from the 1911 Deed and referenced a 1971 Cummings & McCrady, Inc. plat of 47 Legare (Cummings & McCrady plat), which showed both the area of 45 Legare encumbered by the easement to 47 Legare and the western, rear portion of the easement sold to Black. The Covenant also provided the following:

> Black, the owner in fee simple of [45 Legare], hereby covenants and agrees that the strip of land located on the west side of Legare Street in the City of Charleston, State of South Carolina, being eight feet in width and 101.25 feet in depth and being more particularly shown on [the Cummings & McCrady plat], as enclosed within the letters, B, E, F, H, B, the line F, H being the terminus

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[3] For clarity, we provide the complete chain of title for each property from the 1911 division to the current owners. We start with 45 Legare. Hinson retained 45 Legare until his death in 1917, and in 1919, his estate conveyed 45 Legare to his three nieces—Julia, Pauline Dill, and Frances Dill. In 1920, Julia and Frances conveyed their interest in 45 Legare to Pauline, who, in 1936, sold 45 Legare to Henry deSaussure. In 1955, Henry bequeathed 45 Legare to Margarette deSaussure Black. Black retained title to 45 Legare until her death in 1997, at which point her estate devised the property to her sons. In 2004, Black's sons conveyed 45 Legare to Appellants.

As for 47 Legare, Julia retained title to 47 Legare until her death in 1970, when the South Carolina National Bank of Charleston (the Bank) assumed title as executor of Julia's estate. In 1971, the Bank sold 47 Legare to Nancy Linton, who then sold 47 Legare to Tamsberg and her now deceased husband in 1988.

[4] The record is unclear whether "parties" refers to the original parties to the 1911 Deed or Black and the Bank.

> thereof, shall be subject to the following restrictions, limitations[,] and rights as to the future use of said strip of land:
>
> (1) That no building or other structure shall be erected thereon.
>
> (2) That no obstruction shall be placed or permitted to remain thereon so as to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway to the owner of [47 Legare].
>
> The aforesaid covenants, restrictions[,] and limitations shall be covenants running with the land and shall be binding on Margarette deSaussure Black, her heirs, assigns[,] and successors in title.

Tamsberg's deed to 47 Legare—and the deed to her predecessor-in-title—included the following provision with the conveyance of the property on 47 Legare:

> Together an easement, to run with the land, over an adjoining strip of land shown on [the Cummings & McCrady] plat as enclosed within the letters B, E, F, H, and B, for ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway for the owner of [47 Legare] described above, as conveyed by W.G. Hinson less a portion shown on [the Cummings & McCrady] plat within the letters F, G, C, H[,] and F, ... The strip covered by said easement is also covered by restrictive covenants . . . .

Appellants' deed to 45 Legare, however, did not contain the same provision, but did include a clause subjecting 45 Legare's title to all easements and restrictions of record.

Appellants acknowledged they were aware of the easement at or near the time they obtained title to 45 Legare in 2004. However, Appellants considered the easement

abandoned because, in 2004, Tamsberg finished replacing a chain-link fence with a masonry wall that ran alongside the border of 45 Legare in the area where the easement previously extended. The wall contained a three-to-four foot gate, which provided access to 47 Legare from the easement on 45 Legare and was located near the site of a former garage that previously existed in the rear of 47 Legare.[5] Appellants indicated the easement "was never used as a carriage way" or used by Tamsberg, herself. Instead, Appellants stated "the only time [the easement] was ever used" was to allow Tamsberg's landscapers to walk down the driveway to use the gate.[6] Tamsberg, however, claimed she—as well as family members, guests, "tradesmen, and other permittees"—continuously used the easement since she purchased 47 Legare in 1988 because it provided the only access to the rear of 47 Legare for large-scale appliances, equipment, and machinery; and because it provided access to the only suitable area for off-street parking for her property. Tamsberg also claimed she had driven a golf cart down the easement and parked in the rear of 47 Legare.

Appellants claimed that in 2014, ten years after they purchased 45 Legare, Tamsberg approached and informed them that their fence—erected in the easement—"[was] coming down" and she would be using their "driveway as easement to the back."[7] Appellants filed a complaint in Charleston County in September 2014, and subsequently amended their complaint in September 2015. In their amended complaint, Appellants requested: (1) a declaratory judgment ruling that the easement was abandoned, the Covenant was abandoned, and the burdened property should revert to Appellants; (2) injunctive relief preventing Tamsberg from removing Appellants' fence; (3) that the circuit court find the grant of the easement described in the 1911 Deed and the Covenant was an easement in gross that could not be transferred, and as a result, that the easement terminated as a matter of law; and (4) that the circuit court find that each instance of Tamsberg using the easement was a separate act of trespass because Tamsberg used the easement as a walkway, which was outside the scope of the easement's intended

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[5] The gate still existed at the time of the hearing. The site of the former garage was a residential space as of 2004.

[6] At his deposition, Appellant Williams testified Tamsberg asked for, and was given, Appellants' permission for her landscapers to walk down the easement.

[7] The record is not clear as to whether the fence is the same as the wall Tamsberg erected in 2004 or if it is a different fence altogether.

use as a carriage or driveway. The parties consented to reference to the master, and later, filed cross motions for summary judgment under Rule 56, SCRCP. The master held a hearing on Appellants' motion for summary judgment on March 2, 2016, and held a hearing on Tamsberg's motion for summary judgment on March 16, 2016. On March 29, 2016, the master filed an order granting Tamsberg's motion and denying Appellants' motion. This appeal followed.

ISSUES ON APPEAL

I. Did the master err in finding the easement in question was an easement appurtenant and not an easement in gross?

II. Did the master err in finding the restrictive covenant given by Appellants' predecessor-in-title in 1971 was valid and runs with the land?

III. Did the master err in finding Appellants' claims barred by the statute of limitations?

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). "Summary judgment is not appropriate whe[n] further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333.

Determining whether an easement exists is a question of fact in a law action, and when tried by a judge without a jury, is subject to an "any evidence" standard of review. *Tupper v. Dorchester Cty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). "However, the determination of the extent of a grant of an easement is an

action in equity." *Id.* "The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement." *Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362 (Ct. App. 2012). Thus, when a party appeals a judgment pertaining to the extent of an easement, the appellate court may take its own view of the preponderance of the evidence. *In re Estate of Kay*, __ S.C. __, 816 S.E.2d 542 (2018). However, an appellate court still affords a degree of deference to the master because of his superior position to judge the witnesses' credibility. *Id.* Therefore, "the appellant is not relieved of his burden of convincing the appellate court the [master] committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

Appellants argue the master erred in finding an appurtenant easement to 47 Legare and not an easement in gross to Julia. We disagree.

"An easement is a right given to a person to use the land of another for a specific purpose." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). An easement may be created by an express written grant. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965). "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Id.* "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. *Easements* § 57 (1996)). When interpreting a deed, the primary rule of constructing the deed is to ascertain and effectuate the parties' intentions, unless that intention contravenes some well-settled rule of law or public policy. *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806. "The intention of the grantor must be found within the four corners of the deed." *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987)).

In *Tupper v. Dorchester County*, our supreme court distinguished between an easement in gross and an easement appurtenant:

> The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Whe[n] language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted.

326 S.C. at 325–26, 487 S.E.2d at 191 (footnote and citations omitted).

In the present case, Appellants argue the master erred because two of the essential elements of an appurtenant easement—terminus on the land of the party claiming an easement and the easement is essentially necessary to the enjoyment of the dominant parcel—were missing. We address each argument in turn.

a. Terminus

Appellants assert the easement in the 1911 Deed cannot be construed as an easement appurtenant and must be an easement in gross because the easement did not have a terminus on 47 Legare, was entirely on 45 Legare, and ran from Legare Street to the westernmost property line. Moreover, Appellants contend the reaffirmed easement in the 1971 Covenant, which shortened the length of the easement, did not transform the easement from an easement in gross to an easement appurtenant. Specifically, Appellants argue the reaffirmed easement still did not create a terminus on 47 Legare because the newly created terminus in the deed—identified as lines F-H—was entirely on 45 Legare. We disagree.

The absence of a terminus on the dominant estate is fatal to a claim of an appurtenant easement. *See Shia v. Pendergrass*, 222 S.C. 342, 351, 72 S.E.2d 699,

703 (1952) ("[A]n essential feature of an appurtenant easement or way is that it have one of its termini on the dominant property.").

In granting Tamsberg's summary judgment motion, the master relied on *Whaley v. Stevens*, 21 S.C. 221 (1884), to conclude that Tamsberg and her predecessors-in-title enjoyed an easement appurtenant. The master stated *Whaley* established that, in South Carolina, the terminus requirement only requires "the dominant estate be contiguous or adjacent to the easement or right of way." Appellants contend *Whaley* is unclear on the issue or definition of terminus. As support, Appellants cite *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944), in which our supreme court found the easement in question—an alleyway that served as the appellant's border—was an easement in gross rather than appurtenant when the easement lacked a terminus on the appellant's property. We, however, find *Whaley* is applicable to the outcome of the instant case whereas *Steele* is distinguishable.

In *Whaley*, our supreme court found that a terminus could not be on one's land if the easement in question did not touch the property of the one claiming it. 21 S.C. 224–25. In that case, the supreme court examined whether Whaley was entitled to use a right of way that ran over Stevens's land and led to a creek as an easement in gross or easement appurtenant. *Id.* at 221–22. After distinguishing between an easement appurtenant and easement in gross, the court stated that an essential element of an easement appurtenant is having one of its termini on the land "to which it is claimed to be appurtenant." *Id.* at 224. The court noted the "more fatal objection" to Whaley's complaint was not alleging that the claimed appurtenant right of way began or even led from his land. *Id.* Indeed, the court found that the right of way did not even appear to touch Whaley's property at any point or even "reach[] to it." *Id.* Importantly, the court could not find the right of way in question to be appurtenant to Whaley's land when the right of way did not have one of its termini on Whaley's property and when the right of way started and ended on Stevens's land. *Id.* at 224–25. Thus, the dominant estate must at the very least touch the claimed easement to enable the easement to qualify as appurtenant.

However, in *Steele*, our supreme court found that the appellant did not have an easement appurtenant in an alleyway because the alleyway did not have a terminus on the appellant's land, even though the alleyway was the northern boundary of appellant's property, when the alleyway began on a public right of way and ended on the land of the respondent. 204 S.C. at 131–32, 28 S.E.2d at 647. In that case, the appellant's predecessor-in-title, Smith, and the respondent owned adjacent lots.

Id. at 126–27, 28 S.E.2d at 645. Smith and the respondent recorded reciprocal deeds, which created an easement in an alleyway that ran from the street adjacent to Smith's lot on the east; crossed over Smith's land and onto the respondent's property; and then ran over the respondent's property before dead-ending on the respondent's western property line. *Id.* at 127, 28 S.E.2d at 645. Smith later subdivided her property lying south of the alleyway and created three adjacent parcels, which included the appellant's parcel that was bounded on the north by the alleyway and on the east by the public street. *Id.* at 127–28, 28 S.E.2d at 646. The appellant insisted that the parties to the deed intended to create an easement appurtenant in the alleyway. *Id.* at 132, 28 S.E.2d at 647. Our supreme court, however, found the alleyway was not an easement appurtenant, despite the deed's inclusion of the language "heirs and assigns forever," because the easement did not meet the elements of an easement appurtenant as the easement did not have a terminus on the appellant's lot, but instead, only touched it as a boundary before terminating on the respondent's westernmost property line. *Id.*

While we recognize that South Carolina requires an easement appurtenant to have a terminus on the property of the party claiming the easement, no South Carolina case explicitly defines the terminus requirements. However, we find that determining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case. *See Pendergrass*, 222 S.C. at 351, 72 S.E.2d at 703 (finding "[t]he evidence fails to establish that the alleged right of way has a terminus on respondent's lot, and the absence of a terminus on his property is fatal to his claim to an appurtenant easement," but not otherwise defining the terminus requirements); *Hayes v. Tompkins*, 287 S.C. 289, 292–93, 337 S.E.2d 888, 890–91 (Ct. App. 1985) (finding evidence that an implied easement of necessity had a terminus on the dominant land supported a finding that the easement was appurtenant rather than in gross).

