LIST OF CASE LAW

***Arnal v. Arnal*, 609 S.E.2d 821 (2005)**

Court of Appeals of South Carolina.
Laura Lawton ARNAL, Respondent/Appellant,
v.
David Emil ARNAL, Appellant/Respondent.
No. 3943.
Heard Sept. 16, 2004.
Decided Feb. 7, 2005.
Rehearing Denied March 17, 2005.
Certiorari Granted March 23, 2006.

Background: Former husband appealed final order of the Family Court, Beaufort County, Robert S. Armstrong, J., granting parties a divorce, dividing marital property, imputing income to him, establishing child support and visitation, and requiring him to pay attorney and guardian ad litem fees. Former wife appealed equitable distribution and determination of marital property.

Holdings: The Court of Appeals, Hearn, C.J., held that:
(1) imputing income to husband of over $9,000 per month, for calculation of child support, was error;
(2) child support guidelines excluded in-kind income to wife in form of below fair market value rent;
(3) failure to ascertain whether child's uncovered medical expenditures would have been covered by Medicaid if wife had continued to live in South Carolina was error;
(4) evidence regarding corpuses of two trusts of which wife was a beneficiary was relevant to attorney fees and travel reimbursement issues;
(5) dividing the pre-trial guardian ad litem fees equally between the parties was not an abuse of discretion;
(6) imposing upon husband the entire cost of guardian's fees incurred during trial was error;
(7) awarding $65,000 in attorney fees to wife was error;
(8) husband should have been awarded Easter and summer visitation with child;
(9) husband failed to prove he was entitled to special equity interest in non-marital cemetery property;
(10) husband should not have been required to reimburse wife's attorneys for their fees from second contempt hearing; and
(11) requiring husband to pay wife his portion of child's uncovered medical expenses within 14 days of receiving an itemization was unreasonable.

Affirmed in part, reversed in part, and remanded.

HEARN, C.J.:
David Arnal (Husband) appeals from the final order of the family court which granted the parties a divorce, divided the marital property, imputed income to Husband, established child support and visitation, and required him to pay attorneys' fees and guardian ad litem fees. Laura Lawton Arnal (Wife) also appeals, contesting the equitable distribution and the determination of marital property. We affirm in part, reverse in part, and remand.

FACTS

The parties were married in 1995. In 1999, they had a son who was diagnosed with Down's Syndrome. Both prior to and during the parties' marriage, Husband was employed by Wife's father in his development company. Wife's father, Charles Fraser, was one of the main developers of Hilton Head Island, where the parties resided. The parties separated in 1999, shortly after the child was born.

Wife and child now reside in Brevard, North Carolina in a home purchased by one of two trusts under which she is a beneficiary. Father remained in Hilton Head and started his own consulting and land development business. Wife's main source of income is from the family trusts. She is also employed part time in order to be able to devote time to the child's special needs.

This case has a very litigious history. Wife initiated the action seeking custody of the child, child support, division of the property, and ultimately a divorce. Husband answered, requesting joint legal custody, equitable division, and rehabilitative or lump sum alimony.

A temporary hearing was held in January 2000, in which the parties were granted joint legal custody, with Wife having physical custody***826** and decision-making authority with regard to the child's treatment. That temporary order granted Husband visitation in Brevard only and required him to pay $621.78 a month in child support.

In May 2000, Husband moved for a change of custody as a result of Wife's failure to begin therapies for the child. Additionally, Husband contended Wife had failed to complete the ***277** child's vaccinations. By the time of the hearing, Wife had commenced therapy and completed the vaccinations, so the change in custody was denied.

Husband then moved to compel discovery and to amend his pleadings to seek custody of the child. In return to Husband's motion, Wife sought the following relief: psychological testing of the parties; sole custody; sanctions for Husband's failure to comply with Rule 11, SCRCP; and a restraining order against Husband. The court compelled Wife to comply with discovery, declined sanctions against Husband, dismissed the motion for a restraining order, and continued the issue of custody of the child. Wife's request for psychological testing was abandoned.

In October 2000, the family court denied Wife's request for sole custody and granted Husband overnight visitation in the Brevard area and visitation in Hilton Head once a month. A second order required Husband to answer interrogatories and produce requested documents.

Thereafter, Wife filed a rule to show cause against Husband seeking to compel him to pay his portion of the medical expenses for the child. The court found Husband in contempt and ordered him to pay the expenses and $1,000 in attorney's fees. Wife filed a subsequent rule to show cause in December 2000, after Husband failed to pay medical expenses and failed to respond to discovery requests. Husband had complied by the date of the hearing, so the court did not hold him in contempt, though it reserved the issue of legal fees, required Husband to pay the medical expenses, and ordered him to produce documents.

In February 2001, upon Wife's motion, the family court reviewed Husband's visitation. The court concluded that because the child "ha[d] been suffering illnesses since December and the final hearing in this matter [was] scheduled shortly, and since it [was] the cold and flu season" it would be in the child's best interest for all visitation to occur in Brevard rather than having the child travel to Hilton Head pending the final hearing.

Wife subsequently filed a motion to hold Husband in contempt for his failure to respond to discovery and produce documents that he claimed contained a confidentiality agreement***278*** involving investment property he owned with others. The family court held Husband in contempt and ordered him to pay $10,000 in legal fees to Wife. The same order relieved Husband's counsel and appointed a new guardian ad litem for the child. Husband did not appeal the contempt order until the filing of the current appeal.

This action was tried in April 2001. In its final order, the family court granted Wife sole custody of the child and gave her the right to control all medical and educational decisions for the child. Husband received visitation on alternating weekends, but the first and third visitation of the month were required to be in Brevard rather than at Husband's home in Hilton Head. Additionally, the visitation in Brevard was limited to no more than one hour travel, and Husband was required to provide documentation to that effect. The visitation restrictions were to end when the minor reached forty-three months of age.[FN1]

FN1. The parties' child reached forty-three months of age on February 7, 2003. Nevertheless, this court learned during oral argument in September of 2004 that Husband is still not exercising weekend visitation in Hilton Head.

The final order also divided the marital property. The court granted Husband the properties he acquired through his partnership and split the personal possessions. Additionally, in calculating child support, the court imputed income to Husband in the amount of $9,060.62 per month and imputed income to Wife in the amount of $5,012.40 per month. According to their sworn financial declarations filed pursuant to Rule 20, SCRFC, Husband earned $3,656 per month and Wife earned $4,750 per month. Husband***827*** was required to pay $1,564 in child support and to pay his pro-rata share (64%) of uncovered medical expenses. The court required Wife to apply for Medicaid and to research and apply for any other financial assistance available in order to pay the costs of caring for the child.

The family court ordered the guardian's fee to be paid equally by the parties up to the date of trial and required Husband to bear the full cost of the guardian's fee at trial. The court found Husband should be responsible for the full fee at trial because "the issue of visitation was tried primarily ***279*** because [Husband] would not accept the Guardian ad Litem's recommendations." Finally, after analyzing the appropriate factors, the court ordered Husband to pay $65,000 in attorneys' fees in addition to the $10,000 and $1,000 awards previously ordered.

Husband filed a motion for reconsideration, challenging many aspects of the family court's order. The motion was denied in October 2001.

Subsequent to the final order, Wife filed a rule to show cause seeking to hold Husband in contempt on the grounds that: Husband failed to pay uncovered medical expenses, Husband failed to pay his August child support in full, Husband failed to provide documentation he was not traveling more than one hour from Brevard, and Husband failed to pay the remaining balance of $500 on the previous attorneys' fees award of $1,000.

The hearing was held on November 6, 2001. During the hearing, Wife presented the fee affidavit of one of her two attorneys. The attorney was not present, and Husband requested the hearing be continued so that he could cross-examine the attorney on her fee. The subsequent hearing was held two days later.

Following the second hearing, the family court issued two orders in February 2002. One found Husband should pay the increased child support as of August 1, but did not

find him in willful contempt for failing to do so. Additionally, he was found in contempt for failing to make timely payments on medical bills and thereafter required to pay uncovered medicals within fourteen days from the date Wife mailed him notice. Husband was found in contempt for failing to pay the remaining balance on the $1,000 attorneys' fees and was ordered jailed for ten days with the ability to purge the contempt by paying the $500 remaining.

The second order required Husband to pay $4,727.25 in attorneys' fees as a result of Wife's institution of the rule to show cause. This amount was over $2,000 more than the amount submitted at the initial hearing on the rule to show cause.

***280** Husband has appealed the Amended Final Order, the order denying his motion for reconsideration, and the orders resulting from the rule to show cause.

***Bakala v. Bakala*, 576 S.E.2d 156 (2003)**

Supreme Court of South Carolina.
Marguerite A. BAKALA, Respondent,
v.
Zdenek BAKALA, Appellant.
No. 25586.
Heard Nov. 19, 2002.
Decided Jan. 27, 2003.

Wife initiated divorce proceedings against husband. The Family Court, Beaufort County, Robert S. Armstrong, J., granted divorce on ground of husband's adultery, equitably divided marital estate, and held husband in contempt for noncompliance with order. Husband appealed. The Supreme Court, Floyd, Acting J., held that: (1) husband was not prejudiced by post-divorce hearing ex parte communication between trial court and wife's attorney regarding valuation of marital stock; (2) husband was not deprived of actual notice of documents served abroad via mail; (3) evidence supported $300,000 valuation of husband's stock in investment company; (4) husband's deposit of funds with court did not purge his contempt; and (5) award of attorney fees to wife's counsel in connection with husband's motion to quash bench warrant was not excessive.
Affirmed.

Acting Justice FLOYD:
In this domestic case, appellant (Husband) appeals three family court orders regarding contempt, equitable division, and divorce on the ground of adultery. We affirm.

FACTS

Husband was born in the Czech Republic, which was formerly part of Czechoslovakia, and came to this country as a political refugee. He holds dual U.S. and Czech citizenship. Husband and respondent (Wife) met while both were business graduate students at Dartmouth College. They married after graduation in 1990 while living in New York City.

After marrying, the parties moved to London and then Prague where they both worked. Wife quit working sometime before the birth of their son in 1994. When Czechoslovakia was divided in the early 1990's, Husband co-founded the first full-service investment bank in the Czech Republic, Patria Finance, and was very successful. He also invested in several restaurants through his investment company, Hartig Company. According to Wife, during this time, the parties "traveled a lot and lived very, very well." They renovated a

four-story house in one of Prague's most fashionable neighborhoods. Husband's average yearly income was $536,817.

In November 1996, Wife confronted Husband with information that he was having an affair. After a physical altercation, Wife left the marital residence. Two weeks later, she and Husband divided their savings account and, with $198,000, Wife moved back to the U.S. where she eventually settled in Beaufort County.

On May 1, 1998, while Husband was visiting from Prague, Wife had him personally served with a summons and complaint seeking a divorce on the ground of adultery or physical cruelty, custody of the parties' minor son, child support, alimony, and equitable division of the marital estate.

On May 7, Wife filed a motion for temporary relief. A hearing was held June 3, 1998, at which both parties and their attorneys appeared. Husband agreed to submit himself to the jurisdiction of the Beaufort County Family Court on all issues. Following this hearing, as part of its temporary order, the ***621** family court ordered Husband to deposit in escrow $500,000 upon the pending sale of shares of Patria Finance in which he acknowledged owning a 34.5% interest. An additional $250,000 was to be deposited pro rata over the next eighteen months resulting in a payment schedule requiring equal payments of $83,333 each in December 1998, June 1999, and December 1999.

Husband answered and counterclaimed on the merits of Wife's action. He alleged that on the day of the temporary hearing, he had learned that Wife was engaged in an adulterous relationship and accordingly he was entitled to a divorce on the ground of her adultery. In Wife's reply, she admitted she was currently engaged in a relationship that began***161** in June 1997 after the parties had separated. Wife subsequently withdrew her request for alimony.

Meanwhile, Husband returned to Prague while the litigation continued. On June 3, 1999, a pre-trial conference was held at which Husband's counsel appeared. A trial date was set for November 1, 1999. Effective August 13, 1999, counsel was relieved at Husband's request and Husband was ordered to appoint an agent for service or he would be served by mail in the Czech Republic.

The final hearing in the case was held as scheduled on November 1, 1999. Husband did not appear. By order dated December 21, 1999, the family court found Husband in contempt of the 1998 temporary order, ordered child support, equitably divided the marital estate 50/50, and awarded attorney's fees and costs. By order dated December 22, 1999, Wife was granted a divorce on the ground of adultery. These appeals followed.

ISSUES

1. Is the family court's order dividing the marital estate reversible because of an ex parte communication?

2. Were Husband's due process rights violated?

3. Did service in Prague violate international law?

4. Was the valuation of the marital estate proper?

5. Did the family court retain jurisdiction to determine the validity of the bench warrant?

***622** 6. Did the deposit of funds with the court purge Husband of contempt?

7. Was the award of attorney's fees excessive?

8. Should the family court have sua sponte dismissed Wife's complaint on the ground of recrimination?

***Berry v. Berry*, 364 S.E.2d 463 (1988)**

Supreme Court of South Carolina.
William E. BERRY, Jr., Respondent,
v.
Patricia C. BERRY, Petitioner.
No. 22827.
Heard Oct. 19, 1987.
Decided Jan. 25, 1988.

Husband brought divorce action and wife counterclaimed for equitable distribution, alimony and attorney fees. The Family Court, Greenville County, Larry R. Patterson, J., granted husband divorce, barred wife from recovering alimony and attorney fees, and divided marital estate. Both parties appealed. The Court of Appeals, Cureton, J., 290 S.C. 351, 350 S.E.2d 398, affirmed in part, reversed in part, and remanded. Certiorari was granted. The Supreme Court, Finney, J., held that preclusion of alimony award to spouse because of spouse's adultery could not be used to increase equitable distribution award to that spouse.
Affirmed.

FINNEY, Justice:
This Court granted certiorari on the following question:

Did the Court of Appeals commit error in reversing the family court for having considered the fact that petitioner was barred from alimony in making an equitable distribution of the marital property?

We affirm the decision of the Court of Appeals.

William E. Berry, Jr., respondent, and Patricia C. Berry, petitioner, were divorced after thirty years of marriage. William Berry initiated this action for divorce, alleging that his wife was guilty of adultery, and requested an equitable ***335** division of all marital property. Petitioner admitted adultery and counterclaimed for equitable division of marital property, alimony and attorney fees. The trial court granted respondent a divorce, equitably divided the marital estate, and barred petitioner from receiving alimony and attorney fees. The Court of Appeals reversed and remanded the equitable division award, holding that the trial court erred in indicating that it had increased petitioner's distributive share to compensate for the alimony which could not be awarded.[FN1] *Berry v. Berry,* 290 S.C. 351, 350 S.E.2d 398 (Ct.App.1984). *See also,* S.C.Code Ann. § 20-3-130 (1976). Essentially, the Court of Appeals' decision prohibits the family court from using equitable***464** division of marital property to award alimony barred by adultery.

FN1. In equitably dividing the property, the judge stated:

Although it was [Patricia Berry's] adultery that precipitated this divorce action, no deduction has been made from her share by reason of her fault ... Were it not for the length of this marriage and the fact that [she] is barred from alimony, I would have awarded her a substantially lower percentage of the marital property.

Petitioner argues that this decision would require the family court to ignore two of the relevant factors enumerated by this Court when equitably dividing marital property: (1) The present income of the parties; and (2) the effect of distribution of assets on the ability to pay alimony and support. *See, Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66 (1985). In our opinion, the Court of Appeals' decision does not preclude a family court from considering a party's income and the effect of distribution of assets on the ability to pay alimony and support when a divorce has been granted on the grounds of adultery. However, the preclusion of an alimony award to a spouse cannot be used to increase an equitable distribution award. *Berry v. Berry, supra.* Where a spouse is adjudged guilty of adultery, an increase in an equitable distribution award would contravene the public policy considerations manifested in the alimony-barring statute. *See,* S.C.Code Ann. § 20-3-130 (1985).

A review of the record indicates that the Court of Appeals did not err in reversing and remanding the equitable distribution award. Accordingly, we affirm the decision of the Court of Appeals and remand this case for the family court ***336** to reconsider, consistent with the Court of Appeals' decision, the equitable distribution award and eliminate any increase predicated upon Patricia C. Berry's lack of alimony.

AFFIRMED.

NESS, C.J., and GREGORY, HARWELL and CHANDLER, JJ., concur.

***Brooks v. Brooks*, 345 S.E.2d 510 (Ct. App. 1986)**

Court of Appeals of South Carolina.
Joan Tumbleston BROOKS, Appellant,
v.
William Edward BROOKS, Respondent.
No. 0728.
Heard April 15, 1986.
Decided June 9, 1986.

Wife brought domestic relations action for separate maintenance and support, seeking equitable distribution of marital property and permanent use of marital home. Husband counterclaimed for legal separation and sole use and ownership of marital home. The Family Court, Dorchester County, Maxey G. Watson, Family Court Judge, granted the legal separation, awarded marital home to husband, and awarded 35% of marital property to wife and 65% to husband, and wife appealed. The Court of Appeals, Shaw, J., held that: (1) awarding wife only 35% of marital property, instead of 50%, was not abuse of family court's discretion, and (2) portion of savings account representing remainder of wife's inheritance was not subject to equitable distribution as part of marital estate.
Affirmed as modified.

SHAW, Judge.
This is a domestic relations action. Appellant wife, Joan Tumbleston Brooks, appeals the family court's division of the marital property awarding 35% to her and 65% to respondent husband, William Edward Brooks. We affirm as modified.

[1] This court, in domestic relations actions, may find facts according to its own view of the preponderance of the evidence. *Walker v. Frericks,* 285 S.C. 139, 328 S.E.2d 126 (Ct.App.1985).

These parties were married in 1960. Both of their children are now emancipated. The wife brought an action for separate maintenance and support in 1983; however, she did not request alimony. Rather, she sought equitable distribution of the marital property and permanent use of the marital home. The husband counterclaimed for a legal separation and sole use and ownership of the marital home. The family court granted the legal separation, awarded the marital home to the husband, and divided the marital property.

[2] The wife claims the family court erred in awarding her 35% of the marital property. She argues she is entitled to 50%. A family court judge has wide discretion in distributing marital property. *Beinor v. Beinor,* 282 S.C. 181, 318 S.E.2d 269 (1984). The judge may use any reasonable means to reach an equitable result. *Bass v. Bass,* 285 S.C. 178, 328 S.E.2d 649 (Ct.App.1985).

[3] Our Supreme Court has set forth some of the criteria a family court judge may consider in making an equitable distribution. *Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66 (1985). The court listed the criteria as:

... (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current value and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment ***354** at present earnings or better in the future; (12) effect of distribution of assets on the ability to pay alimony and support, and (13) gifts from one spouse to the other during the marriage.

At the time of the hearing the husband was 52 years old; the wife 42. The wife's ****512** annual gross income exceeded the husband's. The parties had been married 24 years and enjoyed a comfortable standard of living.

The parties maintained separate bank accounts during the marriage. The family court found the husband purchased a certificate of deposit, a savings account, a house, six acres of land, a camper, a boat, an individual retirement account, a riding lawn mower, a tractor, and some furniture. The court found the wife purchased an individual retirement account, a savings account, a credit union account, some furniture, and other deposits. Both parties acquired this property primarily through earnings. The wife also paid for most of the costs of the children's education. She also gave the children money for cars and vacations.

The wife did not work the first eight (8) years of the marriage. She worked thereafter except from 1974-1976 when the plant at which she worked closed. The wife shows a total indebtedness of $340.00 while the husband has no debts. Both parties made substantial non-monetary contributions during the marriage. The wife performed all the household duties including cooking, cleaning, laundry, and caring for the children. The husband maintained the marital property including fencing the property for cattle, building a fish pond, building a shed, planting a garden each year, re-roofing the house, building a patio, building a chimney, digging a deep and shallow well, and landscaping the property.

The wife testified she is in "perfect health." The husband testified he has high blood pressure and is under the care of a doctor. He also has undergone hernia operations which prevent him from engaging in heavy lifting. Based on a doctor's recommendation, he is on permanent light duty in his employment at the Charleston Air Force Base where

he performs flight maintenance on aircraft equipment. Because the husband can only perform light duty he is ineligible for ***355*** swing shift duty. Thus, he testifies, his pay has decreased $2,000.00.

Nothing in the record indicates the wife will not be able to continue in her present position as a lab technician. Her financial declaration lists her gross income as $2,000.00 a month. The husband is scheduled to retire from his civil service job in March, 1987, when his gross income will fall to $1,380.00 a month.

Considering the *Shaluly* criteria as applied to the entire record, we cannot say the family court abused its discretion in awarding the wife 35% of the marital property instead of the 50% she seeks.

[4] The wife also argues the family court erred in including a savings account, in her name, as marital property. We agree.

The wife inherited $16,000.00 from her father's estate in 1978. She spent $1,000.00 on the marital home. She placed $1,500.00 in a savings account for one of the parties' sons. She evidently used $3,500.00 to buy their other son an automobile and stereo and to start a savings account for him. She deposited the remaining $10,000.00 into a savings account along with $1,000.00 from another account.

The family court included this $11,000.00 in the marital estate. We hold this was error as to the $10,000.00 representing the remainder of the wife's inheritance. This $10,000.00 is not subject to equitable distribution as part of the marital estate. *Hussey v. Hussey,* 280 S.C. 418, 312 S.E.2d 267 (Ct.App.1984). The husband impliedly argues if any portion of an inheritance is used in the furtherance of the marriage, the entire sum loses its independent status and becomes marital property. We reject this argument as meritless.

AFFIRMED AS MODIFIED.

SANDERS, C.J., and BELL, J., concur.

***Brown v. Brown*, 56 S.E.2d 330 (1949)**

Supreme Court of South Carolina.
BROWN
v.
BROWN.
No. 16283.
Nov. 16, 1949.

Ruth R. Brown sued Samuel E. Brown for divorce.
The Common Pleas Court, Oconee County, J. Frank Eatmon, J., rendered judgment denying plaintiff a divorce and plaintiff appealed.
The Supreme Court, Fishburne, J., affirmed the judgment, holding that evidence did not justify granting plaintiff a divorce on ground of adultery or physical cruelty.

FISHBURNE, Justice.
This is an appeal from a decree of the Court of Common Pleas of Oconee County, denying the appellant, Ruth R. Brown, an absolute divorce from the bonds of matrimony. The suit was based upon the statutory grounds of physical cruelty and adultery charged against her husband, the respondent Samuel E. Brown.

The husband filed an answer signed only by himself, in which he generally denied the allegations of the complaint, waived any and all rights under the Solidiers' and Sailors' Civil Relief Act, as amended, 50 U.S.C.A.Appendix, § 501 et seq., and further waived notice of any hearing to be had in the action. The answer was not verified.

The cause was heard by the trial judge without a reference, and the only testimony offered upon the trial of the case was that of the plaintiff, Mrs. Brown.

The parties were married in August, 1942, at Elkton, Maryland, and later Mrs. Brown returned to her native County of Oconee. There is a dearth of testimony in the meager record of this case as to where the couple might have resided after their marriage, but she testified that the last time they lived together was in Oconee County in July, 1948, after which they lived separate and apart. He is now in the armed services***332*** of the United States, but it does not appear where he is stationed. In support of the allegations of her complaint as to physical cruelty, appellant testified that her husband slapped her twice and pinched her. And to sustain the charge of adultery, she said that her husband had made love to her sister-in-law in her presence, and that on one occasion she found him in bed with her. This is the sole testimony offered by the plaintiff, without elaboration and without any circumstantial detail. She is entirely vague as to when the alleged physical cruelty took place. It may be inferred that the alleged act of adultery occurred shortly before she and her husband parted in 1948. They have one child, who lives with the appellant in Oconee County.

After the trial court had heard the evidence, it entered a decree dismissing the complaint, and holding that the evidence fell far short of being sufficient to support the charges of physical cruelty and adultery. From this decree the wife has appealed, claiming that the evidence is amply sufficient to establish both charges.

In view of the fact that this case brings to the forefront a cause of action not cognizable by the courts of this State for the past seventy years or more it will not be inappropriate to briefly refer to the historical background of divorce laws in South Carolina.

The English law concerning divorce and causes of divorce as it existed prior to the American Revolution, was the Ecclesiastical Law, and not the common law. It was administered by judges and courts, whose jurisdiction never existed in this country; and it has never been recognized as a part of our common law. For a short time, during the Protectorate of Cromwell, when the spiritual courts were closed and the civil law was silenced, the Court of Chancery took cognizance of cases for alimony. 17 Am.Jur., Sec. 6, Page 149.

As is pointed out in Mattison v. Mattison, 1 Strob.Eq., 387, 20 S.C.Eq. 387, 47 Am.Dec. 541, decided in 1846, a Court of Chancery was first established in South Carolina in 1721, and it was there declared: 'Nearly a quarter of a century ago the Supreme Court of this State, in Rhame v. Rhame, advert to the practice of the English Court of Chancery, as well as to that of South Carolina, in relation to matrimonial causes, and it is there declared that the case of alimony has always been regarded as an exception, and that 'the jurisdiction of the Court must be limited to the allowing of ailmony * * *.' If, twenty years since, it was judicially announced that the Court of Equity has no cognizance of matrimonial causes beyond the allowance of ailmony, and a necessity existed for more extensive authority, legislative interference would have supplied the defect, and, following the example of other States, would have vested the judicial tribunals of the State with this new and perilous power * * * . Whether wisely or unwisely, the Legislature has thought proper to withhold these powers. They have delegated to no Court the authority to declare a marriage null and void, and they have

never themselves exercised the authority. Cases of individual hardship have occurred, and will occur; but the observation of a different policy in other States, as well as the experience of our own, has served only to confirm the conviction that it is better to tolerate occasional suffering than to jeopardize the peace of society, and open a wide door to fraud, imposition and other immorality.'

It was not until the adoption of the Constitution of 1868, during the Era of Reconstruction, that any change was brought about in connection with divorce in this State. That Constitution, Art. IV, Sec. 15, declares: 'The courts of common pleas shall have exclusive jurisdiction in all cases of divorce;' and provided in Art. XIV, Sec. 5, that 'divorces * * * shall not be allowed but by the judgment of a court, as shall be prescribed by law.'

When the General Assembly met in 1872, an Act was passed, 15 Stat. 30, authorizing a divorce from the bonds of matrimony on the grounds of adultery and willful desertion. That Act continued of force and effect for six years, when it was repealed by the Act of 1878, 15 Stat. 719. All provisions of the Constitution of Eighteen Hundred and Sixty Eight, and the amendments thereto, were repealed when our present ***333*** Constitution was adopted in 1895, Art. XVII, Sec. 11, subd. 9. Until amended in 1949, the Constitution of 1895 provided, in Art. XVII, Sec. 3. 'Divorces from the bonds of matrimony shall not be allowed in this State.'

In 1949, an amendment to Art. XVII, Sec. 3 of the Constitution of 1895 was ratified by the General Assembly, having been voted on favorably by a majority of the electors. Section 3, in accordance with this amendment, now reads as follows: 'Divorces from the bonds of matrimony shall be allowed on grounds of adultery, desertion, physical cruelty, or habitual drunkenness.' Acts 1949, Page 138, 46 Stat. at Large.

Following the adoption of the foregoing Constitutional Amendment, the General Assembly at its 1949 session, passed an Act to provide for and regulate the granting of divorces from the bonds of matrimony in this State, Act April 15, 1949, 46 St. at Large, Page 216, on the grounds stated in the Amendment. So that the designated Courts of the State are now vested with what was termed in 1846, in Mattison v. Mattison, supra. 'This new and perilous power.'

A careful examination of our reports fails to disclose any case specially passing upon any ground of divorce during the period in which we had a divorce law, from 1872 until 1878. The cases of Mattison v. Mattison, 1 Strob.Eq. 387, 47 Am.Dec. 541, supra, and Grant v. Grant, 12 S.C. 29, 32 Am.Rep. 506, deal mainly with questions of jurisdiction and not with the general principles governing divorce.

Brown v. Brown, 156 S.E.2d 641 (1967)

Supreme Court of South Carolina.
BROWN
v.
BROWN.
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The husband filed an answer signed only by himself, in which he generally denied the allegations of the complaint, waived any and all rights under the Solidiers' and Sailors' Civil Relief Act, as amended, 50 U.S.C.A.Appendix, § 501 et seq., and further waived notice of any hearing to be had in the action. The answer was not verified.

The cause was heard by the trial judge without a reference, and the only testimony offered upon the trial of the case was that of the plaintiff, Mrs. Brown.

The parties were married in August, 1942, at Elkton, Maryland, and later Mrs. Brown returned to her native County of Oconee. There is a dearth of testimony in the meager record of this case as to where the couple might have resided after their marriage, but she testified that the last time they lived together was in Oconee County in July, 1948, after which they lived separate and apart. He is now in the armed services***332*** of the United States, but it does not appear where he is stationed. In support of the allegations of her complaint as to physical cruelty, appellant testified that her husband slapped her twice and pinched her. And to sustain the charge of adultery, she said that her husband had made love to her sister-in-law in her presence, and that on one occasion she found him in bed with her. This is the sole testimony offered by the plaintiff, without elaboration and without any circumstantial detail. She is entirely vague as to when the alleged physical cruelty took place. It may be inferred that the alleged act of adultery occurred shortly before she and her husband parted in 1948. They have one child, who lives with the appellant in Oconee County.

After the trial court had heard the evidence, it entered a decree dismissing the complaint, and holding that the evidence fell far short of being sufficient to support the charges of physical cruelty and adultery. From this decree the wife has appealed, claiming that the evidence is amply sufficient to establish both charges.

In view of the fact that this case brings to the forefront a cause of action not cognizable by the courts of this State for the past seventy years or more it will not be inappropriate to briefly refer to the historical background of divorce laws in South Carolina.

The English law concerning divorce and causes of divorce as it existed prior to the American Revolution, was the Ecclesiastical Law, and not the common law. It was administered by judges and courts, whose jurisdiction never existed in this country; and it has never been recognized as a part of our common law. For a short time, during the Protectorate of Cromwell, when the spiritual courts were closed and the civil law was silenced, the Court of Chancery took cognizance of cases for alimony. 17 Am.Jur., Sec. 6, Page 149.

As is pointed out in Mattison v. Mattison, 1 Strob.Eq., 387, 20 S.C.Eq. 387, 47 Am.Dec. 541, decided in 1846, a Court of Chancery was first established in South Carolina in 1721, and it was there declared: 'Nearly a quarter of a century ago the Supreme Court of this State, in Rhame v. Rhame, advert to the practice of the English Court of Chancery, as well as to that of South Carolina, in relation to matrimonial causes, and it is there declared that the case of alimony has always been regarded as an

exception, and that 'the jurisdiction of the Court must be limited to the allowing of ailmony * * *.' If, twenty years since, it was judicially announced that the Court of Equity has no cognizance of matrimonial causes beyond the allowance of ailmony, and a necessity existed for more extensive authority, legislative interference would have supplied the defect, and, following the example of other States, would have vested the judicial tribunals of the State with this new and perilous power * * * . Whether wisely or unwisely, the Legislature has thought proper to withhold these powers. They have delegated to no Court the authority to declare a marriage null and void, and they have never themselves exercised the authority. Cases of individual hardship have occurred, and will occur; but the observation of a different policy in other States, as well as the experience of our own, has served only to confirm the conviction that it is better to tolerate occasional suffering than to jeopardize the peace of society, and open a wide door to fraud, imposition and other immorality.'

It was not until the adoption of the Constitution of 1868, during the Era of Reconstruction, that any change was brought about in connection with divorce in this State. That Constitution, Art. IV, Sec. 15, declares: 'The courts of common pleas shall have exclusive jurisdiction in all cases of divorce;' and provided in Art. XIV, Sec. 5, that 'divorces * * * shall not be allowed but by the judgment of a court, as shall be prescribed by law.'

When the General Assembly met in 1872, an Act was passed, 15 Stat. 30, authorizing a divorce from the bonds of matrimony on the grounds of adultery and willful desertion. That Act continued of force and effect for six years, when it was repealed by the Act of 1878, 15 Stat. 719. All provisions of the Constitution of Eighteen Hundred and Sixty Eight, and the amendments thereto, were repealed when our present ***333*** Constitution was adopted in 1895, Art. XVII, Sec. 11, subd. 9. Until amended in 1949, the Constitution of 1895 provided, in Art. XVII, Sec. 3. 'Divorces from the bonds of matrimony shall not be allowed in this State.'

In 1949, an amendment to Art. XVII, Sec. 3 of the Constitution of 1895 was ratified by the General Assembly, having been voted on favorably by a majority of the electors. Section 3, in accordance with this amendment, now reads as follows: 'Divorces from the bonds of matrimony shall be allowed on grounds of adultery, desertion, physical cruelty, or habitual drunkenness.' Acts 1949, Page 138, 46 Stat. at Large.

Following the adoption of the foregoing Constitutional Amendment, the General Assembly at its 1949 session, passed an Act to provide for and regulate the granting of divorces from the bonds of matrimony in this State, Act April 15, 1949, 46 St. at Large, Page 216, on the grounds stated in the Amendment. So that the designated Courts of the State are now vested with what was termed in 1846, in Mattison v. Mattison, supra. 'This new and perilous power.'

A careful examination of our reports fails to disclose any case specially passing upon any ground of divorce during the period in which we had a divorce law, from 1872 until 1878. The cases of Mattison v. Mattison, 1 Strob.Eq. 387, 47 Am.Dec. 541, supra, and Grant v. Grant, 12 S.C. 29, 32 Am.Rep. 506, deal mainly with questions of jurisdiction and not with the general principles governing divorce

Bungener v. Bungener, 357 S.E.2d 147 (Ct. App. 1987)

Court of Appeals of Georgia.

MURPHY

v.

The STATE.

No. 73960.

May 4, 1987.

Defendant was convicted in the Superior Court, Muscogee County, McCombs, J., of theft by taking, and she appealed. The Court of Appeals, Carley, J., held that: (1) ledger was admissible under business records exception to hearsay rule; (2) defendant's untimely mistrial motion was waived; (3) instruction in response to jury question was not erroneous; and (4) imposition of restitution as condition for probation was erroneous absent posttrial presentence hearing on that issue.
Conviction affirmed; sentence reversed with direction.

CARLEY, Judge.
Appellant was indicted for one count of theft by taking. A jury found her guilty. Appellant appeals from the judgment of conviction and sentence entered on the jury's verdict.

Camburn v. Smith, 586 S.E.2d 656 (2003)

Supreme Court of Georgia.
ROEBUCK
v.
The STATE.
No. S03A0860.
Sept. 22, 2003.
Reconsideration Denied Oct. 17, 2003.

Defendant was convicted in the Superior Court, Fulton County, Bensonetta Tipton Lane, J., of malice murder. Defendant appealed. The Supreme Court, Carley, J., held that: (1) expert's unrebutted testimony that a fingerprint lifted from the victim's car matched a print on a card which bore defendant's name corroborated conspirator's identification of defendant; (2) expert's reliance upon hearsay affects the weight of the opinion, not the admissibility; overruling *Redwing Carriers v. Knight*, 143 Ga.App. 668, 239 S.E.2d 686; (3) delay of approximately five years before the state arrested and indicted the defendant after identifying him as a possible suspect did not violate due process; and (4) evidence that defendant and prosecution witness had been detained at youth detention center was admissible.
Affirmed.
Fletcher, C.J., concurred specially and filed opinion.
Sears, P.J., dissented and filed opinion.
CARLEY, Justice.
In 1985, Charles Boyd was fatally stabbed in an altercation with three passengers in his car. Anthony Hill and Willie Terrell were convicted of murder, and the convictions and life sentences were affirmed on appeal. ***201** *Terrell v. State*, 258 Ga. 722, 373 S.E.2d 751 (1988). Attempts to identify the third participant in the homicide were unsuccessful until 1994, when a previously unmatched print lifted from the victim's automobile was shown to be that of "Demetrius Jones," an alias that the State contends was used by Appellant Gregory Roebuck. Thereafter, Hill gave a statement, in which he exonerated Terrell and implicated Appellant and Adrian Smith as the other two passengers in Mr. Boyd's car. Eventually, the trial court granted an extraordinary motion for new trial filed by Terrell, and the State dropped the murder charge against him. Smith was never charged with the crime because he died in an unrelated shooting. In 1999, Appellant was indicted for killing Mr. Boyd. A jury found him guilty of malice murder, and the trial court imposed a sentence of life imprisonment. After the denial of a motion for new trial, Appellant brings this appeal.[FN1]

FN1. The crime was committed on October 10, 1985. The grand jury indicted Appellant on April 16, 1999, and he was arrested in May of 1999. The jury returned the guilty verdict on July 5, 2000, and the trial court entered judgment of conviction and imposed

the life sentence on August 4, 2000. Appellant filed a motion for new trial on August 8, 2000, which the trial court denied on September 20, 2002. On December 2, 2002, the trial court granted Appellant an out-of-time appeal, and he filed a notice of appeal the following day. The case was docketed in this Court on February 28, 2003. The appeal was orally argued on May 20, 2003.

Canady v. Canady, 374 S.E.2d 502 (Ct. App. 1988)

Court of Appeals of South Carolina.
Ernestine CANADY, Respondent,
v.
Turner L. CANADY, Jr., Appellant.
No. 1232.
Heard Sept. 21, 1988.
Decided Oct. 31, 1988.

Judgment of marital dissolution was entered in the Family Court, Charleston County, J. Clator Arrants, J., and former wife appealed. The Court of Appeals, Cureton, J., 289 S.C. 512, 347 S.E.2d 115, affirmed in part, reversed in part, and remanded. On remand, the Family Court, found that certain property had been transmuted into marital property and awarded periodic alimony to former wife. Former husband appealed. The Court of Appeals, Shaw, J., held that: (1) home and 25-acre tract of land upon which home was located, which was conveyed to husband by his grandmother during husband's marriage, was transmuted into marital property; (2) court's award to wife of 40 percent of value of home and 25-acre tract upon which home was located was proper; and (3) court's award of permanent, periodic alimony of $250 per month to wife was proper.
Affirmed.
SHAW, Judge:

This is a domestic action which this court has had occasion to review before. The first appeal resulted in a remand for a redetermination of marital property and alimony. *Canady v. Canady,* 289 S.C. 512, 347 S.E.2d 115 (Ct.App.1986). Mr. Canady appeals the family court's order on remand challenging: (1) the finding of certain property as transmuted marital property, (2) the division of marital property, and (3) the award of periodic alimony to Mrs. Canady. We affirm.

The facts having been set forth in our prior opinion, we need not recite them here. Any additional facts necessary to the disposition of this case will be set forth below.

Mr. Canady contends the trial judge erred in equitably dividing a 25 acre tract of land with improvements conveyed to him by his grandmother during the couple's marriage. The couple lived on the property since they married and had been married for ten years at the time of the conveyance from the grandmother. After the conveyance, the parties took out a series of joint loans to make renovations and improvements. The mortgage covered the entire 25 acres. The parties were jointly responsible for the payments which were made from joint funds.

Casey v. Casey, 362 S.E.2d 6 (1987)

Supreme Court of South Carolina.
Joyce M. CASEY, Respondent,
v.
John William CASEY, Petitioner.
No. 22783.
Heard Sept. 8, 1987.
Decided Oct. 12, 1987.

Husband appealed from order of the Family Court, Richland County, Berry L. Mobley, J., entered in divorce action. The Court of Appeals, 289 S.C. 462, 346 S.E.2d 726, affirmed in part, reversed in part and remanded. After granting certiorari, the Supreme Court held that: (1) when goodwill of business is dependent upon owner's future earnings, it is too speculative for inclusion in the marital estate, and (2) goodwill in husband's fireworks business did not constitute marital property subject to equitable distribution. Reversed.

PER CURIAM:

Certiorari was granted in this divorce case to review the decision of the Court of Appeals reported at 289 S.C. 462, 346 S.E.2d 726 (Ct.App.1986). We reverse.

Petitioner (Husband) and respondent (Wife) were married ***504** in 1960. In 1976, Husband purchased a retail fireworks business from his father and has operated it as a sole proprietorship. Wife worked in the business until 1980. The continued success of the business can be attributed largely to Husband's lobbying efforts to keep the sale of fireworks legal in South Carolina.

At the time of the divorce, the tangible assets of the fireworks business consisted of some office fixtures and $6,000 worth of inventory. Wife's expert witness, Dr. Oliver Wood, testified the business's value exceeded that of the tangible assets, but he was unable to place a value on the goodwill.

In equitably dividing the parties' marital property, the family court awarded Wife a 21% interest in the goodwill of the fireworks business and valued her share at $10,500. The Court of Appeals held that goodwill was a marital asset subject to equitable division, but reversed the family court's valuation and remanded for redetermination of Wife's interest.

This Court granted a writ of certiorari to consider two questions:

(1) Was the Court of Appeals correct in holding that goodwill is subject to equitable distribution?