Upon our examination of relevant case law, we find the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate. *See Whaley*, 21 S.C. at 224–

25 (finding a right of way could not be appurtenant to the purported dominant estate when the right of way did not have a terminus that touched or reached the dominant estate); *but see Steele*, 204 S.C. at 131–32, 28 S.E.2d at 647 (finding no terminus on appellant's land when an alleyway running adjacent to the appellant's property began at the public thoroughfare on the east of the appellant's property, continued westward over the land of the appellant's predecessor-in-title, then continued over the respondent's property, extended beyond appellant's property line, and ended on respondent's westernmost property line). This rule statement comports with other jurisdictions that similarly require an easement appurtenant to have a terminus on the land of the party claiming it. *See Newman v. Michel*, 688 S.E.2d 610, 618 (W. Va. 2009) (finding the appellants' argument that the easement in question was an easement appurtenant failed in part because the easement did not connect to the dominant estate, but instead ran over the servient estate and connected to the road leading to the dominant estate); *Hodges v. Lambeth*, 731 S.W.2d 880, 882 (Mo. Ct. App. 1987) ("An essential legal attribute of an easement appurtenant for right of way purposes is that one terminus of the right of way must lie on the land to which it is claimed to be appurtenant."); *id.* ("The Rethmeier tract does not appear to meet that qualification as the right of way *went through that tract*; *it did not terminate there*." (emphasis added)).

Although Appellants rely on *Steele* to demonstrate that an easement does not terminate on the purported dominant estate simply by touching the property, we find *Steele* is distinguishable from the instant case. Here, the easement did not extend beyond the western property line of 45 Legare or 47 Legare, whereas the alleyway in *Steele* extended beyond the appellant's property and ended at the respondent's westernmost property line. Additionally, Appellants assert that similar to *Steele*, a grantor cannot change the nature of the easement simply by including the language "to run with the land." While that premise is well established in South Carolina, we do not find it applicable here because the language in the 1911 Deed demonstrates Hinson's intent to create an easement appurtenant. Specifically, Hinson described the property at 47 Legare and included "the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through[,] and upon the alley-way eight (8) feet wide" lying "immediately to the south of [47 Legare] and being the southern boundary of said [47 Legare]." *See Tupper*, 326 S.C. at 325–26, 487 S.E.2d at 191 ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially

necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance.").

Hinson clearly intended that the driveway be an easement appurtenant, and furthermore, the evidence demonstrates that the elements of an easement appurtenant are met. *See Tupper*, 326 S.C. at 325, 487 S.E.2d at 191 ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof."). The record indicates that, at the time of the 1911 Deed, a garage existed at the rear of 47 Legare and the driveway was the only accessible method of reaching the garage. Additionally, the Cummings & McCrady plat, which was referenced in the 1971 Covenant, shows the existence of the structure at the rear of 47 Legare and located adjacent to the present-day gate, which allows access onto 47 Legare at a point where the easement ends. Not only does the easement touch 47 Legare as a southern boundary and does not extend beyond 47 Legare's boundary, nothing in the record indicates that Tamsberg was prevented from accessing 47 Legare directly from the easement. Indeed, Tamsberg directly accessed the property via the rear gate. This indicates the existence of a terminus onto 47 Legare. Because we find the parties who created the easement intended for it to be an easement appurtenant and because we find the easement has a terminus on 47 Legare, where the rear gate is located, we affirm the master on this issue.

b. Necessity

Appellants next contend the master erred in finding an easement appurtenant because the easement is not essentially necessary to the enjoyment of 47 Legare. We disagree.

"The principle is well settled that a right of way appurtenant cannot be granted, unless it is essentially necessary to the enjoyment of the land to which it appertains." *Kershaw v. Burns*, 91 S.C. 129, 133, 74 S.E. 378, 379 (1912). Generally, absent termination due to circumstances such as abandonment, estoppel, end of necessity, merger, release, or prescription by the servient estate, an easement appurtenant is perpetual and irrevocable. *See* 12 S.C. JURIS. *Easements* § 29 (1992). However, the end of a necessity appears to terminate an easement appurtenant that is implied by necessity and will not terminate an express easement. *See Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C.

460, 464 n.2, 441 S.E.2d 331, 334 n.2 (Ct. App. 1994) ("When an easement is implied by necessity, courts in other jurisdictions have held that the easement ceases at the time the necessity no longer exists. We have been unable to locate a South Carolina case that holds such. Here, however, the instant easement is expressly created by grant and the rules relating to implied easements of necessity do not apply." (citation omitted)); *see also* 12 S.C. JURIS. *Easements* §§ 29 through 34 (1992) (discussing various methods to terminate easements in South Carolina).

The master found Appellants presented no evidence demonstrating issues of material fact regarding whether the easement was necessary at the time of either the 1911 Deed or the 1971 Covenant. The master also found the easement was the only reasonable method for Tamsberg to bring large-scale equipment and tools to the rear of 47 Legare because 47 Legare's front gate was too narrow to permit large equipment or tools. Additionally, the master stated the easement provided the only adequate method of off-street parking for 47 Legare. Appellants contend, however, that while the easement may have been necessary to access a garage that existed in both 1911 and 1971, the easement is no longer essentially necessary to the enjoyment of 47 Legare because the garage no longer exists, Tamsberg can access the rear of 47 Legare from the front gate, Tamsberg's gate at the rear of 47 Legare is too narrow to allow passage of any vehicle, and the easement is no longer used as a driveway but is used primarily by workmen as a footpath.

Upon our review of the record, we find the easement was necessary at the time of its creation in 1911 and also at the time of its reaffirmation in 1971 because the parties to the 1911 Deed and the 1971 Covenant intended the easement provide access to a then-existing garage. *See K & A Acquisition Grp., LLC*, 383 S.C. at 581, 682 S.E.2d at 262 ("The intention of the grantor must be found within the four corners of the deed." (quoting *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392)); *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806 ("The intention of the parties here must be determined by a fair [interpretation] of the grant or reserve creating the easement."). Appellants' argument does not seem to dispute the easement's necessity at the time of creation, but rather, Appellants appear to argue that the easement terminates once it is no longer essential to the enjoyment of the property. However, "an appurtenant easement . . . [is] perpetual and irrevocable" when, as here, the easement was expressly created, thereby making the rules related to implied easements by necessity inapplicable. *See Smith*, 312 S.C. at 464 n.2, 441 S.E.2d at 334 n.2; *see also* 12 S.C. JURIS. *Easements* § 29.

We find the master properly granted Tamsberg's motion for summary judgment because Appellants did not present any evidence that the easement was not necessary at the time of its creation in 1911 or reaffirmation in 1971. Further, no issue of material fact is created when examining the easement's necessity to the present enjoyment of 47 Legare. Tamsberg's affidavit states that she has continuously used the easement since purchasing the property, she has driven a golf cart down the easement to the rear of 47 Legare, she uses the easement for off-street parking, and she needs the easement to bring large equipment and tools to the rear of 47 Legare. Even when viewing the evidence in favor of Appellants' statements that Tamsberg does not personally use the easement and it was only used by her landscapers, no issue of material fact exists to dispute the necessity of the easement to bring large-scale equipment and tools to the rear of 47 Legare. Appellants contend the front gate allows access to the rear, but they offer no evidence to refute the necessity of the easement to allow large equipment into the rear of 47 Legare. Thus, we find the master did not err in finding the easement necessary for 47 Legare's use, and we affirm.

In conclusion, we find the evidence reflects the original parties to the 1911 Deed intended to create an easement appurtenant, and the elements for an easement appurtenant existed at the time of its creation. Accordingly, we find the master did not err in granting Tamsberg's motion for summary judgment, and we affirm the master's order. [8]

[8] Appellants assert that Tamsberg's restrictive covenant argument is an alternative argument if the easement in the 1911 Deed was an easement in gross. Additionally, Appellants' underlying cause of action relies on the non-existence of an appurtenant easement, which is an action at law. Therefore, because our finding of a valid appurtenant easement is dispositive, we need not address Appellant's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing analysis, the master's order granting Tamsberg's motion for summary judgment is

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robin Carr Smith, Respondent/Appellant,

v.

James Rory Smith, Appellant/Respondent.

Appellate Case No. 2015-002455

Appeal From Pickens County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5597
Heard March 14, 2018 – Filed September 19, 2018

AFFIRMED IN PART AND REVERSED IN PART

David J. Brousseau, of McIntosh, Sherard, Sullivan & Brousseau, of Anderson, for Appellant/Respondent.

David A. Wilson, of Wilson & Englebardt, LLC, of Greenville, for Respondent/Appellant.

WILLIAMS, J.: In this domestic relations matter, James Rory Smith (Husband) appeals the family court's divorce decree, arguing the family court erred in (1) imputing minimum wage income to Robin Carr Smith (Wife) and awarding Wife permanent periodic alimony; (2) in the alternative, if alimony was appropriate, not ordering rehabilitative alimony; (3) awarding Wife a larger allocation of the marital estate; and (4) awarding Wife primarily income-producing assets while awarding Husband primarily deferred-compensation assets. On cross-appeal, Wife

asserts the family court erred in (1) failing to include Husband's bonus in the marital estate; (2) allocating payment of the 401(k) mortgage loan to Wife; (3) finding that the parties' 208 Wescott property transmuted into marital property; (4) in the alternative, if the 208 Wescott property is marital property, failing to expressly consider Wife's "special equity" regarding Wife's nonmarital funds used to acquire the property; and (5) unfairly apportioning the marital estate. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on February 28, 2003. The parties had twins—a son and a daughter—who were ten years old at the time of the divorce hearing. This was the second marriage for both parties, and Husband had two adult children from his previous marriage. Wife received a high school education and Husband attended two years of college.

After getting married, the parties lived in Wife's premarital home in Roswell, Georgia, where Wife worked in the insurance-claims industry, earning an income of approximately $66,000. Husband maintained stable employment with Duke Energy. Husband's starting salary with Duke Energy in 2004 was $92,821; however, after receiving substantial pay increases throughout the marriage, Husband earned $182,128.10 in 2014 as a senior nuclear reactor operator. Husband's 2014 income included his annual incentive pay bonus of $21,522.03 and overtime pay of $20,369.64.

In 2005 Wife sold her premarital home in Georgia, and the parties moved to South Carolina where they built their current residence at 208 Wescott. Upon selling Wife's premarital home, Wife deposited the sale proceeds into the SunTrust bank account that Husband also deposited his income. The parties utilized $90,000 of the sale proceeds in the SunTrust account as a down payment on 208 Wescott. However, the mortgage and title for 208 Wescott were solely in Wife's name. When the parties moved into 208 Wescott, they agreed Wife would quit her job to become a stay-at-home mother for their newborn twins, resulting in Wife's unemployment for a majority of the marriage. Accordingly, Husband's income was the parties' sole income at the time and was used to pay for the 208 Wescott

mortgage and later improvements to the property.[1] In subsequent years, the parties purchased six income-producing rental properties with Husband's income. Throughout the marriage, Wife managed the rental properties, which brought in a net income of $1,095 per month after the mortgage payment.