(2) Was the Court of Appeals correct in remanding only a portion of the equitable distribution award without considering the impact of that determination on the remainder of the equitable distribution award and on alimony?

Courts from other jurisdictions are divided as to whether goodwill is marital property divisible upon divorce. *See* Annot., 52 A.L.R.3d 1344 (1973); ***7** 24 Am.Jur.2d *Divorce and Separation* § 899 (1983). The issue is one of first impression in this state.

[1] When the goodwill in a business is dependent upon the owner's future earnings, it is too speculative for inclusion in the marital estate. *See Holbrook v. Holbrook,* 103 Wis.2d 327, 309 N.W.2d 343 (Ct.App.1981); *Nail v. Nail,* 486 S.W.2d 761 (Tex.1972). Moreover, these future earnings are accounted for in an award of alimony. *See Holbrook, supra; Beasley v. Beasley,* 359 Pa.Super. 20, 518 A.2d 545 (1986).

***505** [2] We hold that goodwill in Husband's fireworks business does not constitute marital property subject to equitable distribution.

[3] In some instances the erroneous designation of an asset as marital property may require remanding for consideration of the entire equitable distribution award and alimony. Here, however, we find the remainder of the equitable distribution award and alimony to be fair and equitable. A remand of the case is, therefore, unnecessary.

It was error to hold that goodwill of Husband's fireworks business was subject to equitable distribution.

REVERSED.

Clear v. Clear, 500 S.E. 2d 790 (Ct. App. 1998)

Court of Appeals of South Carolina.
Tina CLEAR, Respondent,
v.
Stephen CLEAR, Appellant.
No. 2830.
Heard March 4, 1998.
Decided April 20, 1998.

Father moved to modify child custody order entered pursuant to divorce proceeding. The Family Court, Spartanburg County, Thomas E. Foster, J., granted child custody to mother. Father appealed. The Court of Appeals, Hearn, J., held that mother's profession as topless dancer did not affect her ability to parent two children, and, thus, was not relevant to custody determination.
Affirmed.

FACTS

The parties were married in 1986 in Missouri. They have two children, Aimaeann and Zack, who were ages seven and four at the time of trial. The parties resided in Missouri until 1992 when Father re-enlisted in the Navy and was stationed in Charleston, South Carolina.

***188** When the parties finally separated in August 1994, the children remained with Mother. At that time, Father was still in the Navy and Mother was working two jobs and attending nursing school. In April 1995, Mother began dancing at a topless club. When Father returned home from sea duty that year, Mother informed him she was a topless dancer. The parties agreed not to tell the children about Mother's employment.

When Father finished his tour of duty in June 1995, he moved back to Missouri. Father obtained a divorce in Missouri in December 1995 and remarried shortly thereafter. Except for extensive visitation with Father in Missouri in the summers of 1995 and 1996, the children remained with Mother.***791** Mother was still working as a dancer at the time of trial in November 1996. Her work schedule permits her to be with the children during the day and her brother cares for the children at night. Mother testified she began dancing because she was receiving no regular support from Father and because it was more lucrative than any other job she could find.

There is some dispute as to the level and regularity of child support provided by Father prior to the commencement of this action. Mother testified that from their separation in August 1994 until April 1995, Father paid her rent. However, she testified Father sent her only $50 in support after he returned to Missouri. Father disputed that he had not provided regular support, noting he did the best he could from where he was located. In

any event, by Temporary Order dated May 16, 1996, Father was ordered to begin paying regular child support.

At trial, Mother testified Father's heavy drinking, drug use, and partying brought about their separation. Father admitted he drank heavily and used marijuana and methamphetamine during the early part of the marriage but denied using any drugs since 1991 or 1992. He testified that he and his present wife drink socially but denied either has a drinking problem. Despite Father's somewhat checkered past, it appears he presently has a stable job and a good marriage.

Near the time of the parties' separation in 1994, Mother had an extramarital affair. When confronted with the affair and presented with the possibility that she might lose custody of ***189** the children, Mother made two unsuccessful and arguably insincere attempts to harm herself. She threatened to shoot herself with a gun containing no bullets and broke a cup on her wrist. After this second episode, she was admitted to Charleston Hospital for one day.

The Guardian ad Litem recommended that Father be granted custody of the children. The Guardian specifically stated he did not consider the mother's career as being dispositive as to his recommendation for custody. Nonetheless, his rationale as communicated to the court at trial centered mainly on Mother's occupation and her failure to establish "any good case about how this lifestyle she presently has is going to be fleeting or that it's really one out of desperation." The Guardian also noted Mother's job requires the children to spend evenings at a babysitter's until she picks them up at approximately 2:30 a.m. In addition, the Guardian noted the parties' younger child would soon be enrolled in school, negating any benefit the children would derive from Mother being home during the day.

The trial judge stated in his order: "There has been only one complaint levied against [Mother]: her dancing occupation." He found, however, that Mother's job had not interfered with her duties as a parent, that she had been their primary caregiver since birth, and that the best interests of the children would be served by granting custody to her.

DISCUSSION

On appeal, Father argues the family court erred in failing to award him custody of the children. Specifically, he asserts the family court issued an order unsupported by the facts, applied the functional equivalent of the tender years doctrine, and paid insufficient heed to the recommendations of the Guardian ad Litem. We disagree.

On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Epperly v. Epperly,* 312 S.C. 411, 440 S.E.2d 884 (1994); *Chester County Dep't of Social Servs. v. Coleman,* 303 S.C. 226, 399 S.E.2d 773 (1990). We are not, however, required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a ***190** better position to evaluate their credibility and assign comparative weight to their testimony. *Cherry v. Thomasson,* 276 S.C. 524, 280 S.E.2d 541 (1981). Further, this broad scope of review does not relieve the appellant of the burden of convincing this court that the family court committed error. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979). Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.***792** *See Aiken County Dep't of Social Servs. v. Wilcox,* 304

S.C. 90, 403 S.E.2d 142 (Ct.App.1991). This is especially true in cases involving the welfare and best interests of children. *Id.*

In all child custody controversies, the welfare and best interests of the children are the primary, paramount, and controlling considerations. *Cook v. Cobb,* 271 S.C. 136, 245 S.E.2d 612 (1978). The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact on the child. *Epperly v. Epperly,* 312 S.C. 411, 440 S.E.2d 884 (1994). Psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should also be considered. *Wheeler v. Gill,* 307 S.C. 94, 413 S.E.2d 860 (Ct.App.1992). "The totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Davenport v. Davenport,* 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975).

[1] The family court judge correctly reasoned that Father's case against Mother centers mainly, if not exclusively, on Mother's dancing occupation. However, the record before us contains no evidence that Mother's topless dancing adversely affected her ability to parent the parties' two children. Absent such evidence, Mother's occupation is not a relevant consideration in denying her custody.

[2] [3] We recognize that some may consider Mother's occupation, though legal, immoral. Nonetheless, the effect which a parent's morality may have on his or her fitness to have custody is limited to what relevancy it has, either directly or indirectly, to the welfare of the child. *Id.; Stroman v. Williams,* 291 S.C. 376, 378, 353 S.E.2d 704, 705 (Ct.App.1987). ***191** Moreover, custody is not to be used to penalize or reward a parent for his or her conduct. *Id.*

Nothing in this opinion should be construed as implying our approval of topless dancing as an occupation for mothers. Whether we approve or disapprove is not the issue. It is not necessary for the court to make a moral judgment on a parent's lifestyle absent evidence that the lifestyle adversely affects the welfare of the child. *Id.* at 381, 353 S.E.2d at 707. (Sanders, C.J., concurring). "We are not in the business of gratuitously judging the private lives [and morals] of other people." *Id.*

We find no merit to Father's contention the family court applied the functional equivalent of the tender years doctrine in awarding custody to Mother. The "tender years doctrine," in which there is a preference for awarding a mother custody of a child of tender years, was abolished effective May 18, 1994. S.C.Code Ann. § 20-7-1555 (Supp.1997). Here, it is evident from the family court's order that the court considered factors such as which parent evolved as the children's primary caregiver and the conduct, attributes, and resources of each parent. These are proper considerations in making child custody determinations. *See, e.g., Parris v. Parris,* 319 S.C. 308, 460 S.E.2d 571 (1995) (primary caretaker versus primary wage earner status is a factor to be considered in custody determinations).

[4] [5] We also find no merit to Father's argument the family court failed to give adequate consideration to the recommendations of the Guardian ad Litem. The role of the Guardian ad Litem in making custody recommendations is to aid, not direct, the court. Ultimately, the custody decision lies with the trial judge. *See Shainwald v. Shainwald,* 302 S.C. 453, 395 S.E.2d 441 (Ct.App.1990) (the Guardian ad Litem does not usurp the judge's function). Here, the family court explicitly considered but rejected the

Guardian's recommendation. Under the facts of this case, we find no abuse of discretion in the court's decision not to adopt the Guardian's recommendation.

For the foregoing reasons, the decision of the family court is

AFFIRMED.

Crim v. Crim, 345 S.E.2d 515 (Ct. App. 1986)

Court of Appeals of South Carolina.
Phyllis J. CRIM, Appellant,
v.
Reuben Sidney CRIM, Respondent.
No. 0730.
Heard April 22, 1986.
Decided June 9, 1986.

Former wife appealed from a divorce decree issued by the Family Court, Richland County, J. Claytor Arrants, J. The Court of Appeals, Goolsby, J., held that: (1) although wife was capable of obtaining a job and contributing to her own support and the support of her family, she was entitled to permanent periodic alimony rather than rehabilitative alimony where it was unlikely that the wife could ever match her former husband in earning capacity and that on her own she could ever achieve the high standard of living to which she and her children were accustomed during the marriage, and (2) trial court, in making an equitable distribution of marital estate, did not abuse its discretion in its valuation of the house contents and the method of distribution.
Reversed in part, affirmed in part, and remanded.
Gardner, J., filed a dissenting opinion.
GOOLSBY, Judge.

Phyllis J. Crim, the wife, appeals from the decree of the family court that granted her a divorce from the husband, Reuben S. Crim, on the ground of adultery, awarded her custody of the parties' two minor children, awarded her rehabilitative alimony for one year, awarded her child support, and equitably divided the marital property. The issues on appeal are whether the trial judge erred in awarding rehabilitative rather than permanent periodic alimony and whether the trial judge abused his discretion in equitably dividing the marital property. We reverse in part, affirm in part, and remand.

The parties married on January 14, 1963, when the wife was nineteen years old and the husband was twenty. At the time of their marriage, the wife had only an associate degree. The husband had not been to college but with the wife's support and encouragement, he attended college and received his bachelor's degree in 1967. While the husband was in college, the wife worked full-time.

Thereafter, in accordance with the parties' prior agreement, the wife returned to school and received her bachelor's ***362** degree also. It is clear from the record that both parties worked and contributed to their own and to each other's education.

In 1968, the husband went to work for Columbia Newspapers as Personnel Director. The parties' first child, Berry W. Crim, was born that same year. Following Berry's birth, the wife remained home and out of the work force for a year and a half.

The wife, who possesses a teacher's certificate, engaged in full-time teaching for ten weeks in the fall of 1970.

In 1970, the husband took a job with a newspaper in Charleston, West Virginia, and moved the family to Charleston. They lived there for the next six years. Their daughter, Jordan B. Crim, was born in Charleston two years later.

The Crims moved to Beckley, West Virginia, in 1976, where the husband worked with a local newspaper for five years. In 1981, they returned to Columbia where the husband was employed as General Manager and Executive Vice President of Columbia Newspapers.

During their years in West Virginia, the wife occasionally worked as a substitute teacher but she never received any substantial income from teaching. She did, however, maintain a current teaching certificate***517*** and is presently certified to teach in elementary schools and to teach business subjects in high school.

Corresponding increases in salary have marked the husband's move up in the newspaper business. At the time of the hearing, his salary exceeded $96,000 a year. He also was receiving many benefits, such as club memberships, a company car, insurance, and stock offerings.

The parties separated in July, 1983, after more than twenty years of marriage. The husband admitted to having an affair with another woman after the date of the separation but strongly denied that his affair caused the breakup of the marriage. Instead, he claimed that the wife withdrew all emotional support from him after they returned to Columbia and that she often embarrassed him in public and in front of business colleagues. Several witnesses corroborated these facts at the trial.

The wife testified that the problems in the marriage began when the husband started staying out after work with ***363*** business associates, became inattentive to her, and generally excluded her from his life.

The parties lived comfortably during their marriage. They travelled to places like Newfoundland, Arizona, Florida, and the Bahamas. The parties lived in expensive homes in West Virginia and in Columbia. One or both of the children took tennis lessons, piano lessons, ballet lessons and played golf. They were members of a country club and another private club.

The trial judge granted the wife a divorce on the ground of adultery but found that "[n]either party was faultless in the deterioration and breakup of the marriage." The judge granted custody of the two children to the wife and ordered the husband to pay $750 per month per child in child support. The trial judge further ordered the husband to pay to the wife $1,000 per month in rehabilitative alimony for a period of one year based upon his finding that the wife "is capable of earning gainful income for her own self-support ...."

The trial judge's order permits the wife to live in the marital home, which is jointly owned by the parties, for a period of one year from the date of the decree and directs the husband to make the monthly house payments for that period. At the end of the year, either the parties may sell the residence with the net proceeds to go to the wife or the husband may convey his one-half interest in the property to the wife, in which case the wife would be responsible for the house payments.

The trial judge divided the remaining property of the parties, including the contents of the marital home. He awarded 60% of the contents to the wife and 40% thereof to the husband. Exclusive of the contents, the wife received by way of equitable distribution assets worth $75,150 while the husband got assets worth $65,535.

I.

The wife contends the trial judge erred in awarding her rehabilitative alimony. She seeks permanent periodic alimony in terms of money and other forms of support, such as house payments, insurance on the husband's life, and country club dues.

[1] ***364** The South Carolina Supreme Court recognized rehabilitative alimony in *Herring v. Herring,* 286 S.C. 447, 335 S.E.2d 366 (1985); *see also* *Eagerton v. Eagerton,* 285 S.C. 279, 328 S.E.2d 912 (Ct.App.1985). Factors to be considered in awarding rehabilitative alimony include (1) the duration of the marriage, (2) the age, health, and educational background of the supported spouse, (3) the financial resources of the parties, (4) the parties' accustomed standards of living, (5) the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance, (6) the time necessary for the dependent spouse to acquire job skills, and (7) the likelihood of success in the job market. *Alliegro v. Alliegro,* 287 S.C. 154, 337 S.E.2d 252 (Ct.App.1985).

****518** [2] This case is clearly a close one. Although the marriage was lengthy, the wife, at 43, is still relatively young and healthy. She is highly educated and already possessed of the skills, if not the experience, necessary to find a job as a teacher.

On the other hand, the husband has a yearly salary approaching $100,000 and has provided his wife and family with a high standard of living. He has the ability to contribute to the continuation of that living standard.

The trial judge based his award of rehabilitative alimony upon his finding that the wife, although then unemployed, was nonetheless capable of earning a livelihood. We likewise think she is capable of obtaining a job and contributing to her own support and to the support of her family. It is unlikely, however, that the wife will ever match her former husband in earning capacity and that on her own she can ever achieve the high standard of living to which she and her children were accustomed during the marriage. To think she might do so, we believe, would deny reality.

We therefore reverse the award of rehabilitative alimony and direct that permanent periodic alimony be awarded to the wife in an amount to be determined by the trial court on remand. *Voelker v. Hillock,* 344 S.E.2d 177 (S.C.Ct.App.1986). In determining this amount, the trial court shall consider the appropriate factors outlined in *Atkinson v. Atkinson,* 279 S.C. 454, 309 S.E.2d 14 (Ct.App.1983), and ***365** other recent cases. The trial court shall also reconsider awarding the wife the other features of support sought by her in light of our decision that she is entitled to permanent periodic alimony in some amount and our decision below regarding equitable distribution. The amount of alimony and the nature of any additional support to be awarded to the wife are matters we commit to the trial court's sound discretion. *Cf.* *Smith v. Smith,* 264 S.C. 624, 216 S.E.2d 541 (1975) (the amount of alimony to be awarded is a matter within the discretion of the trial court).

In awarding the wife permanent periodic alimony rather than rehabilitative alimony, we deem appropriate the language used by the Florida Court of Appeals in a recent case wherein that court reversed an award of rehabilitative alimony and modified an award of permanent periodic alimony by increasing the amount therefor:

By so ruling, we do not intend to lend support to the thought that a middle aged healthy woman need not go out to work. In our society, today, women, more often than not, are required to work until retirement and there is no reason to excuse [the wife] from doing the same just because her former position allowed her to follow a more traditional role. On the other hand, it must be remembered that at her age and level of earning experience, [the wife] is unlikely to become a great financial success story, and in all probability she will not achieve other than a very modest income.

Accordingly, mere rehabilitative alimony is not enough; however, the award of reasonable permanent periodic alimony does not forever enslave the husband, because significantly changed circumstances, either his or hers, are well settled in the law as a basis for later modification thereof.

McAllister v. McAllister, 345 So.2d 352 (Fla.4th Dist.Ct.App.1977), *cert. denied,* 357 So.2d 186 (Fla.1978).

II.

[3] The wife next argues the trial court erred in its equitable division of the marital estate. We disagree.

The criteria for equitable distribution set forth in the ***366** recent case of *Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66 (1985) were considered by the trial court. Considering the record as a whole, we find no abuse of discretion in this award, particularly as to the valuation of the house contents and as to the method of distribution, the only aspects of the trial court's equitable division of the marital estate to which the wife objects on appeal. *See Millis v. Millis,* 282 S.C. 610, 320 S.E.2d 66 (Ct.App.1984).

****519** REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

CURETON, J., concurs.

GARDNER, J., dissents.

GARDNER, Judge.

I dissent. The wife in this case devoted her career-building years to the marriage and the rearing of the parties' children. Obtaining employment at age 43 will be difficult, to say the least, for a woman who has been out of the job market for most of her adult life. The wife of this case sent her husband through college. He now earns more than $96,000 per year. I would modify the appealed order by awarding the wife $3,000 per month permanent alimony. Although this would not equalize the income of the parties, it would afford credence to the obligation of the Court to award alimony in keeping with the standard of living the wife has become accustomed to.

I, as a judge, cannot endorse the proposition that wives of a long marriage who have devoted their career-building years to the marriage and the rearing of the children are not entitled to equitable treatment in divorces brought about by the husband's adultery in the September of their lives. Statistics bear out the fact that in divorces wives are

impoverished and husbands are enriched-equity should not condone this statistically proven fact.

I would affirm with the suggested modification.

Davenport v. Davenport, 220 S.E.2d 228 (1975)

Supreme Court of South Carolina.
George W. DAVENPORT, Appellant,
v.
Jean Hogg DAVENPORT, Respondent.
No. 20119.
Dec. 1, 1975.

Husband brought action for divorce and to gain custody of two children, three and five years of age. The Common Pleas Court, Greenville County, Wade S. Weatherford, Jr., J., reversed findings of master and awarded custody to mother and father appealed. The Supreme Court, Rhodes, J., held that father, who was granted divorce from mother on ground of adultery, failed to prove by greater weight of evidence that welfare of the children required abrogation of separation agreement providing for mother's custody. Affirmed.

RHODES, Justice:

This appeal involves a dispute between the father and the mother over custody of two children, three and five years of age.[FN1] The Circuit Court reversed the finding of the master[FN2] and awarded custody to the mother from which order the father has appealed. We affirm.

FN1. The ages of the children, both of them boys, at the time this action was commenced on June 12, 1974.

FN2. The master recommended that custody of the children be granted to the father subject to the mother's right to retain custody of the youngest child until he reached the age of five and one half years.

This action was instituted by the plaintiff-appellant, George W. Davenport, for the purpose of obtaining a divorce on the ground of adultery from the defendant-respondent, ***526** Jean Hogg Davenport, and gaining custody of their children. Both the Circuit Court and master concluded that the husband was entitled to a divorce on the ground of adultery from which finding there has been no appeal. Thus, the sole issue for determination is whether custody should have been granted to the mother, and our review of the record will be confined to evidence relevant to such issue.

[1] There being no concurrent findings by the master and Circuit Court in this equity case, it becomes the duty of this Court to independently determine the issues of fact according to our view of the weight of the evidence. Adams v. Adams, 262 S.C. 85, 202 S.E.2d 639 (1974).

The parties were married in 1967, and lived together as husband and wife until January 18, 1974. Upon their separation, they entered into a written agreement, initiated by the husband, which provided that the mother was to have custody of their ***230** children with liberal visitation privileges granted the father. The cleavage in the marriage began to appear shortly after the birth of the youngest child at which time the parties were residing in the husband's family home in Greer. The husband was busily engaged in managing a relatively large family automobile dealership of which he was a principal

stockholder. The wife felt that she was being neglected by the husband and the marriage progressively deteriorated, aggravated by sexual incompatibility and mutual suspicion and distrust. When asked by the wife if he had been unfaithful to her, he replied that he could not say that he had or had not. The husband testified that at the time he made this response he had not been unfaithful to his wife, and merely made the statement to make his wife jealous. The wife testified that she felt she had lost her husband and that he no longer wanted her. After this incident, the wife had an illicit affair with another man in August 1973, of which the husband later became aware. Upon the separation of the parties on January 18, 1974, the above-referenced ***527** agreement was entered into and the wife moved from Greer to Spartanburg with the children. With substantial financial assistance from the husband, she purchased a condominium in which she and the children have since resided, she being employed as a school teacher. At the time of the master's hearing the wife was 29 years of age and the husband 31.

In May of 1974 the husband employed private detectives to systematically observe the condominium in which the wife and children resided, and evidence was obtained that an adult male had spent the entirety of five (5) nights at the dwelling. The wife did not dispute the evidence nor does she deny an adulterous relationship with this man.

[2] [3] [4] [5] In determining the issue of child custody the paramount consideration is the welfare of the child. In cases, as here, where the parties have previously agreed as to whom should have custody, the party seeking to set aside the agreement has the burden of proving that the welfare of the children requires the agreement to be abrogated. Ford v. Ford, 242 S.C. 344, 130 S.E.2d 916 (1963). While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed. The morality of a parent is a proper factor for consideration but is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child. Custody of a child is not granted a party as a reward or withheld as a punishment.

In studying the record before us, the conclusion is inescapable that the children's relationship with their mother is exemplary. They are healthy and well-adjusted. The mother has lived with and cared for them since birth. [FN3] The condominium in which they live has three bedrooms and is located in an excellent environment for the rearing of children.***528** The mother's education includes a degree in elementary education and 18 hours of graduate study in early childhood development. Her employment as a 6th grade teacher in the public schools normally allows her to return home by 3:30 p.m., and during her absence the children are either in school or cared for by competent domestic help. At the final hearing before the master, the mother testified that her husband had told her the night before that he knew that she did take good care of the children. The husband did not contradict this testimony. It is significant that the master found it proper for the mother to retain the custody of the younger child until he attained the age of five and one half years.

FN3. Except for a period of a few weeks during this litigation when the father had custody of the older child under a court order.

****231** The father continues to reside in the large family home in Greer, which was the marital abode of the parties. The house is located in the older section of the city where few, if any, small children live. He is a hard-working businessman with many responsibilities. If custody of the children were awarded him, he proposes to hire a housekeeper and other necessary domestic help to care for the children during his absences. He enjoys an excellent reputation in the community.

We are convinced that the admitted moral lapses of the mother are not indicative of a continued course of conduct. Her misconduct in the condominium while the children were living with her is irresponsible and indefensible. She has confessed these transgressions, and her attitude is repentant and remorseful.

[6] We agree with the lower court that the father has failed to prove by the greater weight of the evidence that the welfare of the children required the abrogation of the Separation Agreement.

Affirmed.

LEWIS, C.J., and LITTLEJOHN, NESS and GREGORY, JJ., concur.

Doe v. Doe, 334 S.E.2d 829 (Ct. App. 1985)

Court of Appeals of South Carolina.
John DOE, Appellant,
v.
Jane DOE, Respondent.[FN1]

FN1. For reasons which will soon become obvious, this court, on its own motion, has substituted pseudonyms for the true names of the parties.

No. 0550.
Heard June 26, 1985.
Decided Sept. 10, 1985.

Husband appealed from decree of Family Court, Oconee County, J. Franklin McClain, J., granting wife divorce on ground of one-year continuance separation and awarding alimony. The Court of Appeals, Sanders, C.J., held that: (1) even if single act of fellatio by wife upon another man constituted adultery for purposes of statute providing that no alimony shall be granted to adulterous spouse and statute providing that adultery is ground for divorce, act was condoned by husband and therefore could not be relied upon as bar to paying wife alimony or as ground for divorce; (2) conduct of wife did not so contribute to breakup of marriage that she should be denied alimony; and (3) trial court properly refused to enforce separation agreement insofar as it pertained to alimony. Affirmed.

SANDERS, Chief Judge:

This is an appeal from a decree of the Family Court granting respondent wife a divorce from appellant husband on the ground of one year continuous separation and awarding her alimony in the amount of $200 per month. We affirm.

The husband presents four questions on appeal: (1) whether the trial judge erred in not holding the commission by the wife of an act of fellatio outside the marital relationship constitutes an act of adultery so as to bar her from receiving alimony; (2) whether the trial judge erred in not holding that the conduct of the wife so contributed to the breakup of the marriage that she should be denied alimony; (3) whether the trial judge erred in failing to grant the husband a divorce on the ground of adultery; and (4) whether the trial judge erred in awarding alimony to the wife in view of her waiver of alimony in a prior separation agreement entered into between the parties. The material facts are largely undisputed.

QUESTIONS 1 AND 3

The husband's first and third questions raise the issue of whether an act of fellatio is an act of adultery so as to bar ***509** alimony as a matter of law and entitle him to a divorce on the ground of adultery.

The wife admits that, during her marriage to the husband, she committed a single act of fellatio upon another man. The husband does not contend there is any evidence proving the wife engaged in any misconduct of a sexual nature other than the single act of fellatio which she admits.

The husband relies on two sections contained in Title 20, Chapter 3 of the 1976 Code of Laws of South Carolina, as amended. Section 20-3-130, provides that "[n]o alimony shall be granted an adulterous spouse." Section 20-3-10 provides that adultery is a ground for divorce. Neither section defines the term adultery. Nor does the Code otherwise provide a definition***831** of the term applicable to these sections.

Adultery has been defined in an early South Carolina case, construing a different statute, as "the illicit intercourse of two persons, one of whom, at least, is married." *Hull v. Hull,* 26 S.C.Eq. (2 Strob.Eq.) 174, 187 (1848).[FN2]

FN2. The crime of adultery in South Carolina is defined as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person." Section 16-15-70. Case law in South Carolina holds that to constitute the crime of adultery, where the man and woman are not living together, the intercourse must be "habitual; that is, frequent, occasional acts will not be sufficient." *State v. Carroll,* 30 S.C. 85, 87, 8 S.E. 433, 434 (1889). Criminal cases in other states have recognized broader definitions of the terms adultery and sexual intercourse. *See, e.g., Copeland v. State,* 108 Tex.Cr. 228, 239, 300 S.W. 86, 91 (1927) (in deciding the insufficiency of an indictment for criminal libel, court cited definitions of adultery from *Webster's International Dictionary:* "The unfaithfulness of a married person to the marriage bed. Lewdness or unchastity of thought as well as an act forbidden by the Seventh Commandment."); *Commonwealth v. Bucaulis,* 6 Mass.App. 59, 66, 373 N.E.2d 221, 226 (1978), *cert. denied,* 439 U.S. 827, 99 S.Ct. 100, 58 L.Ed.2d 121 (1978) (in construing term sexual intercourse as including fellatio under a statute making it unlawful to suffer the presence of females on premises to engage in sexual intercourse, court cited another statute providing punishment for a person who "has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen.").

Definitions of fellatio are available from a number of sources, but not this opinion. *See, e.g., State v. Warren,* 59 N.C.App. 264, 296 S.E.2d 671 (1982); *Webster's Ninth New Collegiate Dictionary* 455 (9th ed. 1983).

We are aware of no case in any state directly addressing this issue. Courts in other states have addressed similar issues with mixed results. *See, e.g., ***510** *W v. W,* 94 N.J.Super. 121, 226 A.2d 860 (1967) (held husband not entitled to divorce on ground of adultery from wife, whose vagina was completely occluded, based on her performance on another man of "unnatural sex acts" [sic]); *Cohen v. Cohen,* 200 Misc. 19, 103 N.Y.S.2d 426 (Sup.Ct.1951) (held wife not entitled to divorce from husband on ground of adultery based on his confession of "sodomy upon a male person"); _____ v. _____, (Anonymous), 2 Ohio N.P. 342, 3 Ohio Dec. 450 (1895) (held wife not entitled to divorce from husband on ground of adultery based on his "sodomy with a beast").

See also, e.g., Owens v. Owens, 247 Ga. 139, 140, 274 S.E.2d 484, 485 (1981) (in construing a rule of procedure which prohibited testimony by a person as to adultery by her spouse, court held "both extramarital homosexual, as well as heterosexual, relations constitute adultery"); *Rosser v. Rosser,* 355 So.2d 717 (Ala.Civ.App.1977), *cert. denied sub nom. Ex Parte* Rosser, 355 So.2d 722 (Ala.1978) (in holding wife entitled to collect attorney's fees from husband despite her having committed fellatio, court referred in dicta to wife's act as "adultery").

The paucity of legal precedent on the issue of whether fellatio is adultery suggests that it is not one which society cries out to have resolved. Not for this reason, but because it is unnecessary for us to resolve this issue here, we decline to do so.

According to the undisputed evidence, although relations were strained between the parties after the husband learned what the wife had done, he continued to cohabit and voluntarily engage in sexual intercourse with her for approximately five months.

Condonation in the law of divorce means forgiveness, express or implied, by one spouse for a breach of marital duty by the other.

Grubbs v. Grubbs, 272 S.C. 138, 140, 249 S.E.2d 747, 749 (1978).

Condonation may be presumed from cohabitation; and lapse of time, or a continuance of marital cohabitation with knowledge of the offense, raises a presumption of condonation.

***511** *McLaughlin v. McLaughlin,* 244 S.C. 265, 274, 136 S.E.2d 537, 541 (1964).

****832** In *Grubbs,* the court held that a single act of adultery was an improper basis to deny the wife alimony where the husband had condoned the act by continuing to live with her for more than ten years. In *McLaughlin,* the court held the wife could not be granted a divorce based on an act of physical cruelty by the husband where she had condoned the act by continuing to live with him for approximately five months even though their relationship was strained during this period.

[1] The trial judge here did not make any finding or conclusion as to whether the act of the wife had been condoned by the husband. Instead he concluded that "the act of fellatio does not constitute adultery." Nevertheless, we have the right to sustain his order on any ground appearing in the record. Rule 4, § 8, Rules of Practice in the Supreme Court of South Carolina; *Westbury v. Bauer,* 284 S.C. 385, 326 S.E.2d 151 (1985); *State v. Johnson,* 278 S.C. 668, 301 S.E.2d 138 (1983).

The wife's pleadings do not mention the defense of condonation by name. However, our Supreme Court has held that, while condonation is ordinarily an affirmative defense which must be pleaded, if the evidence shows condonation, it is the duty of the court to so find without pleading. *Lanier v. Lanier,* 251 S.C. 117, 160 S.E.2d 558 (1968). Our Supreme Court has also held that the defense of condonation may even be raised for the first time on appeal. *McLaughlin v. McLaughlin,* 244 S.C. 265, 136 S.E.2d 537. The holdings in these cases may have been superseded by the subsequent adoption of Family Court Rule 11 which expressly provides that "[r]ecrimination and condonation shall be pleaded as affirmative defenses." It is also unnecessary for us to decide whether these holdings have been superseded because a careful reading of the pleadings here reveals that the defense of condonation was pleaded.

Although the wife did not explicitly plead the defense of condonation, the husband's amended petition (which was the first pleading alleging adultery on the part of the wife) alleged the wife had committed adultery "without the condonation and/or consent of the petitioner." The wife's responsive***512*** pleadings (which she styled a "reply" and an "amended reply") denied this allegation thereby putting in issue both the fact of whether she had committed an act of adultery and the fact of whether any such act had been condoned. *See* Family Court Rule 12 ("The petition and all other pleadings shall be liberally construed.").

[2] For these reasons, we hold that the act of fellatio by the wife was condoned by the husband so that even if the act was an act of adultery, the husband cannot avail himself of it as a bar to paying the wife alimony as a matter of law or as a ground for divorce.

QUESTION 2

The husband's second question raises the issue of whether the conduct of the wife so contributed to breaking up the marriage that she should be denied alimony.

The trial judge found the wife was in high school at the time she and the husband were married and did not complete her education until after the birth of their first child, but worked for three years while the husband was completing his education. He further found the wife had been a housewife and mother for the last ten years of the marriage.[FN3]

FN3. Evidence supporting these findings was not included in the Transcript of Record on appeal, but the husband took no exception to the findings by the trial judge as to these facts. *See Stein v. Xepapas,* 204 S.C. 239, 29 S.E.2d 257 (1944) (held where no exceptions are taken on appeal to findings, appellate court need not consider whether findings are correct); *Brothers & Sisters of Charity v. Renfroe,* 57 Ga.App. 646, 654, 196 S.E. 135, 140 (1938) (held where no exceptions are taken to findings of fact or law, findings become the "law of the case").

The husband testified he and the wife had a good marriage until one of their children was seriously injured in an accident. He testified they were so affected by seeing their child maimed for life, they began to argue about "everything." He ***833*** said their relationship continued to deteriorate for about ten months when the wife confessed to him she had committed the act of fellatio approximately three months earlier. The wife testified as to her repentant and remorseful attitude about her transgression. The husband testified he initially felt at fault himself for not having been more loving toward the wife. Although the husband testified he was never able to forgive the wife and never trusted her ***513*** thereafter, he also testified he continued to live with her "to preserve the marriage."

The husband also testified that disputes between him and the wife continued, centering around his objection to her spending too much time on outside activities instead of staying home and "rebuilding my trust." He said when he called home and the wife was not there, he became "very paranoid." He admitted having broken a set of dishes during one dispute and taking the wife's driver's license from her and taking the wheels off her car on other occasions. He characterized his latter actions as follows:

I took away her means of transportation and I guess to somebody that's used to having a car, you know, that's kind of restrictive, but, you know, I was asking her to exercise some judgment and her own restriction and when she wouldn't I disciplined her

like a child, you know, like a recalcitrant child, I guess because, you know, that was about how she was acting.

The husband did not attribute the cause of their separation, about five months after the wife's confession, to any further misconduct by her similar to the act to which she had confessed, but rather testified he had told her to leave because she insisted on taking a job outside the home.

[3] [4] Unless alimony is barred as a matter of law, the award or refusal to award alimony is a matter left to the discretion of the trial judge. *Clardy v. Clardy,* 266 S.C. 270, 222 S.E.2d 771 (1976). Based on the evidence here, we find no abuse of discretion by the trial judge in awarding alimony to the wife.

QUESTION 4

The husband's fourth question raises the issue of whether the wife should be denied alimony based on a separation agreement she entered into with him.

Soon after the parties separated, they entered into a written separation agreement providing for a property settlement "and any and all considerations of family support maintenance and alimony." Under the terms of the agreement, the wife acknowledged the provisions of the agreement were "fair, adequate, and satisfactory to her." The ***514** agreement further provided the wife accepted its provisions "in full and final settlement and in satisfaction of all claims and demands for alimony."

The husband petitioned the Family Court for an order confirming the agreement. The wife denied the agreement was fair and prayed that the husband "be required to provide a reasonable amount of alimony and separate maintenance, both *pendente lite* and permanently."

The wife testified she signed the agreement because the husband had threatened to take her children and "have my name drug through the mud all over town."

The trial judge found "the separation agreement, as it pertains to the property division, is fair and equitable." But on the issue of alimony and support, he found "the agreement to be unfair and inequitable." In doing so the trial judge considered the length of the marriage, the parties' ages, incomes, needs and obligations, as well as their financial status and relative contributions to the marriage. In addition, the trial judge took into account certain tax information supplied by an accountant. He further stated in his order:

"This finding is made with full recognition and appreciation by the court of Respondent's acts which contributed substantially to the breakup of the marriage and which would normally bar her from alimony, as well as her express waiver of alimony in the agreement and her full ***834** understanding of same at the time she entered into it."

[5] Where one party seeks Family Court approval of a settlement agreement between a husband and wife and the other party repudiates it, the court must first determine if the agreement was freely and voluntarily entered into and next determine if it is fair under all circumstances. *Funderburk v. Funderburk,* 286 S.C. 129, 332 S.E.2d 205 (1985).

[6] Based on the evidence here, we conclude the trial judge was correct in not enforcing the separation agreement entered into by the parties insofar as it pertains to alimony.

***515** Accordingly, the decree of the Family Court is

AFFIRMED.

GARDNER and GOOLSBY, JJ., concur.

Doe v. Doe, 478 S.E.2d 854 (Ct. App. 1996)

Court of Appeals of South Carolina.
Jane DOE, Respondent/Appellant,
v.
John DOE, Appellant/Respondent.
No. 2580.
Submitted Sept. 10, 1996.
Decided Oct. 28, 1996.
Rehearing Denied Dec. 23, 1996.

Wife brought action for divorce on ground of adultery, and the Family Court, Lexington County, C. David Sawyer, J., denied request for divorce, but entered order of separate maintenance and required husband to pay $300 per month permanent, periodic alimony, equally divided marital property, refused to require either party to pay for son's college expenses, and denied wife's request for attorney fees. Both parties appealed, and the Court of Appeals, Hearn, J., held that: (1) any error in admission of wife's affidavit and attached medical form regarding husband was harmless; (2) husband's counsel was properly precluded from examining wife about extramarital relationships; (3) entry of order drafted by wife's attorney was permissible; (4) family court's decisions regarding property division, alimony, and college expenses of son were permissible; and (5) denial of attorney fees was proper.
Affirmed.

HEARN, Judge.

Jane Doe (Wife) filed this action against John Doe (Husband) seeking a divorce on the ground of adultery. Wife sought alimony, equitable distribution of the marital estate, possession of the marital home, discovery, and attorney's fees. The judge denied the request for a divorce, finding Wife failed to prove adultery by clear and convincing evidence; however, the judge entered an order of separate maintenance and ***497** support addressing the other issues raised by the parties. The judge ordered Husband to pay $300 per month permanent, periodic alimony, equally divided the marital property, refused to require either party to pay for the college expenses of the parties' child, and ordered each party to pay his or her own attorney fees. Both parties appeal. We affirm.[FN1]

FN1. We decide this case without oral argument pursuant to Rule 215, SCACR.

Facts

Husband and Wife were married in September 1962. One son was born of the marriage. At the time of this action, the son was nineteen and a freshman at Clemson University. The parties separated in May 1993. Both parties worked outside the home

throughout the marriage and shared household and child-rearing responsibilities. Husband, at the time of the action, was fifty-seven years old, in good health, and employed by the South Carolina Employment Security Commission. He has been employed by various state agencies for approximately twenty-five years. Husband testified his income contributed approximately 71% of the marital income. Husband earns a gross monthly salary of $4,212. He also has a ***857*** retirement account valued without a cost of living factor at $115,904.47 and valued with a cost of living factor at $153,768.

At the time of the action, Wife was fifty-two years old, in good health, and employed as a nurse earning a gross monthly salary of $2,141.48. Wife has a retirement account valued at $1,617 and IRAs valued at $33,894.

At the temporary hearing, Wife introduced her affidavit stating Husband had been diagnosed with genital herpes, chlamydia, and chronic prostatitis. She attached a copy of an alleged medical form which she claims contains the diagnoses. The form includes a section entitled "Diagnosis" followed by three numeric codes. "Chlamydia, Herpes of Genitals Unspec, and Chronic Prostatitis" are listed next to each code under a heading entitled "Description." Wife testified she did not have either herpes or chlamydia.

During direct examination, Wife's attorney questioned her about the affidavit and medical document. Husband objected, ***498*** claiming it was not a medical document. The judge took judicial notice of the document because it was in the file. The affidavit was evidently introduced during a prior temporary hearing. Husband argued that although it was in the file, it could not be used at a final hearing. The judge overruled the objection.

During cross-examination, Wife was asked whether she had been propositioned by other men during the marriage. Wife's attorney objected, claiming Husband did not plead marital infidelity by Wife. The judge refused to allow the questioning, finding Wife was not put on notice of this issue. Later in the cross-examination Husband's attorney again tried to question Wife about her relationship with another man. Wife's attorney again objected and Husband's attorney withdrew the question.

Son attends Clemson University and earns As and Bs. Before the end of the marriage, the parties agreed he could attend Clemson if it was his college of choice. Husband testified the parties always agreed to pay Son's college costs. During his first year at Clemson, Husband contributed $7,020 toward his expenses for tuition, books, room, and board. Husband testified he also paid Son's car payment, car insurance, gas, health insurance, medical expenses, and spending money. Husband also purchased a $1,200 computer for Son. Husband used a joint marital savings account of $1,300 to pay some of these expenses.