Wife testified that, in 2008, she discovered Husband placed and answered ads soliciting extra-marital relations on Craigslist and dating websites. When Wife confronted Husband and asked him to participate in counseling, Husband refused. Wife further testified that, in 2012, she discovered Husband was still engaged in extra-marital relations, and Husband and his paramour solicited third parties on Craigslist to engage in group sex. Husband admitted he committed adultery with numerous women throughout the marriage and engaged in unprotected sex twice; however, Husband denied he engaged in group sex. Husband testified he began committing adultery in 2008 due to Wife's "severe lack of affection."[2]

On December 27, 2013, Wife filed an action in family court, seeking a divorce on the grounds of adultery, custody of the minor children, alimony, equitable division of the marital estate, attorney's fees and costs, and related relief. Husband answered and counterclaimed, seeking separate support and maintenance, equitable division of the marital estate, resolution of all issues related to the parties' minor children, attorney's fees and costs, and related relief. On April 16, 2015, the family court issued a final divorce decree, granting Wife a divorce on the ground of Husband's adultery.

The family court determined it was not reasonable for Husband to sustain earning his 2014 overtime pay of $20,369.64, but it was reasonable for Husband to earn at least $12,000 in overtime pay. Based on $12,000 in overtime pay, the court determined Husband's annual earning capacity was $174,000. The family court imputed minimum wage income to Wife, noting the court "did not have sufficient evidence on which to base a determination of Wife's earning potential." The

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[1] Husband testified that $50,000 in improvements were made to 208 Wescott during the marriage.

[2] Based on the circumstances of the case, the family court found Wife's decision to refrain from sex with Husband was reasonable.

family court awarded Wife 57.2% and Husband 42.8% of the $1,018,909[3] gross marital estate; $12,000 for attorney's fees and costs; custody of the parties' two minor children; specified visitation for Husband; and granted Wife's request to relocate with the minor children to Jefferson, Georgia. The family court ordered Husband to pay $1,500 per month to Wife in permanent periodic alimony and $1,345 per month in child support. The family court also awarded Wife five of the parties' six rental properties, including 504 E. College, which had a debt of $33,742 owed to Husband's 401(k) account, and ordered "Wife shall be solely responsible for the indebtedness of the properties she is awarded." However, the family court awarded Husband his 401(k) account and ordered that Wife's alimony payment be reduced by $340 per month, which reduced Husband's monthly alimony payment to $1,160, until Wife paid the loan on the 401(k) in full.

Both parties filed motions to reconsider. On November 2, 2015, the family court issued an order modifying the divorce decree. The modifications increased Husband's share of the marital estate to 45.7% and decreased Wife's share to 54.3%. The amended order also awarded Husband the parties' 2014 tax refund and modified Husband's monthly alimony deduction for the 401(k) loan from $340 to $400 per month, which reduced Husband's alimony payment to $1,100 per month until Wife paid the 504 E. College loan in full. This cross-appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

[3] This does not include Husband's 2013 tax return, which the family court excluded from the marital estate.

LAW/ANALYSIS

I. Husband's Appeal

On appeal, Husband argues the family court erred in (1) imputing minimum wage income to Wife and awarding Wife permanent periodic alimony; (2) in the alternative, if alimony was appropriate, not ordering rehabilitative alimony; (3) awarding Wife a larger allocation of the marital estate; and (4) awarding Wife primarily income-producing assets while awarding Husband primarily deferred-compensation assets.[4]

A. Imputing Minimum Wage and Alimony

Husband first argues the family court erred by imputing minimum wage income to Wife, and as a result, awarding Wife alimony. We disagree.

"Alimony is a substitute for the support normally incidental to the marital relationship." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "Alimony should ordinarily place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Hinson v. Hinson*, 341 S.C. 574, 577, 535 S.E.2d 143, 144 (Ct. App. 2000) (per curiam). The family court has a duty to formulate an alimony award that is "fit, equitable, and just if the claim is well[-]founded." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). In making an alimony award, the family court must consider the following statutory factors: (1) the duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of

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[4] We decline to address Husband's fourth issue as the issue is not preserved for our review. *See Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 81–82 (Ct. App. 2008) (stating an issue must have been raised to and ruled upon by the family court to be preserved on appeal, and if the family court does not rule on an issue and the appellant does not raise it in a Rule 59(e) motion, it is unpreserved). After the family court issued its order, Husband failed to raise the issue of inequitable distribution of income-producing and deferred-compensation assets to the family court in his Rule 59(e) motion. Because the family court did not have the opportunity to rule upon this issue or correct any alleged mistakes in its final order, we find this argument is unpreserved for our review.

living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014).

Specifically, Husband argues the family court should have imputed more than minimum wage income to Wife based on Wife's ability to earn: (1) a minimum of $50,000[5] in the insurance industry prior to becoming a stay-at-home mother to the parties' twins, (2) the $40,000 gross annual rental income of the five rental properties awarded to Wife in the equitable distribution, and (3) the monthly child support obligation of $1,430 based on a $90,000[6] annual gross income. Husband further argues that, if Wife obtained a job in the insurance industry, she would be capable of sustaining a standard of living similar to the one she enjoyed during the marriage with no need for any form of alimony. We disagree.

We find the family court did not err in awarding Wife $1,500 per month in permanent periodic alimony. The record reflects that, at the time of trial, Wife was fifty-five years old and Husband was fifty-seven years old; the parties were married for about eleven years; and Husband's adultery contributed to the demise of the marriage. The parties maintained a good standard of living, the marital residence was valued at $375,000, with an equity of $195,000, and the parties took several vacations per year. Husband had a slightly higher level of education and maintained employment with Duke Energy with substantial pay increases throughout the marriage. Husband's nonmarital retirement contributions and his anticipated earning potential were much greater than Wife's. The parties agreed Wife would leave the insurance industry in 2005 to become a stay-at-home mother for the parties' twins, resulting in Wife's absence from the work force for

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[5] Wife testified that, during her tenure with her prior employer in the insurance industry, she earned between $50,000 and $80,000 annually.

[6] Husband calculated the $90,000 annual gross income from the sum of Wife's $40,000 annual gross rental income and the $50,000 Husband argues Wife is capable of earning in the insurance industry.

approximately ten years.[7] However, throughout the marriage, Wife managed the parties' rental properties which brought in a net monthly income of $1,095. Husband and Wife worked together to find and procure the rental properties. Husband assisted with rental property renovations and Wife managed the day-to-day operations of the rental properties. Wife listed, showed, and procured renters for the parties' vacant properties, paid the bills, and collected the rents from tenants—at times driving to collect rent from a tenant several times a week. Upon de novo review of both parties' financial declarations; monthly expenses; net monthly incomes; and nonmarital property, we find Wife has a need for alimony and Husband has an ability to pay. We also find Wife's need for alimony is reasonable under the circumstances.

There is little testimony regarding Wife's current and reasonably anticipated earning capacity. Beyond Wife's 2005 earning capacity in the insurance industry, Husband offered no expert testimony, nor any witness testimony, as to Wife's earning capacity. However, Wife has been absent from the work force for an extended period of time and forewent opportunities for advancement in favor of being a homemaker. *See Jenkins v. Jenkins*, 345 S.C. 88, 97, 545 S.E.2d 531, 536 (Ct. App. 2001) (finding the wife was entitled to an award of permanent periodic alimony in part because the wife had been absent from the work force for ten years and forewent opportunities for advancement to be a homemaker). Determining Wife's current and reasonably anticipated earning potential based solely on evidence of Wife's 2005 earning capacity after a ten-year absence would require the court to engage in improper speculation. *Sexton v. Sexton*, 308 S.C. 37, 42, 416 S.E.2d 649, 653 (Ct. App. 1992) (reversing an alimony award when the award was "based on an unsupported finding of the husband's earning capacity"), *rev'd on other grounds*, 310 S.C. 501, 427 S.E.2d 665 (1993).

There is insufficient evidence to determine Wife's reasonably anticipated earning potential beyond Wife's net monthly income of $1,095 from the rental properties. *See Crossland*, 408 S.C. at 454–55, 759 S.E.2d at 425 (finding that, because the family court did not have sufficient evidence to base a determination of the wife's earning potential for purposes of awarding alimony, it properly refused to engage in speculation). Based on our view of the facts and relevant factors, we find the income imputed to Wife is reasonable. *See McElveen v. McElveen*, 332 S.C. 583,

[7] The twins were ten years old at the time of trial, and Wife indicated she intended to remain a stay-at-home mother until they left home for college.

600, 506 S.E.2d 1, 9 (Ct. App. 1998) (considering the wife's financial declaration and monthly expenses in determining if the family court's alimony award was reasonable under the circumstances of the case), *disapproved of on other grounds by Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005). We affirm the family court's award of alimony. *See Patel v. Patel*, 347 S.C. 281, 291, 555 S.E.2d 386, 391 (2001) (stating the objective of alimony should be to ensure that the parties separate on as equal a basis as possible).

B. Rehabilitative Alimony

Husband alternatively argues that, if an alimony award was appropriate, the family court erred by not ordering rehabilitative alimony because (1) the parties' marriage was relatively short in duration and (2) Wife was able to earn substantial income in the insurance industry. We disagree.

"If a claim for alimony is well-founded, the law favors the award of permanent periodic alimony." *Jenkins*, 345 S.C. at 95, 545 S.E.2d at 535. "Rehabilitative alimony may be awarded only upon a showing of special circumstances justifying a departure from the normal preference for permanent periodic support." *Id.* "The purpose of rehabilitative alimony is to encourage a dependent spouse to become self[-]supporting after a divorce." *Johnson v. Johnson* (*Johnson 1988*), 296 S.C. 289, 301, 372 S.E.2d 107, 114 (Ct. App. 1988). "However, it should be approved only in exceptional circumstances, in part, because it seldom suffices to maintain the level of support the dependent spouse enjoyed as an incident to the marriage." *Jenkins*, 345 S.C. at 95, 545 S.E.2d at 535. In awarding rehabilitative alimony, the family court should consider several factors, including, among other things, the parties' accustomed standard of living; the time necessary for the supported spouse to acquire job training or skills; the likelihood that the supported spouse will successfully complete retraining; and the likelihood of success in the job market. *See id.* "The record must demonstrate the self-sufficiency of the recipient at the expiration date of the ordered payments and that the supported spouse will match the prior standard of living accustomed to during the marriage." *Belton v. Belton*, 325 S.C. 456, 460, 481 S.E.2d 174, 176 (Ct. App. 1997).

We find no evidence to support Husband's claim that rehabilitative alimony is appropriate. The record fails to demonstrate exceptional circumstances, the time necessary for Wife to acquire job training or skills, the likelihood that Wife will successfully complete retraining, or Wife's likelihood of success in the job market

sufficient to completely support herself. *See id.* (reversing a rehabilitative alimony award because the record failed to show exceptional circumstances or provide evidence that the wife would succeed in her business venture); *Crawford v. Crawford*, 301 S.C. 476, 484, 392 S.E.2d 675, 680 (Ct. App. 1990) (holding no evidence existed to demonstrate that the wife would be reasonably self-sufficient at the termination of the alimony payments). Thus, we find Husband failed to prove special circumstances justifying a departure from the normal preference for permanent periodic alimony. *See Jenkins*, 345 S.C. at 97, 545 S.E.2d at 536 (reversing a rehabilitative alimony award and awarding permanent periodic alimony because the wife had been absent from the work force for ten years, forewent opportunities for advancement in favor of being a homemaker, and the record was devoid of evidence showing that the wife would, at the termination of the alimony payments, be able to maintain a lifestyle approaching that which she enjoyed during the marriage or even to meet her basic expenses).

Husband also argues the short duration of the parties' marriage weighs in favor of rehabilitative alimony. In making an alimony award, "no one factor is dispositive." *Allen*, 347 S.C. at 184, 554 S.E.2d at 425; *Nienow v. Nienow*, 268 S.C. 161, 171, 232 S.E.2d 504, 510 (1977) (holding that in alimony considerations, "all of the facts and circumstances disclosed by the record should be considered; no one factor should be determined dispositive"). Husband overlooks the fact that his own extra-marital conduct and refusal to go to counseling contributed to the demise of the marriage and that other factors, previously discussed in this opinion, weigh in favor of awarding Wife permanent periodic alimony. *See Pirri v. Pirri*, 369 S.C. 258, 268–69, 631 S.E.2d 279, 285 (Ct. App. 2006) ("[South Carolina] courts have not determined that a relatively short marriage is the single determinative factor in denying alimony; alimony has been found proper in some cases where the marriage was of a much shorter duration than [nearly eight years]"); *Johnson 1988*, 296 S.C. at 302–03, 372 S.E.2d at 114 ("An at[-]fault spouse cannot destroy a marriage and then claim its short duration entitles him to more favorable consideration when the economic adjustments attendant to divorce are made.").

Based on our de novo review of the relevant factors and the circumstances of this case, we find no error in the family court's refusal to award rehabilitative alimony to Wife. *See Lewis*, 392 S.C at 384, 709 S.E.2d at 651 (holding the appellate court may find facts in accordance with its own view of the preponderance of the evidence); *Allen*, 347 S.C. at 184, 554 S.E.2d at 424 (stating the family court has a duty to formulate an alimony award that is "fit, equitable, and just if the claim is

well[-]founded"). Accordingly, we affirm the family court's award of $1,500 per month in permanent periodic alimony to Wife.

II. Wife's Cross-Appeal

On cross-appeal, Wife argues the family court erred in (1) failing to include Husband's bonus in the marital estate; (2) allocating payment of the 401(k) mortgage loan to Wife while allocating the 401(k) account to Husband; (3) finding that 208 Wescott transmuted into marital property; (4) in the alternative, if 208 Wescott is marital property, failing to expressly consider Wife's special equity regarding Wife's nonmarital funds used to acquire the property;[8] and (5) unfairly apportioning the marital estate.

A. Husband's Bonus

Wife argues the family court erred in failing to include Husband's $21,522.03 incentive pay bonus for services rendered in 2013. We agree.

Marital property is property "acquired by the parties during the marriage." S.C. Code Ann. § 20-3-630 (2014). "This court has previously held that pensions and other benefits are clearly marital property because they are compensation for services performed during the marriage although not received until a later time." *Lineberger v. Lineberger*, 303 S.C. 248, 250, 399 S.E.2d 786, 787 (Ct. App. 1990).

Although Wife filed for divorce on December 27, 2013—nearly three months prior to Husband receiving his incentive pay bonus on March 15, 2014—Husband received an incentive pay bonus each year in his March 15 paycheck, and the bonus was for services rendered in 2013—during the marriage. Therefore, because the bonus was compensation for services performed during the marriage, the bonus was marital property and should have been included in the marital estate. *See id.* (finding that end-of-year performance and retention bonuses can be divided as marital property even if they will not be received until after the divorce if the bonuses were part of the overall income of the parties during the marriage and received as compensation for services performed during the marriage). Accordingly, the family court should have included Husband's $21,522.03

[8] We consider Wife's special equity issue in our discussion of the marital estate apportionment.

incentive pay bonus in the marital estate. We modify the family court's order to include Husband's bonus in the marital estate.

B. 401(k) Mortgage Loan

Wife argues the family court improperly reduced Wife's percentage of the marital estate and Wife's alimony by allocating responsibility of the 504 E. College 401(k) loan to Wife while allocating the 401(k) account to Husband. Specifically, Wife argues the family court erred by not severing the parties' joint interest in 504 E. College and by reducing Husband's alimony payments as a means to effectuate property division. We agree.

The family court should attempt to sever all entangling legal relationships and to place the parties in a position to begin anew. *Johnson v. Johnson* (*Johnson 1985*), 285 S.C. 308, 311, 329 S.E.2d 443, 445 (1985). The family court is "encouraged to make final disposition of property interests whe[n] possible; failing in this, the [family] courts must state compelling reasons for leaving loose ends." *Bass*, 285 S.C. at 182, 328 S.E.2d at 652.

In the equitable distribution, the family court awarded Wife 504 E. College and the responsibility to pay the corresponding loan from Husband's 401(k) account. Conversely, the family court awarded Husband his 401(k) account and reduced Wife's monthly alimony award by $400 per month until Wife paid the $33,742 loan on the 401(k) account in full. Allocating the 401(k) account to Husband and a considerable debt against the 401(k) account to Wife did not sever the parties' joint interests in 504 E. College. Rather, it would take roughly eighty-four months—at an alimony reduction rate of $400 per month—to satisfy the $33,742 loan and sever the parties' interest in the property. The family court failed to state a compelling reason for not severing the parties' interest in the property, and we do not find a compelling reason in the record on appeal. *See Shealy v. Shealy*, 280 S.C. 494, 498 n.1, 313 S.E.2d 48, 50 n.1 (Ct. App. 1984) (stating the family court is "encouraged to make final dispositions of property interests whe[n] possible or, in the alternative, cite compelling reasons for awarding fractional or joint interests").

We find the family court erred in not severing the parties' interest in 504 E. College. We modify the family court's equitable distribution accordingly, as discussed herein.

C. Transmutation

Wife argues the family court erred in finding 208 Wescott transmuted into marital property. We disagree.

With certain exceptions, marital property is "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 . . . regardless of how legal title is held." S.C. Code Ann. § 20-3-630(A) (2014). "Equitable distribution of marital property 'is based on the recognition that marriage is, among other things, an economic partnership.'" *Crossland*, 408 S.C. at 456, 759 S.E.2d at 426 (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). Moreover, "[u]pon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Id.* (quoting *Morris*, 335 S.C. at 531, 517 S.E.2d at 723).

Nonmarital property may be transmuted into marital property if "[1] it becomes so commingled with marital property that it is no longer traceable, [2] is titled jointly, or [3] 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). "Transmutation is a matter of intent to be gleaned from the facts of each case. 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*, 345 S.C. at 98, 545 S.E.2d at 537. Evidence of transmutation "may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Johnson 1988*, 296 S.C. at 295, 372 S.E.2d at 111. "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295–96, 372 S.E.2d at 111.

First, we find the record demonstrates that the parties' regarded the property as common property of the marriage. Wife testified that, while she was pregnant with

the twins, the parties contemplated where to make their "home" and where to raise their twins before ultimately deciding to move to South Carolina and build 208 Wescott. We find this illustrates Wife's intent not to buy the residence to keep as separate property, but to live in together and to raise the parties' twins. *See Johnson 1988*, 296 S.C. at 295, 372 S.E.2d at 111 (providing that using the property exclusively for marital purposes is evidence that the parties regard the property as common property).

Second, we agree with the family court's finding that the $90,000 down payment on 208 Wescott—from the sale of Wife's premarital home—was deposited into the SunTrust bank account that Husband deposited his earnings. Wife testified she could not provide evidence to account for the premarital funds in the SunTrust account. The commingling of the $90,000 with marital funds transmuted the $90,000 into marital property. *See Wilburn*, 403 S.C. at 384, 743 S.E.2d at 740 (providing nonmarital property can transmute into marital property if it becomes so commingled with marital property that it is no longer traceable).

Third, we find the parties used marital funds to build equity in the residence. The parties used funds from the SunTrust account, which held Husband's income and the rental income, to pay the 208 Wescott mortgage and for substantial improvements to the property. Husband earned his income during the marriage, the parties used the income to purchase the rental properties, and the rental property income was generated during the marriage, therefore, both Husband's income and the rental income were marital property. *See Hamiter v. Hamiter*, 290 S.C. 508, 510, 351 S.E.2d 581, 582 (Ct. App. 1986) (providing funds derived from salary earned during the marriage are marital property); *Orszula v. Orszula*, 292 S.C. 264, 266, 356 S.E.2d 114, 114 (1987) (per curiam) (providing wages and substitutes for wages received during marriage are marital property). The parties built equity in 208 Wescott by using marital funds to pay the mortgage and for substantial improvements to the property. *See Johnson 1988*, 296 S.C. at 295, 372 S.E.2d at 111 (providing that using marital funds to build equity in the property is evidence the parties regard the property as common property).

We find a preponderance of the evidence shows the parties treated 208 Wescott in such a manner during the marriage as to show their intent that it become their common property. We affirm the family court's finding that 208 Wescott transmuted into marital property.

D. Apportionment

Husband argues that, based on the short duration of the marriage and the parties' respective contributions to acquiring the marital assets, the family court erred by apportioning 54.3% of the marital estate to Wife and 45.7% to Husband. Conversely, in her cross-appeal, Wife argues the family court's apportionment of the marital estate is unfair in light of all of the evidence, including Wife's direct and indirect contributions to the marital estate and Husband's extreme marital misconduct. We agree with Wife.

In making an equitable apportionment of marital property, the family court must give weight in such proportion as it finds appropriate to the following factors: (1) the duration of the marriage; (2) marital fault; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value, including contributions as homemaker; (4) the income and earning potential of the parties and the opportunity for future acquisition of capital assets; (5) the parties' health; (6) additional training or education needed; (7) the parties' nonmarital property; (8) the existence or non-existence of vested retirement benefits; (9) the award of alimony; (10) the desirability of awarding the family home; (11) tax consequences; (12) prior support obligations; (13) liens and any other encumbrances upon the marital property; (14) child custody arrangements and obligations; and (15) any other factors the court considers relevant. S.C. Code Ann. § 20-3-620(B) (2014). These criteria are intended to guide the family court in exercising its discretion over apportionment of marital property. *Johnson 1988*, 296 S.C. at 297, 372 S.E.2d at 112. "The ultimate goal of [equitable] apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership." *King v. King*, 384 S.C. 134, 143, 681 S.E.2d 609, 614 (Ct. App. 2009).

In addition to certain findings of fact relating to this marriage, the record reflects that Wife, using premarital funds that transmuted into marital property, contributed $90,000 as a down payment on the marital residence and the family court appropriately included the $90,000 in the marital estate as equity in 208 Wescott. *See Pittman v. Pittman*, 407 S.C. 141, 153, 754 S.E.2d 501, 507 (2014) ("When property is determined to have been transmuted, the entire property, not just a portion of the property, is included in the parties' marital property which is thereafter apportioned by the family court using the criteria set forth in [the

equitable apportionment statute.]" (alteration in original) (quoting *Calhoun v. Calhoun*, 339 S.C. 96, 106, 529 S.E.2d 14, 20 (2000))). Additionally, the record reveals the parties were married for eleven years, Husband engaged in marital misconduct, and Husband refused to seek counseling, which contributed to the demise of the marriage. Husband earned a majority of the parties' income throughout the marriage, he worked long hours, and contributed to the renovations of the parties' rental properties. Husband's earning potential is much greater than Wife's, and he can contribute more to his retirement account through his continued employment with Duke Energy. Wife acted as homemaker and was responsible for vacuuming, cleaning sinks and baseboards, shopping, cooking, doing laundry, and other household duties. Wife was the primary caretaker of the parties' two minor children: she got the children ready for school, transported the children to and from school and doctors appointments, volunteered at the children's school, and was more active in the children's educational development. Wife successfully managed the parties' income-producing rental properties. Wife managed the day-to-day operations of the rental properties; she listed, showed, and procured renters for the parties' vacant properties; she paid the bills; and she collected the rents from tenants—sometimes going to a rental property several times a week to collect rent. Subsequent to the filing of this action, Wife assumed sole responsibility for the mortgage payments for 208 Wescott and reduced the mortgage balance by $5,000 from the date of filing to the date of trial.