Wife contributed funds for Son to take a winter ski trip and a trip to Florida for spring break. Son borrowed $5,800 in student loans during his first school year. The record does not indicate whether the loan proceeds were used to pay tuition or other costs. Son did not work during the school year and Husband testified he did not know what Son did with the money he earned during the summer vacation.

Husband's Appeal

I.

Husband first argues the family court judge erred in admitting Wife's complaint, affidavit, and attached medical form into evidence. We disagree.

[1] [2] [3] ***499** Husband argues the judge erred in admitting Wife's complaint "into evidence" because the allegations in the complaint are untrue and the judge erred in "allowing a false accusation along with a false document resulting in undue harm to the [Husband]" into evidence. Husband alleges the false statements include Wife's allegation he had "sexual relationships with other men and women during the marriage," and her allegation that she was forced out of the marital home. We find this argument is without merit. A complaint is part of the pleadings of a case and is not "evidence." Furthermore, any objections to impertinent or scandalous matters in a complaint are properly raised by the defendant in a motion to strike. Rule 12(f), SCRCP ("Upon motion ... the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.").

[4] Husband argues the family court erred in allowing into evidence the alleged medical form attached to Wife's affidavit as proof that he was diagnosed with chlamydia. Husband also argues the family court erred in allowing into evidence Wife's affidavit in ***858** which she states Husband was diagnosed with chlamydia in 1992. Husband denies he has chlamydia and argues the medical form was merely a statement of services for filing insurance, not a medical report containing a diagnosis.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court and, absent clear abuse, will not be disturbed on appeal. *Recco Tape and Label Co., Inc. v. Barfield,* 312 S.C. 214, 439 S.E.2d 838 (1994). To warrant reversal, the appellant must show both the error of the ruling and resulting prejudice. *Id.* Wife introduced the document as circumstantial evidence of Husband's adultery. However, even if this document was improperly admitted, it did not result in any prejudice to Husband since the family court ultimately found Wife did not prove Husband committed adultery. We find no error.

II.

[5] Husband next argues the judge erred in prohibiting him from cross-examining Wife about extramarital relationships. ***500** Husband argues the inquiry "would have provided relevant information" and the judge's failure to allow the questioning "prohibited [Husband from] getting a fair hearing on this matter and caused considerable damage to [Husband's] case." We disagree. Husband did not plead Wife's adultery and thus was not entitled to question her on the issue at trial.

This court addressed a similar issue in *Oyler v. Oyler,* 293 S.C. 4, 358 S.E.2d 170 (Ct.App.1987). In *Oyler,* the husband, in an effort to bar an award of alimony, sought to elicit testimony from the wife concerning alleged adulterous relationships. *Id.* at 5, 358 S.E.2d at 171. Wife's attorney objected, but the family court judge overruled the objection and allowed the questioning even though the husband had not pled adultery. *Id.* at 5-6, 358 S.E.2d at 171. Wife then admitted having several sexual relationships since the parties' separation. The family court judge subsequently held the wife was barred from receiving alimony. *Id.* at 6, 358 S.E.2d at 171. This court reversed the family court, finding adultery is an avoidance to an action for alimony which must be pled under Rule 8(c), SCRCP. *Id.* at 7, 358 S.E.2d at 172. The court stated:

Had the wife in this case been on notice that the husband would raise adultery as a bar to her alimony claim, she could have pled and sought to prove recrimination or condonation as dictated by Family Court Rule 11.... In our opinion it would be extremely unjust to allow the husband to raise the issue of adultery, a complete bar to alimony, by surprise at this stage of the case.

Id. at 8, 358 S.E.2d at 172. Similarly, to allow Husband in this case to raise the issue at trial without giving Wife notice would have constituted an unfair surprise to Wife. Thus, the family court judge did not err in prohibiting Husband's counsel from questioning Wife about extramarital relationships.

III.

Husband next argues the family court erred in accepting an order drafted by Wife's attorney which contained false statements and enhanced awards not specified by the judge. We disagree.

***501** Husband contends Wife's attorney included false statements of fact in her proposed order. Husband states his attorney gave proposed corrections to the order to Wife's attorney. "Rather than make the corrections, [Wife's] attorney submitted a letter along with the draft to the Judge and pleaded her case to enhance the award." Husband argues Wife's attorney "improperly played the role of judge" by including items in the order that the judge did not orally request. Husband states the incorrect facts include:

a) The parties separated in May 1993; Husband states this is incorrect as Wife deserted him;

b) The parties did not have sex for six years; Husband argues he did not testify to this or agree with Wife's testimony;

c) The Husband was diagnosed with chlamydia; Husband argues he does not have chlamydia;

d) The judge instructed Wife's attorney to recite factors which justify 50/50 division**859** of assets; Husband argues this discretion permitted Wife's attorney to strengthen her case;

e) Each party worked hard during the marriage; Husband claims this is not a fact and Wife's attorney could not know how hard the parties worked.

In addition, Husband lists various other sentences in the order which he feels were unfair to him, including the college degrees he earned during the marriage, lack of fault on the part of Wife in ending the marriage, Wife's potential for advancement in her field, Wife's move to a smaller apartment, Husband's failure to provide a current financial declaration, the purchase of a car for Son, and the addition of the words "permanent, periodic ... [to] continue until the death of the [Husband] or the remarriage or death of the [Wife]" to the judge's oral instructions for alimony. We find this argument without merit.

[6] [7] [8] [9] Judgments in general, and divorce decrees in particular, are not final until written and entered. *Case v. Case,* 243 S.C. 447, 134 S.E.2d 394 (1964). Until written and entered, the judge retains discretion to change his mind and amend his oral ruling accordingly. *Id.* Moreover, Rule 58(a), SCRCP, authorizes a judge to

require a party's lawyer to prepare a ***502*** proposed order. ("[T]he court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment....") This Rule applies to the family court pursuant to Rule 2, SCRFC. In the present case, each of the findings in the order was supported by the record. Although Husband may disagree with the judge's findings, the family court judge is the finder of fact in family court cases and has the authority to determine the weight and credibility of the evidence before him. Furthermore, the proper procedure for correcting factual errors in an order is to file a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. We find no error.

IV.

Husband next argues the judge erred in awarding Wife 50% of the marital estate. Husband contends he provided the majority of the marital assets. He argues Wife should have been required to prove she contributed more of the household and child-rearing duties to offset his larger financial contribution and prove her entitlement to 50% of the marital estate. He further argues the judge failed to consider his financial support of Wife's mother. We disagree.

[10] [11] [12] [13] The apportionment of marital property is within the family court judge's discretion and will not be disturbed on appeal absent an abuse of discretion. *Bungener v. Bungener,* 291 S.C. 247, 353 S.E.2d 147 (Ct.App.1987). South Carolina Code Ann. § 20-7-472 (Supp.1995) lists fifteen factors for the court to consider in making an equitable apportionment of the marital estate. This court will affirm the family court judge if it can be determined that the judge addressed the factors under § 20-7-472 with sufficiency for us to conclude he was cognizant of the statutory factors. *Walker v. Walker,* 295 S.C. 286, 368 S.E.2d 89 (Ct.App.1988). On review of an equitable apportionment of marital property, this court looks to the fairness of the overall apportionment and if the end result is equitable, it is irrelevant that this court might have weighed specific factors differently than the trial court. *Johnson v. Johnson,* 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988), *cert. denied,* 298 S.C. 117, 378 S.E.2d 445 (1989).

503 It is clear from his order that the family court judge weighed the statutory factors in awarding Wife 50% of the marital estate. We find no error.

V.

[14] Husband also argues the family court erred in failing to order both parties to contribute to Son's college expenses. We disagree.

The judge's order states:

The only child of the parties ... is presently a student at Clemson University. He did not testify at the trial. Although there was no dispute that the child is doing well in school, I find that the criteria from *Risinger* and following cases have not been satisfied. There was no testimony that the child cannot otherwise attend college. ***860*** Neither party knew how the child's summer income was being used. The expenses presented to the Court included luxuries such as a new car and trips during Christmas and spring break. There was no testimony that [Son] had sought part-time employment while attending school in order to reduce his expenses.

In *Risinger v. Risinger,* 273 S.C. 36, 253 S.E.2d 652 (1979), the court found a divorced parent may be ordered to help pay for the educational expenses of a child over 18 years of age under certain circumstances. *Id.* at 38, 253 S.E.2d at 653. The court in *Risinger* did not attempt to list all of the circumstances where the parent may be ordered to contribute, but found the following circumstances warranted continuing support:

1. the characteristics of the child indicate that he or she will benefit from college;

2. the child demonstrates the ability to do well, or at least make satisfactory grades;

3. the child cannot otherwise go to school; and

4. the parent has the financial ability to help pay for such an education.

Id. at 39, 253 S.E.2d at 653-54. In *Hughes v. Hughes,* 280 S.C. 388, 313 S.E.2d 32 (Ct.App.1984), the court listed two additional factors: the availability of grants and loans and the ***504** ability of the child to earn income during the school year or on vacation.

In the present case, Son did not testify at the hearing. The testimony of Husband and Wife indicated Son will benefit from college and demonstrates the ability to do well. However, Husband presented no evidence to indicate Son cannot otherwise attend school or that Wife has the financial ability to pay for such an education. Furthermore, there was no testimony to indicate whether Son has the ability to earn income during the school year or on summer vacation, and there was only minimal testimony as to the availability of grants and loans. Thus, we find the family court judge did not err in failing to require Wife to contribute to Son's college expenses.

VI.

Finally, Husband argues the family court erred in awarding Wife alimony. Husband contends Wife should not be entitled to alimony because she abandoned him. He further contends Wife is capable of self-support as a nurse and he cannot afford to pay alimony.

[15] [16] [17] The award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. *Williams v. Williams,* 297 S.C. 208, 375 S.E.2d 349 (Ct.App.1988). Alimony is a substitute for the support that is normally incident to the marital relationship. *Johnson v. Johnson,* 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988), *cert. denied,* 298 S.C. 117, 378 S.E.2d 445 (1989). Ordinarily, the purpose of alimony is to place the supported spouse, as nearly as is practical, in the position of support he or she enjoyed during the marriage. *Id.* It is the duty of the court to make an award of alimony that is fit, equitable, and just if the claim is well-founded. *Woodward v. Woodward,* 294 S.C. 210, 363 S.E.2d 413 (Ct.App.1987).

[18] In making an award of alimony, the family court must consider the following factors: (1) 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 ***505** anticipated expenses of the parties; (8) equitable apportionment; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations. S.C.Code Ann. § 20-3-130(C) (Supp.1995). No one factor is considered

dispositive. *Lide v. Lide,* 277 S.C. 155, 283 S.E.2d 832 (1981). It is clear from the family court judge's order that he properly weighed the statutory factors in determining Wife's award of alimony. We find no error.

Wife's Appeal

I.

Wife argues the family court judge erred in awarding only $300 per month in permanent periodic alimony. We disagree.

*****861*** As stated above, we find the family court judge properly weighed the statutory factors in determining Wife's award of alimony. Furthermore, we find an award of $300 per month adequate in light of the fact that Husband has been solely responsible for Son's college expenses. Thus, we find the family court judge did not err in awarding Wife $300 per month in alimony.

II.

Wife also argues the family court erred in denying her request for attorney's fees. We disagree.

[19] [20] [21] An award of attorney's fees rests within the sound discretion of the trial judge and should not be disturbed on appeal absent an abuse of discretion. *Ariail v. Ariail,* 295 S.C. 486, 369 S.E.2d 146 (Ct.App.1988). In determining whether to award attorney's fees, the court should consider the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.,* 307 S.C. 471, 415 S.E.2d 812 (1992). In determining the amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the beneficial results obtained, ****506*** and the customary legal fees for similar services. *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991).

Accordingly, the decision of the family court judge is

AFFIRMED.

HOWELL, C.J., and STILWELL, J., concur.

Donahue v. Donahue, 384 S.E.2d 741 (1989)

Supreme Court of South Carolina.
Janis F. DONAHUE, Respondent,
v.
James M. DONAHUE, Appellant.
No. 23083.
Heard May 3, 1989.
Decided Sept. 25, 1989.

Husband appealed from divorce order entered in the Family Court, Richland County, Alvin C. Biggs, J. The Supreme Court, Harwell, J., held that: (1) evidence supported finding of husband's adultery as ground for divorce; (2) inclusion of goodwill in valuation of husband's dental practice was error; (3) family court may grant spouse title to marital home as part of equitable distribution; (4) question of alimony should not be reserved where there is no need for alimony at time of trial or indication of extenuating circumstances; and (5) award of reimbursement alimony may be appropriate for contribution of one spouse to education of other spouse when little or no marital property has been accumulated.
Affirmed in part; reversed in part; and remanded.

HARWELL, Justice:

This is a domestic case involving alimony, child support, equitable distribution, inclusion of goodwill in the valuation of a professional practice and attorneys' fees. We affirm in part, reverse in part, and remand.

FACTS

The parties in this case were married on February 15, 1979. The husband is 32 years old and the wife is 41 years old. The parties have a 7 year old child. The wife has two children from a previous marriage who had become emancipated at the time of this hearing and were no longer living with the parties.

In the Fall of 1979, the husband entered dental school. His family deposited money for his tuition and books into an account which he maintained separately. These funds were not used for household expenses or to otherwise support the family. Household expenses and money for family support [FN1] were provided by the wife during the four years the husband attended dental school and thereafter until the opening of his dental practice.

FN1. The wife received monthly child support payments from her former husband for the two children from her previous marriage.

Upon the husband's graduation from dental school in the Spring of 1984, the parties moved to Columbia where they lived with the wife's family for 5 months before moving into their own home. In January of 1984, the husband opened his own dental practice. In order to fund the practice, the wife co-signed several loans, offering personal property as security. She also assisted the husband in preparing for the ***357*** opening of the practice by selecting furniture and business cards and designing a business sign.

Sometime after the practice opened in 1984, the husband began having an extramarital affair. The parties experienced marital discord, and the husband left the marital home on several occasions, but returned each time shortly after leaving. Finally, after a series of these episodes the wife filed for divorce on the ground of adultery. After a final hearing held on September 30, and October 8, 1987, the judge issued an Order granting the divorce on the ground of adultery, awarding custody of the minor child to the wife, requiring the husband to pay child support and reserving the wife's right to alimony. The Order also distributed the marital property and awarded the wife attorneys' fees, detective fees and other costs associated with ***744*** this action. The husband appeals all portions of the Order except child custody.

DISCUSSION

I. ADULTERY

The husband first argues that the family court erred in granting the wife a divorce on the ground of adultery. We disagree.

[1] [2] [3] Adultery may be proven by either direct or circumstantial evidence or a combination of the two. Circumstantial evidence is just as good as direct evidence if it is equally convincing and establishes the disposition to commit the offense and the opportunity to do so. *Anders v. Anders,* 285 S.C. 512, 515, 331 S.E.2d 340, 342 (1985); *Fulton v. Fulton,* 293 S.C. 146, 359 S.E.2d 88 (Ct.App.1987). We have reviewed the record in light of these standards and hold that it supports the family court's finding of adultery. [FN2] Written detective reports placed the husband at the home of his alleged paramour overnight on more than one occasion. The husband admitted spending the night with ***358** his paramour and to sleeping in her bed. There was additional testimony from the wife as to her observation of the paramour's car outside the husband's office all night. There was a bed in the office. Further, during deposition, the husband admitted that he knew his wife had "the goods on him." Ample evidence existed to support a grant of divorce on the ground of adultery.

FN2. No findings are set forth in the family court's order to support this conclusion. While it is true that this lack of factual findings violates Family Court Rule 27 which directs that an order set forth the salient facts upon which it is based, we may consider the issue on appeal where, as here, the appellate record is sufficient for review. *McSwain v. Holmes,* 269 S.C. 293, 237 S.E.2d 363 (1977); *Sumter v. Sumter,* 280 S.C. 94, 311 S.E.2d 88 (Ct.App.1984).

II. HUSBAND'S DENTAL PRACTICE

A. INCLUSION IN MARITAL ESTATE

The trial court found that because of the wife's substantial contributions to the husband's dental practice, she was entitled to an equitable interest in the practice. The husband contends that this was error and cites as authority for this proposition the cases of *Helm v. Helm,* 289 S.C. 169, 345 S.E.2d 720 (1986) and *Heath v. Heath,* 295 S.C. 312, 368 S.E.2d 222 (Ct.App.1988).

In *Helm* and *Heath,* this Court and the Court of Appeals, respectively, held that a professional degree is not marital property and is therefore not subject to equitable distribution. Here, however, we are concerned not with appellant's *degree,* but with his practice, therefore *Helm* and *Heath* are inapplicable.

[4] One spouse's contributions to another spouse's business may create a special equity in his or her favor. *Poniatowski v. Poniatowski,* 275 S.C. 11, 266 S.E.2d 787 (1980). It is not error to consider the assets of a spouse's business in the division of marital property given evidence that the wife materially contributed through personal services to that business. *Reid v. Reid,* 280 S.C. 367, 312 S.E.2d 724 (Ct.App.1984).

[5] Here, the wife's contributions entitled her to an interest in the husband's business. We therefore hold that the family court judge in this case did not err in

including the value of the dental practice in the estate; we disagree, however with the judge's inclusion of goodwill in the valuation of the practice.

B. INCLUSION OF GOODWILL IN VALUATION

Appellant argues that the family court erred in allowing the goodwill of his dental practice to be valued and equitably ***359** distributed. The issue of whether goodwill is subject to equitable distribution was first addressed by this Court in *Casey v. Casey,* 293 S.C. 503, 362 S.E.2d 6 (1987). In *Casey,* we recognized the speculative nature of goodwill, which is dependent upon an owner's future earnings, and held that such goodwill could not be made part of the marital estate subject to equitable distribution. In the present case, we must decide whether the holding in *Casey* should be extended to apply to goodwill in a professional solo practice.

****745** The decision as to the inclusion of goodwill of a professional practice in a marital estate is, "in the final analysis, a public policy issue." *Powell v. Powell,* 231 Kan. 456, 648 P.2d 218, 223 (1982). The following is a well-recognized definition of goodwill:

Goodwill may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Levy v. Levy, 164 N.J.Super. 542, 549, 397 A.2d 374, 377 (1978) citing *In re Ball's Estate,* 161 App.Div. 79, 80-1, 146 N.Y.S. 499, 501 (1914).

More specifically, professional goodwill has been held to have the following attributes:

It attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. [cite omitted] It does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession. It would be extinguished in the event of the professional's death, retirement or disablement. [cite omitted]

Rathmell v. Morrison, 732 S.W.2d 6 (Tex.App. 14th Dist.1987).

***360** [6] "The very nature of a professional practice is that it is totally dependent upon the professional." *Powell,* 648 P.2d at 223. The definitions set forth above indicate the intangible nature of the goodwill asset. It is this intangibility which inevitably results in a speculative valuation. The basis of this Court's concern in *Casey* was the speculative element involved in valuation of goodwill. In light of the definitions above, we see similar problems in the valuation of goodwill of a professional practice.

[7] Accordingly, we hold that the family court erred in placing a value upon, and consequently dividing the goodwill of the husband's dental practice. Because the expert testified that the only value of the practice was its goodwill, the wife is not entitled to any money from the practice.

III. POSSESSION OF MARITAL HOME

The judge awarded the wife title to the marital home, specifically allowing that this would serve as part of her equitable distribution award. Appellant incorrectly contends that this was error and that title to a marital home can only be awarded as an incident of support, and then only if compelling circumstances exist.

[8] [9] In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. S.C.Code Ann. § 20-7-476 (Supp.1987). The court should first attempt an "in-kind" distribution of the assets. *Stevenson v. Stevenson,* 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). A family court may grant a spouse title to the marital home as part of the equitable distribution. *Brown v. Brown,* 279 S.C. 116, 302 S.E.2d 860 (1983).

Here, the wife received the marital home as her share of the total marital estate, not as an incident of support. Part of the reason she was awarded the home was to compensate her for the $23,000 she was entitled to as a result of contributions to the husband's dental practice. Since we have ruled above that she was not entitled to this $23,000, as it was based only on goodwill, we must also remand the award of the marital home for reconsideration. Accordingly, while the husband is incorrect in arguing that the court could not ***361** award the wife title, we must nonetheless remand because of our decision on the goodwill issue.

IV. EQUITABLE DISTRIBUTION

[10] The facts in this case established that the wife's direct contributions to the marital estate totalled $251,000.00 (91%), ****746** whereas the husband's direct contributions totalled $20,112.00 (9%). The judge lowered the wife's share of the equitable distribution to 62% and raised the husband's share to 38%. The Order fails to set forth sufficient reason entitling the husband to such a high percentage of the marital property other than his "indirect contributions" over a 4 month period. In light of the husband's minimal direct contributions, we are unable to ascertain any reason for allowing him such a high percentage of the total estate. For this reason, and because we are remanding a number of issues in this case which will impact on the equitable distribution, we remand the percentages for reconsideration.

V. RESERVATION OF ALIMONY

The husband next argues that the family court erred in reserving an award of alimony to the wife. We agree.

[11] [12] "The general rule is that alimony may be granted after a decree of divorce if [the] right to have it subsequently determined is reserved in the divorce decree." *Taylor v. Taylor,* 241 S.C. 462, 466, 128 S.E.2d 910, 912 (1962). Where the divorce decree does not provide for alimony and there is no reservation of jurisdiction in the decree, such is final and absolute and the wife cannot be allowed alimony in any subsequent proceeding. *Id.* While reservation of alimony is a mechanism available to family court judges in proper cases, it is not to be used to avoid reaching the issue of

whether alimony should or should not be awarded under the facts of a particular case. It should not be routinely included in the decree of divorce, for this unnecessarily prolongs the marital litigation.

Few cases in South Carolina have addressed the question of reservation of alimony. In *Lowe v. Lowe,* 256 S.C. 243, 182 S.E.2d 75 (1971), this Court upheld a family court's denial of alimony to a spouse whose situation at the time of trial ***362** did not entitle her to such an award. Under the facts of that case, the wife was gainfully employed at the time of the hearing. She had previously experienced serious emotional problems, having undergone eighteen shock treatments while institutionalized for 6 weeks approximately 4 years prior to the divorce. She had also attempted suicide approximately 2 years before the divorce. Despite these problems, the wife was gainfully employed and had the ability to provide for herself at the time of the hearing. She was therefore not entitled to alimony. This Court noted however, that this was "one of those cases in which the court should have reserved jurisdiction in the decree such that the alimony issue may in the future be considered." 256 S.C. at 248, 182 S.E.2d at 78. The obvious implication of this decision is that even though the wife was not entitled to alimony at the time of trial, her past emotional problems, which had occurred during the course of the marriage, might recur to the point where she would be entitled to alimony. *Accord Stevenson, supra* (although the court properly denied alimony under the circumstances existing at the time of decree, husband's pre-existing disability entitled him to reservation of alimony); *Smith v. Smith,* 406 So.2d 71 (Fla.App.2d Dist.1981) (reservation of alimony should have been made in light of fact that wife had undergone surgery for cancer and although wife did not have cancer at time of divorce, there was significant risk of the disease recurring at a later date).

[13] The situations outlined above in *Lowe* and the cases cited in accord contrast sharply with the facts advanced to support reservation in the current case. Here the wife is able to provide for herself financially. She is, in fact, earning more money per month than her husband. She reserved her right to alimony, however, because even though her husband could not pay alimony at the time of the divorce, probable future success of her husband's dental practice would enable him to do so at a later date. Alimony is a substitute for support incident to the marital relationship. *Nienow v. Nienow,* 268 S.C. 161, 232 S.E.2d 504 (1977). It is not intended to penalize one spouse while rewarding the other. *Beasley v. Beasley,* 264 S.C. 611, 612, 216 S.E.2d 535, 536 (1975). The marriage contract is not ***747** an annuity; it is not lifetime insurance against the unexpected.

***363** [14] We hold that alimony may be reserved when there is a "determination that there exists an identifiable set of circumstances that is likely to generate a need for alimony in the reasonably near future." *Turrisi v. Sanzaro,* 308 Md. 515, 531, 520 A.2d 1080, 1088 (Ct.App.1987) (concurring opinion); where, however, as here, there is no need for alimony at the time of trial, and no indication of physical or mental illness, foreseeable change in need in the future, or some other extenuating circumstance, the question of alimony should not be reserved. Accordingly, we reverse the reservation of alimony in this case, and find that permanent alimony should be denied.

VI. REIMBURSEMENT ALIMONY

The concept of "reimbursement alimony" was first introduced by the New Jersey Supreme Court in *Mahoney v. Mahoney,* 91 N.J. 488, 500, 453 A.2d 527, 533 (1982), in which that court recognized that:

Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

 [15]  [16] Generally, the contribution of one spouse to the education of the other spouse may be taken into account by giving the supporting spouse a larger distributive share of the marital property to be divided. This remedy is not, however, sufficient when little or no marital property has been accumulated during the marriage. In these situations reimbursement alimony may be appropriate, regardless of the appropriateness of permanent alimony.

Cases adopting reimbursement alimony "... establish a spectrum, from those narrowly focusing on financial support provided to the professional spouse, while he or she was a student, to those which consider the totality of the non-professional spouse's efforts in the family venture to obtain economic stability through education." *Martinez v. Martinez,* 754 P.2d 69, 77 (Utah App.1988). Among those jurisdictions which consider the "totality of the non-professional ***364*** spouses efforts," it has been held that a court should consider "all relevant factors" including the "amount of the supporting spouse's contributions, his or her foregone opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the non-supporting spouse's professional education." *Saint-Pierre v. Saint Pierre,* 357 N.W.2d 250, 262 (S.D.1984).

In *Mahoney,* the court broadly held that:

[R]eimbursement alimony should cover *all* financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses, and any other contributions used by the supported spouse in obtaining his or her degree or license.

91 N.J. at 501, 453 A.2d at 534.

Other jurisdictions which have focused only on the actual financial support have suggested the following formula as a guideline:

working spouse's financial contributions to joint living expenses and educational costs of student spouse

less

1/2 (working spouse's financial contributions plus student spouse's financial contributions less cost of education)

equals

equitable award to working spouse.

DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn.1981) cited in *Hoak v. Hoak,* 370 S.E.2d 473, 479 (W.Va.1988). We favor the broader "all relevant factors" approach because it is more equitable than the strict financial contributions approach.

Obviously, money expended for the support of the parties' children should also be taken into consideration. Further, where, *****748*** as here, there are children from a previous marriage living with the couple, consideration should be given to money expended by the working spouse in excess of the child support provided by her previous spouse.

****365*** [17] Determination of the amount of reimbursement alimony is within the discretion of the trial judge. The amount will depend on the facts of each case. We therefore decline to set forth a specific mathematical formula for computing an amount, but rather direct the judge to consider "all relevant factors" as indicated above.

On remand, the wife shall be allowed to amend her pleadings, if she so chooses, to include a prayer for reimbursement alimony. We decline, however, to consider whether reimbursement alimony should be awarded, as we believe this issue merits full consideration first by a trial judge so that a record can be made for our review.

VII. ATTORNEYS' FEES, AND COSTS

The husband was ordered to pay the wife a total of $9,462.00 for reimbursement of attorneys' fees and other expenses associated with this action. The husband contends this was error.

[18] [19] In awarding attorneys' fees and costs, the family court should consider the nature, extent and difficulty of the services rendered, the time necessarily devoted to the case, professional standing of counsel, contingency of compensation, beneficial results obtained, and the customary legal fees for similar legal services. *Atkinson v. Atkinson,* 279 S.C. 454, 457-8, 309 S.E.2d 14, 16 (Ct.App.1983). An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court. *Stevenson,* 295 S.C. at 415, 368 S.E.2d at 903; *Cudd v. Arline,* 277 S.C. 236, 285 S.E.2d 881 (1981).

[20] [21] This was a complex divorce action involving several difficult issues, some of them novel in this jurisdiction. The beneficial results achieved by the wife are apparent. The wife's attorney faced difficulty and lack of cooperation from the husband, which serves as an additional basis for the award of attorneys' fees. *Johnson v. Johnson,* 296 S.C. 289, 303-4, 372 S.E.2d 107, 115 (Ct.App.1988). The wife achieved her divorce on the basis of adultery. Reasonable and necessary expenses incurred in obtaining evidence of a spouse's adultery are recoverable in a divorce proceeding. *Stevenson,* 295 S.C. at 415, 368 S.E.2d at 903. We see no abuse of discretion in ordering the husband to pay ****366*** attorneys' fees and costs. Further, each party shall bear their own costs of this appeal.

Appellant's remaining exceptions are dismissed pursuant to Supreme Court Rule 23.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

GREGORY, C.J., and CHANDLER, FINNEY and TOAL, JJ., concur.

DuBose v. DuBose, 192 S.E.2d 329 (1972)

Supreme Court of South Carolina.
Margaret McG. DuBOSE, Respondent,
v.
Johnnie Leo DuBOSE, Jr., Appellant.
No. 19502.
Oct. 18, 1972.

Action by wife for divorce. The Common Pleas Court, Lexington County, Mims P. Hall, Family Court Judge, granted wife a divorce, and primary custody of and support for two children of parties, and attorney's fees, and husband appealed. The Supreme Court, Bussey, J., held that evidence was sufficient to prove charge of adultery, including approximate times, places and circumstances of such adultery, at least with one woman, if not with second woman.
Affirmed.
Littlejohn, J., dissented and filed opinion.
BUSSEY, Justice:

In this action the respondent wife was granted a divorce on the ground of adultery, primary custody of and support for the two children of the parties, and attorney's fees. The husband appeals, challenging all relief granted to the wife.

The parties were married on June 1, 1956, and separated finally on May 10, 1971. This action was commenced May 13, ***330** 1971, and the divorce decree was entered on December 7, 1971. Two sons of the marriage reached the respective ages of five and eleven during the summer of 1971.

Appellant's primary contention is that there was error in granting a divorce on the ground of adultery in that there was allegedly no evidence to establish any time or place of the alleged offense, with whom it was committed, or the circumstances thereof. He also asserts that there was insufficient corroborating evidence. We summarize the evidence in the light of these two contentions.

The husband's employment record seems to have been quite irregular. From March 1967 until January 1968 he worked for the Exchange Realty Company. In 1968 he went briefly into business for himself and then to work for Ben Arnold Company where he was working during 1969. In 1970 he worked for Atlantic Detective Agency for some five or six months. In May 1967 a female, whom we shall refer to simply as Sandra, went to work at Exchange Realty Company and became the secretary of the appellant husband. At substantially the same time, the husband left his wife and children for a period of about two and a half months, ***421** leaving them in more or less destitute circumstances financially. His entire attitude toward his wife changed substantially, leading her to suspect his involvement with another woman.

During the brief period of time that Sandra was his secretary, he endorsed a note for her in the amount of $400.00. In either 1968 or 1969 he endorsed another note for Sandra to a finance company in the amount of $1,500.00, and along about the same time he gave Sandra his Master Charge credit card for her personal use. The wife knew nothing of the first note endorsed for Sandra until the trial of the case, but learned of the fifteen hundred dollar note in January 1971 when she received a telephone call from the finance company thereabout. Naturally, she demanded an explanation of her husband,

who insisted that he was not involved with Sandra, that he had simply tried to help her out because she was in financial straits, and that he had no other involvement with her or obligation on her account. She accepted his explanation and continued to live with him until May 10th, when a law suit was instituted against him for an account balance of some two thousand dollars incurred upon the Master Charge card given by the husband to Sandra for her personal use. Since this latter development the parties have not lived together.

Subsequent to the separation of the parties, the wife learned of the husband's involvement with a female, whom we refer to simply as Annette _ _, and whom the husband admittedly met at Myrtle Beach during the summer of 1969 while traveling for Ben Arnold Company. A Mr. Hamer, with whom the husband worked in the summer of 1970, testified that the husband had told him of taking Annette to his room, and staying with her, at the Continental Motel at Myrtle Beach during the summer of 1969. Among other things, according to Mr. Hamer, the husband told him that Annette was in love with him and liked the type of underwear he wore. While the husband was working with Mr. Hamer, Annette called the husband by telephone on ***422** more than one occasion, arranging with the husband rendezvous at one place or another. In response to a question on cross-examination, Mr. Hamer also testified that Annette herself told him of staying with the husband at the Continental Motel in Myrtle Beach.

After the separation of the parties the husband contacted both Mr. and Mrs. Hamer and asked to visit them for the purpose of discussing his relationship with his wife. As a result, Mrs. Hamer talked with him in detail, in person, and additionally talked to him on the phone on several occasions. He wanted Mrs. Hamer to talk to his wife in his behalf. In the course of ***331** these conversations Mrs. Hamer discussed with the husband at some length his relationship with Annette. Among other things, he told Mrs. Hamer that Annette was still in love with him and was still trying to have an affair with him. He neither admitted nor denied his adulterous relationship with Annette, telling Mrs. Hamer, according to her testimony, that he had been advised 'not to admit anything'. In this connection there is also evidence to the effect that he told his wife that he would confess everything if she would consent to take him back.

The husband called no witness, relying solely on his own testimony. He denied having committed adultery with either Sandra or Annette. He admitted endorsing the notes for Sandra and giving her the credit card for her use, and also admitted personally making some payments on these obligations but testified that he did so to protect his credit. He claimed that many of the items charged against the Master Charge account were not obtained by Sandra, and that the card had been stolen from her. While he denied committing adultery with Annette and denied having admitted such to Mr. Hamer, he did not refute many of the details brought out in the testimony of both Mr. and Mrs. Hamer showing a continuing, friendly relationship on his part with the said Annette over a period of some two years.

The foregoing is only a summary of the highlights of the evidence upon which the lower court concluded,

***423** 'The entire testimony taken as a whole leads me to only one conclusion and that is that the husband is guilty of adultery * * *.'

We have omitted to recite many details which while not necessarily significant in themselves, tend to support the conclusion reached by the lower court.

In Lee v. Lee, 237 S.C. 532, 118 S.E.2d 171, we had occasion to point out,

'This action is one in equity. Section 20-105 of the 1952 Code. Our duty in equity cases to review challenged findings of fact does not require that we disregard the findings below or that we ignore the fact that the trial Judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve the appellant of the burden of convincing this Court that the trial Judge erred in his findings of fact. Inabinet v. Inabinet, 236 S.C. 52, 113 S.E.2d 66. In the instant case, the trial Judge saw the witnesses, heard the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character.'


[1] It is, of course, true that where a divorce is sought on the ground of adultery the infidelity must be established by a clear preponderance of the evidence, and, as a general rule, the proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed. Insufficiency in this respect, however, should not be allowed to defeat a divorce where the Court is fully convinced that adultery has, in fact, been committed and the defendant has had full opportunity to defend against or refute the charge. For instance, proof of precise times and places might be exceedingly difficult for an innocent spouse who was unaware of otherwise clearly proved adulterous conduct until long afterward. To quote again from Lee v. Lee, supra,

***424** 'A 'preponderance of the evidence' stated in simple language is that evidence which convinces as to its truth.'


[2] We are convinced that the evidence was quite sufficient to prove the charge of adultery, including approximate times, places and the circumstances of such adultery, at least with Annette, if not with Sandra. And as to Sandra, there is at ***332** least strong circumstantial evidence of guilt.

The husband's contention that the divorce should have been denied for lack of corroborating evidence is without merit under the principles enunciated in Frazier v. Frazier, 228 S.C. 149, 89 S.E.2d 225, and McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537.

The wife was awarded primary custody of the two children but with the right of weekly visitation to the husband from 7:30 A.M. until 5 P.M. on each Saturday, except for legal holidays. Additionally, on each third Saturday the husband was allowed to keep the children until 5 P.M. of the following day. He was ordered to pay the wife support for the children in the amount of $50.00 per week. The husband's challenge to these provisions of the decree as to custody and support are clearly without any merit. A careful review of the evidence discloses no abuse of discretion on the part of the lower court in this respect, amounting to an error of law.

Lastly, the husband challenges the award of an attorney's fee for his wife, but both exceptions raising this question are predicated on the contention that the wife was not entitled to a divorce and for that reason not entitled to attorney's fees. Accordingly, the affirmance of the decree of divorce disposes of this last issue adversely to the husband.

For the foregoing reasons, the judgment of the lower court is

Affirmed.

MOSS, C.J., and LEWIS and BRAILSFORD, JJ., concur.

LITTLEJOHN, J., dissents.

***425** LITTLEJOHN, Justice (dissenting):

I respectfully dissent and would reverse the judgment of the lower court to the extent that it found the husband guilty of adultery.

In Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353 (1966), we discussed the requirements of proof in adultery cases:

'The proof of adultery as a ground for divorce must be clear and positive and the infidelity must be established by a clear preponderance of the evidence. The proof must be sufficiently definite to identify The time and place of the offense, and the Circumstances under which it was committed. It is not necessary that the fact of adultery be proved by direct evidence, but it may be sufficiently proved by indirect or circumstantial evidence, or it may be proved by evidence consisting in part of both, however, if after due consideration of all the evidence proof of guilt is inconclusive, a divorce will be denied.' (Emphasis added)

The complaint alleges that the husband 'was having then and still is having an adulterous affair with said woman.' The woman is not named but is referred to as a business acquaintance. The evidence establishes beyond question that the woman referred to was Sandra. The time, place and circumstances of the adulterous conduct are not alleged. Some evidence was presented relative to improper conduct with Annette.

The trial judge does not find the husband guilty of adultery with either Annette or Sandra, but says, 'The entire testimony taken as a whole leads me to only one conclusion and that is that the Respondenthusband is guilty of adultery and that the Petitioner-wife is entitled to a divorce A vinculo matrimonii.'

We have the unusual situation of the plaintiff alleging adultery by her husband with Sandra, who was identified by inference. The proof is aimed at both Sandra and Annette.***426** The lower court finds the husband guilty of adulterous conduct in general. The majority opinion tacitly admits****333** the charge of adultery with Sandra is not sufficiently proved, and holds that the circumstantial evidence submitted is sufficient to prove adultery with Annette, who was not even inferentially mentioned in the complaint.

The majority opinion weakens the rule set forth in Odom, supra. It alludes to the necessity of proof sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed. The impact of the established rule is then lessened by stating:

'Insufficiency in this respect, however, should not be allowed to defeat a divorce where the Court is fully convinced that adultery has, in fact, been committed and the defendant has had full opportunity to defend against or refute the charge.'

In the light of the Odom requirements, it is not sufficient to say that approximate times, places and circumstances have been proved. In actuality, an adulterous act has not been proved either directly or circumstantially. Therefore, I would hold that the finding of the circuit judge does not warrant the conclusion that plaintiff's case has been

proved by the 'clear preponderance of the evidence.' I would otherwise affirm the lower court.

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

Supreme Court of South Carolina.
E.D.M., Respondent,
v.
T.A.M., Appellant.
No. 23603.
Heard Jan. 20, 1992.
Decided March 16, 1992.

Wife brought action for separate support and maintenance. Husband counterclaimed for annulment. The Greenville County Family Court, Thomas E. Foster, J., awarded wife $500 per month alimony, equitably divided marital property and awarded wife $2,300 in attorney's fees, and thereafter reduced alimony to $300 per month. Husband appealed. The Supreme Court, Moore, J., held that: (1) evidence failed to support finding that wife concealed incapacity for sexual relations, for purposes of entitling husband to annulment on ground of fraudulent inducement; (2) facts that husband and wife lived together, shared same bed, and engaged in at least minimal sexual activity supported finding that the husband and wife's marriage was consummated by cohabitation; and (3) wife was not entitled to award of alimony.
Affirmed in part and reversed in part.

MOORE, Justice:
This is an action for separate support and maintenance. Appellant (Husband) appeals the denial of his counterclaim for an annulment and the award of alimony and attorney's fees to respondent (Wife). We affirm in part and reverse in part.

***473** FACTS

Wife commenced this action in April 1990. Husband counterclaimed for an annulment of the marriage on the ground of fraud alleging Wife concealed her psychological problems and resulting sexual incapacity. It is undisputed the parties never had penile-vaginal intercourse before or after their marriage in 1985. The extent of their sexual activity was infrequent oral sex performed by Husband upon Wife.

In September 1990, the family court issued a decree of separate support and maintenance awarding Wife $500 per month alimony, equitably dividing the marital property 80% to Husband and 20% to Wife, and awarding Wife $2,300 in attorney's fees. Husband's request for an annulment was denied. In October 1990, the family court amended its order by reducing alimony to $300 per month. Husband appeals.

ISSUES

(1) Is Husband entitled to an annulment on the ground of fraud and lack of cohabitation?

(2) Is the award of alimony to Wife proper?

(3) Is the award of attorney's fees to Wife proper?

DISCUSSION

Husband contends the family court erred in refusing an annulment of the marriage because Wife induced him to marry her by fraud and the marriage was never consummated.

[1] On appeal from a family court order, this Court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Rutherford v. Rutherford,* 414 S.E.2d 157 (S.C.1992); *Miller v. Miller,* 299 S.C. 307, 384 S.E.2d 715 (1989).

[2] The family court has jurisdiction to determine any issue affecting the validity of a contract of marriage. S.C.Code Ann. § 20-1-510 (1985); *see also* § 20-7-420(5) (1985 and Supp.1991). Section 20-1-530 (1985) provides:

If any [marriage] contract has not been consummated by the cohabitation of the parties thereto the court may declare such contract void for want of consent of either of the contracting parties or for any other cause going to show that, at the time the supposed contract was made, it was not a contract.

***474** [3] [4] This statute abrogated the common law right to annul a marriage for want of legal consent by adding the "no cohabitation" requirement. *State v. Sellers,* 140 S.C. 66, 134 S.E. 873 (1926). Even a marriage contracted without legal consent becomes binding once there has been cohabitation between the parties. *Id.; Davis v. Whitlock,* 90 S.C. 233, 73 S.E. 171 (1911).[FN1]

FN1. This statute does *not* apply and cohabitation does not validate a marriage by a person legally *incompetent* to contract marriage, i.e. a bigamous or incestuous spouse. *Hughey v. Ray,* 207 S.C. 374, 36 S.E.2d 33 (1945); *Davis v. Whitlock, supra.*

[5] Thus, under § 20-1-530, a party seeking an annulment on grounds other than legal incompetence to contract marriage must show (1) lack of legal consent or that the marriage was not a valid contract and (2) no cohabitation between the parties.

[6] First, Husband claims the marriage contract was invalid because he was induced by fraud to marry Wife. He alleges Wife did not reveal before marriage the psychological problems which resulted in her sexual incapacity. False representations regarding one's character, social standing, or fortune do not constitute fraud sufficient to annul a marriage. *Jakar v. Jakar,* 113 S.C. 295, 102 S.E. 337 (1920). Husband claims, however, sexual capacity ****815** qualifies as a ground for annulment under *Jakar* as "something essential to the marriage relation ... making impossible the performance of the duties and obligations of that relation." 102 S.E. at 339.

[7]  We need not decide whether concealment of a known sexual dysfunction is fraud sufficient to justify an annulment. We conclude the record in this case does not support a factual finding Wife concealed an incapacity for sexual relations.

The parties shared a bed on many occasions during their five-year courtship but agreed they would not engage in pre-marital sex. Wife testified she told Husband about her emotional problems before their marriage. Further, she testified Husband knew about her problem with sexual intercourse from an "engaged encounter" they attended before they married. Wife was never diagnosed or treated for psychological problems until 1987, two years after the parties married. Husband ***475** introduced no evidence Wife knew the extent of her sexual problems before the marriage. He admits, in fact, she did not know until she began treatment with the psychiatrist in 1987 after the parties had tried and failed to engage in sexual intercourse.

The party attacking the validity of a marriage bears the burden of proof. *Yarbrough v. Yarbrough,* 280 S.C. 546, 314 S.E.2d 16 (Ct.App.1984). We conclude Husband failed to prove by a preponderance of the evidence he was entitled to an annulment on the ground of fraudulent inducement. Moreover, despite Husband's assertions to the contrary, the parties' marriage was consummated by cohabitation and therefore § 20-1-530 bars an annulment even if fraud were proved in this case.

[8]  "Cohabitation" has been defined as "living together in the same house." *Barksdale v. United States,* 4 F.Supp. 207 (D.S.C.1931). Husband argues, however, this Court should define cohabit to require actual sexual intercourse. This Court has never viewed actual sexual intercourse as distinguishable from other sexual activity in determining marital matters. In *RGM v. DEM,* 306 S.C. 145, 410 S.E.2d 564 (1991), for instance, we rejected an argument that homosexual activity could not constitute adultery because there was no actual sexual intercourse. Here, the parties admittedly lived together, shared the same bed, and engaged in at least minimal sexual activity. We conclude this evidence of living together in an intimate relationship supports a finding of cohabitation.

Next, Husband contends Wife should not have been awarded alimony. The factors to be considered in awarding alimony in a separate support and maintenance action are:

(1) financial condition of the payor and needs of the payee;

(2) age and health, respective earning capacities, and individual wealth;

(3) payee's contribution to joint wealth;

(4) parties' conduct;

(5) respective necessities;

(6) payee's standard of living;

(7) duration of the marriage;

(8) ability of the payor to pay;

(9) actual income of the parties.

***476** *Rivenbark v. Rivenbark,* 301 S.C. 175, 391 S.E.2d 232 (1990). [FN2]

FN2. This action was filed before the effective date of S.C.Code Ann. § 20-3-130 (Supp.1991) which sets forth the factors to be considered in awarding alimony.

[9] In this case, the parties separated after only four and one-half years of marriage. At the time, both were in good health and were thirty-one years of age. Both have college degrees. Husband was earning $48,000 per year as an engineer; Wife was earning $20,000 in an administrative job at a college. Wife's psychological problems do not affect her ability to work.

During the marriage, Husband paid all the household bills and provided the money for a downpayment on the marital home. His total financial contribution in support of the marriage was $187,497; Wife's contribution was $11,300. In addition, Husband maintained the house and did extensive home improvements himself whereas Wife contributed very little. At the time of separation, Wife had her own savings totalling $7,000. Her monthly medical bills for psychiatric treatment and other medical complaints totalled $506.

****816** In light of the factors to be considered, we agree with Husband that Wife is not entitled to an award of alimony.[FN3] Wife made only minor contributions to the marriage and is able to support herself. She left the marriage with individual savings of $7,000, plus Husband was ordered to pay her $5,666 for her equity in the marital home. Wife's psychiatric treatment was to continue for two years after the May 1990 separation and her medical expenses will likely decrease. Also, she has health insurance which pays a certain yearly amount toward psychiatric treatment and the $506 is not a constant monthly amount.

FN3. Husband also contends he is entitled to reimbursement for the payments he made pursuant to a temporary order. Husband did not appeal the temporary order and this issue is not before the Court.

[10] Finally, Husband contests the award of attorney's fees to Wife. In determining whether an attorney's fee should be awarded, the following factors should be considered:

(1) the party's ability to pay his/her own attorney's fee;

(2) beneficial results obtained by the attorney;

***477** (3) the parties' respective financial conditions;

(4) effect of the attorney's fee on each party's standard of living.

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

Applying these factors here, we conclude Wife is not entitled to an award of attorney's fees based on the relatively small amount in question and her ability to pay from income earned and savings. Moreover, in light of our reversal of the alimony award, the results achieved by Wife's counsel were not beneficial.

Accordingly, the family court's denial of an annulment is AFFIRMED and the awards of alimony and attorney's fees are REVERSED.

HARWELL, C.J., FINNEY and TOAL, JJ., and ALEXANDER M. SANDERS, Jr., Acting Associate Justice, concur.

Ford v. Ford, 130 S.E.2d 916 (1963)

Supreme Court of South Carolina.
Barbara D. FORD, Respondent,
v.
Herman A. FORD, Appellant.
No. 18066.
May 6, 1963.

Child custody proceedings. The Juvenile and Domestic Relations Court of Greenville County awarded custody of the children to the wife and held that an order dismissing husband's prior habeas corpus proceedings in a foreign court was not res judicata where dismissal was made after agreement between the parties that the husband was to have custody during the school year and the wife was to have custody during summer vacations and on some holidays. On appeal, the Court of Common Pleas, Greenville County, John Grimball, J., held that the dismissal in the foreign habeas corpus proceedings was not res judicata and awarded custody to the wife during the school months and to the husband during the other part of the year. On appeal, the Supreme Court, 239 S.C. 305, 123 S.E.2d 33, held that the order dismissing the foreign habeas corpus proceedings was res judicata. On certiorari, the United States Supreme Court, 371 U.S. 187, 83 S.Ct. 273, held that the order dismissing the foreign state habeas corpus proceedings was not res judicata and that South Carolina was not required to give full faith and credit to such order. On remand, the Supreme Court, Moss, A. J., held that there was nothing in the record to indicate that the agreement entered into did not serve the best interests and welfare of the children.
Reversed and remanded.
MOSS, Justice.

Barbara D. Ford, the respondent herein, and Herman A. Ford, the appellant herein, were married on March 16, 1952. Three children were born of this marriage, having been born in June 1953, March 1955, and March 1957, the child born in 1955 being a girl and the other two boys. The controversy here is over the custody of these three children.

It appears that the parties, in 1959, were domiciled in Sanford, North Carolina, where they lived in a comfortable rented home and were in the course of planning the construction of their own home. On August 25, 1959, as a result of an adulterous affair on the part of the wife which would have entitled the husband to an absolute divorce under the law of this state, as well as that of most, if not all, other jurisdictions, the parties separated and the wife went to the home of her mother in Richmond, Virginia, the children remaining in North Carolina in the custody of the husband. On August 27, 1959, the wife took the children from North Carolina to the home of her mother in Richmond, Virginia, without the permission of the husband.

The first litigation between these parties concerning the custody of these children took place in Richmond, Virginia, when the husband, on August 28, 1959, filed in the Law and Equity Court of Richmond, Virginia, a petition for habeas corpus alleging that the wife had the children and that she 'has recently been guilty of acts which were not only of the nature that would justify the petitioner seeking a divorce from her, but which render her unfit to have custody of said children.' It was further alleged that the husband was a fit and proper person to have such custody and the best interests of said children would be promoted by them being forthwith returned to his care, custody and control. The wife

answered the petition alleging that she was a proper person to have custody of the children and asking that the writ of habeas corpus be dismissed.

Thereafter, negotiations took place between the parties, both being represented by able counsel, and they agreed that the husband was, with minor exceptions, to have custody of the children during the school year and that the wife was to have custody during summer vacations and on some holidays. When notified of this agreement, the Richmond Court entered an order dismissing the case upon the representation that the parties had agreed concerning the custody of the infant children. Thereafter, the wife, by her adulterous conduct having forfeited her right to live in the marital domicile in Sanford, North Carolina, and be supported by her husband, came, in January 1960, to Greenville, South Carolina, where she rented an apartment and, after completing a course at a business college, obtained employment and went to work to support herself.

On or about June 20, 1960, the husband, pursuant to the agreement entered into in Richmond, delivered, or caused to be delivered, the children to the wife in Greenville. On or about July 13, 1960, she sought to commence proceedings against the husband with respect to the custody of the children in the Juvenile and Domestic Relations ***919*** Court of Greenville County, but did not succeed in obtaining service on the husband, and thereafter, on August 10, she caused to be served upon the husband process when he came to Greenville for the purpose of communicating with his children about the recent death of his mother. The wife in her complaint alleged that she was a proper person to have custody and that her husband was not. She did not mention in her complaint the Richmond litigation, the agreement entered into, or any change of condition whatsoever subsequent to the agreement and dismissal of the suit in Richmond.

The husband, by way of answer, charged that the wife was not a fit and proper person to have custody of the children because of her adulterous conduct during the summer of 1959, and further asserted that the husband was a fit and proper person to have the custody. As a further defense, the husband alleged that the wife had violated and breached the agreement made between the parties with reference to the custody of the children, and had also violated the duly issued order of the court in Richmond, Virginia, made pursuant to said agreement. The case came on for trial before the judge of the Juvenile and Domestic Relations Court of Greenville County on October 24, 1960, and on December 8 the judge filed an order in which he concluded that it was to the best interests of the children that their custody and control be awarded to the mother. He rejected the husband's argument that the order of dismissal in the Virginia court should be treated as res judicata. On appeal the Court of Common Pleas concluded that the best interests of the children required that the wife have custody during the school months and the husband during the other parts of the year, in effect, inverting the arrangement previously made in the parents' agreement. The Circuit Court further held that the court was not bound by the dismissal in the habeas corpus proceedings in Virginia, which was based on the parents' agreement.

On appeal, this court reversed the holding of the lower court and held that the 'dismissed agreed' order of the Virginia Court entered in the habeas corpus proceeding against the wife upon agreement as to custody constituted a judgment on the merits barring subsequent action for the same cause and was res judicata in Virginia where rendered, and accordingly, was entitled to full faith and credit in this State under Article IV, Section 1, of the Constitution of the United States, Ford v. Ford, 239 S.C. 305, 123 S.E.2d 33.

The Supreme Court of the United States granted certiorari to consider the question of full faith and credit upon which we based our decision. 369 U.S. 801, 82 S.Ct. 642, 7 L.Ed.2d 549. Thereafter, this case was argued orally before such court on November 15,

1962, and was decided on December 10, 1962. The Supreme Court held that under the Virginia law an order by which a father's habeas corpus proceeding seeking custody of his minor children is dismissed, upon agreement of the parties concerning the custoy of the children, is not res judicata and South Carolina was not required to give full faith and credit to such order. Accordingly, our decision was reversed and remanded to us, the court saying:

'We hold that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining the best interests of these children and entering a decree accordingly. In holding otherwise, the South Carolina Supreme Court was in error. The case is reversed and remanded to that court for further proceedings not inconsistent with this opinion.' Ford v. Ford, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240.

The appeal now before us relates only to the provision of the decree with respect to the custody of the three children of the parties to the action. The appellant husband asserts the lower court erred in awarding the custody of the three minor children ***920** to the wife during the normal school year, the opposite of the agreement previously made between the husband and wife, setting forth several assignments of error with respect thereto.

[1] We have held in numerous cases that the welfare of the children, and what is for their best interest, is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89; Powell v. Powell, 231 S.C. 283, 98 S.E.2d 764; Moore v. Moore, 235 S.C. 386, 111 S.E.2d 695; and Ex Parte Atkinson, 238 S.C. 521, 121 S.E.2d 4. Our statute, Section 31-51 of the 1952 Code, puts the father and mother upon parity with respect to the legal right of custody of their children and, further expressly provides, as all of our pertinent decisions hold, that the welfare of the children is the first consideration of the court.

The difficulty is not in the recognition of the foregoing principles, but in the application thereof to the facts of a given case, and determining what is for the best interests of the children involves a consideration of all of the circumstances of the particular case and, usually, many factors. Before proceeding to apply the aforesaid principles to the instant case, it is, of course, appropriate to set forth in detail the facts disclosed by the record at the time of the trial.

The children were in the actual custody of the husband in the home in Sanford, North Carolina, those of school age being in school there. In the home the husband had, in addition to a servant, a very competent lady of excellent repute, a Mrs. Perry, aged 52, who lived in the home and cared for the children. Mrs. Perry had raised two fine children of her own, and, in addition to caring for the children of the parties, operated a kindergarten which she had been operating for some time before taking the position with the husband in this case. The husband had a substantial position in the tobacco industry and a very adequate income. During two months of the year his work hours were from 7:30 in the morning until 5:30 in the afternoon, and the rest of the time the husband set his own hours, and usually got home from work around 2:30 in the afternoon, never later than 4:30 or 5, after leaving home in the morning at 8:30.

Prior to the estrangement of the parties, the husband had been called upon to travel considerably in his work, but had been successful in eliminating most of his travel so that he could be at home with the children. The new home which the parties were planning at a cost of approximately $40,000.00, when they separated, was nearly completed and ready for occupancy at the time of the trial.

But for the admitted misconduct of the wife, she would be a part and parcel of a very adequate family domicile where she would have been well supported by her husband and the children would have had the constant and uninterrupted love, care and kindness of both parents. As a result, however, of her conduct, her situation was that she was living separate and apart not only from her husband, but from her children, and employed earning her living at an advertising agency. Neither her hours of work nor the time which she would have to devote to the care of her children appeared in the record. She occupied a rented apartment and offered the court no details as to her plans or arrangements for the care of her children during her absence at work. It does appear that she employed a negro servant, but no details as to this servant are contained in the record; nothing about her age, competency, permanency, hours, or anything else to throw any light upon what the actual situation would be in the apartment home of the wife with respect to the care and welfare of the children.

The wife, in her pleadings, alleged no change of conditions as to either party as a basis for changing the agreement entered into by the parties. The evidence did, however, disclose a change of condition with ***921** respect to the husband, which was that his mother who spent at least a part of the time with him and the children had died, her death occurring on August 4, 1960, after the wife sought to commence this proceeding, but before service was actually effected on the husband, and the death of the husband's mother was not a basis of the proceeding. This one change of condition was more than offset by the fact that the husband had substantially rearranged his work in order to be at home with his children, and has also secured the excellent services of Mrs. Perry. The only change of condition with respect to the wife, if it can be termed such, is that she offered evidence tending to prove that she was leading an exemplary life in Greenville, and that her misconduct of the summer of 1959 was a thing of the past.

[2] [3] Although this is not a divorce action, the record clearly reflects that the husband would have been entitled to a divorce, under the law of this state, had he sought one on the ground of misconduct of the wife.

'In determining to whom the custody of a child of divorced parents shall be awarded, the court must weigh all the conflicting rules and presumptions together with all of the circumstances of each particular case, and all relevant factors must be taken into consideration.' 27B C.J.S. Divorce § 309(1), page 449.

The text from which the foregoing quote is taken goes on to point out that while the controlling consideration of the court in making the award is the welfare and best interests of the child, many factors should be considered in determining such welfare. Among the various factors and circumstances, mentioned in the text, which the court should consider in determining what is for the best interest of a child or children in a particular case are the age, health and sex of children, sometimes referred to as the 'tender years doctrine', under which the mother is given preference as to children of tender years; the residence, surroundings and opportunities afforded in the respective environments; the conduct and suitability of parents; the preference in favor of the innocent or prevailing party; the financial condition of the parents; agreements between parties, and others.

[4] The elements or factors which should be considered by a court in determining the welfare and best interests of a child are also discussed in 67 C.J.S. et seq., Parent and Child, § 12, page 646. It is there pointed out that one factor to be considered is the actual possession of the child. From the text, at page 667, we quote the following:

'As between the parents actual possession of the child may have weight in determining the question of custody, for it has been said that the power to change the custody of the child between contending parents living apart is a delicate discretion not to be exercised except in cases in which its necessities clearly demand it.'

[5] The claim of the wife to the custody of the children here, in the light of the pleadings, the evidence and the findings of fact below, rests solely on the 'tender years doctrine'. An analysis of the order of the trial court and the order of the circuit court shows that in each instance the mother was favored by the decisions below solely on the basis of that doctrine, and that other facets and circumstances which should have been considered in determining what was in the best interest of the children were either not considered or, if considered, were given no effect. Both judges found as a matter of fact that both parents were, at the time of the trial, fit parents to have the custody of the children, and then proceeded to decide on the basis of the 'tender years doctrine', and on that basis alone, that the mother should be favored. In this, we think they erred.

'The general rule as to preference to be given to the mother in the award of ***922** custody of young children, or so-called 'tender years doctrine,' is not, however, inflexible and applicable in every case merely because the mother has not been shown clearly unfit; and it has been said to be merely an aid to the court or one facet of the basic principle that the best interests and welfare of the child are the controlling considerations. The general rule is qualified by the requirement that other things be equal, and whether or not such rule has been recognized or affirmed by statute, the mother of a child of tender years is not entitled to its custody as a matter of law. Accordingly, such a child may be awarded to the father, in the discretion of the court, where the circumstances of the case require it for the child's best interests.' 27B C.J.S. Divorce § 309(4), page 461.

[6] [7] Applicable to the controversy here is the following quote from Powell v. Powell, 231 S.C. 283, 98 S.E.2d 764:

'It is usual for the custody of children of divorced parents to be awarded to the parent who is innocent of the conduct which led to the divorce. 27 C.J.S. Divorce § 309e, p. 1175: 'Preference should be given to the party not at fault, and the custody of the child is usually awarded to the party who prevails in a suit for divorce * * *. In some jurisdictions * * * a divorce on the ground of adultery is a conclusive adjudication of the guilty party's unfitness to have custody.' 17 Am.Jur. 518, Divorce and Separation, Sec. 683: 'Other considerations being equal * * * it is usual to award custody of children to the innocent spouse.'

'It is unusual, but by no means unprecedented, for the custody of children of tender years to be awarded to the father rather than to the mother. 27 C.J.S. Divorce Sec. 309c, p. 1172. Always, the controlling consideration is the welfare of the children. 'This right of the mother (to the custody of children of tender years) may be recognized although she is the party in fault, if such fault does not reflect on her moral character.' (Emphasis added.) 17 Am.Jur. 518, Sec. 683.'

With respect to the agreement between the parties, the trial judge and the circuit judge apparently did not consider or decide the legal implications or effect of the same.

[8] The general law on the subject of contracts or agreements as to custody of children is set forth in 17A Am.Jur. 17, Section 822, the concluding sentence of the text reading as follows:

'The rule is that contracts between spouses as to the custody of children will be recognized unless the welfare of the children requires a different disposition.'

[9] It seems to us that under this general rule it was incumbent upon the wife to show that the welfare of the children required the court to ignore and set aside the agreement of the parties.

Authorities in support of the quoted rule include Slattery v. Slattery, 139 Iowa 419, 116 N.W. 608, and Lowery v. Lowery, 108 Ga. 766, 33 S.E. 421. Pertinent here, we think, is the decision in Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, Virginia being the state where the agreement here under consideration was made. In that case, the wife, who was the guilty party in a divorce proceeding, sought to set aside a custody provision contained in the divorce decree. The court held that she was not entitled to any relief, and at least one basis of the decision was that she had agreed to the custody provisions outlined in the decree. In the Lowery case, above cited, it was said that the court would ordinarily enforce a contract regarding custody, provided that the welfare of the children did not require a different disposition, and provided that the party seeking to enforce the contract had not breached or violated the same.

*923 [10] Here, the husband scrupulously lived up to the provisions of the agreement. The only reason the children were ever physically in the jurisdiction of the Juvenile and Domestic Relations Court of Greenville County was that the husband saw to it that they were there in accordance with the terms of the agreement. On the other hand, the wife, almost as soon as she got them within the physical jurisdiction of that court, sought, with the aid of the court, to abrogate the agreement. Aside from the 'tender years doctrine' upon which her claim rests, there is nothing in the record to indicate that the agreement entered into did not serve the best interests and welfare of the children.

Pertinent to the issue before us, we think, is whether the agreement entered into between the parties was fair, just, equitable and in the best interests of the children at the time it was entered into. If it was, another pertinent inquiry is whether there is any showing that there had been a sufficient change of conditions to indicate that the agreement was not, under the circumstances prevailing at the time of the trial, a proper one in the best interests of the children. Certainly, if the case had been presented to this court under circumstances which existed at the time the agreement was entered into, there is nothing to show that the agreement would not have been approved as being in the best interests of the children, unless it be that the agreement accorded the wife greater rights with respect to the children than may have been accorded to her by a court under a contest.

The facts and circumstances shown by the record, we think, are entirely insufficient to warrant this court in disregarding the agreement entered into between the parties.

While we recognize the soundness of the 'tender years doctrine' in proper cases, we do not think that it should prevail in a case such as this to the exclusion of all other rules and considerations. Aside from that doctrine every other facet of the case, as shown by

the record at the time of the trial, greatly outweighed that doctrine, in favor of the recognition and enforcement of the agreement. The trial court, as well as the circuit court, should have given effect to the other considerations and denied relief to the wife.

It should be unnecessary to point out that our decision here is, of necessity, based upon the facts existing in October 1960, as shown by the record, and we, of course, do not prejudge any question as to what is for the best interests of the children under presently existing facts and circumstances.

Since the children, under the erroneous order of the Juvenile and Domestic Relations Court of Greenville County, are apparently now in the custody of the wife and in school in Greenville, it is not in the best interests of the children that their custody be disturbed until the end of the present school year. However, since, under the agreement of the parties, the wife will be entitled to the custody of the children during the summer vacation of 1963, it is only equitable that the father have some custody during vacation.

Accordingly, it is ordered that the present custody of the children shall not be disturbed until the end of the current school year. It is further ordered that the husband shall have the custody of the children for a period of thirty days during the summer vacation of 1963, in addition to the custody to which he is entitled under the agreement between the parties. The exact time of this thirty day period of custody shall be fixed by the Juvenile and Domestic Relations Court of Greenville County, upon motion of either party, if they find themselves unable to agree thereabout.

For the reasons herein stated, the order appealed from is reversed and the cause remanded for any necessary further proceedings in accordance with the views herein expressed and the foregoing order.

TAYLOR, C. J., and LEWIS, BUSSEY and BRAILSFORD, JJ., concur.

Frank v. Frank, 429 S.E.2d 823 (Ct.App. 1993)

Court of Appeals of South Carolina.
Martha L. FRANK, Respondent,
v.
Donnie R. FRANK, Appellant.
No. 1984.
Heard Feb. 23, 1993.
Decided April 5, 1993.

Action was brought for divorce. The Family Court, York County, David N. Wilburn, Jr., J., awarded marital home and wife's engagement ring to wife, ordered all debts and remaining marital assets to be divided, and found husband in contempt for violating restraining order. Husband appealed. The Court of Appeals, Gardner, J., held that; (1) marital home was transmuted into marital property; (2) engagement ring was wife's separate property; (3) marital debt must be specifically identified and apportioned in equitable distribution; and (4) evidence did not support finding of contempt. Reversed and remanded.

GARDNER, Judge

Donnie R. Frank (the husband) and Martha L. Frank (the wife) were married in 1984. The parties were divorced in 1991 based on a one year separation. The trial court awarded the marital home and the wife's engagement ring to the wife. He also ordered

all debts and remaining marital assets be divided between the parties. The trial court found the husband in contempt for violating a restraining order. The husband appeals from the trial court's rulings on the property division and contempt. We reverse and remand.

FACTS

The marital home was given to the wife by her parents in 1981. At that time, the marital home bore a mortgage of ***456** $21,000. In 1986, while the parties were separated, the wife refinanced the house to consolidate***825** bills. Subsequently, the parties reconciled and started living together again at which time they obtained home equity loans of $30,000.

The proceeds from the home equity loans went largely to furnishing and remodeling the house. The parties used $7,200 of the loan for a boat. At the time of this action, only $447 in interest had been paid on the loan. The monthly mortgage payments are $481 per month. The total of mortgages on the house is $74,000. The house is listed for sale at $190,000. During the seven years of marriage, the husband earned approximately $72,000 and the wife earned about $137,000.

ISSUES

The husband argues that the trial court erred by: 1) ruling the marital home was not transmuted and remained the separate property of the wife; 2) ruling the engagement ring was the wife's separate property; 3) failing to award the husband the personal property he acquired before the marriage; 4) failing to allocate the personal property and the debt; and 5) finding the husband in contempt of a restraining order.

DISCUSSION

[1] This Court has jurisdiction to find the facts according to its own view of the preponderance of the evidence. *Phillips v. Phillips,* 290 S.C. 455, 351 S.E.2d 178 (Ct.App.1986).

[2] First, the husband argues that the trial court erred by ruling that the record did not show an intent to transmute the marital home into marital property. We agree.

[3] [4] It is well settled that in certain circumstances, nonmarital property may be transmuted into marital property if it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. *Johnson v. Johnson,* 296 S.C. 289, 372 S.E.2d 107, *cert. denied* 298 S.C. 117, 378 S.E.2d 445 (Ct.App.1988). Property can be transmuted, even though one spouse acquires legal title to property prior to the marriage, if both parties discharge the indebtedness. ***457** *Canaday v. Canaday,* 296 S.C. 521, 374 S.E.2d 502 (Ct.App.1988); *Wyatt v. Wyatt,* 293 S.C. 495, 361 S.E.2d 777 (Ct.App.1987).

In the instant case the wife owned the marital home prior to the marriage. Both parties, however, signed a $30,000.00 promissory note securing a mortgage on the

house, and, therefore, both parties are liable for the discharge of the debt. Even though the home equity loan has not been repaid and the husband contributed very little in the way of financial support to the marital home, he remains liable on the note. Accordingly, we hold that, to the extent that the husband is liable for the home improvement loan, the marital home is transmuted. We reverse and remand the transmutation issue to the trial court so that it may consider the marital home in the equitable distribution of the marital estate.

[5] Next, the husband contends that the judge erred by concluding that the engagement ring was the wife's property. The husband gave the wife an engagement ring in 1981. The ring had belonged to his grandfather and father. The husband claims he and the wife had an understanding that "if anything happened" he would get the ring back. The wife denied this understanding.

[6] An antenuptial gift of an engagement ring is the recipient's separate property. *McClerin v. McClerin,* 310 S.C. 99, 425 S.E.2d 476 (Ct.App.1992). Furthermore, this Court will not ordinarily disregard the factual findings of the trial judge who saw the witnesses, observed their demeanor, and was in a better position to make credibility determinations. *See Husband v. Wife,* 301 S.C. 531, 392 S.E.2d 811 (Ct.App.1990). Thus, we affirm the trial judge's ruling on the wife's right to the engagement ring.

[7] The husband also argues that the court erred in failing to equitably apportion the remaining marital assets and debts of the parties. The record reflects that the trial judge ordered the parties' boat be sold and the proceeds be applied "pro rata" to ***826** the debts listed on the parties' financial declarations. He also ordered that the remaining assets be divided 65 percent to the wife and 35 percent to the husband. However, the marital debts were neither specifically identified nor specifically apportioned to either party.

S.C.Code Ann. section 20-7-472 (1976) provides:

***458** In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors:

* * * * * *

(13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage;

* * * * * *

(15) such other relevant factors as *the trial court shall expressly enumerate in its order.* (Emphasis added).

We hold that the statute implicitly requires that marital debt, like marital property, be specifically identified and apportioned in the equitable distribution. Accordingly, we hold that upon remand the trial court shall specifically identify and apportion the marital debt.

[8] Additionally, the husband contends that the trial court failed to award him certain personal property. First, we note that the wife gave the husband opportunity to take anything he wanted from the house in her absence. At trial, the husband presented a list of personal property that he wished to retrieve from the marital home. The trial court did not specifically discuss the items on this list.

We find the husband's hand written list to be illegible. Based on the insufficiency of the record, it is impossible for this Court to properly address this issue. Moreover, counsels for both parties conceded at oral argument that a settlement had not been attempted on this issue and that such negotiations would be forthcoming. Accordingly, we find this issue is without merit and do not address it.

[9] Finally, the husband appeals the trial court's finding of contempt. There is of record a restraining order issued by the trial court on March 7, 1991, ordering the husband to stay off the wife's home and work premises. The wife asserts that she served the husband with an order and rule for contempt for violating the restraining order on March 22 and 24, 1991 and on April 1, 1991. The husband stated he did not go on the wife's property after he received the restraining order.

***459** [10] This Court will not disturb a trial court's decision on contempt unless it is without evidentiary support. *Pirkle v. Pirkle,* 303 S.C. 266, 399 S.E.2d 797 (Ct.App.1990). "[A] person cannot be brought into contempt for not complying with an order or decree of court unless personal service thereof has been made on him or unless he has had actual notice of the making of such order or of the rendition of such judgment or decree." 17 C.J.S. *Contempt* § 18 (1963). There is no evidence of record that the husband received notice of or knew of the restraining order at the time of the violations. We, therefore, reverse the finding of contempt.

For the foregoing reasons, we reverse and remand for further proceedings consistent with this decision.

REVERSED and REMANDED.

SHAW and BELL, JJ., concur.

Gill v. Gill, 237 S.E.2d 382 (1997)

Supreme Court of South Carolina.
Mary Ann GILL, Appellant,
v.
Charles GILL, Respondent.
No. 20507.
Sept. 8, 1977.

Wife instituted divorce proceedings, in which husband counterclaimed for divorce on ground of physical cruelty. The County Court, Union County, David N. Wilburn, Jr., J., granted husband a divorce, and wife appealed. The Supreme Court, Ness, J., held that: (1) husband should not have been granted a divorce where although he engaged in several confrontations with wife it was not shown that husband had sufficient reason to apprehend danger to his life, limb or health; (2) wife was entitled to reasonable periodic support and (3) although lump-sum awards of alimony in actions for separate support

and maintenance are not favored such could be awarded where wife had a substantial interest in the property involved.
Reversed and remanded with direction.
NESS, Justice.

Appellant, Mary Ann Gill, instituted divorce proceedings against respondent, ***383** Charles Gill, and sought custody of the couple's child, alimony, and support. Subsequently, appellant amended her complaint to seek a separation rather than a divorce. Respondent counterclaimed for a divorce on the ground of physical cruelty.

Respondent was granted a divorce on the basis of physical cruelty by the wife. We reverse.

 [1]  [2] Physical cruelty by a spouse which justifies the granting of a divorce in this State, has generally been defined as "actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe." Brown v. Brown, 215 S.C. 502, 508, 56 S.E.2d 330, 333 (1949). See also Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965). While there is no specific test for determining whether or not certain acts constitute physical cruelty, it has been repeatedly stated that not every slight violence committed by the husband or wife against the other will authorize a divorce on this ground. Brown, supra; Barstow v. Barstow, 223 S.C. 136, 74 S.E.2d 541 (1953).

 [3] In his case, respondent alleged several acts of physical cruelty by the wife to establish his grounds for divorce. One instance involved a confrontation at a motel where respondent was staying with another woman. There was conflicting testimony as to whether appellant physically attacked respondent upon confronting him there. In ***340** any event, respondent admitted that he was not particularly afraid of his wife on that occasion.

Another alleged attack occurred following a similar incident at the motel. The parties left the motel in two vehicles, with appellant's car following respondent's truck. A short distance from the motel, appellant allegedly intentionally crashed her car into the back of respondent's truck, damaging both vehicles and injuring herself. The testimony surrounding this event is contradictory, the appellant contending the respondent forced the collision by suddenly applying his brakes.

Respondent also alleged that his wife threatened him with a pistol on one occasion. However, the "pistol" was actually a BB or pellet gun.

While acknowledging that a wife may be capable of inflicting acts of physical cruelty upon a husband, this Court has held that:

"(S)light acts of violence by a wife from which the husband can easily protect himself do not constitute physical cruelty entitling him to a divorce." Barstow, supra, 223 S.C. at 142, 74 S.E.2d at 543-544. See also 27A C.J.S. Divorce s 26.

Although the evidence reveals a deplorable state of affairs between the parties, it does not show that respondent had sufficient reason to apprehend danger to his life, limb or health. In nearly every instance, the conduct of the appellant was provoked by the acts of her husband.

The evidence shows that appellant is willing to continue her marital relations with respondent. She seeks a separation rather than a divorce.

In view of the nature of the alleged acts by the wife and the testimony surrounding those acts, we do not believe the husband should have been granted a divorce on the ground of physical cruelty. Accordingly, the order granting respondent a divorce is reversed.

***341** [4] The lower court also erred in denying appellant's request for periodic alimony. The decision of the trial court was based on fault of the appellant. In view of our holding, the support to which the appellant is entitled should be decided on the basis of her no-fault. We believe appellant is entitled to reasonable periodic support as she has done nothing to forfeit her right to maintenance. It would be unjust and improper to relieve respondent of all future support and obligation toward his wife.

[5] We do not now decide how the property should be divided according to equitable principles. Traditionally, lump sum awards of alimony in actions for separate support and maintenance were not favored (see Matheson v. McCormac, 186 S.C. 93, 195 S.E. 122 (1938)), although they would be ***384** ordered when consented to or in exceptional situations. Here, however, appellant has a substantial interest in the property involved, and she could, by petition in this action, have this matter determined. Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974).

For the reasons stated, we reverse the order of the trial court, and remand the case with the direction that the trial court:

(1) Dismiss the counterclaim of the respondent;

(2) Determine and allow a reasonable and just amount for support to the wife for her separate maintenance, the payment of the same to begin as of February 6, 1976, and continue until the further order of the court;

(3) Determine other matters raised by the pleadings.

REVERSED AND REMANDED.

LEWIS, C. J., and LITTLEJOHN, RHODES and GREGORY, JJ., concur.

Griffith v. Griffith, 645, 506 S.E.2d 526 (Ct. App. 1998)

Court of Appeals of South Carolina.
Steven R. GRIFFITH, Appellant/Respondent,
v.
Jennifer A. GRIFFITH, Respondent/Appellant.
No. 2890.
Heard June 2, 1998.
Decided Oct. 12, 1998.

Action was brought for divorce. The Family Court, Charleston County, Berry L. Mobley and Frances P. Segars-Andrews, JJ., entered divorce decree denying permanent alimony, equitably dividing property, and awarding attorney fees, and both parties appealed. The

Court of Appeals, Howard, J., held that: (1) wife who invoked privilege against self-incrimination on adultery questions could not seek affirmative relief of alimony; (2) wife's invocation of privilege against self-incrimination when questioned about alleged adulterous conduct established her adultery by a preponderance of the evidence; (3) allocation of marital property did not result in an equal division of marital assets; (4) award of $10,000 in attorney fees to wife was not supported by evidence
Affirmed in part, reversed in part, and remanded.
Anderson, J., filed dissenting opinion.
HOWARD, Judge:

In this divorce action, we are asked to consider the implications arising from the refusal of a party who seeks the affirmative relief of alimony to answer questions concerning alleged adulterous behavior, asserting the Fifth Amendment privilege against self-incrimination.[FN1] Steven R. Griffith (the husband) and Jennifer A. Griffith (the wife) sued each other for a divorce on multiple grounds, including adultery. In the final hearing, the wife and two witnesses named as paramours declined to answer questions concerning their alleged adulterous conduct, asserting the Fifth Amendment privilege against self-incrimination. The family court denied the wife permanent alimony because she asserted her Fifth Amendment privilege, and she appeals from this ruling. The husband appeals the family court's refusal to draw an adverse inference from the wife's invocation of the privilege against self-incrimination, asserting that this inference, along with other evidence, established the wife's adultery as a ground for divorce. The husband also appeals the failure of the family court to order reimbursement of temporary alimony payments, the valuation of the equitable***528** distribution of property, and the award of attorney's fees to the wife. We affirm in part, reverse in part, and remand for further proceedings.

FN1. U.S. Const. amend. V. In South Carolina, adultery is a crime. S.C.Code Ann. §§ 16-15-60 & 70 (1985).

FACTS

The parties were married in 1982 and have two minor children. They separated in March of 1994, and the wife brought an action for separate maintenance and support. The court granted her temporary custody, child support, and temporary alimony. Following discovery, the husband brought a separate action for custody and made a motion in this case to amend his answer to assert adultery as a ground for divorce and as a bar to alimony. This motion was made on November 18, 1996, two days before the scheduled final hearing. [FN2]

FN2. The propriety of maintaining a second, simultaneous action for custody is not before us. The parties and the family court apparently treated the husband's action as consolidated with the wife's action, though we find no order of consolidation in the record.

***634** The family court, the Hon. Berry L. Mobley presiding, granted the motion over the wife's objection, and continued the final hearing. Both the husband and wife then amended their pleadings to seek a divorce based on adultery. The husband also alleged the alternative ground of living separate and apart for one continuous year, and both alleged habitual drunkenness.

The parties reached an accord on the issues of custody and child support, which the court adopted in its final decree. The merits hearing was held before the Hon. Frances P. Segars-Andrews on February 11 and 12, 1997, following which the court granted a divorce based on one year's continuous separation. At the beginning of the hearing, the

parties stipulated that they had been granted immunity from prosecution for adultery by the Solicitor for the Ninth Judicial Circuit. In the hearing, the husband called the wife and her two alleged paramours to the witness stand and directly asked each if the wife had committed adultery. All three refused to answer the questions, asserting their Fifth Amendment privilege against self-incrimination.[FN3]

FN3. The husband did not specifically raise the impropriety of the wife's invocation of the privilege against self-incrimination in light of the purported grant of immunity to the trial court. Thus, we do not address the issue. *See* *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986) (issue not raised below will not be considered on appeal).

The second of the two alleged paramours admitted returning to Charleston, South Carolina from El Paso, Texas to visit with the wife, following her telephone call to him. He acknowledged that he and the wife had been romantically involved during high school. In June of 1995 he stayed at a local motel, and the wife visited him there. He also admitted that the wife told him about a previous relationship with another man named Bill (the first alleged paramour is named Bill), and from her words he "inferred that it was a very close relationship including a sexual relationship," though he added that he "had no knowledge directly."

Based on the refusal to answer the direct questions concerning adulterous conduct, the husband asked the court to infer the wife's adultery. The husband argued that this inference, coupled with the other testimony as noted above, established ***635** adultery by a clear preponderance of the evidence. The family court did not rule on the husband's request to consider a negative inference from the invocation of the Fifth Amendment privilege, although the court denied the wife the affirmative relief of permanent alimony based on the fact that she did invoke the privilege. The court ruled that the husband failed to prove adultery. From a motion to reconsider filed pursuant to Rule 59(e), SCRCP, the court declined to modify its ruling, or to require the wife to repay the temporary alimony.