We find the family court's 54.3/45.7 division of the marital estate, in favor of Wife, resulted in an unfairly low apportionment to Wife in light of the aforementioned circumstances. Accordingly, we find that, based on our de novo review of the preponderance of the evidence, the more equitable division of the marital residence is 60% to Wife and 40% to Husband.[9]

In light of our holding that Husband's 2013 bonus is part of the marital estate and that the equitable distribution should attempt to sever the parties' joint interest in 504 E. College, we modify the family court's equitable distribution to reflect these changes. To accomplish the 60/40 division, Husband shall be responsible for the $33,742 loan against his 401(k) account; this will effectively sever the parties' joint

[9] Upon review of the record and including Husband's 2013 bonus, we value the net marital estate at $744,686. Accordingly, under a 60/40 division, Wife is awarded $446,812 and Husband is awarded $297,874.

interest in the property. In addition, Wife is to receive Husband's bonus in the equitable distribution, totaling $21,522, plus an additional sum of $859 to accomplish the 60/40 division of marital property.[10]

CONCLUSION

Based on the foregoing analysis, the family court's order is

AFFIRMED IN PART and REVERSED IN PART.

LOCKEMY, C.J., and KONDUROS, J., concur.

[10] These modifications do not impact Wife's alimony award and Husband shall make no alimony deductions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Emily S. Brown, Respondent,

v.

Grady C. Odom, Appellant.

Appellate Case No. 2015-002628

Appeal From Barnwell County
Vicki J. Snelgrove, Family Court Judge

Opinion No. 5598
Heard May 8, 2018 – Filed September 19, 2018

AFFIRMED

William E. Bird, of Bird & Smith, PA, of Columbia, for Appellant.

Robert N. Hill, of The Law Office of Robert Hill of Lexington; and H. Edward Smith, of Brown, Jefferies & Boulware, of Barnwell, for Respondent.

WILLIAMS, J.: In this domestic relations matter, Grady C. Odom (Husband) appeals the family court's divorce decree, arguing the family court erred in (1) finding that Husband's limited liability company, Twin Oaks Villas, LLC (the LLC), transmuted into marital property; (2) imposing a constructive trust on the LLC; and (3) including property in the marital estate that the parties did not own as of the date of filing. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on April 27, 2006. This was both parties' third marriage. They had no children together during their eight-year marriage; however, each party had two adult children from prior marriages. Wife filed for divorce on May 30, 2013, citing a one-year continuous separation as of December 15, 2012.

Prior to the parties' marriage, Husband formed two businesses: the LLC and Twin Oaks Personal Care, Inc. (the Corporation). The LLC owned a building in North Charleston, South Carolina. The Corporation managed and ran an assisted living facility in the LLC's building. Husband was the sole member of the LLC and the sole stockholder in the Corporation. In 1994, Husband approached Wife, a family friend at the time, for a $60,000 loan to refinance the entities. In 2003, Wife left college to work for the entities. Wife testified she assisted Husband in making business decisions for the LLC, worked without pay at times, helped increase the LLC's net monthly income, and assisted in obtaining a $2.4 million Housing and Urban Development (HUD) loan for the LLC.

Wife testified she devoted her time and money into the entities as an investment for herself and her children and believed Husband regarded the entities as marital property. Wife and Wife's son (Son) testified Husband held Wife out as a fifty-fifty partner in the Corporation and the LLC. Wife testified Husband assured her he would complete the necessary paperwork to transfer fifty percent ownership to Wife after he obtained a HUD loan; however, Husband never transferred the shares to Wife. Husband claimed that, when the parties separated on December 15, 2012, Wife's involvement with the Corporation and the LLC ceased.

During the parties' marriage, Husband used marital funds to acquire 30.05 acres of land (the Ruben Odom Property) from Husband's Uncle, Ruben Odom (Uncle), for $60,092.[1] Husband used marital funds to pay a $10,000 down payment and for two of the three $16,679.99 monthly installment payments to Uncle, as lienholder. In June 2010, Husband notified Uncle of his inability to pay the outstanding $17,522.31 balance, and the parties refinanced the monthly payments to $282.20. However, Husband again defaulted on monthly payments and Uncle filed a

[1] This land is unrelated to the LLC property.

complaint for foreclosure on the Ruben Odom Property. Using marital funds, Husband paid Uncle a total of $48,445 under the installment contract but still owed $11,647.46. On April 18, 2013, Husband, without Wife's knowledge, executed a quitclaim deed which conveyed the Ruben Odom Property to Uncle in lieu of foreclosure. On July 3, 2013, Husband filed a corrective quitclaim deed, to correct the property description on the Ruben Odom Property deed. Prior to Uncle's April 3, 2013 complaint for foreclosure, Husband, without Wife's knowledge, conveyed 251 acres of nonmarital property—worth $452,939—to SJW Holdings, LLC, his ex-wife's LLC, to hold in trust for Husband's daughters.

On July 9, 2013, the family court entered an order restraining the parties from disposing of or encumbering or reducing in value, any properties or assets, including the LLC. However, on December 18, 2013, Husband entered into an agreement to sublease the entities' operations, building, and land for $6,250 a month without Wife's knowledge. On October 28, 2014, prior to the conclusion of mediation, Husband abruptly left the mediation and willfully failed to disclose his whereabouts during litigation. Husband failed to appear for the merits hearing, present evidence, or respond to Wife's requests for admissions. On August 17, 2015, the family court issued a final order, including both entities and the Ruben Odom Property in the marital estate.

On January 7, 2016, in response to a motion by Husband to alter or set aside the judgment, the family court entered an amended final order. The court found the Ruben Odom Property constituted marital property and awarded Wife a $48,445—equal to the total marital funds invested in the property—interest in the property. Based on evidence that the parties worked jointly as partners and that Husband promised Wife an interest in the business, the court found the Corporation and the LLC each transmuted into marital property, as well as the $6,250 monthly rent payment. The court awarded Husband possession, use, and ownership of the entities; awarded Wife a one-half interest in the entities; and ordered a judgment in favor of Wife in the amount of $590,018 to effectuate a fifty-fifty division. The court awarded Wife an equitable interest in the entities by virtue of a constructive trust and imposed a judicial lien on the entities, in favor of Wife, to secure the $590,018 judgment. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in finding the LLC transmuted into marital property?

II. Did the family court err in imposing a constructive trust on the LLC?

III. Did the family court err in including property in the marital estate that the parties did not own as of the date of filing?

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

An action to declare a constructive trust is one in equity and the appellate court may find facts in accordance with its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987).

LAW/ANALYSIS

I. Transmutation of the Entities

Husband argues the family court erred in finding the LLC transmuted into marital property. We disagree.

A. Preservation

As an initial matter, on appeal, Wife argues Husband's entity distinction argument is not preserved for our review because Husband first raised the argument in his motion to alter or set aside the judgment. We find this issue is preserved.

"Post-trial motions are . . . utilized to raise issues that could not have been raised at trial." J. Toal, et al., *Appellate Practice in South Carolina* 189 (3d ed. 2016). "A post-trial motion must be made when the [family] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006).

The first time the family court ruled on whether the Corporation and the LLC transmuted into marital property was in the final order. Husband filed a motion to alter or set aside the judgment, and argued for the first time that the evidence did not support the family court's finding that both the Corporation and the LLC transmuted into marital property. In its amended final order, the family court addressed this issue on the merits and found sufficient evidence supported its finding that both the Corporation and the LLC transmuted into marital property.

We find Husband properly raised the argument that the LLC and the Corporation are two separate entities through his Rule 59(e), SCRCP, motion. The family court's ruling, which treated Wife's involvement with the entities as a whole, rather than separate entities, created the distinction issue. *See Buist v. Buist*, 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014) (holding an alleged error in awarding attorney's fees can be raised for the first time in a motion to reconsider, in order to preserve the error for appellate review); *Anderson Cty. v. Preston*, 420 S.C. 546, 569, 804 S.E.2d 282, 294 (Ct. App. 2017) (finding the issue of whether a quorum at a county council meeting was destroyed by council members' conflicts of interest was not raised prior to trial or ruled upon during trial, and therefore the county's post-trial motion raising the issue was sufficient to preserve it for appeal, when the circuit court never ruled at trial whether votes in question were invalid based upon conflict of interest, and the court did not find, until issuance of its final order, that council members who made those votes were disqualified from voting due to conflicts of interest), *cert. granted*, S.C. Sup. Ct. order dated March 29, 2018; *cf. Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App.

1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

Because we find Husband's motion to alter or set aside the judgment constituted a timely challenge to the family court's finding of transmutation of both entities, the issue is preserved for our review.

B. Transmutation

Husband argues the LLC did not transmute into marital property and Wife only contributed to the Corporation, not the LLC.[2] We disagree.

With certain exceptions, marital property is "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 . . . regardless of how legal title is held." S.C. Code Ann. § 20-3-630(A) (2014). "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, 456, 759 S.E.2d 419, 426 (2014) (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Id.* (quoting *Morris*, 335 S.C. at 531, 517 S.E.2d at 723).

Nonmarital property may transmute into marital property if "[1] it becomes so commingled with marital property that it is no longer traceable, [2] is titled jointly, or [3] 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). "Transmutation is a matter of intent to be gleaned from the facts of each case. The spouse claiming transmutation must

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[2] On appeal, Husband does not contest the family court's ruling that the Corporation transmuted into marital property. This ruling is the law of the case. *See Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding an unchallenged ruling becomes the law of the case regardless of whether the ruling is correct); *Sanders v. Sanders*, 396 S.C. 410, 423 n.2, 722 S.E.2d 15, 21 n.2 (Ct. App. 2011) (holding an unappealed allocation of assets becomes the law of the case).

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). "If the [spouse] presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740. Evidence of transmutation "may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 111 (Ct. App. 1988). "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295–96, 372 S.E.2d at 111.

As an initial matter, we disagree with Husband's argument that his premarital intentions are not relevant as to whether the LLC transmuted into marital property. A party's premarital intent can serve as evidence of intent to transmute a nonmarital property into marital property. *See id.* at 296, 372 S.E.2d at 111 (holding the marital residence did not transmute into marital property, based on the court's finding that the parties' unenforceable prenuptial agreement was evidence of the husband's intent to maintain the nonmarital property as separate property). We find the preponderance of the evidence supports the family court's finding that the LLC transmuted into marital property. *See Pittman*, 407 S.C. at 151, 754 S.E.2d at 506–07 (finding both parties' significant day-to-day involvement in the business—including the wife's credible testimony that all major business decisions were made jointly, including the parties' decision to structure the wife's pay to benefit both parties at the time and upon the wife's retirement—demonstrated the parties' intent to treat the business as a marital asset); *Jenkins*, 345 S.C. at 99–100, 545 S.E.2d at 537 (finding both acreage and a rental home the husband inherited transmuted into marital property due in part to the wife's substantial involvement in the general care and maintenance of the property and the parties' strategic plan to make the property part of their joint retirement plan); *Wyatt v. Wyatt*, 293 S.C. 495, 497, 361 S.E.2d 777, 779 (Ct. App. 1987) ("Though one spouse acquires legal title to property prior to marriage, the discharge of indebtedness by both the husband and wife may transmute the property into marital property.").