In the divorce decree, the court ordered an equitable division of marital property ostensibly on a 50/50 basis, ordering that each party retain possession of the property which that party possessed. The court also awarded the wife attorney's fees of $10,000. Both parties stipulated at oral argument that a 50/50 division of property was proper, irrespective of this court's resolution of the remaining issues.***529** But the husband appeals the family court's award, arguing it does not result in an even allocation of assets.[FN4] The husband also appeals the award of attorney's fees. The wife appeals the court's pre-trial ruling allowing the husband to raise adultery as an issue and the denial of affirmative relief on the basis of her invocation of the Fifth Amendment privilege against self-incrimination.

FN4. The husband also appealed the court's rulings as to his military retirement account and the refusal to reopen the case to admit and consider after discovered evidence. The parties stipulated at oral argument, however, that these issues have been rendered moot during the course of this appeal by the husband's separation from the service, with the exception of the amount to which the wife is entitled. This, the parties agree, must be decided by the lower court.

DISCUSSION

I. Wife's Appeal

A. Motion to amend

[1] The wife first asserts the lower court should not have allowed the husband to amend his pleadings to allege adultery two days before trial, citing *Oyler v. Oyler,* 293 S.C. 4, 358 S.E.2d 170 (Ct.App.1987). We find this argument to be without merit.

***636** In *Oyler* this court held that a party may not raise adultery as an avoidance to an action for alimony for the first time at trial. There was no pretrial motion to amend pleadings and assert adultery as a defense. The issue was raised during cross-examination of the wife at trial. The family court "liberally" construed the husband's general reply to the wife's counterclaim for alimony to encompass the issue. This court held the wife had been prejudiced because adultery had not been pled, giving her notice. We stated, "[c]learly, ... adultery involves the introduction of new matter which constitutes an avoidance to a claim for alimony," and must be pled under Rule 8(c), SCRCP. *Id.* at 7, 358 S.E.2d at 172.

Pleadings may be amended by leave of court, which "shall be freely given when justice so requires and [it] does not prejudice any other party." Rule 15(a), SCRCP; [FN5] *see* *Bennefield v. Bennefield,* 263 S.C. 233, 209 S.E.2d 563 (1974) (motion to allow amendment of pleading is addressed to the sound discretion of the family court). The wife suffered no prejudice in this case by the pretrial ruling, since the court continued the trial to allow the amendment of the pleadings and gave each party two months to prepare. Where, as here, there is no prejudice, the family court has not abused its discretion by allowing the amendment.

FN5. Made applicable to the family courts by Rule 81, SCRCP, and Rule 2, SCRFC.

B. Denial of affirmative relief

[2] The wife argues that the denial of the affirmative relief of alimony in a divorce case to a party who invokes the privilege against self-incrimination "simply cannot be the rule in South Carolina." We disagree.

[3] [4] Under the laws of this state, adultery is a criminal offense. S.C.Code Ann. § 16-15-60 & 70 (1985). A conviction of adultery subjects the violator to punishment of up to a five hundred dollar fine, one year imprisonment, or both. *Id.* "The framers of the Bill of Rights recognized the dangers inherent in self-incrimination, and as a result, placed in the Fifth Amendment a prohibition against compelling a witness to testify against himself. This prohibition against compelled self-incrimination is a basic constitutional mandate which is ***637** not a mere technical rule, but rather, a fundamental right of every citizen in our free society." *State v. Thrift,* 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). Therefore, it is legally proper for persons facing criminal prosecution for adultery to invoke their Fifth Amendment privilege against self-incrimination.

No South Carolina case has directly addressed whether a party may continue to seek the affirmative relief of alimony while denying the opposing party the opportunity to cross-examine on the subject of their alleged adultery. The handling of the refusal to

answer relevant questions regarding adultery on Fifth Amendment grounds in other states is, of course, dependent on the criminality of the alleged conduct in the first instance. Our research indicates that those ***530** states confronted by this issue have almost uniformly concluded that one who seeks this affirmative relief in a civil case may not invoke the Fifth Amendment privilege against self-incrimination in response to proper questions relating to the subject matter in issue. In such instances, the trial court may properly require them to choose between the Fifth Amendment privilege and the continuation of their claim for affirmative relief. *See* Cantwell v. Cantwell, 109 N.C.App. 395, 427 S.E.2d 129 (1993); Stockham v. Stockham, 168 So.2d 320 (Fla.1964) (equity considerations require complaining spouse in divorce action to answer requests or pursue action no further); Minor v. Minor, 232 So.2d 746 (Fla.Dist.Ct.App.1970), *aff'd* 240 So.2d 301 (Fla.1970); Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968) (plaintiff required to waive privilege against self-incrimination or have divorce action dismissed); Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483 (1955) (en banc) (complaining spouse's refusal to answer questions at support hearing justified striking of spouse's pleadings); Pulawski v. Pulawski, 463 A.2d 151 (R.I.1983) (wife could not seek financial relief and at the same time preclude her husband from examining her on other matters that were relevant to that relief).[FN6]

FN6. Other courts have made the same requirement in civil cases that do not concern divorce. *See* Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed.Cir.1987) (party may not bring action, claim Fifth Amendment privilege, and proceed with action); Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir.1969) ("The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim"); Pavlinko v. Yale-New Haven Hosp., 192 Conn. 138, 470 A.2d 246 (1984) (plaintiff invoking the privilege against self-incrimination risks having complaint dismissed); City of St. Petersburg v. Houghton, 362 So.2d 681 (Fla.Dist.Ct.App.1978) (petition for affirmative relief properly dismissed where party seeking affirmative relief invokes Fifth Amendment privilege against self-incrimination); Master v. Savannah Sur. Assocs., Inc., 148 Ga.App. 678, 252 S.E.2d 186 (1979) (affirming trial court's dismissal based on Plaintiff's invocation of Fifth Amendment privilege); Galante v. Steel City Nat'l Bank of Chicago, 66 Ill.App.3d 476, 23 Ill.Dec. 421, 384 N.E.2d 57 (1978) ("Plaintiffs have forced the defendants into court. It would be unjust to allow them to prosecute their cause of action and, at the same time, refuse to answer questions, the answers to which may substantially aid defendants or even establish a complete defense."); Levine v. Bornstein, 13 Misc.2d 161, 174 N.Y.S.2d 574 (Sup.Ct.1958) (plaintiff has right to invoke the Fifth Amendment privilege, but not at detriment to defendant's ability to develop a defense), *aff'd,* 7 A.D.2d 995, 183 N.Y.S.2d 868 (1959), *aff'd,* 6 N.Y.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921 (1959).

***638** These courts are uniform in holding, either directly or by necessary implication, that the denial of the right to seek affirmative relief to one who refuses to answer questions relevant to the issues is not a violation of any right guaranteed by the Fifth Amendment. As the court reasoned in Lyons v. Johnson:

> If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who has made the election to create an imbalance in the pans of the scales.

415 F.2d 540, 542 (9th Cir.1969); *see also* Minor v. Minor, 232 So.2d 746, 747 (Fla.Dist.Ct.App.1970), *aff'd* 240 So.2d 301 (Fla.1970) ("The rationale of Stockham is clearly and properly bottomed on the venerable maxim that one seeking equity must do

equity; thus if appellant would be a suppliant in a court of conscience she need only bare her own conscience.")

In the North Carolina case of *Cantwell v. Cantwell,* the court observed:

While we recognize that the defendant in the present case had the right to invoke her privilege against self-incrimination, "[t]he interests of the other party and regard for the ***639** function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege...." The privilege against self-incrimination is intended to be a shield and not a sword. Therefore, "if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense [,] he should not have it within his power to silence his ***531** own adverse testimony when such testimony is relevant to the cause of action or the defense."

109 N.C.App. 395, 427 S.E.2d 129, 130 (1993) (citations omitted).

The *Cantwell* court concluded that the defendant "was properly given the choice to either shield herself from criminal charges by refusing to answer questions regarding her alleged adultery, and in so doing abandon her alimony claim, or waive her privilege and pursue her claim." *Id.* at 131.

In South Carolina, proof of adulterous conduct acts as an absolute bar to alimony when the adultery occurs "before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties." S.C.Code Ann. § 20-3-130(A) (Supp.1997). None of these events had occurred here.

The parties stipulated that they had been granted immunity from prosecution for adultery. Thus, there was no legal justification for the wife's refusal to answer the questions. Her assertion of the privilege clearly denied the husband legitimate access to information which was relevant on the issues of divorce and her entitlement to alimony. Under these circumstances, we hold the family court did not abuse its discretion by ruling that the immunized wife could not invoke her Fifth Amendment privilege against self-incrimination, refusing to answer questions concerning her alleged adulterous conduct, and continue to seek the affirmative relief of alimony.

II. Husband's Appeal

A. Proof of adultery

[5] The family court refused to consider an adverse inference from the invocation of the Fifth Amendment privilege ***640** against self-incrimination. Under the circumstances of this case, we conclude this was error.

In *Baxter v. Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), the Supreme Court laid to rest the constitutional objection to drawing an adverse inference from the invocation of the Fifth Amendment privilege in a civil case between private parties. *See* Robert Heidt, *The Conjurer's Circle-The Fifth Amendment Privilege in Civil Cases,* 91 Yale L.J. 1062, 1111 (1982) ("In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to

permit an adverse inference to be drawn from exercise of the [Fifth Amendment] privilege does not implicate the policy considerations underlying the privilege.").

[6] Following *Baxter,* the propriety of considering an adverse inference from the invocation of the privilege has gained acceptance in those jurisdictions confronted by the issue.[FN7] We ***641** join with these jurisdictions in ****532** concluding that it is permissible for the fact finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination. Having so concluded, we draw the inescapable conclusion that the trial judge was in error when she refused to consider an adverse inference from the wife's refusal to answer questions concerning her alleged adultery.

FN7. *See Pulawski v. Pulawski,* 463 A.2d 151, 156 (R.I.1983) ("It thus appears that the imposition of sanctions upon a party who seeks affirmative relief and the drawing of adverse inferences against such a party when he refuses to answer relevant questions on self-incrimination grounds are widely accepted in both state and federal courts."). *See also Langley v. Langley,* 617 So.2d 678 (Ala.Civ.App.1993) (asserting Fifth Amendment privilege by parties alleged to have committed adultery in divorce case may be brought to the attention of the trier of the facts, and it raises a presumption that operates against the party claiming the privilege); *Brewer v. Brewer,* 249 Ga. 517, 291 S.E.2d 696, 697 (1982) (stating that "although no inference of guilt can be drawn from a privileged refusal to testify in a criminal case, and although the exercise of the privilege in a civil case cannot be used in a subsequent criminal case against the party, it is permissible to draw an unfavorable inference in a civil case from the privileged refusal to testify in that case."); *Barr v. Barr,* 58 Md.App. 569, 473 A.2d 1300 (1984) (where wife testified to husband's pre-trial admissions of adultery and husband declined to testify, invoking the Fifth Amendment privilege against self-incrimination, the "hotly contested" circumstances and permissible inferences allayed any fears of collusion as well as affirmatively corroborating out of court admissions of adultery); *In re Estate of Trogdon,* 330 N.C. 143, 409 S.E.2d 897 (1991) (the finder of fact in a civil case may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him); *Mahne v. Mahne,* 66 N.J. 53, 328 A.2d 225 (1974) (although striking of a defendant's answer upon invocation of privilege in pre-trial setting of civil case may be too harsh, adverse inference may properly be drawn from the invocation); *Palin v. Palin,* 213 A.D.2d 707, 624 N.Y.S.2d 630 (1995) (where parties' son testified defendant told him he had a child with a woman other than his wife and defendant refused to answer questions regarding the subject, invoking his Fifth Amendment privilege against self-incrimination, hearing officer properly drew an adverse inference from invocation of privilege to support conclusion adultery had been proved); *Fritz v. Fritz,* 88 A.D.2d 778, 451 N.Y.S.2d 519 (1982) (husband's invocation of Fifth Amendment privilege when asked if he had sexual relations with certain named women permits an adverse inference against him); *Romero v. Colbow,* 27 Va.App. 88, 497 S.E.2d 516 (1998) (wife's "inconsistent display" in the invocation of Fifth Amendment at hearing properly considered in determination of proof of adultery, although adultery was not established in case by " 'clear and positive and convincing' evidence").

There being no legal justification for the wife to invoke the privilege here, as she had already been granted immunity from prosecution, we find the permissible inference to be most compelling. There being no good faith reason for the refusal to testify, we can think of but one logical explanation for her reticence; that is, the answers would have tended to establish the adulterous conduct which the husband sought to prove.

The husband contends the adverse inference, when added to the other evidence, established the fact of the wife's post-separation adultery by a clear preponderance of the

evidence. In this regard, the husband argues that an inference adverse to the wife was properly drawn, not only from her refusal to testify, but also from the refusal of the other witnesses. The husband analogizes this circumstance to that of a party who fails to call an available witness to testify. *See* *McCowan v. Southerland,* 253 S.C. 9, 168 S.E.2d 573 (1969); *Wisconsin Motor Corp. v. Green,* 224 S.C. 460, 79 S.E.2d 718 (1954).

We disagree with the premise that the two situations are analogous, and we have concerns over the appropriateness of drawing an inference adverse to a party based on another witness's invocation of the privilege against self-incrimination in a civil case. *See* ***642** *Levy v. Levy,* 53 A.D.2d 833, 385 N.Y.S.2d 314 (1976) (finding trial court erred in drawing negative inference from co-respondent's invocation of privilege against self-incrimination). However, we need not reach this issue, because we conclude that the strong adverse inference drawn from the wife's invocation of the privilege, when added to the remaining testimony, establishes her adultery by a clear preponderance of the evidence.

Having reached this conclusion, it is now necessary to consider what relief is appropriate. We need not modify the basis for the divorce, because granting a divorce to the husband on the grounds of adultery would not dissolve the marriage any more completely. *Smith v. Smith,* 294 S.C. 194, 363 S.E.2d 404 (Ct.App.1987). The finding of adultery does not alter the division of property based on fault, because the parties have stipulated that a 50/50 division is appropriate. Nor does the finding of adultery affect the entitlement to attorney's fees in this case, because the husband only appeals the amount of fees awarded to the wife and not her entitlement to it. *See* discussion *infra* Part II.C.

The one remaining issue affected by this ruling is the right to reimbursement of temporary alimony. Because we have found that the husband proved the wife's adultery by a clear preponderance of the evidence, this requires reimbursement of temporary alimony. The establishment of adultery as a defense to alimony is a bar to all alimony under section 20-3-130(A), and requires the reimbursement of court-ordered temporary spousal support. *Watson v. Watson,* 291 S.C. 13, 351 S.E.2d 883 (Ct.App.1986). This response is further mandated by the family court's ruling that by invoking her privilege against self-incrimination the wife could not seek the affirmative relief of alimony. The right to retain the alimony paid under the temporary order was affirmative relief, and the husband's ability to defend against the wife's right to retain it was adversely affected by her invocation of the privilege against self-***533** incrimination. To allow her to retain it would be to grant her the affirmative relief of alimony.

The amount to be reimbursed is subject to interpretation and proof under the temporary order because the husband was required to make payments to third parties on joint debts instead of paying a sum to the wife. We must, therefore, ***643** remand for a determination of the appropriate amount to be reimbursed.

B. Allocation of property

[7] Next the husband asserts the family court did not effect an equal division of the marital property with its allocation of the marital assets, though the court ordered a 50/50 split. The testimony of the parties on this issue is confusing, and it appears the court ultimately may have misunderstood it. In any event, we conclude the value assigned to the property retained by each party under the court's order is not consistent with an equal division.

The court awarded to each party the marital property in that party's possession. The court also assigned to the property the values contained in the wife's inventory, a conclusion with which we do not disagree. According to the inventory and testimony, the wife was awarded marital property in her possession having a value of $8,826, and the husband retained marital property valued at $1,975. The wife does not contest this assertion on appeal. Clearly, then, an award of all property in each party's possession, together with a 50/50 division of the remaining marital property, results in a disproportionately large award to the wife which does not result in an equal division of marital assets. Therefore, it is necessary to remand this issue for a redetermination of the allocation of assets to effect a 50/50 division of marital property.

C. Attorney's fees

[8] The husband appeals the amount of attorney's fees awarded to the wife on the specific grounds that the wife failed to provide sufficient evidence of the time and labor her attorney devoted to the case, or the fees customarily charged in the locality for similar legal services. *See* *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991) (listing the six factors to consider when determining the amount of attorney's fees to award).

During the course of the hearing on the merits, both sides submitted affidavits by stipulation summarizing their bills for attorney's fees. The attorneys discussed the extent of their stipulation during the cross-examination of the wife. In that discussion the husband's attorney acknowledged the agreement ***644*** as to the admissibility of the attorney's fees affidavits, but nevertheless sought to cross-examine the wife as to the *Glasscock* factors to see if her understanding of the amount of fees earned by her attorney was the same as that of her attorney. On appeal, the wife argues that the parties intended by their agreed admission of opposing affidavits to stipulate to the amount and reasonableness of the attorney's fees, leaving to the family court the sole issue of entitlement.

The wife's attorney's fees affidavit consists of two paragraphs which provide in summary form that the wife's attorney expended 57.5 hours on the case at the rate of $175 per hour, for a total attorney's fee of $10,062.50. In the final order and decree of divorce, the family court found that the wife had paid her trial attorney a $5,000 retainer, had paid a previously retained attorney $500, and had incurred total fees and costs in the case of $10,339.90. The court recognized the good standing of counsel, and the time "necessarily devoted to prepare and try such a case." The court awarded the wife substantially all of the requested fee, in the sum of $10,000, basing the award on these findings and the fault of the husband. In the order denying reconsideration, the court declined to amend the decree to set forth more specific facts in support of the award. The court made the additional finding that the attorneys had agreed on the record to submit attorney's fees affidavits, thereby precluding a post-trial objection to their sufficiency.

[9] "A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations ... are binding upon those who make them." *Kirkland v. Allcraft Steel Co., Inc.,* 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citation omitted); *see also* ***534*** *Corley v. Rowe,* 280 S.C. 338, 312 S.E.2d 720 (Ct.App.1984).

[10] "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." *Belue v. Fetner,* 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968); *see also Winchell v. Winchell,* 291 S.C. 321, 353 S.E.2d 309 (Ct.App.1987) (holding family court did not err ***645** in relying on agreement between husband and wife as to division of personal property).

[11] [12] However, it is generally recognized that "[s]tipulations will not be so construed as to give the effect of an admission of fact obviously intended to be controverted or the waiver of a right not plainly intended to be relinquished." *Suddeth v. Knight,* 280 S.C. 540, 544, 314 S.E.2d 11, 14 (Ct.App.1984). "A stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination of the parties' rights or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein." *Id.*

The record does not support a conclusion that the parties entered into a stipulation regarding the required proof of attorney's fees beyond the agreement to allow affidavits of counsel to be admitted without objection. It appears the wife's attorney was under the impression that each side had stipulated that the affidavits were sufficient to establish the amount of attorney's fees reasonably incurred, leaving only the entitlement to an award in controversy. However, it does not appear from the record that the husband's attorney had the same view of the agreement. Thus, the husband's attorney cross-examined the wife concerning her understanding of the amount of time expended by her attorney, the beneficial results obtained, and all of the other *Glasscock* factors. Though the family court concluded in its order on reconsideration that the parties had agreed on the record to submit attorney's fees affidavits, this finding alone does not supplant the requirement that the proof, by affidavit or otherwise, establish a basis for satisfying the factors required to make the award.

[13] [14] In determining *whether* to award attorney's fees, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.,* 307 S.C. 471, 415 S.E.2d 812 (1992); *Doe v. Doe,* 324 S.C. 492, 478 S.E.2d 854 (Ct.App.1996). In determining the *amount* of attorney's fees to award, the court should consider the nature, extent, and difficulty of the services rendered; the ***646** time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991); *Doe v. Doe,* 324 S.C. 492, 478 S.E.2d 854 (Ct.App.1996).

The entitlement of the wife to an award of attorney's fees is not appealed, and is therefore the law of the case. *Stone v. Salley,* 244 S.C. 531, 137 S.E.2d 788 (1964) (the unappealed portion of a trial court's judgment presents no issue for determination by the reviewing court and constitutes to such extent the law of the case). However, the order awarding the fee does not set forth specific findings of fact on each of the six required factors to be considered in determining the amount of the fee pursuant to *Glasscock.* The conclusory information of total time expended and hourly rate charged which was set forth in the affidavit is insufficient to provide the evidentiary basis necessary to support the award, even with the wife's testimony confirming the amounts actually paid. *See*

Johnson v. Johnson, 288 S.C. 270, 341 S.E.2d 811 (Ct.App.1986) (one-half page statement of estimated time devoted to case, totaling 90 hours, coupled with vague testimony of attorney as to time and labor, found insufficient to support award of attorney's fees).

Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record ***535** for each of the required factors to be considered. Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."); *Blumberg v. Nealco, Inc.,* 310 S.C. 492, 427 S.E.2d 659 (1993) (attorney's fees award pursuant to contract); *Atkinson v. Atkinson,* 279 S.C. 454, 309 S.E.2d 14 (Ct.App.1983) (per curiam) (attorney's fees award pursuant to divorce decree authorized by statute). Generally, if on appeal there is inadequate evidentiary support for each of the factors, the appellate court should reverse and remand so the trial court may make specific findings of fact. *Blumberg v. Nealco, Inc.* 310 S.C. 492, 427 S.E.2d 659 (1993). However, when an order from the family court is issued in violation of Rule 26(a), SCRFC, the ***647** appellate court "may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence." *Holcombe v. Hardee,* 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991).

In this case, the record on appeal is not sufficient for us to make our own findings. Accordingly, we reverse and remand this issue with specific instructions to allow additional evidence on the issue of the amount of attorney's fees, and to make specific findings of fact as to each of the six *Glasscock* factors.

CONCLUSION

In summary, the ruling of the family court denying the wife the affirmative relief of alimony is affirmed. For the reasons stated above, the ruling of the court denying reimbursement of temporary alimony is reversed and the issue remanded for further proceedings to determine the proper amount of temporary alimony to be reimbursed. The award of equitable division on an equal basis is affirmed, but the actual division of property is reversed with instructions to reallocate the property so as to effect a 50/50 division of assets. The award of attorney's fees to the wife is reversed and remanded for further proceedings consistent with this opinion. The case is also remanded for further proceedings regarding the disposition of the husband's military retirement benefits, as requested by the parties.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, J., concurs, and ANDERSON, J., dissents in a separate opinion.

ANDERSON, Judge (dissenting):

I respectfully dissent from the majority's conclusion in regard to the efficacy of the Fifth Amendment to the issues in this case.

As to the invocation of the Fifth Amendment privilege by the Wife, I disagree with the reasoning and analysis of the issue by the majority. Because the Wife asserts her Fifth Amendment privilege, the majority bludgeons her with an adverse inference *and* a denial

of any affirmative relief. Simplistically ***648*** put, this judicial "Scud Missile" is inappropriate when juxtaposed to the exercise of a constitutional right.

The rule adopted in this case turns the Fifth Amendment on its head by requiring the person to forfeit all offensive and defensive rights in the civil venue. The iniquitous result of the rule adopted by the majority is to eradicate all standing in the civil venue by a person claiming the Fifth Amendment constitutional privilege. Such a rule is infected with a prosecutorial mentality that persons taking the Fifth Amendment lose other citizenship rights. Admittedly, the rule spawned by the majority eliminates confusion but eviscerates constitutional protections. To strip a civil litigant of all protection in the civil venue as a consequence of taking the Fifth Amendment is a judicial exodus from constitutional principles that is illogical.

Here, immunity was given and probably no Fifth Amendment privilege exists. The majority chooses to write on the Fifth Amendment privilege, thus forcing the issue.

It is apodictic the grant of absolute immunity vitiates any Fifth Amendment privilege. However, in that regard it is essential to evaluate the type of immunity given. In *State v. Thrift,* 312 S.C. 282, 440 S.E.2d 341 (1994), the South Carolina Supreme Court edified the bench and bar in regard to the ****536*** bifurcation of immunity, *i.e.,* (1) use immunity and (2) transactional immunity.

In dissonance to the writing penned by the majority, I do not believe a pandemic rule is extant on this issue. There is a significant body of law in this country rejecting the position adopted by the majority. The better rule is articulated in *Brewer v. Brewer,* 249 Ga. 517, 291 S.E.2d 696 (1982). In *Brewer,* the Georgia Supreme Court held:

Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611 (1974), holds that although no inference of guilt can be drawn from a privileged refusal to testify in a criminal case, and although the exercise of the privilege in a civil case cannot be used in a subsequent criminal case against the party, it is permissible to draw an unfavorable inference in a civil case from the privileged refusal to testify in that case.

Brewer, 291 S.E.2d at 697. *See also Robinson v. Robinson,* 328 Md. 507, 615 A.2d 1190, 1194 (1992) ("[W]here a party in a civil proceeding invokes the Fifth Amendment privilege ***649*** against self incrimination in refusing to answer a question posed during that party's testimony, the fact finder is permitted to draw an adverse inference from that refusal."); *Molloy v. Molloy,* 46 Wis.2d 682, 176 N.W.2d 292 (1970) (although a person may invoke Fifth Amendment in civil case in order to protect himself from use of such evidence against him in criminal action ... an inference against his interest might be drawn; since inference is irresistible and logical in such circumstances, court may as matter of law draw the inference); *Id.* (such an inference is based upon implied admission that truthful answer would tend to prove witness had committed the criminal act or might constitute a criminal act; the inference is not based upon the condition the witness is seeking relief or ought not to receive relief because he has invoked the privilege).

The majority cites the Georgia case of *Master v. Savannah Sur. Assocs., Inc.,* 148 Ga.App. 678, 252 S.E.2d 186 (1979). *Master* is a 1979 Georgia Court of Appeals case and certainly is not controlling precedent in the face of *Brewer, supra.*

A reasonable and commonsensical approach is to invoke an adverse inference, but not to emasculate all rights of the person claiming the Fifth Amendment privilege. The adverse inference drawn from the invocation of the Fifth Amendment privilege should not be followed with the draconian result of denial of affirmative relief or affirmative defense.

Guinan v. Guinan,176 S.E.2d 173 (1970)

Supreme Court of South Carolina.
Betty F. GUINAN, Respondent,
v.
Robert F. GUINAN, Appellant.
No. 19089.
July 28, 1970.

Wife brought an action against husband for divorce. The Common Pleas Court, Richland County, John A. Mason, J., entered a judgment granting wife divorce and awarding her custody of the children and requiring husband to convey certain property interest to wife and the husband appealed. The Supreme Court, Brailsford, J., held that evidence relating to a single incident of quarreling when the husband and wife mutually engaged in a scuffle, without any testimony of precedent or attendant circumstances raising apprehension that act would likely be repeated, was insufficient to establish physical cruelty within meaning of divorce statute.
Reversed.
BRAILSFORD, Justice:
In this action for divorce, brought by the wife in the Richard County Court, the husband appeals from an adverse decree whereby the wife was awarded a divorce on the ground of physical cruelty and custody of a minor son and daughter, and the husband was ordered to convey to the wife his interest in the family residence, which, inferentially, is owned by the parties as ***174** tenants in common, and all of the furniture therein.

The parties were married in 1961 and have no natural children of their own. The son and daughter are the children of the wife by a former marriage, and are the adopted children of the husband.

[1] [2] The first exception challenges the sufficiency of the evidence to establish physical cruelty within the meaning of the divorce statute. This exception must be sustained. In this respect, the complaint alleges only that on March 23, 1969, 'the Defendant beat, hit, slapped and otherwise abused the Plaintiff, * * *.' The scant record on appeal contains brief excerpts from the testimony of three witnesses, including the wife. This testimony is strictly confined to the one incident referred to in the complaint. It reveals nothing of the prior or subsequent relationship of the parties. The strongest inference which can be drawn from the testimony ***557** is that on this occasion, while quarreling, the husband and wife mutually engaged in a scuffle (shoving, pushing and pulling each other between two bedrooms) during which the husband choked the wife to some extent, sufficient to cause bruises on her throat. The wife did not testify that she was in bear of her husband either before, during or after this scuffle or that he applied sufficient pressure to her throat to cause her pain or to interfere with her breathing. The evidence is simply not susceptible of the inference that the husband's conduct on this occasion was of such atrocity as to take the case out of the general rule that a single act of physical cruelty does not constitute grounds for divorce, nor was there any evidence of precedent or attendant circumstances raising an apprehension that such act would likely be repeated. Hence, the evidence was insufficient to establish physical cruelty within the meaning of the statute. Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949); Godwin v. Godwin, 245 S.C. 370, 140 S.E.2d 593 (1965).

[3] Without any findings of fact, other than her suitability as a custodian, the court awarded custody of the two children to the wife. At the time of the hearing the boy was sixteen years of age and in the eleventh grade in school. (He became seventeen on March 8, 1970, and, inferentially, is a rising high school senior.) As a witness, the boy stated that he regarded his adopted father as his real father and loved him as such, and that he preferred to live with him than to live with his mother. The father charges that the court erred in disregarding the wishes of the boy and awarding custody to the mother. We agree.

[4] Ordinarily, the wishes of a child of this boy's age, intelligence and experience, although probably not controlling, Ex parte Reynolds, 73 S.C. 296, 53 S.E. 490 (1906), are entitled to great weight in awarding his custody as between estranged parents. Annot., 4 A.L.R.3d 1396, 1434 (1965). The court made no finding of fact tending to offset this important factor in awarding custody, ***558** and the record before us is bare of any evidence tending to do so. Absent any evidence tending to establish that the best interest of the boy would be served by awarding his custody to the mother, the court erred in failing to allow him to live with the parent of his choice. [FN1]

FN1. The following unorthodox provision of the decree suggests that the court had misgivings about awarding custody against the wishes of the boy: 'IT IS FURTHER ORDERED that should Jimmy Guinan's conduct become uncontrollable by the Plaintiff as a result of acts or failure to act by the Defendant, upon Petition of this Court by the Plaintiff, the Defendant shall be held in contempt and incarcerated in the County Jail with proper sentence.'

[5] We need not consider the grounds on which the husband challenges the order that he convey property to the wife. This provision of the decree was incidental to the award of a divorce to the wife and falls with the reversal of the divorce decree. Cf. ****175** Crowder v. Crowder, 246 S.C. 299, 306, 143 S.E.2d 580, 584 (1965). The award of custody of the daughter to the mother is not involved on the appeal and is unaffected by our judgment. In other respects, the decree is

Reversed.

MOSS, C.J., and LEWIS, BUSSEY and LITTLEJOHN, JJ., concur.

Hardee v. Hardee, 585 S.E.2d 501 (2003)

Supreme Court of South Carolina.
Mary F. HARDEE, Respondent/Petitioner,
v.
Jerry N. HARDEE and Hardee Construction Company, Inc., Petitioners/Respondents.
No. 25695.
Heard June 24, 2003.
Decided Aug. 11, 2003.
Rehearing Denied Sept. 10, 2003.

Wife petitioned for divorce. The Family Court, Sumter County, Marion D. Myers, J., granted the divorce, found portions of the parties' premarital agreement void, and

awarded wife permanent periodic alimony in the amount of $4,250.00 per month, attorney and accounting fees, and 30% of assets acquired during marriage. Husband appealed. The Court of Appeals, 348 S.C. 84, 558 S.E.2d 264, affirmed in part and reversed in part. Husband and wife appealed. The Supreme Court, Waller, J., held that: (1) prenuptial agreement did not bar wife from receiving an equitable division of the property acquired during the parties' marriage, and (2) prenuptial agreement provisions which waived alimony and attorney fees were enforceable.
Affirmed as modified.
JUSTICE WALLER:

We granted a writ of certiorari to review the Court of Appeals' opinion reported at 348 S.C. 84, 558 S.E.2d 264 (2001). We affirm as modified.

FACTS

Jerry Hardee (Husband) and Mary Hardee (Wife) met in 1986, while Wife was working as officer manager for the law firm which was handling Husband's second divorce. ***502** Both Husband and Wife had children from prior marriages. Wife moved into Husband's home in April 1987, and they lived together until December 24, 1988, when Husband proposed. They planned a March 18, 1989 wedding day. In early February 1989, Husband presented Wife with a prenuptial agreement drafted by his attorney (Miles). Wife showed the agreement to her employer/attorney (Young), who advised her not to sign it. Although Wife was upset about the agreement, she signed it on February 22, 1989. The parties were married on March 18, 1989.

The prenuptial agreement noted that Wife, age 41 at the time, had diabetes and sponge kidneys. It also provided, *inter alia:*

1. That all properties of any kind or nature, real, personal or mixed, wheresoever the same may be located, which belong to each party, shall be and forever remain the personal estate of the said party, including all interest, ***385** rents, and properties which may accrue therefrom **unless otherwise so stated in this Agreement.**

4. That **each party, in the event of separation or divorce, shall have no right against the other by way of claims for support, alimony, attorney's fees, cost, or division of property, except as specifically stated hereinafter.**

7. It is specifically understood and agreed that should a separation or divorce occur between the parties, each of the parties would maintain all of their property as if the marriage had never occurred and each of the parties will have no interest whatsoever in the property of the other **except as hereinafter provided.**

9. The provisions contained herein **shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement.**

10. ... Each party acknowledges that they shall have no right against the other by way of claim for support, alimony, attorney fees, costs or division of property, except as stated within this agreement. (Emphasis added).

In 1995, Wife discovered Husband was having an affair with another woman. As a result, Husband left the marital home. Thereafter, Wife instituted this action seeking a divorce on grounds of adultery, habitual drunkenness, and physical cruelty. She sought alimony, spousal support, equitable distribution of marital property, and attorney's fees. The family court granted Wife a divorce on the ground of adultery. The family court also

ruled the waivers of alimony, spousal support and attorney's fees were contrary to public policy and void; it further held the agreement did not bar equitable division of property acquired during the marriage. The court also found that there had been a substantial and material change in circumstances since the execution of the agreement inasmuch as Wife was, at the time of the final hearing, totally disabled and unable to support herself.[FN1] The family court awarded Wife permanent periodic alimony of $4,250 per month and ***386** ruled that property acquired by the parties during the marriage be divided with Husband receiving 70% of the assets and Wife receiving 30%. Lastly, the family court awarded Wife $85,000 in attorney fees and $15,000 in accounting fees and costs.

FN1. The court found Wife suffered from even more serious conditions than those that existed prior to the marriage, including diabetes mellitus, sponge kidney, Lupus, neuropathy of the extremities, heart irregularities, vision problems, and thyroid problems, and that she was unable to be gainfully employed.

The Court of Appeals affirmed in part and reversed in part. 348 S.C. 84, 558 S.E.2d 264 (2001). The Court upheld the family court's determination that the prenuptial agreement did not bar the equitable division of property acquired by the parties during the marriage. However, it held the family court erred in finding the waivers of alimony, support, and attorney fees were void and unconscionable. Both parties appeal.

ISSUES

1. Did the Court of Appeals err in upholding the family court's determination that the prenuptial agreement did not bar ***503** equitable distribution of property acquired during the marriage? (Husband's Appeal).

2. Did the Court of Appeals err in holding that the prenuptial agreement's provisions relating to alimony, support, and attorney's fees were not unconscionable or contrary to public policy? (Wife's Appeal).

1. EQUITABLE DISTRIBUTION

[1] Husband argues the Court of Appeals erred in holding the prenuptial agreement allowed for equitable distribution of assets acquired by the parties during the marriage. We disagree.[FN2] As noted previously, paragraph 9 of the agreement provides:

FN2. S.C.Code Ann. § 20-7-473(4) (Supp.2002) permits exclusion of property from the marital estate if excluded by a written antenuptial agreement which was voluntarily executed and both parties were represented by separate counsel.

9. The provisions contained herein **shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement.**

***387** (Emphasis added). We agree with the Court of Appeals that this provision patently and unambiguously allows Wife equitable distribution of any and all property acquired by the parties during the marriage, whether titled in Husband's name, Wife's name, or both.

[2] [3] When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.,* 334 S.C. 529, 514 S.E.2d 327 (1999). The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.,* 199 S.C. 325, 19 S.E.2d 463 (1942). Accordingly, we affirm the Court of Appeals' ruling concerning the equitable distribution of property acquired during the marriage.

2. ALIMONY, SUPPORT & ATTORNEY'S FEES

[4] The issue we must decide is whether a prenuptial agreement purporting to waive alimony, support, and attorney's fees is void and unenforceable as against the public policy of this state.

Recent case law of this Court supports Husband's contention that parties are free to contractually alter the obligations which would otherwise attach to marriage. In *Stork v. First Nat'l Bank of South Carolina,* 281 S.C. 515, 516, 316 S.E.2d 400, 401 (1984), this Court held that antenuptial agreements "will be enforced if made voluntarily and in good faith and if fair and equitable.... Such contracts are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship." Similarly, in *Moseley v. Mosier,* 279 S.C. 348, 306 S.E.2d 624 (1983), we addressed a family court's jurisdiction over a separation agreement which had not been merged into the parties' divorce decree. This Court directly acknowledged that, although subject to family court approval, that the parties may contract concerning their property settlement, and alimony, and that "they may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably." 279 S.C. at 353, 306 S.E.2d at 627.

***388** More recently, in *Gilley v. Gilley,* 327 S.C. 8, 488 S.E.2d 310 (1997), the husband brought an action for an order of separate maintenance and support, equitable distribution, and attorney's fees. Although the validity of the prenuptial agreement was not at issue in *Gilley,* this Court affirmed the family court's finding that husband's action did not belong in family court since the prenuptial agreement provided neither party could claim alimony or separate maintenance.

As noted by the Court of Appeals in this case, "[t]he current trend and majority rule allows parties to prospectively contract to limit or eliminate spousal support." 348 S.C. at 94, 558 S.E.2d at 269, *citing* *Pendleton v. Fireman,* 24 Cal.4th 39, 99 Cal.Rptr.2d 278, 5 P.3d 839, 845-46 (2000); Allison A. Marston, *Planning for Love: The Politics of Premarital Agreements,* 49 Stan. L. Rev. 887, 897-99 (1997). As noted in Richard A. Lord, ***504** 5 *Williston on Contracts* § 11:8 (4th ed.) (May 2003):

In the past two decades ... the courts have reconsidered ... public policy in light of societal changes, and today, premarital agreements, so long as they do not promote divorce or otherwise offend public policy, are generally favored as conducive to the welfare of the parties and the marriage relationship as they tend to prevent strife, secure peace, and adjust, settle, and generally dispose of rights in property.

Accord *Cary v. Cary,* 937 S.W.2d 777, 782 (Tenn.1996) (declaring agreements waiving or limiting alimony enforceable, "so long as the antenuptial agreement was entered into

freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching"); *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law,* 116 Harv. L. Rev. 2075 (May 2003) (noting that states have shifted from holding antenuptial agreements *per se* invalid as contrary to public policy to holding them judicially enforceable). We concur with the majority of jurisdictions which hold that prenuptial agreements waiving alimony, support and attorney's fees are not *per se* unconscionable, nor are they contrary to the public policy of this state.[FN3]

FN3. Wife cites *Towles v. Towles,* 256 S.C. 307, 182 S.E.2d 53 (1971) for the proposition that a contractual waiver of spousal support or alimony is against public policy and void. *Towles* involved a reconciliation agreement entered into subsequent to the marriage; it is therefore distinguishable from the present case. In any event, we take this opportunity to overrule *Towles* in light of its outdated views concerning women. There, we invalidated a reconciliation agreement finding it "tantamount to a release of the husband of his duty to perform his essential marital obligations and ... therefore, void as against public policy." *Id.* at 311, 182 S.E.2d at 54. We went on to state, "Among the essential incidents to marriage is the **duty of the husband to support his wife.** 41 Am.Jur. 2d, *Husband and Wife,* Sections 329 and 330; *State v. Bagwell,* 125 S.C. 401, 118 S.E. 767. An agreement whereby the **husband is relieved of this obligation to support his wife,** as a condition of the marital relationship, is against public policy and void." *Id.* at 312, 182 S.E.2d at 55. (emphasis supplied).

We find *Towles* represents an outdated and unwarranted generalization of the sexes which is no longer warranted in today's society. *See e.g. United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)(gender classifications should not be used as they once were to create or perpetuate the legal, social, and economic inferiority of women; cautioning reviewing courts to closely scrutinize generalizations or tendencies of the sexes). As we have done in other cases, we find the distinction between men and women is based upon "old notions" that females should be afforded special protection. *Accord In the Interest of Joseph T,* 312 S.C. 15, 430 S.E.2d 523 (1993); *Richland Mem'l Hosp. v. Burton,* 282 S.C. 159, 318 S.E.2d 12 (1984). Accordingly, we overrule *Towles* to the extent it relies upon outdated notions which are violative of equal protection.

***389** The Court of Appeals adopted the following test, to determine whether a prenuptial agreement should be enforced: "(1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?" *Citing Scherer v. Scherer,* 249 Ga. 635, 292 S.E.2d 662, 666 (1982); *Brooks v. Brooks,* 733 P.2d 1044, 1049 (Alaska 1987); *Gentry v. Gentry,* 798 S.W.2d 928, 936 (Ky.1990); *Rinvelt v. Rinvelt,* 190 Mich.App. 372, 475 N.W.2d 478, 482 (1991). *See also Blue v. Blue,* 60 S.W.3d 585 (Ky.App.2001); *Cantrell v. Cantrell,* 19 S.W.3d 842 (Tenn.App.1999); *Booth v. Booth,* 194 Mich.App. 284, 486 N.W.2d 116 (1992). Applying these factors to the case at hand, the Court of Appeals found the agreement had been entered after fair and full disclosure, with advice from Wife's attorney, it was not unconscionable, and that circumstances had not so changed as to render the agreement unfair and unenforceable. We adopt this test and ***390** agree with the Court of Appeals' conclusion that the prenuptial agreement in this case was enforceable.

It is patent that the agreement here was not obtained through fraud, duress, misrepresentation or nondisclosure. Wife was separately represented by her own counsel, by whom she was employed, was fully aware of the extent of husband's assets, and was advised by her attorney not to sign the agreement.

***505** As to unconscionability, this Court has held that unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996). Clearly, Wife here had a meaningful choice: she could have refused to sign the agreement and opted against marrying Husband if he insisted on a prenuptial agreement. Further, Wife received some substantial benefits from being married to Husband for the five-year duration of their marriage, such as a heightened standard of living, owning several homes, and driving luxury cars. *Accord* *Gant v. Gant,* 174 W.Va. 740, 329 S.E.2d 106, 116 (1985)(noting that "marriage can be of substantial economic, as well as emotional value to a financially weak party").

Lastly, the inquiry is whether the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable? The family court found Wife totally disabled and unable to support herself; it also found Wife would be a public charge if substantial support were not given. The Court of Appeals held the facts and circumstances at the time of enforcement of the agreement had not changed to such an extent that it was unfair or unreasonable to enforce the agreement. It stated:

At the time Wife signed the agreement, she had serious health problems, including diabetes and sponge kidney disease. The premarital agreement specifically noted Wife's health problems. It was completely foreseeable to Wife that her health would worsen. Wife's attorney advised Wife not to sign the agreement because of her health problems. ***391** Although it is unfortunate that Wife's health has deteriorated, we do not find that fact alone sufficient to justify nullifying a contract Wife freely and voluntarily signed, fully aware that under its terms she would not receive any spousal support.

348 S.C. at 96, 558 S.E.2d at 270. Under the circumstances of this case, we agree with the result reached by the Court of Appeals. We concur with Husband that it would be unfair and inequitable to permit a party who, fully aware of serious health issues and declining health, knowingly signs a prenuptial agreement against the advice of her attorney, to thereafter recover alimony and/or support. Accordingly, we affirm the Court of Appeals' ruling in this case.[FN4]

FN4. However, we note that, in a case in which a party is unaware of health issues at the time a prenuptial agreement is entered, but who becomes aware of serious health issues subsequent to its execution, a different result may well ensue.

Finally, Wife asserts that if this Court affirms the Court of Appeals' holding that prenuptial agreements are valid and enforceable, our opinion should be given prospective application only as it creates new substantive rights. We disagree.

[5] Judicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively; prospective application is required when liability is created where formerly none existed. *Osborne v. Adams,* 346 S.C. 4, 550 S.E.2d 319 (2001). We find the Court of Appeals' holding in this case does not create any new substantive rights. On the contrary, the Court of Appeals' holding is simply a matter of basic contract enforcement. Moreover, in light of our prior precedents of *Stork, supra,* and *Gilley, supra,* our holding in this case is not a departure from established precedent. The Court of Appeals' opinion is

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

Hendricks v. Hendricks, 330 S.E.2d 553 (Ct. App. 1985)

Court of Appeals of South Carolina.
Dora B. HENDRICKS, Respondent,
v.
John D. HENDRICKS, Appellant.
No. 0474.
Heard March 20, 1985.
Decided May 17, 1985.

Wife brought action against husband seeking a divorce, equitable distribution of the marital property, alimony, and attorney fees. The Family Court, Greenville County, Larry R. Patterson, J., allocated the property and awarded lump-sum alimony and attorney fees, and husband appealed. The Court of Appeals, Shaw, J., held that: (1) trial court did not err in giving wife the marital home as an equitable distribution, and (2) trial court did not err in making a lump-sum alimony award to wife where husband had not supported his family for 19 years, had quickly spent a $45,000 inheritance by buying a truck and paying hospital bills of a paramour in another state and where wife needed funds for two operations and extensive repairs to her home.
Affirmed.
SHAW, Judge:

Respondent Dora B. Hendricks brought this action against appellant John D. Hendricks, seeking a divorce, equitable distribution of the marital property, alimony, and attorney's fees. The family court allocated the property and awarded lump sum alimony and attorney's fees. We affirm.

[1] In appeals from family courts this court has jurisdiction to find the facts in accordance with its own view of the preponderance***554** of the evidence. *Mitchell v. Mitchell,* 283 S.C. 87, 320 S.E.2d 706, 708 (1984); *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

Mr. and Mrs. Hendricks married in 1949. In 1964 Mr. Hendricks deserted the marital home and went to Florida, leaving Mrs. Hendricks with four children ages two to fifteen and five past-due installments on the home mortgage. Mrs. Hendricks worked two jobs as a seamstress, put three of her children through college, and paid-off the mortgage. Now she is in poor health. There was disputed testimony regarding whether Mr. Hendricks supported his family since he left: Mrs. Hendricks testified he sent her no funds, but he testified he sent either her or the children approximately $3000. Mr. Hendricks inherited non-marital real property valued between $120,000 and $60,000: Mrs. Hendricks' appraiser testified his 193 acres are worth $625 each; however, Mr. Hendricks testified his 172 acre tract is not worth more than $300 per acre and his 21 acre tract is worth between $300 and $400 per acre.

[2] [3] The court gave Mrs. Hendricks the marital home as an equitable distribution of the marital property. Mr. Hendricks argues the court erred in granting relief not sought in the pleadings because Mrs. Hendricks petitioned for the "home as alimony." The court properly disregarded Mrs. Hendricks' request for the home as alimony because it "is well settled a court may not unconditionally order the transfer of property as alimony or in lieu thereof." ***594** *Poniatowski v. Poniatowski,* 275 S.C. 11, 266 S.E.2d 787, 788 (1980). We hold the court did not err in giving Mrs. Hendricks the home as an equitable distribution because (1) her petition also states she "is entitled to an equitable division of all the real and personal property acquired during the marriage of the parties," and (2) the court made findings of fact regarding most of the factors enumerated in *Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66, 68 (1985).

II

[4] [5] The court also gave Mrs. Hendricks $30,000 lump sum alimony. Family courts have the power to award lump sum alimony, and the award rests in their discretion. S.C.Code Ann. § 20-3-130 (1976 & Supp.1984); *Jeffords v. Hall,* 276 S.C. 271, 277 S.E.2d 703, 704 (1981). However, this power "should be exercised only where special circumstances require it or make it advisable." *Millis v. Millis,* 282 S.C. 610, 320 S.E.2d 66, 67 (Ct.App.1984); *Matheson v. McCormac,* 186 S.C. 93, 195 S.E. 122, 125 (1938). The Supreme Court found special circumstances and approved an award of lump sum alimony in *Jones v. Jones,* 270 S.C. 280, 241 S.E.2d 904, 905 (1978). In *Jones* the trial judge feared a spouse who had failed to support his family for five years would dissipate his property. The Supreme Court also found special circumstances and approved a lump sum award in *Murdock v. Murdock,* 243 S.C. 218, 133 S.E.2d 323, 326 (1963); in that case the trial judge feared a spouse who had deserted his family, moved to another state, and remarried, would not make periodic payments. The following special circumstances justify an award of lump sum alimony in this case: (1) Mr. Hendricks has not supported his family for nineteen years; (2) Mr. Hendricks has quickly spent a $45,000 inheritance by buying a truck and paying the hospital bills of a paramour in another state; and (3) Mrs. Hendricks needs funds for two operations and extensive repairs to her home. Therefore, we hold the court did not err in making a lump sum award.

III

[6] [7] The court also gave Mrs. Hendricks $1000 attorney's fees. Family courts have the power to award attorney's fees, and the award rests in their discretion. ***595** S.C.Code Ann. § 20-3-120; *Smith v. Smith,* 253 S.C. 350, 170 S.E.2d 650, 653 (1969). "Factors to be taken into consideration ... are the nature, extent and difficulty***555** of the services rendered; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation, and the beneficial results accomplished." *Smith,* 170 S.E.2d at 653. Mrs. Hendricks' attorney (1) held five or six thirty minute conferences with her, (2) represented her at the hearing, and (3) obtained a beneficial result. Under these circumstances we hold the court did not abuse its discretion in its award of attorney's fees.

AFFIRMED.

SANDERS, C.J., and BELL, J., concur.

Johns v. Johns, 420 S.E.2d 856 (Ct. App. 199Court of Appeals of South Carolina.
Antoinette JOHNS, Appellant,
v.
James D. JOHNS, Respondent.
No. 1853.
Heard May 12, 1992.
Decided July 13, 1992.

Alleged common-law wife sought a divorce and husband denied common-law marriage. The Family Court of Barnwell County, G. Larry Inabinet, J., determined no common-law marriage existed, granted custody of the parties' child to the alleged wife, awarded visitation to the alleged husband, increased child support, and awarded attorney fees, and the alleged wife appealed. The Court of Appeals, Cureton, J., held that: (1) the common-law marriage was void from its inception; (2) a claim of res judicata based on a consent order affirming the marriage did not bar the action; (3) the award of attorney fees and costs to the alleged wife was inadequate; and (4) the visitation awarded the alleged husband was not excessive.
Affirmed as modified.
CURETON, Judge:

This is an appeal from an order of the family court wherein Antoinette Johns, appellant, contended that the parties were married by operation of common law. The appellant sought a divorce, custody of the parties' child, an increase in child support, alimony, and attorney fees. James D. Johns, the respondent, counterclaimed and denied the common law marriage, sought custody and the right to claim the child for tax purposes, and requested the appellant to replace certain savings bonds the respondent bought for the benefit of the child and were cashed by the appellant. In its order the trial court held there was no common law marriage, granted custody to the appellant, awarded visitation to the respondent, increased ***201** child support, permitted the respondent to claim the child for tax purposes, required the appellant to replace the savings bonds cashed by her, and awarded $650.00 to the appellant as attorney fees. The appellant appeals all issues. We affirm as modified.

Appellant and respondent began residing together while respondent was married to a third party. In August 1983, prior to their cohabitation, the parties consulted an attorney. The attorney informed them the respondent would not be eligible to divorce his wife on the ground of one year separation for a certain number of days. The parties began living together shortly thereafter.***858** One child was born to them in October 1984.

The parties remained together, living as husband and wife, until they separated in September 1986. The respondent began living with another woman in November 1987. The respondent obtained a divorce from his wife in 1988. In October 1989, the parties signed a consent order in which the court found they were married at common law and ordered that they were "legally separated."

The issues presented on appeal are whether the trial judge erred in (1) finding there was no common law marriage; (2) failing to award costs to the appellant; (3) awarding only $650.00 in attorney fees to the appellant; (4) granting respondent two week periods of visitation in June, July, and August; and (5) requiring the appellant to replace $2,000.00 in savings bonds.

[1] [2] At the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy. S.C.Code Ann. § 20-1-80 (1985) ("All marriages contracted while either of the parties has a former wife or husband living shall be void"). It was void from its inception, not merely voidable, and, therefore, cannot be ratified or confirmed and thereby made valid. *Day v. Day,* 216 S.C. 334, 58 S.E.2d 83 (1950); 52 Am.Jur.2d *Marriage* § 67 (1970).

In South Carolina, ... [a] relationship illicit at its inception does not ripen into a common law marriage once the impediment to marriage is removed. Instead, the law [in this ***202** State] presumes that the relationship retains its illicit character after removal of the impediment. In order for a common law marriage to arise, the parties must agree to enter into a common law marriage *after* the impediment is removed, though such agreement may be gathered from the conduct of the parties. (emphasis added)

Prevatte v. Prevatte, 297 S.C. 345, 349, 377 S.E.2d 114, 117 (Ct.App.1989) (quoting *Yarbrough v. Yarbrough,* 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct.App.1984)).

Here, the respondent did not divorce his wife until after his separation from the appellant. Although the impediment was removed, the parties did not thereafter agree to enter into a common law marriage. In retrospect, their separation ended the relationship. Therefore, no common law marriage ever existed between the parties.

On appeal, the appellant argues the issue of the existence of a common law marriage is *res judicata* based on the earlier consent order signed by the parties. We disagree.

Appellant testified regarding her knowledge of respondent's marital status as follows:

Q. Okay. And please, if you would look on page four, line six. The question: "All right. So you know [sic] that he was still married when you went to that attorney in Sumter?" Your answer: "Uh-huh. Yes."

A. That's what I just said.

Q. Right.

A. I know [sic] the day I went to the lawyer that he was married.

Q. And that was before you started living with him?

A. Yes.

Q. And you are telling the Court now that you didn't know that he continued to be married to someone else?

A. That's-Yes, sir.

On the other hand, the respondent testified the appellant knew he was married the entire time they were living together. He also stated the appellant knew they were never legally married when they signed the consent order.

The common law marriage was "void" as a matter of public policy. S.C.Code Ann. § 20-1-80 (1985). The fact the appellant ***203** claims to have subjectively acted in "good

***859** faith" does not change the rule that the bigamous marriage was void. *Toler v. Oakwood Smokeless Coal Corp.,* 173 Va. 425, 4 S.E.2d 364 (1939); 52 Am.Jur.2d *Marriages* § 71 (1970). Jurisdictions following these rules, such as South Carolina, will not recognize such marriages irrespective of "good faith" of one party because to do so would violate their public policy. *Id.*

[3] [4] Although *res judicata* is based on sound public policy, it is not to be applied rigidly so as to defeat the ends of justice. *Beverly Beach Properties, Inc. v. Nelson,* 68 So.2d 604 (Fla.1953); 46 Am.Jur.2d *Judgments* § 402 (1969). Thus, application of *res judicata* will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies. *Id.* The public policy underlying *res judicata* may have to yield to other public policies, even in consent orders. 47 Am.Jur.2d *Judgments* § 1090 (1969). Here, the public policy expressed in S.C.Code Ann. § 20-1-80 (1985) overrides the public policy of *res judicata.* Although the parties' consent order is not void, the marriage it affirms is void. In balancing the relevant public policies (i.e. the public policy of finality of judgments versus the public policy of not recognizing bigamous marriages) the consent order should not be given *res judicata* effect. Accordingly, we affirm the ruling of the court that *res judicata* does not bar this action. *Cf. Jennings v. Dargan,* 417 S.E.2d 646 (S.C. Ct.App.1992) (where two policies conflict, the court will give deference to the overriding policy).

Appellant further contends defendant is estopped from asserting a former marriage as a defense because he consented to the earlier order of the family court and did not appeal it. We disagree.

[5] [6] The burden of proof is on the party who asserts estoppel. *Frady v. Smith,* 247 S.C. 353, 147 S.E.2d 412 (1966). The elements of estoppel as to the party estopped are (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party claiming the estoppel, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon ***204** the conduct of the party estopped. *Southern Dev. Land & Golf, Co., Ltd. v. South Carolina Pub. Serv. Auth.,* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991). The elements of estoppel have not been proven by the appellant. She cannot now assert that she relied upon the respondent to terminate his prior marriage when it is clear from the record both parties entered into this relationship with the knowledge the respondent was already married to a third party. Appellant states she made no further inquiries of respondent about his pending divorce and respondent apparently made no attempt to finalize his divorce until after the parties separated. "Estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other." *Helsel v. City of North Myrtle Beach,* 307 S.C. 24, ----, 413 S.E.2d 821, 824 (1992) (citing *Chaffee v. City of Aiken,* 57 S.C. 507, 513, 35 S.E. 800, 802 (1900)). Also, estoppel will not apply where, as here, the appellant had the "means of knowledge" of the respondent's true marital status. *Frady,* 247 S.C. 353, 147 S.E.2d 412.

[7] On appeal, the appellant also argues the trial court erred in not awarding her costs and only awarding her $650.00 in attorney fees.

The appellant has a degree in criminal justice and at one time owned her own detective agency. She is presently unemployed and has only worked temporary jobs

since the birth of her child. Due to injuries sustained in a motorcycle accident, she developed osteoporosis in the ankles and legs which limits her ability to stand, walk, or sit for long periods of time. Her handicap has made it difficult for her to obtain permanent***860*** employment, but she states she is looking for work all the time. The appellant lives in government subsidized housing paying $9.00 per month rent. She receives $102.00 monthly in food stamps and $100.00 per week in child support.

From the onset of these proceedings the respondent vigorously contested the appellant's right to custody of the parties' child. In also pursuing her claim for custody, appellant incurred substantial costs. She incurred costs for detective services in the amount of $860.00 and costs for a psychological evaluation of the child.[FN1] Her attorney fees totaled $4,200.00.

FN1. The cost of the psychological evaluation is not in the record.

On appeal from the family court, the Court of Appeals may ***205*** find facts according to its own view of the preponderance of the evidence. *Winchell v. Winchell,* 291 S.C. 321, 353 S.E.2d 309 (Ct.App.1987). It is clear from the record the fees were incurred in large part to defend against a claim for custody by the respondent. That claim was presented with sufficient vigor to require the appointment of a guardian ad litem [FN2], a full investigation by the guardian, pendente lite court action, and a psychologist's examination of the minor child. It is also apparent the appellant has limited resources to bear the costs of this litigation. We, therefore, modify the trial court's award and award the appellant $2,000.00 in attorney fees and costs.

FN2. The guardian ad litem was awarded fees and costs of $959.00.

[8] [9] In addition, appellant claims the trial court's award to respondent of two weeks visitation with the child in June, July and August is excessive. We disagree.

The amount of visitation awarded is a matter left to the trial judge's discretion. *Courie v. Courie,* 288 S.C. 163, 341 S.E.2d 646 (Ct.App.1986); *Lassiter v. Lassiter,* 289 S.C. 341, 345 S.E.2d 504 (Ct.App.1986). Visitation which is "tantamount to divided custody" is to be avoided. *Courie,* 288 S.C. at 167, 341 S.E.2d at 649.

The trial judge awarded visitation as follows: every other weekend, from 6:00 p.m. Friday until 6:00 p.m. Sunday; the first two weeks of June, July, and August; alternate Thanksgiving and spring break holidays; and one week at Christmas. This award of visitation is well below the amount rejected in *Lassiter* where the amount of visitation amounted to nearly 150 days per year with a weekday (Wednesday) visitation every week. Respondent's visitation is also well below that rejected in *Courie* which was 165 days per year. Also, the visitation here results in much less shuttling of the child between parents than in *Lassiter.* Moreover, the record does not reflect the amount of visitation will have a detrimental effect on the child. We find no abuse in the trial court's award of visitation.

All other issues raised by appellant are manifestly without merit and are hereby affirmed.

AFFIRMED AS MODIFIED.

GOOLSBY, J., and LITTLEJOHN, Acting Judge, concur.

Johnson v. Johnson, 372 S.E.2d 107 (Ct. App. 1988), cert. denied 298 S.C. 117, 378 S.E.2d 445 (1989)

Court of Appeals of South Carolina.

C. Carl JOHNSON, Appellant-Respondent,

v.

Terry Cobb JOHNSON, Respondent-Appellant.

No. 1212.

Heard March 14, 1988.

Decided Aug. 29, 1988.

Husband brought action to enforce an antenuptial agreement and wife counterclaimed, seeking divorce on the ground of physical cruelty. The Family Court, Greenwood County, Thomas B. Barrineau, Jr., J., declared the antenuptial agreement void and granted the divorce. Husband appealed from the equitable distribution and attorney's fees award, and wife appealed from the award of alimony and attorney's fees. The Court of Appeals, Bell, J., held that: (1) court erred in concluding that certain disputed property was transmuted; (2) court did not err in apportioning the marital estate; (3) court erred in awarding rehabilitative alimony, and award of permanent, periodic alimony was required; and (4) court abused its discretion in awarding attorney's fees in an amount less than actually incurred.

Affirmed in part, reversed in part, and remanded.

BELL, Judge:

This is a divorce action. Both parties appeal from the final decree of divorce. The issues on appeal concern (1) the equitable distribution of the marital estate; (2) the award of rehabilitative alimony to the wife; and (3) the award of attorney's fees to the wife. We affirm in part and reverse in part and remand.

C. Carl Johnson, a dentist practicing in Greenwood, South Carolina, proposed marriage to Terry Cobb, a dental hygienist working in Columbia, in April, 1985. Dr. Johnson made the proposal by telephone, asking Terry to quit her job and marry him. Terry immediately accepted the proposal. It was her first marriage, his second.

During the five week engagement, Dr. Johnson told Terry he wanted her to be his wife, homemaker, and companion. He promised she would never have to work again outside the home. He suggested she ***109** dispose of much of her furniture, because together they had more than they needed for the marital home. Five days before the wedding, and after Terry quit her job, gave up her apartment in Columbia, and disposed of many of her belongings, Dr. Johnson presented her with an antenuptial agreement drafted by his lawyer. The ***292** family court found that he presented it in a way that left Terry with the belief there would be no wedding unless she signed it. She signed in the kitchen of Dr. Johnson's home without consulting an attorney. The family court ruled that the agreement was procedurally and substantively unfair and, therefore, void. Dr. Johnson does not contest that ruling.

The parties were wed on May 11, 1985. After the wedding, the marriage began to deteriorate rapidly due to Dr. Johnson's conduct. We need not detail his behavior. Suffice it to say, he severely mistreated Mrs. Johnson, mentally and physically abusing her in many ways. Among other things, he battered her on at least three occasions, the last consisting of seven or eight blows to her face. After submitting to fourteen months of continuous abuse, and fearing for her physical safety, Mrs. Johnson left the marital home on July 14, 1986. She went to live with her mother. Thenceforward, the parties lived separately.

On August 21, 1986, Dr. Johnson commenced this action seeking to enforce the antenuptial agreement. Mrs. Johnson answered, denying the validity of the agreement, and counterclaimed, seeking a divorce on the ground of physical cruelty. She also petitioned for an equitable division of marital property, an award of alimony, and attorney's fees.

In an unusually detailed order, the family court declared the antenuptial agreement void; granted a divorce on the ground of physical cruelty; identified, valued, and distributed the marital estate; awarded Mrs. Johnson rehabilitative alimony for a period of twelve months; and granted her partial attorney's fees. Dr. Johnson does not contest the judgment of divorce. He does challenge the equitable distribution and the attorney's fees. Mrs. Johnson appeals from the award of alimony and the attorney's fees.

I.

A.

[1] Each party brought previously acquired property into the marriage. Among other things, Dr. Johnson owned a house at Wellington Green, which the parties used as the marital residence; a 1976 Mercedes automobile, ***293** which he let Mrs. Johnson use as her own during the marriage; over $33,000 of household contents; a Keogh account valued at the time of divorce at $189,428; Individual Retirement Accounts (IRA's) valued at the time of divorce at $9574; a Kiawah Island property; a Belle Meade property; and a MayApple property. For convenience, we shall refer to these items as the "disputed property."

In the family court, Mrs. Johnson argued the "disputed property" was transmuted into marital property and became subject to equitable distribution. Dr. Johnson maintained that all property acquired before the marriage remained separate property during the marriage and was not subject to equitable distribution.

The family court judge, while expressing the opinion that the "disputed property" was "probably" transmuted into marital property, in effect treated it as Dr. Johnson's separate property in the actual equitable distribution. The judge held, however, that the increase in value of these properties during the marriage was marital property subject to equitable distribution. Dr. Johnson asserts this was error.

B.

The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership. Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title. ***110** *Walker v. Walker,* 295 S.C. 286, 368 S.E.2d 89 (Ct.App.1988).

In making an equitable distribution of marital property, the court must (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the property so identified; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable

division of the marital estate, including the manner in which distribution is to take place. ***294** *Toler v. Toler,* 292 S.C. 374, 356 S.E.2d 429 (Ct.App.1987); *Gibson v. Gibson,* 283 S.C. 318, 322 S.E.2d 680 (Ct.App.1984).

C.

Identification of marital property is controlled by the provisions of the Equitable Apportionment of Marital Property Act.[FN1] The Act defines marital property as all real and personal property acquired by the parties during the marriage which is owned as of the date of filing or commencement of marital litigation, regardless of how legal title is held. Section 20-7-473; *see also, Berry v. Berry,* 290 S.C. 351, 350 S.E.2d 398 (Ct.App.1986), *affirmed,* 294 S.C. 334, 364 S.E.2d 463 (1988) (marital property is all property acquired during the marriage which does not fall within some established exception).

FN1. Section 1, Act No. 522, Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session, 1986, 64 Stat. at Large 3264, 3265 (codified as Sections 20-7-471 through 20-7-479, Code of Laws of South Carolina, 1976, as amended).

The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital esate. *Cf., Roberts v. Roberts,* 296 S.C. 93, 370 S.E.2d 881 (Ct.App.1988). If she carries this burden, she establishes a prima facie case that the property is marital property.

If the opposing spouse then wishes to claim that the property so identified is not part of the marital estate, he has the burden of presenting evidence to establish its nonmarital character. *Miller v. Miller,* 293 S.C. 69, 358 S.E.2d 710 (1987).

Under the Act, property acquired by either party before the marriage is nonmarital property. Section 20-7-473(2); *see also, Sauls v. Sauls,* 287 S.C. 297, 337 S.E.2d 893 (Ct.App.1985). Property acquired during the marriage in exchange for property acquired before the marriage is also nonmarital property. Section 20-7-473(3). Likewise, any increase in the value of nonmarital property during the marriage is nonmarital property, except to the extent the increase resulted directly or indirectly from the efforts of the other spouse during the marriage. Section 20-7-473(5); *see also, Miller v. Miller, supra.*

***295** If the opposing party shows that an item of property was either acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate. However, it does not necessarily end the matter.

In certain circumstances, nonmarital property, as defined by the Act, may be transmuted into marital property during the marriage. Property, nonmarital at the time of its acquisition, may be transmuted (1) if it becomes so commingled with marital property as to be untraceable; (2) if it is titled jointly; or (3) if it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. *Trimnal v. Trimnal,* 287 S.C. 495, 339 S.E.2d 869 (1986); *Wyatt v. Wyatt,* 293 S.C. 495, 361 S.E.2d 777 (Ct.App.1987).

As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case.[FN2] The spouse claiming ***111** transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage. Such evidence 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.[FN3] The mere use of separate property to ***296** support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation.[FN4] The primacy of the parties' intent in determining if property is marital or nonmarital is underscored by the Act itself, which permits the parties to exclude property from the marital estate by written agreement. *See* Section 20-7-473(4).

FN2. *See Clinkscales v. Clinkscales,* 275 S.C. 308, 270 S.E.2d 715 (1980) (interspousal gift); *Walton v. Walton,* 282 S.C. 165, 318 S.E.2d 14 (1984) (separately titled residence acquired before marriage); *Hussey v. Hussey,* 280 S.C. 418, 312 S.E.2d 267 (Ct.App.1984) (proceeds of inherited property commingled); *Cooksey v. Cooksey,* 280 S.C. 347, 312 S.E.2d 581 (Ct.App.1984) (proceeds of inherited property used to purchase jointly titled marital residence); *Rampey v. Rampey,* 286 S.C. 153, 332 S.E.2d 213 (Ct.App.1985) (inherited property jointly titled and used in support of marriage); *Barr v. Barr,* 287 S.C. 13, 336 S.E.2d 481 (Ct.App.1985) (third party gift).

FN3. *See Cooksey v. Cooksey, supra* (property placed in joint names); *Peterkin v. Peterkin,* 293 S.C. 311, 360 S.E.2d 311 (1987) (using for marital purposes); *Trimnal v. Trimnal, supra* (commingling with marital property); *Wyatt v. Wyatt, supra* (building equity); *cf. Burgess v. Burgess,* 277 S.C. 283, 286 S.E.2d 142 (1982); *Bailey v. Bailey,* 293 S.C. 451, 361 S.E.2d 348 (Ct.App.1987) (interspousal gift). An exchange of nonmarital property for marital property should not be confused with an exchange of nonmarital property for other nonmarital property. The latter case is governed by Section 20-7-473(3); the former is not.

FN4. *See Peterkin v. Peterkin, supra* (income from nonmarital property used for marital purposes); *Walton v. Walton, supra* (separately titled house acquired before marriage used as marital residence); *Brooks v. Brooks,* 289 S.C. 352, 345 S.E.2d 510 (Ct.App.1986) (portion of inherited property used in support of marriage); *Sauls v. Sauls, supra* (separately titled marital residence purchased and paid for prior to marriage).

D.

Turning to the facts of this case, we hold the family court erred in concluding the "disputed property" was transmuted. The record discloses a clear, consistent intent of Dr. Johnson to maintain the nonmarital character of all property he acquired before the marriage. In particular, the antenuptial agreement stated plainly that neither party would acquire any interest in the separately titled property of the other by reason of the marriage. Although the antenuptial agreement is not an enforceable contract, it is evidence of Dr. Johnson's intent to maintain his previously acquired, nonmarital property as separate property. Unless subsequent acts of the parties during the marriage showed a change of intent, the property could not be transmuted. Here we find no evidence of such a change. Consequently, the "disputed property" was not transmuted.

The family court found the "disputed property" was probably transmuted; but in the actual apportionment and distribution of the marital estate, the court allocated all property which Dr. Johnson acquired before the marriage to him. Since he received the "disputed property" free and clear from any equity in favor of Mrs. Johnson, and did not suffer any corresponding reduction in his share of the remaining marital estate, the final result was the same as if the property had been found to be nonmarital. Thus, any ***297** error in characterizing the "disputed property" as marital property was harmless.

[2] The only property considered for the purposes of apportionment and distribution of the marital estate was the increase in value of the parties' realty and

personalty during the marriage. The court found these assets appreciated a total of $94,492 in value during the marriage. Following Section 20-7-473(5), the court determined that only the portion of the increase resulting directly or indirectly from the efforts of the parties was marital property. The court valued this portion of the appreciation at $55,969. The remaining appreciation was treated as nonmarital property.

Items the court treated as part of the marital estate included such things as household contents acquired during the ***112** marriage, contributions of marital funds to Dr. Johnson's Keogh account, and the use of marital funds to reduce mortgage indebtedness on his separately titled real estate. These items were clearly marital property.[FN5] The judge correctly concluded that they were subject to equitable apportionment and distribution.

FN5. *See Morris v. Morris,* 268 S.C. 104, 232 S.E.2d 326 (1977) (household contents acquired during marriage); *Watson v. Watson,* 291 S.C. 13, 351 S.E.2d 883 (Ct.App.1986) (contribution of spousal income to voluntary pension plan); *Trimnal v. Trimnal, supra* (reduction of mortgage indebtedness on separately titled real estate by joint efforts during marriage).

E.

[3] Dr. Johnson does not challenge the family court's valuation of the parties' marital and nonmarital assets. He does argue, however, that even if the marital estate was correctly identified and correctly valued, the judge erred in apportioning it.

In making an apportionment of the marital estate, the court must consider fifteen criteria specified by the Act, giving to each such weight as it finds appropriate on the facts of the case. *See* Section 20-7-472.[FN6] These criteria guide the court in exercising its discretion over apportionment of the marital property. They are nothing more than equities ***298** to be considered in reaching a fair distribution of marital property. They subserve the ultimate goal of apportionment, which is to divide the marital estate, as a whole, in a manner which fairly reflects each spouse's contribution to the economic partnership and also the relative effect of ending that partnership on each of the parties.[FN7]

FN6. These statutory criteria replace the thirteen so-called " *Shaluly* factors" of pre-Act law. *See Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66 (1985).

FN7. Prior to *Shaluly v. Shaluly, supra,* the law looked solely to the economic status of the parties at the time of divorce or separation. The primary factor to be considered was the relative incomes and material contributions of the spouses during the marriage. The court could also give secondary consideration to relative fault in ending the marriage and to the net worth of the nonmarital estate of each party. *See Foreman v. Foreman,* 280 S.C. 461, 313 S.E.2d 312 (Ct.App.1984). In other words, judicial enquiry was retrospective. It sought to determine how the spouses had reached the economic status they enjoyed before separation. Under *Shaluly* and the Act, the court must consider not only retrospective factors, but also prospective factors (e.g., earning potential, opportunities for future acquisition of capital assets, vested retirement benefits, child custody) in reaching a fair apportionment. This approach gives consideration to the impact of separation on the future economic status of the parties.

F.

In this case, the family court determined that the marital estate should be apportioned fifty per cent to each spouse. Dr. Johnson argues that an equal apportionment is inequitable because his direct contributions far exceeded those of Mrs. Johnson. There is no question that most of the appreciation in the value of the assets was attributable to Dr. Johnson's earnings and income during the marriage. Dr. Johnson's argument overlooks the fact, however, that the direct contribution of each party to the acquisition of marital property is not the only criterion to be considered in apportionment. The record reflects several important equities in Mrs. Johnson's favor which Dr. Johnson ignores.

First, there is her homemaker's equity. At Dr. Johnson's insistence, the parties agreed that in their marriage he would be the income earner and she would be his wife, homemaker, and companion. Dr. Johnson asked Mrs. Johnson to give up her career and promised she would never again have to work outside the home. Prior to this suit, Dr. Johnson apparently considered this arrangement to be an equal partnership of the spouses. During the marriage, Mrs. Johnson faithfully performed her homemaker role under the ***299** most trying of circumstances. Because she gave up her own career and dutifully contributed her labor to provide a good marital home for her husband, she acquired an equity in the marital estate to be considered in making the apportionment. *Cf., Parrott v. Parrott,* 278 S.C. 60, 292 S.E.2d 182 (1982).

****113** Second, Dr. Johnson's earnings were property of the marriage, not his separate property as he seems to suppose. *See Orszula v. Orszula,* 292 S.C. 264, 356 S.E.2d 114 (1987) (wages and substitutes for wages received during marriage are marital property); *Hamiter v. Hamiter,* 290 S.C. 508, 351 S.E.2d 581 (Ct.App.1986) (funds derived from salary earned during marriage are marital property). The contribution of these marital earnings to the appreciation in value of his nonmarital property represented nothing more than a change in the form of the marital property. Marital property in the form of earnings simply became marital property in the form of appreciation in the value of the nonmarital estate. This was a factor to be considered in making the apportionment.

Third, Mrs. Johnson is entitled to a special equity in the Kiawah Island property. When the parties married, the Kiawah property had deteriorated to the point that it was no longer rentable. Mrs. Johnson personally renovated the property, contributing her own labor and skills to improve it. As a direct result of her efforts, the property became marketable and began producing rental income, amounting to $7373 in the last eleven weeks of the summer of 1986. A spouse has an equitable interest in improvements to property to which she has contributed, even if the property is nonmarital. *Webber v. Webber,* 285 S.C. 425, 330 S.E.2d 79 (Ct.App.1985).

In addition to ignoring these equities in Mrs. Johnson's favor, Dr. Johnson also quarrels with the weight the family court gave to several statutory factors. Among other things, he argues that the length of the marriage should have weighed heavily in his favor.

How the individual factors are weighed depends on the facts of each case. *See Foreman v. Foreman, supra.* The statute vests in the trial judge, not the appellate court, the discretion to decide what weight should be assigned to the ***300** various factors. *Cf., Simon v. Flowers,* 231 S.C. 545, 99 S.E.2d 391 (1957). On review, this Court looks to the fairness of the overall apportionment. *See Morris v. Morris,* 295 S.C. 37, 367 S.E.2d 24 (1988). If the end result is equitable, it is irrelevant that this Court might have weighed specific factors differently than the trial judge. *See Simon v. Flowers, supra.*

In this case, the family court reached an eminently fair result. The total net value of the property owned by the parties at divorce was $663,288. Dr. Johnson, with an earning capacity and income well over $100,000 a year, received marital and nonmarital assets

totalling $628,928, with a substantial opportunity for future acquisition of capital assets. Mrs. Johnson, with an earning capacity of $18,000 a year, received marital and nonmarital assets totalling $34,360. Dr. Johnson's property includes substantial income-producing assets; Mrs. Johnson's, none. On these facts, Dr. Johnson's claim that Mrs. Johnson's award was excessive is patently without merit.

We affirm the equitable distribution.

II.

[4] Mrs. Johnson appeals from the court's award of rehabilitative alimony. She contends an award of $300 a month for twelve months is plainly inadequate to maintain the standard of living she enjoyed during the marriage. She also argues that there is no evidence to show she would be able to support herself at her marital standard of living after a twelve month rehabilitation period.

Alimony is a substitute for the support which is normally incident to the marital relationship. *Lide v. Lide,* 277 S.C. 155, 283 S.E.2d 832 (1981). Ordinarily, the purpose of alimony is to place the supported spouse, as nearly as is practical, in the position of support she enjoyed during the marriage. *See Voelker v. Hillock,* 288 S.C. 622, 344 S.E.2d 177 (Ct.App.1986).

Alimony may be awarded as periodic payments or in a lump sum. Section 20-3-130, Code of Laws of South Carolina, 1976; *McCune v. McCune,* 284 S.C. 452, 327 S.E.2d 340 (1985). It may also be awarded as permanent support or as temporary, rehabilitative support. *See* Section 20-3-130; ***301** *cf., Brewer v. Brewer,* 242 S.C. 9, 129 S.E.2d 736 (1963) (permanent alimony); ****114** *Herring v. Herring,* 286 S.C. 447, 335 S.E.2d 366 (1985) (temporary, rehabilitative support). If a claim for alimony is well founded, the law favors the award of permanent, periodic alimony. *See O'Neill v. O'Neill,* 293 S.C. 112, 359 S.E.2d 68 (Ct.App.1987).

The power to award lump sum alimony should be exercised only where special circumstances require it. *Millis v. Millis,* 282 S.C. 610, 320 S.E.2d 66 (Ct.App.1984). Lump sum awards are not favored and should be given only in exceptional cases or when consented to. *Matheson v. McCormac,* 186 S.C. 93, 195 S.E. 122 (1938). An award of lump sum alimony must be supported by some impelling reason for its necessity or desirability. *Millis v. Millis, supra.*[FN8]

FN8. The factors to be considered in awarding lump sum alimony are set forth in *Atkinson v. Atkinson,* 279 S.C. 454, 309 S.E.2d 14 (Ct.App.1983). Special circumstances justifying a lump sum award include the need to continue support after the death of the supporting spouse and the likelihood of default if periodic payments are awarded. *See McCune v. McCune, supra; Hendricks v. Hendricks,* 285 S.C. 591, 330 S.E.2d 553 (Ct.App.1985).

Similarly, rehabilitative alimony may be awarded only upon a showing of special circumstances justifying a departure from the normal preference for permanent, periodic support. The purpose of rehabilitative alimony is to encourage a dependent spouse to become self supporting after a divorce. *Toler v. Toler, supra.* It permits former spouses to develop their own lives free from obligations to each other. *Id.* 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. *See Id.; Voelker v. Hillock, supra.*

The factors to be considered in awarding rehabilitative alimony include: (1) the duration of the marriage: (2) the age, health, and education of the supported spouse; (3) the financial resources of the parties; (4) the parties' accustomed standard of living; (5) the ability of the supporting spouse to meet his needs while meeting those of the supported spouse; (6) the time necessary for the supported spouse to acquire job training or skills; (7) the likelihood that the supported spouse will successfully complete retraining; and (8) the supported spouse's likelihood of success in ***302** the job market. There must be evidence demonstrating the self sufficiency of the supported spouse at the expiration of the ordered payments in order for rehabilitative alimony to be granted. *Toler v. Toler, supra.*

In this case, the court found as a fact that Mrs. Johnson's standard of living during the marriage was much higher than her premarital standard of living and more than her income after dissolution of the marriage could sustain. Without explaining why rehabilitative alimony was appropriate, the judge fixed alimony at an amount which, at best, would restore her to her standard of living *before* she married, not, as the law requires, the standard of living she enjoyed *during* the marriage. This was an error of law amounting to an abuse of discretion.

The record reveals a great disparity in the financial resources and earning capacities of the parties. Moreover, it shows that Dr. Johnson has the financial ability to meet his own needs while supporting Mrs. Johnson at the standard of living she enjoyed during the marriage. It is likewise apparent that Mrs. Johnson could not possibly sustain her marital standard of living on her own earnings at the end of the period of rehabilitation. To require Dr. Johnson to pay a paltry $3600 in support of his former spouse is plainly insufficient. These circumstances mandate an award of permanent, periodic alimony.