Despite Husband's adamant contention that he never intended the LLC to become marital property, transmutation is ultimately a matter of discerning the parties' intent from the facts of the case. *See Pittman*, 407 S.C. at 151, 754 S.E.2d at 506 ("[T]ransmutation is ultimately a matter of discerning the *parties'* intent." (emphasis added)). Husband failed to appear at trial, call witnesses to rebut Wife's transmutation testimony, or respond to Wife's requests for admissions. *See* Rule 220(c), SCACR (stating the appellate court may affirm for any reason appearing in the record); Rule 36, SCRCP (stating a matter is deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). "[A] party cannot sit back at trial without offering proof, then come to this [c]ourt complaining of the insufficiency of the evidence to support the family court's findings." *Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987); *see also Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741 ("[The h]usband did not contest [the w]ife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting [the w]ife's testimony is sufficient justification to affirm the family court."). Husband's memorandum in support of his motion to alter or set aside the judgment is the only item in the record supporting Husband's argument that he lacked the intent to transmute the LLC into marital property because Wife was involved with the Corporation, not the LLC. However, a memorandum in support of a motion is not evidence. *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011); *see also Lewis*, 392 S.C. at 384, 709 S.E.2d at 651 (finding the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the *evidence*).

The preponderance of the evidence supports the family court's finding that the parties' actions during the marriage objectively demonstrates a mutual intent to regard the LLC as a marital asset. For instance, Wife testified extensively about her financial and non-financial marital contributions to the entities, including:

1. Loaning the entities over $200,000[3] during the marriage—including $25,000 to upgrade the LLC's building's telephone system and $17,400 to make noncritical repairs to the building;

[3] Wife testified she invested $210,464 of personal funds into the entities, of which she invested $6,000 prior to the marriage. Wife also testified that in 1994 she loaned Husband $60,000 to refinance the entities; however, Husband repaid the 1994 loan, and Wife did not include the loan in the $210,464.

2. Assisting in obtaining loans, including a HUD loan, and refinancing loans for the entities;
3. Consulting with architects and engineers to implement Department of Health and Environmental Control (DHEC) regulatory codes;
4. Overseeing compliance with structural standards;
5. Purchasing sheetrock and iron needed for DHEC building upgrades;
6. Coordinating with governmental agencies and participating in DHEC inspections;
7. Attending staff meetings;
8. Overseeing all accounts payable;
9. Assuming responsibility for three bank accounts related to the businesses—which listed her as the LLC's business advisor—and acting as signatory on the parties' personal bank account and the Corporation's bank account;
10. Authorizing and issuing maintenance checks;
11. Handling all correspondence for the entities during 2004, 2005, 2006, 2009, and 2010, including correspondence for the HUD loan;
12. Increasing the LLC's net monthly income;
13. Painting walls and installing ceiling fans; and
14. Purchasing planters and patio furniture.

Additionally, Wife and Son testified Husband introduced Wife as his partner and owner in the entities and intended the LLC to be marital property. Wife testified, in lieu of putting funds in a retirement account, she invested in the entities and had no retirement accounts as a result. Husband failed to respond to Wife's requests for admissions, which included the admissions that Wife assisted in making business decisions for the LLC and that she contributed to the LLC's increased monthly net income. Due to Husband's failure to act, the matters contained in Wife's requests for admissions are deemed admitted under Rule 36, SCRCP. *See* Rule 36, SCRCP (stating matters contained in a request for admission are deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). For the foregoing reasons, we affirm the family court's finding that the LLC transmuted into marital property.

II. Constructive Trust

Husband argues there is no clear and convincing evidence that Wife's actions conferred a benefit on the LLC. We disagree.

A constructive trust arises when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990). "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. Fraud is an essential element, although it need not be actual fraud." *Lollis*, 291 S.C. at 529, 354 S.E.2d at 561. "In order to establish a constructive trust, the evidence must be clear and convincing." *Cox*, 301 S.C. at 500, 392 S.E.2d at 794.

On appeal, Husband contends Wife's investments were for the benefit of the Corporation, not the LLC. The record reflects Wife provided a benefit to the LLC in the form of a HUD loan. Wife testified the $25,000 she invested to upgrade the LLC's buildings' telephone system and the $17,400 she invested to make noncritical building repairs were both necessary to procure the HUD loan. The HUD loan, which Wife helped procure and later repay, was obtained for the benefit of the LLC, because the LLC, not the Corporation, was appraised in connection with the HUD loan in 2009. Based on the 2009 appraisal of $3.2 million, the parties obtained a $2.4 million HUD loan. Taking into account all debts, the LLC was valued at $1,130,649 in 2012. By failing to respond to Wife's requests for admissions, the matters contained therein—that Wife used personal funds to improve the LLC and that Wife assisted in making business decisions for the LLC—are admitted. *See* Rule 36, SCRCP (stating matters contained in a request for admission are deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). The evidence supports the family court's finding that Wife's efforts and investments conferred a benefit on the LLC.

Husband also argues no clear and convincing evidence of fraud exists to impose a constructive trust on the LLC. Wife and Son testified Husband held Wife out as a fifty-fifty partner in the LLC and Wife believed she was making an investment for herself and her children by investing her time and money into the LLC. Wife testified Husband assured her he would complete the necessary paperwork for a share change after the completion of the HUD loan. Husband failed to rebut Wife's testimony on this issue. *See Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741. ("[The h]usband did not contest Wife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting [the w]ife's testimony is

sufficient justification to affirm the family court."). The record contains clear and convincing evidence that Husband fraudulently led Wife to believe she was a partner in the LLC and that Wife, in reliance of Husband's promise of equity in the LLC, devoted efforts that significantly enhanced the LLC's value. Allowing Husband to retain ownership of the LLC to the exclusion of Wife is inequitable. We affirm the imposition of a constructive trust.

III. Ruben Odom Property

Husband argues the family court erred by including property in the marital estate that the parties did not own as of the date of filing. Specifically, Husband argues that because he recorded the quitclaim deed in lieu of foreclosure on April 18, 2013, prior to Wife's May 30, 2013 filing, the property was not in existence on the date of filing and was not subject to equitable distribution.[4] We disagree.

"For the family court to properly include property within the marital estate, two factors must coincide." *Shorb v. Shorb*, 372 S.C. 623, 632, 643 S.E.2d 124, 129 (Ct. App. 2007); *see also* S.C. Code Ann. § 20-3-630(A) (2014). "First, the property must be acquired during the marriage" and "[s]econd, the property must be owned on the date of filing or commencement of marital litigation." *Shorb*, 372 S.C. at 632, 643 S.E.2d at 129. The ownership prong may present problematic issues if the family court overlooks assets that should have been included in the marital estate, but were non-existent on the date of filing due to a party's misconduct. *Id.* "Consequently, if a party attempts to unfairly extinguish

[4] Husband argues two additional grounds for overruling the inclusion of the Ruben Odom Property in the marital estate. First, Husband argues the family court erroneously found Husband conveyed the property to his daughter after the foreclosure action. This issue is unpreserved because Husband failed to raise this issue in his Rule 59(e) motion. *See Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 81–82 (Ct. App. 2008) (stating an issue must have been raised to and ruled upon by the circuit court to be preserved on appeal, and if the circuit court does not rule on an issue and the appellant does not raise it in a Rule 59(e) motion, it is unpreserved). Second, Husband argues the date of evaluation of the Ruben Odom Property should be the date of filing. This issue is unpreserved because Husband failed to include the issue in the statement of issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

ownership of marital property before the date of filing or to improperly delay ownership of marital property until after litigation is commenced, the family court must include that property in the marital estate." *Id.*; *see also Bowman v. Bowman*, 357 S.C. 146, 156, 591 S.E.2d 654, 659 (Ct. App. 2004) ("[W]here lack of ownership status as of the date of marital litigation is attributable to any purposeful act or omission by the spouse, the property shall be deemed 'owned' within the meaning of [section 20-3-630] so as to include the marital portion in the marital estate."). Concluding otherwise would "promote fraud, reward misconduct, and contravene legislative intent." *Bowman*, 357 S.C. at 155, 591 S.E.2d at 659.

However, the family court will include such property in the marital estate only if the party seeking to classify the property as marital property introduces clear and convincing evidence of fraud in relation to the disposal of the property. *See Shorb* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options."); *see also Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("Fraud must be shown by clear and convincing evidence."). "[F]raud will not be presumed, but [one] who alleges it must prove it." *Devlin v. Devlin*, 89 S.C. 268, 272, 71 S.E. 966, 968 (1911).

As to the first prong, both parties concede that Husband acquired the property during the marriage with marital funds. *See Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). With regard to the second prong, Husband's quitclaim deed to Uncle before the date of filing negated the ownership prong necessary to classify the funds as marital property. *See Shorb*, 372 S.C. at 633, 643 S.E.2d at 130 (finding the sale of stock options, which were acquired during the marriage but sold before the date of filing, negated the ownership prong, which was necessary to classify the proceeds from the sale of the options as marital). Thus, the property is marital property only if Wife introduced clear and convincing evidence of fraud in relation to Husband's disposal of the property. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options.").

The record contains clear and convincing evidence that Husband fraudulently executed the quitclaim deed to Uncle in anticipation of divorce. Husband executed

the quitclaim deed on April 18, 2013, prior to Wife's May 30, 2013 divorce filing, but more than five months after the parties December 15, 2012 separation.[5] On August 5, 2013, three months after Wife filed for divorce, Husband filed a corrective quitclaim deed. Husband did not afford Wife the opportunity to make the $282 monthly installment payments and avoid foreclosure; rather, he executed the quitclaim deed to Uncle without Wife's knowledge. The $48,445 Husband paid to Uncle under the installment contract came from marital funds and the funds were lost when Husband executed the quitclaim deed.

Husband claims that the quitclaim deed resulted from his inability to make the $282 monthly payments on the $11,647 loan balance. However, we find that prior to Husband claiming he could not afford the installment payments, Husband purposefully divested himself of nonmarital property in anticipation of marital litigation. On January 2, 2013—prior to Uncle's April 3, 2013 complaint for foreclosure—Husband recorded a deed to his daughters through SJW Holdings, LLC, which conveyed nonmarital property with a market value of $452,939. On May 15, 2014, Husband deeded his remainder interest in another plot of land, worth approximately $51,900, to one of his daughters.[6] Husband also retained his ownership interest in the Corporation and the LLC, collectively valued at $1,239,820 in 2012. The record contains clear and convincing evidence that Husband intentionally divested himself of nonmarital property, which hindered his ability to avoid foreclosure of the Ruben Odom Property. *See Smith v. Smith*, 327 S.C. 448, 458–59, 486 S.E.2d 516, 521 (Ct. App. 1997) (holding the family court, in dividing the marital property, properly considered actions taken by the husband before the parties' actual separation, including opening and closing accounts and transferring money).

We find Wife introduced clear and convincing evidence of fraud in relation to Husband's disposal of the Ruben Odom Property. We affirm the inclusion of the Ruben Odom Property in the marital estate.

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[5] In his amended answer, Husband claimed he left the home in November 2012.

[6] On September 25, 2012, Uncle conveyed this property to Husband, as remainderman, and reserved a life estate.

CONCLUSION

Based on the foregoing analysis the family court's decision is

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Group III Management, Inc., Respondent,

v.

Suncrete of Carolina, Inc., d/b/a Crystal Pools, Appellant.

Appellate Case No. 2015-002584

Appeal From Richland County
Tanya A. Gee, Circuit Court Judge

Opinion No. 5599
Heard March 14, 2018 – Filed September 19, 2018

AFFIRMED

Alan Ross Belcher, Jr. and Elizabeth Wieters, both of Hall Booth Smith, PC, of Mount Pleasant, for Appellant.

John C. Bruton, Jr., of Haynsworth Sinkler Boyd, PA, of Columbia, and Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondent.

KONDUROS, J.: Suncrete of Carolina, Inc. appeals the circuit court's order altering the previous circuit court order, which had granted Suncrete's motion to modify the arbitration award on the basis that the arbitrator erroneously relied on South Carolina law instead of North Carolina law when determining attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

In October of 2012, Group III Management, Inc. entered into a construction contract with the Army Corps of Engineers for repairs, renovations, and upgrades to the Legion Pool Complex at Fort Jackson. The contract included removal of an existing swimming pool, construction of a new pool and deck, and construction of a building and other improvements. In November of 2012, Group III entered into a contract (the Contract) with Suncrete, which was doing business as Crystal Pools, for Suncrete to build the new swimming pool and deck for $339,960. The Contract included an arbitration clause, which specified the Federal Arbitration Act (FAA) applied to the agreement to arbitrate. The Contract also stated it was governed by North Carolina law. It further provided:

> Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provision hereof, to protect its interest in any matter under this Agreement, to collect damages for the breach of the Agreement, or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

Problems arose during construction, and Group III terminated Suncrete in March of 2013. On September 19, 2013, Group III filed a demand for arbitration against Suncrete, seeking to recover damages in the amount of $252,313.71 plus any other amounts to which it may be entitled from Suncrete's failure to complete work required by the Contract. Suncrete filed a counterclaim, alleging Group III owed it a balance under the Contract. Arbitration hearings were held in July of 2014. The arbitrator determined Suncrete was entitled to additional costs for certain services totaling $15,324.74, which were not included in Suncrete's counterclaim. The arbitrator determined Suncrete owed Group III a net amount of $81,138.03 after deducting the amount Group III owed Suncrete. Following the final hearing, the parties submitted affidavits regarding attorney's fees. On August 18, 2014, the arbitrator issued its determination, finding in favor of Group III in the amount of

$197,304.09, of which $116,165.86 was for attorney's fees.[1] The arbitrator did not award Suncrete damages for its counterclaim.

On September 8, 2014, Suncrete filed a motion with the arbitrator to modify the award to reduce or eliminate the attorney's fees portion of the award because the arbitrator failed to apply North Carolina law. The arbitrator denied the motion, finding "[t]he parties submitted to the [a]rbitrator the issue of determining the 'prevailing party' and the amount of reasonable attorney's fees that should be awarded to that party. That decision was carefully considered and made as set forth in the Award."

Group III filed a motion to confirm the arbitration award, but Suncrete filed a motion to vacate or modify the award; both motions were filed in the circuit court. Judge J. Ernest Kinard, Jr. heard the motions on February 6, 2015, and requested proposed orders. Judge Kinard issued an order dated April 23, 2015, granting Suncrete's motion to vacate the attorney's fees because under North Carolina law Group III was not the prevailing party because it did not recover at least 50% of the amount of damages it sought. There was a delay in the filing of the order, and Judge Kinard passed away on May 19, 2015, the day after the order was filed.[2]

Group III filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, and Judge Tanya A. Gee heard the motion as the successor judge. Judge Gee determined she did not need to reach Suncrete's argument about whether North Carolina law would bar the attorney's fees based on the standard of review provided by the FAA requiring manifest disregard by the arbitrator, which must be more than a showing the arbitrator misconstrued the law. Judge Gee granted the motion and amended Judge Kinard's order to deny Suncrete's motion to modify or vacate the arbitration award and confirmed the arbitration award in full. This appeal followed.

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[1] The arbitration award stated Group III asserted a claim of $308,386.52 and Suncrete asserted a counterclaim of $84,671.98.

[2] The copy of the order in the Record is stamped May 18, 2015. The subsequent order determining the motion to alter or amend notes the order has a second filing date stamp of May 26, 2015.

LAW/ANALYSIS

I. Standard of Review of an Arbitration Award

"The [FAA] evidences the well-established federal policy favoring the arbitration of disputes." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 103, 333 S.E.2d 781, 784 (1985) (citation omitted). "While this policy favoring the arbitration of disputes is also well established in South Carolina, both in its statutory and decisional law, this state law is supplanted by federal substantive law with respect to disputes to which the [FAA] is applicable." *Id.* at 103-04, 333 S.E.2d at 785 (footnote and citations omitted). The FAA "is intended to advance the 'federal policy in favor of arbitration of disputes.'" *Id.* at 104, 333 S.E.2d at 785 (quoting *Bruno v. Pepperidge Farm, Inc.*, 256 F. Supp. 865, 867 (D. Pa. 1966)). "The fundamental premise upon which this policy is grounded is the laudable goal of providing 'a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.'" *Id.* (quoting *Diapulse Corp. of Am. v. Carba Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)). "The primary function of arbitration is to serve as a substitute for and not a prelude to litigation." *Id.* at 104-05, 333 S.E.2d at 785 (quoting *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907, 908 (D. Wash. 1953)).

"[T]he scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . . .'" *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998)). "The 'widely recognized' policy 'to encourage the use of arbitration' requires this limited scope of judicial review." *UBS Fin. Servs., Inc. v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016) (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994)). "A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation." *Remmey*, 32 F.3d at 146. "Indeed, '[b]road judicial review on the merits would render resort to arbitration wasteful and superfluous. . . .'" *Trident Tech. Coll.*, 286 S.C. at 105, 333 S.E.2d at 785 (alterations by court) (quoting *Farris*, 113 F. Supp. at 908).

"Generally speaking, '[a]n award within the scope of submission is conclusive on fact issues and interpretation of law.'" *Id.* at 111, 333 S.E.2d at 788 (alteration by court) (quoting *Oinoussian Steamship Corp. v. Sabre Shipping Corp.*, 224 F. Supp.

807, 809 (D.N.Y. 1963)). "The award is presumptively correct, and '[i]t is the general rule that the courts will refuse to review the merits of an arbitration award.'" *Id.* at 111, 333 S.E.2d at 788-89 (alteration by court) (quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 261 F. Supp. 832, 835 (D.N.J. 1966), *aff'd*, 397 F.2d 594 (3d Cir. 1968)). "[C]ourts defer to the arbitral panel both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'" *UBS Fin. Servs., Inc.*, 842 F.3d at 339 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). "Otherwise, an arbitration award would signify 'the *commencement*, not the end, of litigation.'" *Trident Tech. Coll.*, 286 S.C. at 111, 333 S.E.2d at 789 (quoting *Newark Stereotypers' Union No. 18*, 261 F. Supp. at 835). "Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions." *Remmey*, 32 F.3d at 146. "[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Id.* (quoting *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993)).

"This circumscribed scope of review means that 'in reviewing [an arbitration] award, a district or appellate court is limited to determine whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" *UBS Fin. Servs., Inc.*, 842 F.3d at 339 (quoting *Three S Del., Inc.*, 492 F.3d at 527). The Fourth Circuit "ha[s] emphasized that a district court may not overturn an arbitration award 'just because it believes, however strongly, that the arbitrators misinterpreted the applicable law.'" *Jones v. Dancel*, 792 F.3d 395, 401 (4th Cir. 2015) (quoting *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 478 n.5 (4th Cir. 2012)). "Even a 'clearly erroneous interpretation of the contract' cannot be disturbed." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (quoting *Trident Tech. Coll.*, 286 S.C. at 108, 333 S.E.2d at 787).

"Moreover, the arbitrators need not specify their reasoning or the basis of the award, . . . so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" *Trident Tech. Coll.*, 286 S.C. at 111, 333 S.E.2d at 789 (quoting *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 704 (2d Cir. 1978)). "If a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." *Id.* (quoting *Kurt Orban Co. v. Angeles*

Metal Sys., 573 F.2d 739, 740 (2d Cir. 1978)). "The [FAA] essentially requires that this [c]ourt must 'uphold the award unless the challenging party demonstrates one of the infirmities listed in § 10 of the [FAA].'" *Id.* (quoting *Maidman v. O'Brien*, 473 F. Supp. 25, 28 (D.N.Y. 1979)). Because "arbitrators need not give *any* rationale for an arbitration award, requiring their opinions to be 'free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions.'" *PPG Indus., Inc. v. Int'l Chem. Workers Union Council of United Food & Commercial Workers*, 587 F.3d 648, 652 (4th Cir. 2009) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)). "Therefore, 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *Id.* (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). "An arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract 'in terms that offer even a barely colorable justification for the outcome reached' in order to withstand judicial scrutiny.'" *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (quoting *In re Andros Compania Maritima, S.A.*, 579 F.2d at 704). "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.'" *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (emphasis added by court) (quoting *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003)).

"[A]n arbitration award fails to draw its essence from the agreement at issue 'when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong.'" *Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (4th Cir. 2008) (quoting *Three S Del., Inc.*, 492 F.3d at 528). "As the Seventh Circuit characterized the standard: 'The test is not error; it is *ultra vires*.'" *Norfolk & W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 700 (4th Cir. 1994) (quoting *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 922 (7th Cir. 1985)).

"Consequently, a court 'may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§ 10 and 11 is found to exist.'" *Trident Tech. Coll.*, 286 S.C. at 105, 333 S.E.2d at 785 (quoting *Diapulse Corp. of Am.*, 626 F.2d

at 1110). Section 10 of the FAA provides an arbitrator's award may be vacated when:

> (1) . . . the award was procured by corruption, fraud, or undue means;
> (2) . . . there was evident partiality or corruption in the arbitrators, or either of them;
> (3) . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) . . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2012); *see also Gissel*, 382 S.C. at 242, 676 S.E.2d at 324 (recognizing the same four grounds). Additionally, section 11 allows the award to be modified or corrected when:

> (a) . . . there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) . . . the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) . . . the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11 (2012). "These grounds must be construed in light of the rule that the [c]ourt's function in vacating, or confirming, an arbitration award is severely limited." *Trident Tech. Coll.*, 286 S.C. at 106, 333 S.E.2d at 786.

II. Exceeding Authority

Suncrete maintains Judge Gee erred by granting the motion for reconsideration of Judge Kinard's order. It asserts the arbitrator's award exceeded the jurisdiction of

the arbitrator because the arbitrator failed to apply the plain language of the agreement—to apply North Carolina law. We disagree.

"The question of whether the arbitrators exceeded their power relates to the arbitrability of the underlying dispute. An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement." *Id.* (citation omitted). "Conversely, if the issues presented to the arbitrators are within the scope of the arbitration agreement, subsection (d) does not require the court to 'review the merits of every construction of the contract.'" *Id.* (quoting *United Steelworkers of Am.*, 363 U.S. at 598-99). "Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers." *Gissel*, 382 S.C. at 242, 676 S.E.2d at 324.

The Contract provided for attorney's fees. Accordingly, the decision to award attorney's fees was within the scope of the agreement between the parties. Therefore, the arbitrator did not exceed its powers in doing so. *See Trident Tech. Coll.*, 286 S.C. at 106, 333 S.E.2d at 786 ("An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement.").

III. Manifest Disregard

Suncrete contends Judge Gee erred in confirming the award because the arbitrator manifestly disregarded the law in awarding attorney's fees. It contends North Carolina law defines a prevailing party more strictly than South Carolina as a party who has obtained a judgment equal to at least 50% of his or her monetary claim and only a prevailing party can recover attorney's fees. Rather than decide if attorney's fees would be allowed under North Carolina law in the situation here, we instead look to whether the award of attorney's fees rises to the level of manifest disregard by the arbitrator. We find that it does not.

"Courts may vacate or modify an arbitration award only under the limited circumstances listed in the [FAA] or under the common law if the award 'fails to draw its essence from the contract' or 'evidences a manifest disregard of the law.'" *UBS Fin. Servs., Inc.*, 842 F.3d at 339 (citation omitted) (quoting *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006)). "[A]n arbitration

award may be vacated when the arbitrator 'manifestly disregards' the law." *Jones*, 792 F.3d at 401.[3] "A court may vacate an arbitration award under the manifest disregard standard only when a plaintiff has shown that: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle." *Jones*, 792 F.3d at 402; *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) ("[F]or a court to vacate an arbitration award based upon an arbitrator's 'manifest disregard for the law,' the 'governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.'" (quoting *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323)). Manifest disregard of the law "presupposes something beyond a mere error

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[3] In *Wachovia Securities, LLC*, 671 F.3d at 481, the Fourth Circuit recognized the Supreme Court's opinion in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), "has been widely viewed as injecting uncertainty into the status of manifest disregard as a basis for" setting aside an arbitration award. However, the Fourth Circuit looked to a more recent Supreme Court case, which held:

> We do not decide whether " 'manifest disregard' " survives our decision in *Hall Street Associates, L.L.C.*, 552 U.S. at 585, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Assuming, arguendo, that such a standard applies, we find it satisfied . . . .