Dr. Johnson argues, and the family court agreed, that the short duration of this marriage weighs in favor of rehabilitative alimony. He overlooks the fact that his own conduct was responsible for its quick demise. Mrs. Johnson was entirely blameless for the failure of the marriage. When she married, she was entitled to expect a lifelong partnership which would provide her with a high standard of living and great financial security. Without cause, Dr. Johnson brought those prospects to an end. ***115** In effect, he now asks us to treat the result of his own misconduct as an equity in his favor.

Unlike most cases, fault is a substantial factor in awarding alimony in this case. Dr. Johnson, not Mrs. Johnson, is to blame for the shortness of the marriage. When the duration of the marriage is seen in its proper light, the equities favor Mrs. Johnson, not Dr. Johnson. An at fault spouse cannot ***303** destroy a marriage and then claim its short duration entitles him to more favorable consideration when the economic adjustments attendant to divorce are made.

We reverse the award of rehabilitative alimony and remand for an award of permanent, periodic alimony. *See Voelker v. Hillock, supra.* The factors which should guide the judge's discretion in making the award are set forth in *Lide v. Lide, supra.* While based upon the reasonable needs of the wife to maintain her marital standard of living, the award should also take into account her own earning capacity. Alimony should not serve as a disincentive for her to improve her employment potential nor dissuade her from providing, to the extent feasible, for her own support. *Josey v. Josey,* 291 S.C. 26, 351 S.E.2d 891 (Ct.App.1986).

III.

[5]  Finally, Mrs. Johnson appeals from the court's refusal to award her full attorney's fees.

It is undisputed that her fees actually incurred were $12,901. The court found that her attorney enjoys high professional standing and that the fee charged was customary for similar legal services. Dr. Johnson does not contend the attorney's billing rate is unreasonable. Neither is there any question about Dr. Johnson's ability to pay.

On the other hand, Mrs. Johnson had no means to pay for defense of the action. Under the fee agreement with her lawyer, the practical effect of the court's failure to award a full fee was to reduce her modest equitable distribution award by almost fifteen per cent.

The court found that Dr. Johnson initiated the lawsuit and that his attempt to enforce an invalid antenuptial agreement rendered the case more difficult to defend. According to the court, he also failed to furnish discovery information and to file a proper financial declaration, as required by the rules of court, which further increased the time and expense of litigation for Mrs. Johnson. For example, when Mrs. Johnson's attorney sought disclosure of his assets, Dr. Johnson disclosed assets of only $7500. By other means, Mrs. Johnson's attorney was ultimately able to uncover assets in his name of $653,773.

Despite these facts, the court, without giving any reason ***304** to justify its action, refused to award full fees. A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion. *See Turbeville v. Morris,* 203 S.C. 287, 26 S.E.2d 821 (1943). We hold that the court abused its discretion in awarding attorney's fees in an amount less than actually incurred.

In reaching this conclusion, we have given consideration to Dr. Johnson's contention that the fee awarded is excessive. His primary complaint is that Mrs. Johnson's lawyer spent too many hours preparing the case. He objects, in particular, to the thirty-five hours spent on the pretrial brief or proposed order, the thirteen hours spent in conference with the client, and four hours spent in trial preparation. Given the factual and legal complexity of the case, the vigorous manner in which Dr. Johnson contested every issue, his lack of cooperation in discovery which forced Mrs. Johnson to obtain relevant evidence by other means, and the excellence of her attorney's work in briefing and presenting the case, we are satisfied the number of hours spent were reasonable and justified. We find no evidence that the hours were inflated by unnecessary work.

The award of attorney's fees is reversed and remanded for redetermination in light of our opinion. Of course, Mrs. Johnson will incur additional expenses as a result of this appeal and the remand. The family court should include these in its determination***116** of the attorney's fee to be finally awarded in the case.

For the reasons stated, we affirm the judgment of the court as to the apportionment and distribution of the marital estate. We reverse and remand the judgment as to alimony and attorney's fees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

SANDERS, C.J., and GARDNER, J., concur.

Supreme Court of South Carolina.

C. Carl JOHNSON

v.

Terry Cobb JOHNSON.

April 19, 1989.

***117** Robert J. Thomas, Columbia, for Terry Cobb Johnson.

Prior Report: 296 S.C. 289, 372 S.E.2d 107.

The Court has issued the following Order on Petition for Writ of certiorari:

Petition for Writ of Certiorari denied.

Jones v. Jones, 241 S.E.2d 904 (1978)

Supreme Court of South Carolina.
Doris F. JONES, Respondent,
v.
Paul Ray JONES, Appellant.
No. 20620.
Feb. 23, 1978.

In divorce action, the Family Court, Horry County, Winston W. Vaught, J., granted wife divorce, awarded wife custody of minor children and use of family residence and all furnishings therein, and ordered husband to pay lump-sum alimony, and husband appealed. The Supreme Court, Gregory, J., held that: (1) award of lump-sum alimony was appropriate, in view of evidence indicating that husband was unable and unwilling to provide support for his family in regular installments; (2) trial court was authorized to give husband option of conveying to wife for period of 12 years all cleared land he inherited from his mother, and (3) remand was warranted with respect to award to wife of use of family residence, in view of trial judge's failure to set forth salient facts and conclusions of law upon which award was based.
Affirmed in part and remanded in part.
***282** GREGORY, Justice:
This appeal is from the order of the lower court awarding Mrs. Jones lump sum alimony and the exclusive use of the family residence. We affirm the award of lump sum alimony and remand to the lower court in accordance with Rule 27 of the Family Court Rules on the issue of Mrs. Jones' use of the family residence.

****905** Mr. and Mrs. Jones were married in the early 1950's and have three children. At the time of these proceedings the oldest child was 24 and the two minor children were 16 and 9. In June 1973 Mrs. Jones initiated an action against her husband for a divorce a vinculo matrimonii on the grounds of physical cruelty, habitual drunkenness, and adultery. In an order dated January 15, 1977, the lower court granted Mrs. Jones' prayer for a divorce on the grounds of physical cruelty and habitual drunkenness; awarded Mrs. Jones custody of the two minor children and the use of the family residence "so long as she does not remarry" and all furnishings therein; and ordered Mr. Jones to pay $36,000 as lump sum alimony or in lieu thereof to pay $150.00 per month from January 1977 through October 1977 and then convey to Mrs. Jones all of the cleared land on his farm for a term of twelve years so that she can rent the same for her support.

Mr. Jones appeals from the award of lump sum alimony and the provisions for an alternate method of payment, and from the award to Mrs. Jones of the use of the family residence.

[1]  In equity actions such as this where the case was heard by the family court judge, this Court will review the entire record for the purpose of determining the facts in accordance with our own view of the preponderance of the evidence. Wood v. Wood, S.C., 239 S.E.2d 315 (1977).

Mrs. Jones testified that appellant had failed to provide for her support and the support of their children for a period ***283** of five years preceding this action. She testified that Mr. Jones had been using alcohol excessively for at least ten years, and had not been regularly employed for some time. Her attempts to obtain support from him through legal process were thwarted when he moved to North Carolina to evade the support orders. The unsettled estate of Mr. Jones' mother provided some support for Mrs. Jones and her children, and Mrs. Jones' family assisted her to a large extent. Mrs. Jones testified that Mr. Jones told her he would leave the country before he would support his family.

Mr. Jones did not attend the hearing and presented no testimony.

When the estate of Mr. Jones' mother was settled, he inherited 245 acres more or less of farm land and wooded property located in Horry County and valued at approximately $98,183.50. Forty acres are cleared and have a tobacco allotment of 15,289 pounds. Additionally, Mr. Jones inherited a partial interest in a tract of land in North Carolina which he sold for $25,000.00. Mrs. Jones received $9,000.00 from the sale. She used a portion to pay back debts and placed the remainder in savings.

The lower court awarded Mrs. Jones $36,000 as lump sum alimony after finding that Mr. Jones "due to his regular and excessive drinking, is failing to properly attend his business and this Court is convinced that in a short while he will probably dissipate the property and at present it does not appear that award (sic) of alimony in installments would provide the plaintiff (Mrs. Jones) with any award on which she could rely."

[2]  Mr. Jones has an estate valued in excess of $98,000.00. His past conduct and statements demonstrate both his inability and his unwillingness to provide support for his family in regular installments. An award of lump sum alimony was appropriate, and neither party challenges the amount specified by the lower court. Accordingly, ***284** we affirm the lower court's order awarding Mrs. Jones $36,000 lump sum alimony.

[3]  The lower court's order also specified an alternate method of satisfying the alimony award. Under the terms of the order, Mr. Jones has the option of conveying to Mrs. Jones for a period of twelve years all the cleared land he inherited from his mother. This conveyance would enable Mrs. Jones to receive the income derived from renting the property and to utilize the same for her support. While the lower court lacks jurisdiction, absent consent, to order Mr. Jones to convey his real property to Mrs. Jones, it may give Mr. Jones the option of making such a transfer as an alternate method of satisfying the alimony award.

***906** [4]  Mr. Jones next appeals the award to Mrs. Jones of the exclusive use of the family residence and argues that the lower court erred by granting more relief than was sought in the complaint. The complaint does not specifically request an award of the use of the family residence, but does contain a prayer for "such other and further relief as to this Court may seem just and proper." In awarding Mrs. Jones the use of the family

residence the trial judge failed to set forth the salient facts and conclusions of law upon which this award was based, as required by Rule 27 of the Family Court Rules (formerly Rule 13). The record is insufficient to permit a review by this Court, and we remand to the Family Court of the Fifteenth Judicial Circuit for further consideration. Johnson v. Robinson, 267 S.C. 660, 230 S.E.2d 815 (1976).

Affirmed in Part and Remanded.

LEWIS, C. J., and LITTLEJOHN, NESS and RHODES, JJ., concur.

Jones v. Jones, 314 S.E.2d 33 (Ct. App. 1984)

Court of Appeals of South Carolina.
Donald Ray JONES, Appellant,
v.
Lily Carolyn JONES, Respondent.
No. 0120.
Heard Jan. 31, 1984.
Decided March 5, 1984.

In a divorce action, husband appealed from an order of the Family Court, Greenville County, Larry R. Patterson, J., challenging, inter alia, the court's equitable distribution award and alimony award. The Court of Appeals, Cureton, J., held that: (1) award to wife of one-half interest in real estate was not excessive; (2) alimony award to wife of $400 a month was not excessive; (3) award of exclusive use of marital home to wife during remaining two years of youngest child's minority was proper, but husband should not have been enjoined from mortgaging his interest in the home; and (4) order requiring husband to pay taxes, insurance and maintenance costs of the house was an abuse of discretion in light of the other awards in the case.
Affirmed as modified.
CURETON, Judge:

In this divorce action, the husband appeals from the order of the trial judge and asserts: (1) the equitable distribution award to the wife was excessive, (2) the alimony award was excessive, (3) the trial court should not have awarded the wife the exclusive use of the marital home, while requiring him to pay the taxes, insurance and maintenance costs thereon, and (4) the trial judge failed to consider the tax consequences to him in making the several awards to the wife.

The parties were married approximately twenty-nine years and have four children, two of whom are now emancipated. The trial judge awarded the wife custody of the minor children, $400 monthly alimony, $200 monthly child support, exclusive use of the marital home until the youngest child reaches eighteen, and a one-half interest in all of the real estate owned by the parties consisting of a home worth approximately ***99*** $80,000 and four lots worth $6,000 each. Additionally, the husband was ordered to maintain hospitalization and major medical insurance coverage on the minor children and to pay the taxes, insurance and maintenance costs on the marital home until the youngest child reaches age eighteen. The husband was permitted to retain the $15,000 in cash he withdrew from the bank at the time of the parties' separation.

With respect to the award to the wife of a one-half interest in the real estate, the husband contends the award is excessive because the record does not demonstrate that the wife's contributions to the acquisition of the property warranted such an award. We disagree.

[1] [2] In making an equitable division of marital property, the family court may employ any reasonable means, *Taylor v. Taylor,* 267 S.C. 530, 229 S.E.2d 852 (1976), and its decision in this regard will not be disturbed by this Court unless found to be an abuse of discretion. *Simmons v. Simmons,* 275 S.C. 41, 267 S.E.2d 427 (1980). We cannot develop a precise mathematical formula to govern our family court judges in making such awards, *Baker v. Baker, supra;* we must rely, therefore, on our family court judges whose mature judgments we accord great deference. However, the amount of the wife's award should bear a reasonable relationship to her contributions to the acquisition of the property, *Baker v. Baker,* 276 S.C. 427, 279 S.E.2d 601 (1981), or the financial and material success of the family, *Moyle v. Moyle,* 262 S.C. 308, 204 S.E.2d 46 (1974).

[3] Here, while the wife's monetary contributions to the acquisition of the marital properties were small when compared to the husband's, the record reveals she was a good wife who raised the parties' children, performed usual wifely duties and worked outside the home for at least twenty years out of the twenty-nine-year marriage. We therefore find no abuse of discretion in the amount of the award.

[4] [5] We next consider the husband's argument that the alimony award was excessive. When making an alimony award, the court must consider a number of factors, *Lide v. Lide,* 277 S.C. 155, 283 S.E.2d 832 (1981), and its discretion will not be disturbed unless abuse is shown, *Smith v. Smith,* 264 S.C. 624, 216 S.E.2d 541 (1975). In the case *sub judice,* the wife's income was approximately $7200 a ***100** year while the husband's expected income exceeded $35,000 a year. Although at the time of the divorce hearing, the husband had not received a paycheck for two of his last four pay periods, he testified he expected that situation to be only temporary. The trial court also found that his employment status***36** was only temporary. In view of the fact that the husband could petition for relief if his employment situation proved otherwise, we see no abuse of discretion in the trial judge's treatment of the husband's employment status.

The husband next argues that the trial court erred in awarding the wife the use of the marital home until the youngest child reaches age eighteen. The announced basis for this award was that since the home was suitable for the wife and minor children, "it would be unfair to order the [wife] and the two children out of this home ...." Although not set out in the divorce decree, we think it apparent that the trial judge intended the use of the home to constitute an incident of support and not a property division.[FN1]

FN1. We presume that the trial court intended that one-half of the value of the use of the home should be regarded as child support, since the alimony award appears to have been a full one.

[6] In the case of *Smith v. Smith,* 312 S.E.2d 560 (S.C.App.1984), we said that where a spouse is awarded custody of minor children, that fact may constitute sufficient reason for granting the custodial spouse exclusive use of the marital home. We did not indicate, however, that in every case, the court must necessarily award exclusive use of the marital home to the custodial spouse. We think that the trial court must in such cases weigh the cost, inconvenience and other hardships that may be experienced by requiring the custodial spouse to move out of the marital home to the burden imposed upon the non-custodial parent in being unable to realize his equity from a sale or other disposition of the home.

[7] [8] Here, the husband has been deprived, by a conservative estimate, of over $30,000 equity in the marital home. Additionally, the husband has been enjoined from mortgaging his interest in the home. At oral argument we were advised that the youngest child will become eighteen in approximately two years. We, therefore, do not think it unreasonable to require the husband to wait two more years before ***101** he can dispose of his equity in the home. On the other hand, we see no compelling reason to restrain the husband from mortgaging his interest in the home during the period that the wife has exclusive use thereof. The wife is adequately protected from the effects of foreclosure against the husband's one-half interest in the property, since the mortgagee would have notice, pursuant to the divorce decree, of the wife's right of possession and any such mortgage lien would be subject to such right. We therefore reverse the trial court on this particular and modify the decree accordingly.

[9] Likewise, we think the trial court's order requiring the husband to pay the taxes, insurance and maintenance costs on the house is an abuse of discretion in light of the other awards. The record does not show the trial judge placed any monetary value on these awards, nor did he satisfy Family Court Rule 27(C) by designating the awards as alimony or child support. Moreover, we are of the opinion that the alimony, child support and equitable distribution awards were adequate under the circumstances, without this additional award.

[10] [11] Lastly, the husband contends that the trial court committed error in failing to consider the tax consequences of the awards. This issue was not presented to the trial court by way of pleadings or argument and therefore this court need not consider the exception. *Murphy v. Hagan,* 275 S.C. 334, 271 S.E.2d 311 (1980). The trial court should not be reversed for a non-jurisdictional error that was not called to its attention. *See* *Williamson v. S.C. Electric and Gas Company,* 236 S.C. 101, 113 S.E.2d 345 (1960).

The husband argues, nonetheless, that the requirement that the trial court consider tax consequences in making property and money awards in marital litigation is substantive law and need not be pled or argued, citing *Simonds v. Simonds,* 225 S.C. 211, 81 S.E.2d 344 (1954). We note first that in *Simmonds* the question of the tax consequences of the alimony award was argued before the trial judge. Secondly,***37** we are not convinced, especially as to the awards of child support and alimony, that the trial court did not consider the tax treatment of those awards. The favored treatment to the husband in awarding the wife $400 a month alimony and $200 a month child support for the two minor children, we think, ***102** militates against the conclusion that the trial court overlooked the tax consequences of these awards. Further, none of the husband's exceptions squarely presents this issue.

We therefore affirm the trial court's order, except to modify it to relieve the husband of the requirement to pay the taxes, insurance and maintenance costs on the marital home. We also modify the trial court's order to permit the husband to mortgage his interest in the marital home, such mortgage to be subject to the wife's right of exclusive possession until the youngest child reaches age eighteen.

AFFIRMED AS MODIFIED.

GARDNER and GOOLSBY, JJ., concur.

Josey v. Josey, 351 S.E.2d 891 (Ct. App. 1986)

Court of Appeals of South Carolina.
Dr. Julian Cleon JOSEY, Appellant-Respondent,
v.
Jean Yarborough JOSEY, Respondent-Appellant.
No. 0847.
Heard Oct. 15, 1986.
Decided Dec. 29, 1986.

Wife sought divorce from husband on grounds of adultery. The Family Court, Spartanburg County, Clyde K. Laney, Jr., J., granted divorce and both husband and wife appealed. The Court of Appeals, Cureton, J., held that: (1) trial court did not make specific findings of fact based upon necessary factors in determining whether pension plan should be classified as marital property; (2) trial court inappropriately adjusted net worth figure of husband by accrued capital gains tax figure; (3) $66,000 adjustment made in value of condominium units was not sustained by record; (4) portion of land on which marital home sat which had been transmuted into marital property was not determined by trial court; (5) wife should have been awarded title to marital home; (6) proportionate division of estate was not abuse of discretion; (7) alimony award was not excessive; (8) child support award was not excessive; and (9) award of attorney fees was factually supported by record.
Affirmed in part, reversed in part and remanded.
CURETON, Judge:

In this divorce action the trial judge granted the wife a divorce from the husband on the ground of adultery, divided the parties' marital property and awarded the wife alimony and child support. Both parties appeal. We affirm in part, reverse in part and remand.

Appellant husband is a successful physician in Spartanburg, South Carolina. Respondent wife, although a college graduate, has not worked outside the home since shortly after the birth of their oldest child. The parties have three children who were ages 20, 18 and 13 at the time of the divorce hearing. The two oldest children are in college at Washington and Lee University and the youngest child is still in the home in the custody of the wife. Over a period of several years, the relationship of the parties deteriorated with the husband becoming interested in another woman. Finally, in November 1983, the husband left the marital home.

The present action was filed by the wife alleging that the husband had physically abused her and had committed acts of adultery. She prayed for alimony, child support, custody of the children, equitable distribution of marital property, attorney fees, court costs and use of the marital home. The husband denied that he had been physically abusive to the wife or that he had committed acts of adultery.

The trial judge found that, although over a period of several years prior to the separation of the parties the husband had physically abused the wife, the abuse did not result in the breakup of the marriage but did contribute to its destruction. He also found that the husband had committed adultery and that his adulterous conduct caused the breakup of the marriage.

The husband was found to have earned an income of $163,818.50 in 1983 and $141,237.74 plus fringe benefits of ***29** $23,000.00 in 1984. The court found that the net value of the marital estate was $833,981.00, less the value of the land on which the

marital residence sits. The land was found to be nonmarital property. The court included in the marital estate the husband's profit sharing plan worth $49,695.00 and his pension plan worth $159,989.91. The wife was awarded a forty percent interest in the marital estate. The divorce decree provided that after crediting the husband with the value of the furniture and the cash value of an insurance policy which were awarded to the wife, the husband would pay the wife the remainder of $200,000.00 of her equity within 30 days. The balance of the award was required to be paid to the wife in two annual installments.

The husband does not challenge the proportional distribution of the marital estate, but argues that it was error to classify his pension and profit sharing plans as marital property and that the trial judge erroneously placed a value of $833,981.00 on the marital estate. He also argues that the trial judge committed reversible error: (1) by advising the attorneys that he had decided the issues of the case in one manner, yet issuing an order deciding the issues differently: (2) in awarding alimony and child support of $60,000.00 per year; and (3) in awarding attorney fees of $15,500.00 and suit expenses of $9,500.00.

The wife's principal argument pertaining to the apportionment of the marital property concerns the failure of the trial judge to find that the land on which the marital home sits is marital property, and in failing to award her title to the home. The home sits on an 8.7 acre tract of land. Both parties valued the home site at $288,000.00. The house is encumbered with mortgages totaling approximately $145,000.00. The wife also claims that the trial judge should have awarded her one-half of the marital ***894** estate. Finally, she argues the award of attorney fees was inadequate.

IDENTIFICATION AND VALUATION OF MARITAL PROPERTY

[1] Dr. Josey first argues that the trial judge should not have included his pension and profit sharing plans in the marital estate because both plans are employer financed and not subject to division under *Smith v. Smith,* 280 S.C. 257, 312 S.E.2d 560 (Ct.App.1984). *Smith,* of ***30** course, did not address the division of a voluntary contributory pension. In the recent case of *Watson v. Watson,* 291 S.C. 13, 351 S.E.2d 883 (S.C.Ct.App. 1986) this Court dealt with a profit sharing plan similar to the plan involved in this case. After deciding that the plan was both contributory and voluntary, this Court then held that the contributory nature of a plan is not dispositive of whether it should be classified as marital property. We listed nine factors in *Watson* that a trial judge should consider in determining whether a specific pension or profit sharing plan should be classified as marital property. Here, the record does not permit us to properly apply the factors enumerated in *Watson,* especially as to the pension plan. We therefore remand the question of whether these plans are marital property to the trial court to take additional testimony, if necessary, and make specific findings of fact based upon the *Watson* factors.

The husband next claims error in the trial court's valuation of the marital estate. To arrive at the value of the marital estate, and because all of the marital property was listed on the husband's financial statement attached to his financial declaration, the trial court ascertained the husband's net worth, then subtracted from his net worth the value of his separate property. In so doing, the trial court found the husband's net worth to be the $847,981.00 represented by his financial declaration, plus an adjustment of $66,000.00 to account for an increase in value of some condominium units as testified to by the wife's real estate expert, less a reduction of $80,000.00 for inherited property which was included on the financial statement.

[2]  The husband claims the trial judge should not have used the net worth figure of $847,981.00 from his financial statement as a starting point because, according to his tax expert, accrued capital gains taxes of $171,000.00 should have been deducted from that figure, reducing his effective net worth to $676,981.00. The trial court found that this was an inappropriate adjustment. We agree. On cross examination the tax expert admitted that the $171,000.00 figure was an estimate of the taxes that would be due if the husband were to sell all his assets, then pay the wife her proportionate share from the sale proceeds. ***31*** While the decree requires a sale of some assets, we would be required to speculate as to what, if any, taxes would have to be paid by the husband. Moreover, any assets transferred to the wife as part of the division would not result in a transfer taxable to the husband. I.R.C. Section 1041 (Law.Co.-op.1985). This contention is without merit.

[3]  We agree with the husband that the $66,000.00 adjustment the trial court made in the value of the condominium units is not sustained by the record. The husband's financial statement reflects his one-third interest in the condominiums based upon a gross appraisal of $520,000.00. The court relied upon the wife's appraiser who appraised the condominiums at $572,000.00. The difference between these appraisals is only $52,000.00, not $66,000.00. Moreover, the appraiser testified that the seller could expect to pay a six percent commission on the sale or $34,000.00. If the $52,000.00 is reduced by the amount of the commission, the increase in value to be added to the net worth figure is approximately $18,000.00.

The husband also argues other errors in the valuation of the marital estate, but we find them to have no merit and dispose of them under provisions of Section 14-8-250, Code of Laws of South Carolina, 1976.

[4]  Regarding the equitable division, the wife's first argument is that the 8.78 ***895** acres of land on which the marital home sits is marital property. The trial judge found that the land was a gift solely from the husband's parents to the husband. While there is evidence to sustain this finding, the trial judge did not address the question of whether any portion of the property had been transmuted into marital property. The husband's counsel conceded during oral argument that under *Cooper v. Cooper,* 289 S.C. 377, 346 S.E.2d 326 (Ct.App.1986), a portion, but not all, of the tract had been transmuted into marital property. Because we cannot determine from the record what portion of the 8.78 acres was transmuted, we remand this issue to the trial court to take testimony, if necessary, and to determine what portion of the tract has been transmuted into marital property.

[5]  [6]  The wife next argues that she should have been awarded title to the marital home. A family court has ***32*** wide discretion in effecting a division of marital property and may employ any reasonable means at its disposal to do so. *Taylor v. Taylor,* 267 S.C. 530, 229 S.E.2d 852 (1976); *LaFitte v. LaFitte,* 280 S.C. 473, 313 S.E.2d 41 (Ct.App.1984). Here, although the wife's equitable interest in the marital estate apparently exceeds the equity in the house, she was not awarded the house because the judge found that she could not afford it. The husband has indicated an intent to sell the house and has voiced no objection to the wife receiving the house as long as it does not affect the amount of support he is required to pay her. The wife loves the home dearly. Under these circumstances, the home should have been awarded to the wife with the

proviso that its maintenance will not affect the amount of her future alimony. Such a disposition will also serve to minimize the possibility that the husband will have to pay capital gains taxes as a result of the equitable division.

[7] [8] The wife's final argument is that she should have been awarded one-half of the marital estate. Perhaps a family court's most difficult task in distributing the marital estate is to determine an appropriate division. The amount should bear a reasonable relationship to the relative direct and indirect contributions of the parties to the acquisition and maintenance of the marital property. *Stearns v. Stearns,* 284 S.C. 459, 327 S.E.2d 343 (1985); *Jones v. Jones,* 281 S.C. 96, 314 S.E.2d 33 (Ct.App.1984). We find a reasonable relationship between the wife's award and her contributions to the acquisition and maintenance of the marital estate. If anything, the wife's award was on the generous side. No abuse of discretion having been shown by the wife, the proportionate division of the estate is affirmed.

Because we have remanded the question of whether the pension and profit sharing plans should be included in the marital estate, and also the matter of what portion of the land on which the marital home is located should be classified as marital property, we cannot pass upon the ultimate value of the estate at this time. On remand, the trial court should first determine if the pension and profit sharing plans are marital property. If found not to be, their values as found by the trial judge should be deducted from the initial net worth figure of the husband. Thereafter, an additional***33*** adjustment should be made by increasing this figure by $18,000.00. This adjusted sum should then be reduced by the $80,000.00 inheritance and by the value of the acreage found not to be marital property. The wife should then be awarded forty percent of the last mentioned figure.

ALIMONY AND CHILD SUPPORT

[9] [10] The husband appeals the alimony award claiming it to be excessive and further argues that an award of $48,000.00 per year in alimony "can only serve to deter self improvement and precludes any viable option of her remarriage." Because we have remanded the equitable distribution award, and because the amount received in equitable distribution is a factor to be considered in awarding alimony, we remand this issue for reconsideration in ****896*** light of the wife's final equitable distribution award. *Johnson v. Johnson,* 288 S.C. 270, 341 S.E.2d 811 (Ct.App.1986). We agree with the husband that the ultimate alimony award, while based upon the reasonable needs of the wife, should not serve as a disincentive for her to make reasonable efforts to improve her employment potential or dissuade her, to the extent feasible, from becoming self-supporting. *Crim v. Crim,* 289 S.C. 360, 345 S.E.2d 515 (Ct.App.1986).

[11] The husband's principal complaint regarding the child support award of $1,000.00 per month is that it is excessive in view of the alimony award and the fact that the wife was given the right to claim the child as a dependent. The wife, on the other hand, claims the award was inadequate. We find no abuse of discretion. The record supports the child support award. As regards the child as a tax exemption, the husband does not suggest in his brief what we should do about that. Moreover, as we understand the Federal Tax Laws, the wife, as custodian of the child, would be the one entitled to claim the child as a dependent unless she relinquished that right in writing. I.R.C. Section 152(e) (Law.Co.-op.1985).

ATTORNEY FEES AND SUIT MONEY

[12] The court ordered the husband to pay $15,500.00 of the wife's attorney fees, but credited him with the $3,500.00 previously paid in temporary attorney fees. ***34** Both parties appeal the award. The husband claims the award was excessive while the wife argues the award was insufficient. We affirm. The trial court found that the wife's attorneys were "both experienced and respected for their professional qualifications and have submitted affidavits of service rendered at reasonable rates totaling approximately $20,000.00." The husband argues that since the wife hired two attorneys, she should be required to pay part of their fees. He has not shown, however, that the attorneys duplicated services. In fact, the record shows there was a clear delineation of duties between the attorneys. Attorney fees are discretionary with the trial judge. *Lyvers v. Lyvers,* 280 S.C. 361, 312 S.E.2d 590 (Ct.App.1984). Although the factual findings of the trial court pertaining to the attorney fees award are not exhaustive, our review of the affidavits together with the decree demonstrate that the trial judge's award is factually supported by the record and does not constitute an abuse of discretion. *Brewington v. Brewington,* 280 S.C. 502, 313 S.E.2d 53 (Ct.App.1984). We find no merit to the arguments of either party.

In addition to the attorney fees, the trial court ordered the husband to pay costs and expenses of litigation of $9,500.00. Both parties agree that this assessment is inaccurate. The evidence shows costs and expenses of $6,489.00. The award is modified accordingly.

EX PARTE COMMUNICATIONS BETWEEN WIFE'S COUNSEL AND THE COURT

The husband claims that the final decree does not reflect the decision of the trial judge, but is the product of ex parte communication which allegedly transpired between the wife's attorney and the judge. There is nothing in the record which provides the court with information regarding the trial judge's decision other than some general remarks of the judge at the end of the hearing and a letter from the husband's attorney to the trial judge dated about a week before the date of the decree in which he complains that the order proposed by the wife's attorney goes beyond the instructions furnished by the judge.

[13] [14] According to the husband's attorney, the court contacted him and gave him instructions to prepare an ***35** order. The court then contacted one of the wife's attorneys and requested that he prepare a proposed order within the parameters of the same instructions furnished the husband's attorney. The wife's attorney claims that the trial judge gave him permission to go outside his instruction in certain provisions of the order if he could justify ****897** such provisions. The wife's attorney then prepared a proposed order that varied in several respects from the instructions and cited case law to justify the deviations from instructions. We find no error. While the Supreme Court and this Court have said that it is reversible error for a judge to sign an order contrary to a ruling announced in open court, *McCranie v. Davis,* 278 S.C. 513, 299 S.E.2d 338 (1983); *Martin v. Ross,* 286 S.C. 43, 331 S.E.2d 785 (Ct.App.1985), where, as here, the trial judge requests proposed orders, he is free to accept or reject all or any portion of such orders. We reject the husband's argument.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

BELL and GOOLSBY, JJ., concur.

Kelly v. Kelly, 477 S.E.2d 727 (Ct. App. 1996)

Court of Appeals of South Carolina.
Kenneth E. KELLEY, Respondent,
v.
Delores E. KELLEY, Appellant.
No. 2579.
Submitted Sept. 10, 1996.
Decided Oct. 21, 1996.

Former husband filed action to terminate or reduce his alimony obligation to former wife. The Family Court, Greenville County, R. Kinard Johnson, Jr., J., entered order reducing alimony obligation. The Court of Appeals, Howell, C.J., held that: (1) former wife's increased earnings were anticipated at time of divorce, and thus did not establish changed circumstances warranting reduction in alimony; (2) evidence that former husband's decreased income significantly impaired his ability to meet his prior support obligations, and that his reasonable efforts to achieve his earning potential had failed, supported finding of changed circumstances warranting reduction in his alimony obligation; and (3) former husband's alleged prior misrepresentations to Internal Revenue Service (IRS) and lower court and alleged misconduct underlying divorce were not relevant to claim of changed circumstances warranting reduction in alimony obligation based on current inability to pay.
Affirmed.
Hearn, J., dissented in a separate opinion.

HOWELL, Chief Judge:
Kenneth Kelley (Husband) filed suit to terminate or reduce his alimony payments to his ex-wife Delores Kelley (Wife). From an unfavorable Family Court order reducing her alimony, Wife appeals. We affirm.[FN1]

FN1. We decide this case without oral argument pursuant to Rule 215, SCACR.

*484 Facts

Husband and Wife married in 1971 and had two children. The parties were divorced in January 1990 on the ground of one year continuous separation. At the time of the divorce, Husband had a bachelors degree and worked as an accountant at the Michelin Tire Corporation; Wife had graduated high school and had one year of college, and worked part-time outside the home. In its divorce decree the Family Court adopted a prior order of March 1989, giving custody of the children to Wife, and ordering Husband to pay $900.00 per month child support, $66.00 per month health insurance for the children and Wife, and $600.00 per month alimony.

Husband left his accounting job at Michelin in January 1991 and received 6 months severance pay. He then began a real estate venture with his brothers, refurbishing and selling homes. This business failed and he was only able to find a salaried position as a delivery manager of telephone directories for nine states in the southeast in 1994. Husband testified that his new job's salary was $19,500 per year, though his employer did provide for certain travel expenses (meal, auto, lodging). Wife, however, subsequently **729 increased her income by turning her part-time job into full-time work at a local bank.

Husband's child support obligations ended in August 1993. In April 1994 Husband moved to modify the January 1990 divorce decree and its incorporated order. Although he no longer paid $900.00 per month in child support nor $66.00 per month for his children's health insurance, he argued that his decrease in monthly income and Wife's increased income were significant changes in circumstances to warrant modification of his alimony payments. The lower court made the following findings: [FN2]

FN2. There appear to be some inconsistencies in the figures used in the final written order, but neither party has challenged the lower court's calculations. These numbers do not reflect the parties' respective alimony payments or receipts.

	Husband		Wife	
	1988	1994	1988	)94
Gross Monthly Inc.	4216.00	1625.00	406.26	516.67
		1199.00 (net)		
Monthly Expenses	2359.00	1781.00		282.57
Monthly Deficit		582.00		5.90

***485** After hearing the evidence the Family Court agreed with Husband, and though it found that he was underemployed, the court reduced his alimony payments from $600.00 to $400.00 per month. Wife argues that Husband's voluntary underemployment, misconduct, and misrepresentations preclude the lower court's finding of a change in circumstances to warrant a reduction in alimony.

Scope of Review

[1] [2] [3] An appellate court reviewing a family court order may find facts in accordance with its own view of the preponderance of the evidence. *Robinson v. Tyson,* 319 S.C. 360, 461 S.E.2d 397 (Ct.App.1995); *O'Neill v. O'Neill,* 293 S.C. 112, 359 S.E.2d 68 (Ct.App.1987). The broad scope of review does not require the reviewing court to disregard the findings of the family court judge, who, having seen and heard the witnesses, is in a better position to examine their credibility. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979); *Pirkle v. Pirkle,* 303 S.C. 266, 399 S.E.2d 797 (Ct.App.1990). Nor does this broad review relieve an appellant of his or her burden of convincing the appellate court that the family court committed error. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979). Questions concerning alimony rest with the sound discretion of the trial court, whose conclusions will not be disturbed absent a showing of abuse of discretion. *Bannen v. Bannen,* 286 S.C. 24, 331 S.E.2d 379 (Ct.App.1985). An abuse of discretion occurs when the court is controlled by some error of law or where the

order, based upon findings of fact, is without evidentiary support. *McKnight v. McKnight,* 283 S.C. 540, 324 S.E.2d 91 (Ct.App.1984).

Discussion

[4] [5] The General Assembly has expressly authorized ex-spouses to seek modification of alimony based on a change of either spouse's circumstances or in the payor spouse's financial ability. S.C.Code Ann. § 20-3-170 (1976) (whenever "the circumstances of the parties or the financial ability of the ***486** spouse making the periodic payments shall have changed ... either party may apply to the court"). The change must be unanticipated and either substantial or material. *Brown v. Brown,* 278 S.C. 43, 292 S.E.2d 297 (1982); *Calvert v. Calvert,* 287 S.C. 130, 336 S.E.2d 884 (Ct.App.1985). Many of the same considerations relevant to the initial setting of an alimony award have been applied in the modification context as well. *See, e.g., Kielar v. Kielar,* 311 S.C. 466, 429 S.E.2d 851 (Ct.App.1993) (parties' standard of living during the marriage); *Boney v. Boney,* 289 S.C. 596, 347 S.E.2d 890 (Ct.App.1986) (earning capacity); *Calvert v. Calvert,* 287 S.C. 130, 336 S.E.2d 884 (Ct.App.1985) (payor spouse's continued ability to support the other spouse). The party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change has occurred. *Boney v. Boney,* 289 S.C. 596, 347 S.E.2d 890 (Ct.App.1986). The following circumstances, without more, have been found insufficient to warrant modification of alimony: unwarranted debts, inflation, increased or decreased income of the payor spouse, a payee spouse's anticipated employment,***730** and the "straitened financial situation[s]" which are a normal consequence of divorce. *See Brown v. Brown,* 278 S.C. 43, 292 S.E.2d 297 (1982); *Kielar v. Kielar,* 311 S.C. 466, 429 S.E.2d 851 (Ct.App.1993); *Calvert v. Calvert,* 287 S.C. 130, 336 S.E.2d 884 (Ct.App.1985); *Baker v. Baker,* 286 S.C. 200, 332 S.E.2d 550 (Ct.App.1985).

Therefore, the issue here is whether the lower court abused its discretion in finding that Husband proved that the requisite change of circumstances occurred. Although there is some evidence to support Wife's argument, under this Court's scope of review, and particularly in light of the deference given the trial court's credibility determinations, *see Pirkle v. Pirkle,* 303 S.C. 266, 399 S.E.2d 797 (Ct.App.1990), we agree with the Family Court and conclude that Husband is entitled to a modification.

[6] Husband asserts that Wife's increased monthly income from $406.26 to $1516.67 (excluding alimony) is proof of changed circumstances. Wife testified that she did not work outside the home until both children started school. At the time of the divorce she had part-time employment, which she later turned into a full-time job. There is no evidence in the record that the parties expected Wife to continue working only ***487** at home. On the contrary, the record suggests that, at the time of the divorce, the parties anticipated that Wife would later return to work full-time outside the home. Accordingly, Husband cannot use Wife's increased earnings as a basis for changed circumstances. *See, e.g., Brown v. Brown,* 278 S.C. 43, 292 S.E.2d 297 (1982).

[7] Husband also argues that he met his burden because his own diminished salary and overall economic circumstances do not permit him to pay $600 per month in alimony. We agree. *Compare White v. White,* 290 S.C. 515, 351 S.E.2d 585 (Ct.App.1986) (payor-husband adequately demonstrated that his deteriorated financial condition adversely affected his ability to make alimony payments) with *Calvert v.*

Calvert, 287 S.C. 130, 336 S.E.2d 884 (Ct.App.1985) (while payor-spouse had proven that his income decreased, he failed to show, *inter alia,* that he was no longer in a position to pay alimony).

Husband's ability to pay alimony is significantly reduced. His monthly gross income has dropped by $2591.00, from $4216.00 to $1625.00. While he no longer pays $900.00 in child support, his monthly expenses, excluding alimony, have fallen more slowly, only $1428.00, from $3259.00 [$900.00 of which was child support] to $1781.00. He testified that because his "assets are obliterated and on a salary of $19,500 a year," he could no "longer afford to continue paying $7,200 a year in alimony." He further testified that he has never missed paying his alimony or child support, but it was extremely difficult to continue to do so. The lower court found Husband's current monthly deficit to be $582.00. In short, Husband requested the termination of alimony so that he "could survive financially." The trial court agreed with Husband, finding that "he has had a dramatic decrease in income and his decrease exceeds his decrease in expenses."

Wife counters that notwithstanding this finding, Husband failed to meet his burden because he is voluntarily underemployed, causing his actual income to be far below his earning capacity. She points out that he has a bachelor's degree in business administration and has several years experience in finance and cash accounting. Therefore, she contends, it would be inequitable and contrary to the case law concerning earning capacity to permit a reduction.