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) (first alteration by court) (citation omitted).

The Fourth Circuit "read this footnote to mean that manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.'" *Wachovia Sec., LLC*, 671 F.3d at 483 (quoting *Stolt-Nielsen S.A.*, 559 U.S. at 672 n.3). The court "decline[d] to adopt the position of the Fifth and Eleventh Circuits that manifest disregard no longer exists." *Id.*

in construing or applying the law." *Trident Tech. Coll.*, 286 S.C. at 108, 333 S.E.2d at 787. "[T]he manifest disregard standard is not an 'invitation to review the merits of the underlying arbitration.'" *Jones*, 792 F.3d at 402 (quoting *Wachovia Sec., LLC*, 671 F.3d at 483). Manifest disregard requires more than "establish[ing] that the arbitrator 'misconstrued' or 'misinterpreted the applicable law.'" *Id.* (quoting *Wachovia Sec., LLC*, 671 F.3d at 478 n.5, 481). "[A] manifest disregard of the law is established only where the 'arbitrator[ ] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same.'" *Patten*, 441 F.3d at 235 (all alterations except first by court) (quoting *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991)).

> In evaluating whether an arbitrator has manifestly disregarded the law, we have heretofore concluded that "a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision."

Three S Del., Inc., 492 F.3d at 529 (quoting *Remmey*, 32 F.3d at 149).

A party challenging an arbitration award solely on the arbitrator's interpretation of applicable law does not meet the burden of demonstrating the arbitrator manifestly disregarded the law. *Jones*, 792 F.3d at 403. Further, if the arbitrator's interpretation did not fall "beyond the scope of reasonable debate," the burden is not met. *Id.* When binding precedent requiring a contrary result is absent, an arbitrator's decision does "not constitute a refusal to heed a clearly defined legal principle." *Id.* Even though "another arbitrator might have reached a different conclusion," a reviewing court cannot "pass judgment on the strength of the arbitrator's chosen rationale." *Id.* at 403-04.

In *Trident Technical College*, the appellant asserted "courts have not hesitated in appropriate cases to vacate an arbitration award" when a manifest disregard or perverse misconstruction of the law has occurred. 286 S.C. at 108, 333 S.E.2d at 787. Our supreme court found, "While this is certainly true, those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law." *Id.* The supreme court noted all of the cases

relied upon by the appellant "contain the explicit caveat that 'the nonstatutory ground of "manifest disregard" of the law as a basis for vacating arbitration awards . . . presuppose[s] something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.'" *Id.* at 108-09, 333 S.E.2d at 787 (alterations by court) (quoting *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978)).

Suncrete maintains section 44A-35 of the North Carolina Code completely bars the recovery of attorney's fees in this case because Group III did not recover at least 50% of the amount of damages it sought. Section 44A-35 provides:

> In any suit brought or defended under the provisions of *Article 2 or Article 3 of this Chapter*,[4] the presiding judge may allow a reasonable attorney['s] fee to the attorney representing the prevailing party. . . . *For purposes of this section, "prevailing party" is a party plaintiff or third[-]party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third[-]party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended*.

N.C. Gen. Stat. Ann. § 44A-35 (2017) (emphases added).

Suncrete asserts North Carolina courts have applied section 44A-35 to cases other than for surety claims. *See Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 645 S.E.2d 810 (N.C. Ct. App. 2007) (regarding enforcement of a subcontractor's subrogation lien on real property); *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 500 S.E.2d 108 (N.C. Ct. App. 1998) (involving a lawsuit to perfect and enforce a lien); *Mainline Supply Co. v. Hillcrest Constr., Inc.*, 721 S.E.2d 765 (Table) (N.C. Ct. App. 2012) (unpublished) (concerning a plaintiff's assertion of a mechanic's lien); *Brooks Millwork Co. v. Levine*, 696 S.E.2d 924 (Table) (N.C. Ct. App. 2010) (unpublished) (pertaining to a lawsuit requesting enforcement of its lien). However, Group III posits this section only applies to

[4] These articles are titled "Statutory Liens on Real Property" and "Model Payment and Performance Bond," respectively.

claims under Article 2 and 3, which relate to mechanic liens and state bonds for building projects, respectively. It asserts this case involves neither of those situations. It also contends all of the cases Suncrete cites are lien cases and thus do not apply to the present circumstances.

Group III also points to the North Carolina statute regarding the award of attorney's fees in arbitration, which indicates: "An arbitrator may award reasonable expenses of arbitration if an award of expenses is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." N.C. Gen. Stat. Ann. § 1-569.21(b) (2017). That statute also provides: "An arbitrator may award reasonable attorney['s] fees if[] (1) [t]he arbitration agreement provides for an award of attorney['s] fees[] and (2) [a]n award of attorney['s] fees is authorized by law in a civil action involving the same claim." *Id.* The comment to subsection 1-569.21(b) states, "Although [s]ection 21(b) . . . allow[s] recovery when such an award has a basis in law, [it] has no requirement that the arbitrator apply the appropriate legal standard or have sufficient evidence to support a claim of attorney's fees under the applicable statute." N.C. Gen. Stat. Ann. § 1-569.21 cmt. 2.[5] That comment also notes: "Section 21(b) authorizes arbitrators to award reasonable attorney's fees and other reasonable expenses of arbitration where such would be allowed by law in a civil action; in addition, parties may provide for the remedy of attorney's fees and other expenses in their agreement even if not otherwise authorized by law." *Id.* Additionally, Group III asserts the attorney's fees award was not only for the money it recovered for its cause of action but also for its successful defense against Suncrete's counterclaim for damages. It contends the total amount in controversy was $398,058.50—$308,386.52 for its claim and $84,671.98 for Suncrete's counterclaims. Thus, it asserts the attorney's fees awarded were less than the amount in controversy as required by section 6-21.6(f) of the North Carolina General Statute (2017).

The Contract provided that if a party utilized "an attorney to institute suit or demand arbitration to enforce any of the provision hereof . . . [or] to collect damages for the breach of the Agreement, . . . the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein." Therefore, the Contract allowed the recovery of attorney's fees and it was within the arbitrator's authority to award them. *See Eljer Mfg., Inc. v.*

[5] This section has two comment "2"s. This statement is found in the first.

Kowin Dev. Corp., 14 F.3d 1250, 1257 (7th Cir. 1994) (finding an argument by a party seeking to vacate an arbitration award—that the arbitrator could not have awarded fees pursuant to state law because those claims were time barred—was an attempt to have the court review the arbitrator's decision for errors in law and noting for factual and legal questions falling within the arbitrator's authority, the court defers to the arbitrator's decision).

Judge Gee did not err in granting Group III's motion for reconsideration and reinstating the arbitrator's award of attorney's fees. The federal courts have vacated arbitration awards when the arbitrator demonstrates a manifest disregard of the law. Therefore, we need only determine whether the arbitrator manifestly disregarded the law in light of section 44A-35, which provides a prevailing party can be awarded an attorney's fee and defining a prevailing party as a plaintiff who recovers 50% or more of monetary damages sought or a defendant who is found liable for less than 50% of the damages sought. Because section 44A-35 begins with the statement "[i]n any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter," which apply to liens and state bonds, Group III's argument this section would not apply to the case here is reasonable. *See* § 44A-35. Thus, the legal principle Suncrete contends the arbitrator failed to apply is not clearly defined and is subject to reasonable debate. *See Jones*, 792 F.3d at 402 (holding manifest disregard of the law only occurs if "a plaintiff has shown . . . the disputed legal principle is clearly defined and is not subject to reasonable debate"); *C-Sculptures, LLC*, 403 S.C. at 56, 742 S.E.2d at 360 ("[F]or a court to vacate an arbitration award based upon an arbitrator's 'manifest disregard for the law,' the 'governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.'" (quoting *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323)); *Weimer v. Jones*, 364 S.C. 78, 81, 610 S.E.2d 850, 852 (Ct. App. 2005) ("The parties' vigorous debate regarding [the issue] demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision. [The appellant] simply fails to show the arbitrator knew the applicable law and chose to disregard it."). Accordingly, the arbitrator did not manifestly disregard the law by not applying section 44A-35 to bar the award of attorney's fees.

If the arbitrator erred by not applying North Carolina law or applying North Carolina law incorrectly, such error does not rise to the level of manifest disregard of the law. *See Trident Tech. Coll.*, 286 S.C. at 108, 333 S.E.2d at 787 (holding manifest disregard of law "presupposes something beyond a mere error in

construing or applying the law"); *see also Jones*, 792 F.3d at 402 (holding that establishing "the arbitrator 'misconstrued' or 'misinterpreted the applicable law'" is not sufficient to demonstrate manifest disregard (quoting *Wachovia Sec., LLC*, 671 F.3d at 478 n.5, 481)). Like in *Trident Techical College*, "Even assuming *arguendo* that the arbitrators did erroneously apply the law in the various particulars alleged by appellant, these legal errors would be insufficient to constitute manifest disregard of the law under the pertinent cases." 286 S.C. at 109, 333 S.E.2d at 787. If the arbitrator here erred in awarding attorney's fees, any error would not rise to the level of manifest disregard of the law. Accordingly, we affirm Judge Gee's order.

IV. Reduction in Attorney's Fees

Suncrete also contends North Carolina law does not allow a party to recover attorney's fees exceeding the monetary damages award. It argues that because the award of attorney's fees was more than the damages recovered, the award violates section 6-21.6(b). However, at oral arguments, Suncrete stated it was no longer arguing this statute on appeal because it was instead relying on its argument the attorney's fees should not have been awarded at all because Group III was not a prevailing party.

At the time of arbitration, section 6-21.6(b) provided in part, "In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorney['s] fees may not exceed the monetary damages awarded." N.C. Gen. Stat. Ann. § 6-21.6(b) (amended by 2015 N.C. Sess. Laws 264, § 32.5, in part to remove last sentence).[6] Group III claims subsection (f) of this section conflicts with subsection (b). Subsection (f) provides: "In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages,

[6] That subsection begins: "Reciprocal attorney['s] fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorney['s] fees and expenses only if all of the parties to the business contract sign by hand the business contract." N.C. Gen. Stat. Ann. § 6-21.6(b) (2017). Another subsection of the same statute defines a business contract as "[a] contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this [s]tate is a party." N.C. Gen. Stat. Ann. § 6-21.6(a)(1) (2017).

the award of reasonable attorney['s] fees may not exceed the amount in controversy." § 6-21.6(f). Group III notes the North Carolina legislature has since removed the language from subsection (b) that Suncrete points to here.

Because Suncrete abandoned at oral arguments its contention that subsection 6-21.6(b) limits the amount of attorney's fees to the amount recovered in damages, we do not address whether the arbitrator's decision to award attorney's fees more than the amount of damages in light of this statute rises to the level of manifest disregard. *See State v. Oglesby*, 384 S.C. 289, 294 n.1, 681 S.E.2d 620, 623 n.1 (Ct. App. 2009) (noting it was not addressing issues raised by the appellant in his brief that he abandoned at oral arguments).

CONCLUSION

Judge Gee's granting Group III's motion to reconsider and reinstating the arbitration award is

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS, J., concur.