***488** Although the trial court did not fully explain its finding that Husband was voluntarily underemployed, it can be inferred from the record that the court found his testimony and explanation for his diminished salary to be in good faith and reasonable under the circumstances. While Husband's argument that his sexual orientation forced his resignation from Michelin and has hindered his subsequent job prospects is not supported by the record, *Cf.* *Clark v. Greenville County,* 313 S.C. 205, 437 S.E.2d 117 (1993) (counsel's argument not evidence to oppose summary judgment), there is evidence that he has made good-faith reasonable efforts to acquire gainful employment since then. Husband described that his four year real estate venture with his brothers, which first appeared to be lucrative, ultimately was not. He testified that he took his current job "because that's the only job that has been specifically ***731** offered to [him] after the accusations of recent years." Husband stated that he has tried to get another job to make more money and is still trying to do so.

[8] Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider earning capacity. *See, e.g.,* *Boney v. Boney,* 289 S.C. 596, 347 S.E.2d 890 (Ct.App.1989); *Vestal v. Vestal,* 297 S.C. 215, 375 S.E.2d 355 (Ct.App.1988). Further, the supreme court has emphasized that voluntary changes in employment which impact a payor spouse's ability to pay alimony are to be closely scrutinized. *Camp v. Camp,* 269 S.C. 173, 236 S.E.2d 814 (1977).[FN3] However, contrary to Wife's position, just as increased or decreased income, without more, is insufficient to warrant a change in circumstances, *see, e.g.,* *Brown v. Brown,* 278 S.C. 43, 292 S.E.2d 297 (1982); *Baker v. Baker,* 286 S.C. 200, 332 S.E.2d 550 (Ct.App.1985); *Calvert v. Calvert,* 287 S.C. 130, 336 S.E.2d 884 (Ct.App.1985), the failure to reach earning capacity, by itself, does not automatically ***489** equate to voluntary underemployment such that income must be imputed.

FN3. An even closer scrutiny is called for in cases where parents attempt to modify their child support obligations. In *Vestal v. Vestal,* 297 S.C. 215, 375 S.E.2d 355

(Ct.App.1988) and *White v. White,* 290 S.C. 515, 351 S.E.2d 585 (Ct.App.1986), the payor was permitted a reduction of alimony, but not a reduction in child support obligations.

Although some of the precedents appear inconsistent, the common thread in cases where actual income versus earning capacity is at issue is that courts are to closely examine the payor's good-faith and reasonable explanation for the decreased income. *See generally Boney v. Boney,* 289 S.C. 596, 347 S.E.2d 890 (Ct.App.1986) (trial judge did not find payor-husband's testimony that his termination as a loan officer had adversely affected his ability to earn income was credible); *Robinson v. Tyson,* 319 S.C. 360, 461 S.E.2d 397 (Ct.App.1995) (income imputed to payor-father where *inter alia,* he made insincere efforts to provide trial court with evidence of his earning potential); *Vestal v. Vestal,* 297 S.C. 215, 375 S.E.2d 355 (Ct.App.1988) (payor-husband's decision to resign as an officer and enlist in the Air Force would benefit him financially in both the long run and the short run); *White v. White,* 290 S.C. 515, 351 S.E.2d 585 (Ct.App.1986) (payor-husband's various financial downturns entitled him to a reduction in alimony payments). Efforts to frustrate support obligations are not tolerated, nor are prolonged periods of unemployment generally countenanced. *See, e.g., Fisher v. Fisher,* 319 S.C. 500, 462 S.E.2d 303 (Ct.App.1995) (reduction in child support denied and income imputed where husband voluntarily left job because it was too far away, too dirty, and unrelated to his prior work, and he waited to hear from one potential employer for two months).

However, courts are reluctant to invade a party's freedom to pursue the employment path of their own choosing or impose unreasonable demands upon parties. *See generally Walker v. Frericks,* 292 S.C. 87, 354 S.E.2d 915 (Ct.App.1987) (reduction but not termination of husband's alimony payments affirmed because order did not require retirement-age husband to resume employment but instead continue part-time work he was already doing). Nonetheless, even otherwise unreviewable career choices are at times outweighed by countervailing considerations, particularly child support obligations. *See generally Robinson v. Tyson,* 319 S.C. 360, 461 S.E.2d 397 (Ct.App.1995) ($30,000 income imputed to attorney-father who earned $700 per month doing providing legal services for those in poverty, while inexperienced lawyers in ***490** the area made $24,000-$40,000 per year); *Chastain v. Chastain,* 289 S.C. 281, 346 S.E.2d 33 (Ct.App.1986) (father's earning potential properly considered where he had both a bachelors and masters degree and earned as much as $24,500 annually, but voluntarily removed himself from the job market to attend law school).

Thus, the lower court considered Husband's earning capacity, and its finding of voluntary underemployment is reflected in the court's decision not to further reduce the amount of alimony payments. Moreover, the court's first-hand opportunity to observe Husband, his current financial situation, and Husband's reasons for the adverse changes, ****732** are embodied in the court's decision to reduce his alimony by one-third. In short, the Family Court's balancing of the relevant considerations in arriving at its final decision was not erroneous and, is consistent with the precedents outline above.

[9] [10] Wife also contends that Husband's misrepresentations and omissions, to both the IRS in 1990-92 and to the lower court, should preclude a reduction in alimony. To the extent that Wife is using this evidence to attack Husband's credibility, we defer to the credibility determinations implicit in the court's ruling below. *See Pirkle v. Pirkle,* 303 S.C. 266, 399 S.E.2d 797 (Ct.App.1990); *Bramlett v. Davis,* 289 S.C. 85, 344 S.E.2d 867 (Ct.App.1986). To the extent that Wife is using this evidence to rebut Husband's argument on his changed financial condition, it is not relevant to Husband's financial condition in 1994.

[11] Finally, Wife raises Husband's misconduct as a basis for denying the modification. This argument is without merit, for she alleges no 'new' misconduct since the original alimony order was set. Husband's fault in bringing about the divorce is not relevant to the inquiry into Husband's current ability to meet his previously-ordered alimony obligations.

Therefore, because Husband demonstrated that his decreased income significantly impaired his ability to meet his prior support obligations, and that his sincere, reasonable efforts to achieve his earning potential failed, we agree that he met his burden to show a change of circumstances warranting a reduction in alimony.

***491** Therefore, for the foregoing reasons, the judgment below is

AFFIRMED.

STILWELL, J., concurs.

HEARN, J., dissents in a separate opinion.

HEARN, Judge (dissenting):

Respectfully, I dissent. In my view, the husband failed to carry his burden of proving a substantial change in circumstances.

Here, the primary change in circumstances since the parties' divorce was the husband's voluntary reduction in income. He earned $4,216 per month as an accountant at Michelin at the time of the divorce in 1989. In December 1990, the husband resigned from this position. At the time of the hearing on his request for a reduction, the husband was earning $1,625 per month delivering telephone books, a decrease of over $2,500 per month since the divorce. While the wife's income has increased since the divorce, the majority admits this increase cannot be used to justify a reduction in alimony since it was contemplated by the parties at the time of the divorce. *Brown v. Brown,* 278 S.C. 43, 45, 292 S.E.2d 297, 298 (1982). The trial judge found the husband was underemployed based upon his education and experience, but inexplicably decreased the husband's alimony obligation by one-third. I believe this constituted an error of law amounting to an abuse of discretion.

An alimony award may be modified upon a showing of changed circumstances. S.C.Code Ann. § 20-3-170 (1985); *Darden v. Witham,* 258 S.C. 380, 387, 188 S.E.2d 776, 778 (1972). The burden of showing by the preponderance of the evidence that a change has occurred, however, is upon the party seeking the modification. *Cartee v. Cartee,* 295 S.C. 103, 104, 366 S.E.2d 269, 269 (Ct.App.1988) (quoting *Boney v. Boney,* 289 S.C. 596, 597, 347 S.E.2d 890, 892 (Ct.App.1986)).

In *Boney,* the husband sought a reduction or termination of alimony due to his termination from his former employment. The trial judge, however, as affirmed by this court, found the husband's potential earning ability should be based upon his ***492** capacity for prospective earnings rather than upon his actual earnings, and refused to grant a modification. *Id.* at 599, 347 S.E.2d at 892. Similarly, Mr. Kelley's voluntary underemployment should not be the basis for a reduction of alimony when his *capacity* for earning remains the same as it was in 1989. *See Fisher v. Fisher,* 319 S.C. 500, 507, 462 S.E.2d 303, 307 (Ct.App.1995) (imputing father's potential income for determination

of child support obligation); *Robinson v. Tyson,* 319 S.C. 360, 363, 461 S.E.2d 397, 399 (Ct.App.1995) (holding father capable of higher earning potential for determination of child support obligation).

***733** Moreover, with the emancipation of the parties' two children, the husband was relieved from his child support obligation of $966 per month. This change in circumstances substantially improved the husband's financial condition. Given this fact and the voluntary nature of his own reduction in income, I believe the trial judge erred in granting the husband a reduction in alimony.

I would reverse.

Latimer v. Farmer, 602 S.E.2d 32 (2004)

Supreme Court of South Carolina.
Charlotte LATIMER, Stuart Latimer, and Michelle Farmer, Appellants,
v.
Daniel FARMER, Respondent.
No. 25857.
Heard May 27, 2004.
Decided Aug. 16, 2004.

Background: Mother petitioned for a permanent restraining order to prevent father from moving out of state with adopted child or a transfer of custody to mother, and maternal grandparents petitioned for autonomous visitation rights independent of mother. The Family Court, Pickens County, Wayne M. Creech, J., entered order allowing father to relocate with adopted child and denied grandparents' petition. Mother and maternal grandparents appealed.

Holdings: The Supreme Court, Burnett, J., held that:
(1) mother failed to establish a substantial change in circumstances that warranted a change in child custody from father to mother;
(2) evidence supported finding that guardian ad litem conducted an independent, balanced, and impartial investigation; and
(3) maternal grandparents were not entitled to some form of autonomous visitation with child.

Affirmed.
Justice BURNETT:

This is a custody dispute arising out of the custodial parent's relocation. Appellant Michelle Latimer Farmer (Mother) appeals the family court order concluding Respondent Daniel W. Farmer (Father) should be allowed to relocate with their adopted child (Child). Appellants Charlotte and Stuart Latimer (Grandparents) appeal the family court's order denying them autonomous visitation rights with Child. We affirm.

FACTS

Mother and Father were married on June 4, 1988 and were divorced on February 11, 2000 because of Mother's adultery with one John Case.

Approximately a year and a half before the divorce, Father and Mother adopted Child, a Romanian orphan born May 14, 1997. Father and Mother brought Child home to

Greenville in August 1998. Three weeks later, Father discovered Mother's adulterous relationship with Case. Mother agreed to terminate the relationship and the couple were reconciled.

***379** In May 1999, the parties' adoption of Child was completed. One month later, Mother separated from Father. Father became suspicious of Mother's activities, and, at the suggestion of Mother's parents, hired a private investigator who confirmed Mother was still involved in the adulterous relationship. Following initiation of divorce proceedings by Father, the parties, by agreement, resolved all issues incident to the divorce. The agreement provided Father would have sole custody of Child and Mother was given visitation ***34** each week from 6:00 p.m. Thursday through 6:00 p.m. Saturday and additional visitation during holiday and vacation periods.

Father is an automation programmer.[FN1] While in Greenville Father was employed by Fluor-Daniel Corporation. Father sought and received a job offer in Plymouth, Michigan and now resides there with Child, his new wife, and a child born to them.

FN1. While in Greenville, Father's job entailed creating programs for automated industries, visiting factories for which the programs were designed and implementing the programs. He has no formal education, but has received on the job training.

When Father informed Mother he was moving to Michigan, Mother and Grandparents sought and obtained an *ex parte* order preventing Father from moving to Michigan with Child. Appellants also sought a permanent restraining order preventing Father from moving out of state with Child or, in the alternative, transfer of custody to Mother. A hearing was held in November 2001. The court concluded it to be in Child's best interests to allow Father to move to Michigan with Child. The court also denied Grandparents' autonomous visitation rights independent of those of Mother. The court ordered extensive visitation for Mother, including computer teleconferencing, e-mail, and telephone contact.[FN2]

FN2. Telephone contact is unlimited when initiated by Child. Wife has two calls per week not to exceed thirty minutes at specified times. Computer teleconferencing is unlimited when initiated by Child and one per week when initiated by Wife. E-mail access is unlimited.

ISSUES

I. Did the family court err in allowing Father to relocate to Michigan and declining to change custody of Child to Mother?

***380** II. Did the Guardian ad Litem (GAL) adhere to the proper standards in conducting his investigation?

III. Did the family court judge abuse his discretion in denying separate visitation rights to Grandparents?

LAW/ANALYSIS

[1] [2] [3] Where a family court order is appealed, we have jurisdiction to find facts based on our own view of the preponderance of the evidence. We are not required to disregard the findings of the trial judge who saw and heard the witnesses and

was in a better position to evaluate their credibility. *Strout v. Strout,* 284 S.C. 429, 327 S.E.2d 74 (1985). This degree of deference is especially true in cases involving the welfare and best interests of the child. *Dixon v. Dixon,* 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct.App.1999). Our broad scope of review does not relieve the appealing party of the burden of showing the family court committed error. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979).

I.

We are called upon to resolve one of the most challenging problems our family courts encounter. Cases involving the relocation of a custodial parent with a minor child bring into direct conflict a custodial parent's freedom to move to another state without permission from the court and the noncustodial parent's right to continue his or her relationship with the child as established before the custodial parent's relocation.

Some states recognize a presumption in favor of the custodial parent's right to relocate. *See e.g., In re Custody of D.M.G. & T.J.G.,* 287 Mont. 120, 951 P.2d 1377, 1383 (1998); *In re Marriage of Burgess,* 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473 (1996). Since our decision in *McAlister v. Patterson,* 278 S.C. 481, 299 S.E.2d 322 (1982), the courts in this state have been guided by a presumption against relocation in determining whether to allow a custodial parent to relocate with a minor child. We take this opportunity to review this presumption. Insofar as *McAlister* established a presumption against relocation, we hereby overrule it for the following reasons.

***381** First, we recognize that standards imposing restrictions on relocation have become antiquated in our increasingly transient society. Second, confusion abounds surrounding the status of our relocation law, in part, because of the often stated, but infrequently ****35** applied, presumption against relocation. In all child custody cases, including relocation cases, the controlling considerations are the child's welfare and best interests. The presumption against relocation is a meaningless supposition to the extent a custodial parent's relocation would, in fact, be in the child's best interest.

[4] [5] [6] [7] Under the present facts, Mother seeks a change in custody. As in all matters of child custody, a change in custody analysis inevitably asks whether the transfer in custody is in the child's best interests. In order for a court to grant a change in custody, there must be a showing of changed circumstances occurring subsequent to the entry of the divorce decree. *Davenport v. Davenport,* 265 S.C. 524, 220 S.E.2d 228 (1975). "A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change." *Stutz v. Funderburk,* 272 S.C. 273, 276, 252 S.E.2d 32, 34 (1979). The change of circumstances relied on for a change of custody must be such as would substantially affect the interest and welfare of the child. Because the best interest of the child is the overriding concern in all child custody matters, when a non-custodial parent seeks a change in custody, the non-custodial parent must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child.

In the present case, Mother seeks a change in custody. Therefore, she bears the burden of establishing both of these criteria.[FN3]

FN3. Mother disagrees that she bears the burden of showing a substantial change in circumstances. Mother argues Father seeks to modify the custody agreement. However,

the custody agreement is silent on whether Father could move out of state with Child. Therefore, there was no agreement on relocation to be modified. This case is distinguishable from *Pitt v. Olds,* 333 S.C. 478, 511 S.E.2d 60 (1999). In *Pitt,* the custodial, relocating parent sought a modification of the custody order to alter the visitation schedule and consequently bore the burden of showing a substantial change in circumstances. In the present case, the non-custodial parent seeks a change in custody and therefore bears the burden of showing sufficient changed circumstances affecting the welfare of the child.

***382** [8] [9] Mother has failed to show a substantial change in circumstances warranting a change in custody from Father to Mother for reasons set forth below. Father's remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of Child to warrant a transfer of custody to Mother. *See Fisher v. Miller,* 288 S.C. 576, 344 S.E.2d 149 (1986) (remarriage alone is not sufficient to warrant a change in custody). Likewise, a change in Father's residence is not itself a substantial change in circumstances affecting the welfare of Child, which justifies a change in custody. We decline to hold relocation in itself is a substantial change in circumstance affecting the welfare of a child. Relocation is one factor in considering a change in circumstances, but is not alone a sufficient change in circumstances. One location may not necessarily affect the best interests of the child as would another. The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests.

Not only has Mother failed to show a change in circumstances affecting Child's welfare, she has also failed to show a change in custody would be in Child's best interests. We believe the best interests of Child are served by Father's relocation with Child to Michigan. We have not previously delineated criteria for evaluating whether the best interests of the child are served in relocation cases. As noted by the Court of Appeals in *Pitt v. Olds,* 327 S.C. 512, 519, 489 S.E.2d 666, 670 (Ct.App.1997), *reversed on other grounds,* 333 S.C. 478, 511 S.E.2d 60 (1999), other states have provided criteria to guide a court's decision. We do not endorse or specifically approve any of these factors for consideration, but merely provide the following for consideration in determining whether a child's best interests are served. For example, the New York Court of Appeal has set ***36** forth the following factors when determining if the child's best interests are served:

***383** (1) each parent's reasons for seeking or opposing the move,

(2) the quality of the relationships between the child and the custodial and noncustodial parents,

(3) the impact of the move on the quality of the child's future contact with the noncustodial parent,

(4) the degree to which the custodial parent's and child's life may be enhanced economically, emotionally, and educationally by the move, and

(5) the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.

Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145, 148 (1996).

Pennsylvania requires courts in potential relocation cases to consider:

(1) the potential advantages of the proposed move, economic or otherwise;

(2) the likelihood the move would improve substantially the quality of life for the custodial parent and the children and is not the result of a whim on the part of the custodial parent;

(3) the integrity of the motives of both the custodial and noncustodial parent in seeking the move or seeking to prevent it;

(4) and the availability of realistic substitute visitation arrangements that will adequately foster an ongoing relationship between the child and the noncustodial parent.

Gancas v. Schultz, 453 Pa.Super. 324, 683 A.2d 1207, 1210 (1996). Montana and Florida have compiled comparable factors.[FN4]

FN4. Montana's factors are:

(1) whether the prospective advantage of the move will improve the general quality of life for parent and child; (2) the integrity of the custodial parent's motives in moving; (3) the integrity of the noncustodial parent's motives for opposing the relocation, and the extent to which it is intended to secure a financial advantage with respect to continuing child support and; (4) the realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is permitted.

Carter v. Schilb, 877 S.W.2d 665, 667-68 (Mo.Ct.App.1994). Florida law provides the court must consider:

(1) whether the move would be likely to improve the general quality of life for both the residential parent and the child; (2) the extent to which visitation rights have been allowed and exercised; (3) whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements; (4) whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent; (5) whether the cost of transportation is financially affordable by one or both parties; and (6) whether the move is in the best interests of the child.

Florida Statutes § 61.3(2)(d) (1997).

***384** Applying some of these factors to this case and considering foremost the overriding consideration in all custody matters, *i.e.,* the best interests of the child, we affirm the family court's order allowing Father to relocate to Michigan and denying a change in custody.

First, the potential advantages of the proposed move weigh in favor of Father's relocation. Father's current job, unlike his previous employment in Greenville, does not require travel, thereby allowing him to spend more time with Child. Additionally, Father has a stable family environment in Michigan having his siblings in close vicinity. Mother and her family, on the other hand, have a history of familial discord. Not only has Mother's relationship with her parents been unstable, Mother's brother is currently estranged from Grandparents.

Child's moral upbringing is also enhanced by her relocation with Father. The family court concluded even though Mother was a full time homemaker prior to the parties' separation, Father assumed the majority of the care of Child when he came home from

work. The court also found Father has taken the responsibility for the moral upbringing of Child by taking her to church and reading her Bible stories.

Second, we conclude it likely the move would improve the quality of life for the ***37** custodial parent and the child, and it is not the result of a whim on the part of the custodial parent. For the reasons stated above, the quality of Child's life would be enhanced by the dependable and loving family environment in Michigan.

***385** Third, the integrity of the motives of both the custodial and noncustodial parent in seeking the move or seeking to prevent it neither weigh in favor of nor against Child's best interests. The family court concluded Father's primary reason for the move was job related. Neither Father's reasons for moving nor Mother's reasons for seeking a change in custody seem to originate from spiteful or vindictive motives thereby affecting Child's best interests.

Fourth, we consider the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between Mother and Child. Clearly, the relationship between Mother and Child will be significantly affected given the prior frequency of contact and the hardship now imposed on the visitation schedule because of the distance to travel. Mother is provided extensive contact with Child given the distance involved. As previously noted, the family court ordered Mother would have extensive visitation with Child.

[10] [11] Mother raises several evidentiary issues in disputing the family court's order that Child's relocation with Father is in Child's best interests. First, Mother argues the family court erred in allowing testimony about her adulterous conduct predating the adoption hearing, which violated principles of res judicata. We disagree. Res judicata requires three elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical in the first; (3) the second action must involve matters properly included in the first action. *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999). The third element is not satisfied. The court's finding in the adoption hearing on the fitness of parents for purposes of adoption has no bearing on any future determination of custody.

As to Mother's assertion the family court judge overemphasized Mother's adultery in refusing to transfer custody to her, a review of the order shows this determination was not based on Wife's adulterous conduct. The family court made specific findings regarding the best interests of Child and the effect of her relocation on her welfare. Specifically, the court found Father has taken a proactive role in Child's life, has taken responsibility for Child's moral upbringing, and has a history ***386** of fostering familial relationships. It is upon these bases the family court judge made his determination regarding custody. Even with no proof of adultery, the record supports the grant of custody to Father.

Second, Mother argues the court failed to give due consideration to Child's age and background in determining whether a change in custody was appropriate. We disagree. The court did consider Child's age and the fact Child is a Romanian orphan and Mother previously had significant visitation. Recognizing the hardship imposed on the mother/daughter relationship, the Court made a special provision for “live” video teleconferencing. Additionally, Father actively participated in the Romanian adoption and there is no indication Mother has special knowledge regarding Romanian orphans.

Finally, Mother contends the court improperly ignored the testimony of Heather Cirelli, an expert who spoke on the possible negative consequences of Father relocating with Child. We disagree. In the court's Order on Motion to Reconsider, the court expressed

great reservation about Cirelli's credentials. The court stated it exercised great latitude in even qualifying Cirelli as an expert. Cirelli was contacted about three weeks prior to trial and saw Child only once. To the extent Mother advanced a contrary opinion at trial, the family court acted within its discretion in assigning more weight to Father's expert. *See* Bragg v. Bragg, 347 S.C. 16, 21-22, 553 S.E.2d 251, 254 (Ct.App.2001) (appellate court is not required to ignore the trial judge who saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony).

For the foregoing reasons, Mother has failed to show (1) a substantial change in ***38** circumstances affecting Child's welfare and (2) a change in custody advances Child's overall best interests. Additionally, the court did not err in its evidentiary rulings.

II.


[12] Mother argues the trial court erred in failing to require the GAL to adhere to the standards we set forth in Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001). The present case was filed in April 2000 and pre-dates the Patel ***387** opinion. Although the GAL was allowed to make a recommendation regarding custody prior to the Patel decision, we conclude the guardian meticulously conducted an independent, balanced, and impartial investigation.

In Patel, we set the baseline standards for the responsibilities and duties of a GAL. In particular, the GAL shall:

conduct an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Id. at 288, 555 S.E.2d at 390; *see also* South Carolina Private Guardian Ad Litem Reform Act, S.C.Code Ann. § 20-7-1549 (Supp.2003) (codifying the Patel guidelines with more specificity, but only directly applicable to guardians ad litem appointed after January 15, 2003).

In Patel, the GAL's investigation overwhelmingly favored the husband. For example, the GAL contacted the husband's attorney nineteen times, but failed to ever contact wife's counsel. The GAL only met with the children when they were with the husband. The GAL even secretly listened in on conversations between husband and wife while visiting with the husband. *Id.* at 286, 555 S.E.2d at 388-89. The Court concluded the actions and inactions of the GAL so tainted the decision of the family court that wife was not afforded due process. *Id.* at 286-87, 291, 555 S.E.2d at 389, 391.

In this case the GAL submitted two reports. The GAL interviewed Mother on several occasions and observed Mother and Child together on one occasion. The GAL also met independently with Mother's new husband. When the GAL learned Mother had remarried, the GAL requested Mother send photographs of her new home and Child's bedroom. The GAL noted the Mother's residence was "very adequate." The GAL also stated that if Child were placed with Mother and her husband on a permanent basis, Child would not suffer. The GAL testified Mother did a good job with Child, takes good care of her and her husband seemed "very genteel."

***388** The GAL observed Father with Child on two occasions. One visit was at the former marital home in Easley and the other was in the GAL's office. The GAL did not visit the Father in Michigan, finding it would present an undue financial burden for the litigants. Instead, the GAL requested Father send information pertaining to the town where Father was living, the schools, and pictures of the home. Therefore, there is no merit to Mother's assertion that the GAL was biased because he asked Father to prepare an album for him with information about Father's situation.

Finally, Mother alleges the GAL has not spent substantial time with Child in eighteen months. To the contrary, the GAL consistently inquired of both parents as to Child's situation. The GAL filed a supplemental report in July 2003. The GAL attended depositions of Mother and Father about six weeks prior to the trial date. At that time the GAL asked questions and received updated information. We conclude the GAL showed no bias or prejudice in the investigation.

III.


[13] Grandparents argue the trial court erred in failing to permit them some form of autonomous visitation with Child. We disagree.

South Carolina Code Ann. § 20-7-420(33) (Supp.2003) provides the family court has exclusive jurisdiction

****39** to order periods of visitation for the grandparents of a minor child where ... parents of ... child ... are divorced ... regardless of the existence of a court order or agreement, and upon a written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship. In determining whether to order visitation for the grandparents, the court shall consider the nature of the relationship between the child and his grandparents prior to the filing of the petition or complaint.

In *Brown v. Earnhardt,* 302 S.C. 374, 396 S.E.2d 358 (1990), we stated,

it would seldom, if ever be in the best interests of the child to grant visitation rights to the grandparents when their child, the parent, has such rights. Visitation by grandparents***389** should be derivative; otherwise the child might have four, or even six people competing for his company: father, mother, paternal grandparents and maternal grandparents.

Id. at 377, 396 S.E.2d at 360 (quoting *In the Matter of Adoption of a Child by M.,* 140 N.J.Super. 91, 355 A.2d 211, 213 (Ch. Div.1976)).

In *Camburn v. Smith,* 355 S.C. 574, 586 S.E.2d 565 (2003), we applied the United State Supreme Court's opinion in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Under *Troxel,* the court must give "special weight" to a fit parent's decision regarding visitation. Before visitation may be awarded to grandparents over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

No compelling or exceptional circumstances exist in this case that would warrant autonomous visitation. This is a difficult case because Grandparents enjoyed a close

relationship with Child and were her primary caretakers during the marital difficulties between Mother and Father. However, given the tumultuous nature of the relationship between Mother and Grandparents, we believe autonomous visitation with Grandparents could divide the family further should Mother's relationship with her parents again deteriorate. A contentious environment created by an additional visitation schedule would not be in Child's best interests. However, we strongly encourage Mother to foster an ongoing relationship between Child and Grandparents by sharing her visitation time with Grandparents when Child visits her in South Carolina.

CONCLUSION

For the foregoing reasons, we affirm the decision of the family court (1) denying a change in custody to Mother, (2) concluding the GAL followed appropriate standards in his investigation, and (3) denying Grandparents autonomous visitation rights.

MOORE, Acting C.J., WALLER, PLEICONES, JJ., and Acting Justice CLIFTON NEWMAN, concur.

Levin v. Levin, 68 S.C. 123 (1903)

Supreme Court of South Carolina.
LEVIN
v.
LEVIN.
Feb. 29, 1904.

Appeal from Common Pleas Circuit Court of Charleston County; Purdy, Judge.
Action by Dora Levin against Hyman Levin. Judgment for defendant. Plaintiff appeals. Reversed.
***945** Bryan & Bryan, for appellant. Mordecai & Gadsden, for respondent.

WOODS, J.
Hyman Levin and Dora Friedman were married on October 15, 1899. After a short bridal trip, they lived together at the home of the wife's father in New York until November 1, 1899. Levin then returned to his home in Charleston. Mrs. Levin did not accompany him, but continued to live with her father, and has continuously refused to go to her husband's home and assume the position of a wife. She commenced this action for alimony on October 26, 1901, alleging, under a number of specifications, cruel and inhuman treatment, sufficient, as she insists, to justify her in refusing to cohabit with her husband and in demanding separate support. The defendant denies the charges, and undertakes to lay the blame of separation entirely on his wife and her parents. The cause was referred to G. H. Sass, Esq., master, and his report finding against the plaintiff has been reviewed and confirmed by the circuit judge.

The findings of fact in the report and the decree are of great value, not only on account of the sources from which they come, but because of the earnest consideration manifestly given to the cause. A careful study of the evidence leads to the conviction that these findings as to the essential issues are, in the main, correct. The chief question for discussion is as to the correctness of the legal conclusions drawn by the master and the circuit judge from the facts.

The grounds upon which alimony should be allowed are thus stated in Wise v. Wise, 60 S. C. 447, 38 S. E. 802, after a review of the ***946** decisions in this state: "(1) Desertion of the wife by the husband, without just cause. *** (2) Where the husband inflicts upon his wife, or threatens her with, bodily injury, amounting to the saevitia of the civil law, which is defined 'to be personal violence actually inflicted or menaced, and affecting life or health.' (3) Where the husband practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic of the sex that a modest and pure-minded woman would find these grievances more dreadful and intolerable than the most cruel inflictions upon her person." It should not be supposed that a separate support must be denied to the wife under the second proposition, because the personal violence on account of which it is claimed does not actually imperil her life or health. It is sufficient if it tends to do so. Great and continued physical indignities-such, for example, as chastisement or imprisonment-might possibly not endanger life or health, but certainly a wife is not called upon to endure them. It should also be said in this connection that the time has passed when assent can be given to the statement made in Hair v. Hair, 10 Rich. Eq. 173: "No words of reproach and insult amount to legal cruelty; no affront and indignity, no torture of the feelings and sensibilities, however severe and grievous to be borne, unaccompanied by bodily injury or a well-grounded apprehension of such, will authorize the wife to leave the bed and board of her husband, and to claim thereupon from this court a decree for alimony." At the same time we fully accept the language used in Evans, 1 Hagg. Rep. 39, quoted with approval in Rhame v. Rhame, 1 McCord, Eq. 206, 16 Am. Dec. 597: "What merely wounds the mental feelings is, in few cases, to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm), do not amount to legal cruelty." One of these few cases arises when a husband habitually uses to his wife abusive language, which she cannot endure without a complete surrender of self-respect, or strikes at the vital point of female character by making and maintaining the charge of unchastity. The husband's right of dominion and the wife's duty to live with him and obey him cease to exist when the husband ceases to support them by at least decent respect and consideration. The general view of the law above stated will, no doubt, receive ready assent; but the delicacy of the subject makes the application of principles to the facts of each case the real judicial task.

While each case that has arisen in this state differs widely as to its facts from every other, a review of the cases leads to the conclusion that the decision of this case should depend upon the following questions: (1) Has the defendant inflicted on the plaintiff such physical violence or personal indignity as would make her residence with him as a wife intolerable? (2) Has the wife deserted her husband, or so contributed to the alienation that the law will deny her separate support? (3) Has the wife so condoned the alleged wrongs that her claim must fail? (4) Does the defendant's invitation to the plaintiff to come to his home as his wife discharge him of any liability he may have incurred for her separate support? It may be well to remark before beginning the discussion of these questions, that we attach slight importance, except as a mere sidelight, to the fact that the acquaintance of these parties was brought about by Levin and the parents of Mrs. Levin through the intervention of a matchmaker, and the marriage itself based more on convenience than sentiment. The court in a case of this kind has little to do with the finer sentiments and emotions of conjugal life, and must concern itself with the right of the wife to be protected from cruelty and indecency.

A number of charges are made against Levin. The first accusation-that he was very drunk on his wedding night-is clearly proved, and it cannot be doubted that this misconduct brought to his bride great mortification and disgust. Some excuse is to be allowed in the fact that he had been fasting for a day under the Jewish law, and did not take proper account of the effect of wine on an empty stomach. If the occasion had been

an ordinary one, the drunkenness would, no doubt, be excused by all the charitable as accidental; but it is not easy to see how the instinct of ordinary self-respect could have been so off guard on his wedding night. This offense, however, was forgiven, and no doubt its effect on the wife's feelings would have been obliterated if the impression of lack of sensibility had not been deepened by subsequent misconduct. Levin's explanation of registering with his wife at the St. Dennis Hotel under an assumed name is sufficient to make the impropriety of little consequence in this inquiry.

Mrs. Levin testifies that on the bridal trip to Baltimore the defendant forced sexual intercourse against her will, called her "flirt and loafer," telling her "to go to the devil" or "to go to hell," in anger struck her in the face, and nearly pushed her down the stairs. Whether all these cruelties were perpetrated, it is impossible to say with certainty, for they rest in assertion by the wife, and are met by denial of the husband. It cannot be doubted, however, that there were serious disagreements on this unhappy journey arising from the husband's grossness of conduct and jealous disposition. After this they returned to the home of Mrs. Levin's parents, and lived together as husband and wife for a week or more. For some reason, during this period, Mrs. Friedman became ***947** solicitous about her daughter's physical condition, and had an examination by a physician, from which she received the impression that Mrs. Levin was pregnant. Levin insisted that he had not known his wife sexually, and we cannot doubt that, in her father's house, he strongly intimated, if he did not directly charge, that, if his wife was pregnant, she had been unchaste. While there is much conflict, we think the testimony sustains the master and circuit judge in finding that Levin, before leaving New York, insisted on sexual intercourse at a time when his wife's physical condition made his doing so indecent. It appears that this became so repulsive to her that she left his room, and sought refuge with her mother. The details of the testimony on this point are too revolting to be recited. It is sufficient to say that plaintiff's physical condition was such that it would be difficult to imagine anything more disgusting and distressing to a decent woman than the defendant's conduct in this respect towards her. When the defendant left New York, his wife was painfully, if not seriously, ill, and in great distress. He testifies that he believed she was shamming; and there is no doubt that her statement is true that he actually charged her with pretending to be sick, without having, so far as we can discern, the slightest ground for the imputation. In addition to all this, Levin, on his departure, failed to leave his wife any money, or to make provision of any kind for her maintenance and comfort.

It may be that any one of the wrongs done by Levin, standing alone, might be regarded as only "a sally of passion," or a somewhat abnormal development of human weakness, to which in some degree many men may be subject, and which ought to be borne by a wife as incident to an unfortunate alliance. But, considering all the outrages together, perpetrated as they were when his wife was a young bride, having a right to expect, even from a husband of the commoner sort, at least respectful consideration, we cannot resist the conclusion that they amount to intolerable cruelty, justifying her separation from him. We think the evidence sustains the opinion that the plaintiff's refusal to accompany her husband to Charleston was due to her sickness, and also to her aversion to him arising from ill treatment.

The real defense up to this point, linked to a total denial of all improper conduct, except drunkenness, on the part of the defendant, is the allegation that all the matrimonial differences arose from the officious intermeddling of Mrs. Friedman, the plaintiff's mother. While the failure of the plaintiff to have her father and mother to testify has not impressed us favorably, we have sought in vain for facts adequate to support this defense. Mrs. Friedman was satisfied with the alliance, and in defendant's behalf had induced her daughter to be reconciled to him after his drunkenness. This kindly attitude, even if her temper was not of the best, is entirely inconsistent with Levin's statement that, upon his return from the bridal tour, without any provocation, Mrs. Friedman

became prejudiced against him, and determined to separate her daughter from him. Nor does the evidence bear out the allegation, pressed with so much vigor in argument, that plaintiff's parents were determined all along that their daughter should not live in Charleston, being willing to separate her from her husband to prevent her doing so, and that this is the secret of the separation; for after the marriage Mrs. Levin's personal apparel and all the wedding presents were packed by Levin, and shipped to Charleston, with the apparent acquiescence of the entire family. This theory requires for its support much stronger evidence than is offered here. It is against nature that parents should be anxious to separate a daughter from her husband, and thus wreck her life, in order to keep her at home.

We next inquire, has the wife deserted her husband, or so contributed to the alienation that the law will deny her a separate support? Having already held that she committed no breach of duty in separating herself from her husband, it follows that she did not in any legal sense desert him.

One phase of Mrs. Levin's conduct, which has given rise to the greatest perplexity in the effort to reach a just conclusion, is the accusation made by her that her husband had imparted to her a repulsive disease. She does not allege this as one of her grounds of action, but it is considered here for the reason that, if she falsely and recklessly made such a charge, in connection with her refusal to live with her husband, she would be entitled to no relief. The charge she made was on the trial completely disproved by the best evidence on the subject that could then be offered. We hold that Levin did not have such a disease, and therefore could not impart it. Nevertheless, it cannot be said that Mrs. Levin is subject to great censure for entertaining the opinion she expressed. The attending physician discussed her symptoms with her or her mother, and while he did tell them that he could only be sure of the cause which produced them by the use of the microscope, yet it is manifest from his testimony that he regarded these unusual symptoms as probably indicating venereal disease; and this view was no doubt expressed at that time as strongly as it was in his testimony. Mrs. Levin cannot be acquitted of a lack of care in not doing what she could to relieve her husband of this dreadful imputation by procuring a microscopic examination, as suggested by the physician; but it must be remembered that Levin knew of his wife's condition, and her belief as to the cause, before he left New York, and yet he left with this shocking charge hanging ***948** over him without even seeing the physician who had made the examination, and from whom, as we must suppose, the impression came. It is said in Hair v. Hair, supra, that: "The conduct of the wife must be blameless. If she elopes, or commits adultery, or violates or omits to discharge any of the important hymeneal obligations which she has assumed upon herself, the husband may abandon her without providing for her support." It is not meant by this that a wife must be perfect-her conduct absolutely free from fault-in all distressing circumstances. It does not mean that when her husband has brought upon her great wrongs sufficient to sustain her appeal to the courts, she must be entirely free from imputing to him other wrongs of which he is not guilty. We do not think, when all the circumstances are considered, such blame attaches to the plaintiff as should defeat her action.

We next inquire, is the defendant protected from his wife's claim by condonation of his offenses? It is quite clear that a decree for alimony cannot be based upon wrongs which have been condoned, all misconduct having ceased after such condonation. But to hold that cruelties of a husband which have been forgiven are not to be considered when others have followed until the wrong becomes unbearable would not be to give encouragement and support to a wife's patient endurance, but to mock at it. In such case, as is said in Threewits v. Threewits, 4 De S. 574, the wife has a right to judge of the future by the past; and the court will connect the whole of the husband's conduct, in order to form a correct judgment. The case of Wise v. Wise, supra, is not in conflict with

this view, because the conditions under which the condonation was there held a bar are essentially different from those existing here.

The last inquiry is, does the defendant's invitation to the plaintiff to come to his home as his wife discharge him from any liability he may have incurred for her separate support? At the outset of the discussion of this question it is proper to remark that ordinarily evidence as to negotiations for settlement should be excluded, but in this case these negotiations were brought into the issue by the answer, and we do not perceive how testimony concerning them could have been rejected by the master, or could now be excluded from consideration at the defendant's instance. When the past misconduct of a husband has justified his wife in leaving him, it is too obvious for argument that a mere invitation to her to return to him does not impose upon the wife any obligation to comply with her husband's wish at the risk of receiving like treatment. Under the decisions of this state and elsewhere, his invitation must be accompanied by such expressions of sorrow as would lead a court to hold that the wife had reasonable ground to expect ordinary respect and consideration in future. Levin's position from first to last, except as to the drunkenness, has been one of absolute self-justification and denial of wrong, laying all the misconduct at the door of the wife and her parents. But, aside from this, and attributing to the defendant an honest conviction that he did nothing, while his wife was cohabiting with him, that was not strictly within his marital rights, her refusal to return was justified by his charge of unchastity. That he made the accusation before parting with his wife cannot be doubted. He himself testifies that his suspicions were removed on the birth of the child. Yet after this, when professing to wish his wife to come to him, assuring her by letter that he did not blame her, but her mother, for any wrong done to him, he says no word of retraction or regret. He sends Mr. Banov to influence his wife to come to him, who returns with a written retraction for his signature, which she asks at his hands, but the paper is not signed. Levin's attorney, Mr. Mordecai, says he told Mr. Bryan, attorney for Mrs. Levin, before this suit was brought, that she would come out of court "with her character as a wife ruined." Whatever meaning Mr. Mordecai may have intended to convey by this language, in view of the serious charge of unchastity before made, and apparently adhered to, it must have meant to her a threat to establish this charge. An invitation extended under such circumstances as these we cannot hold a wife bound to accept.

We conclude that Levin's acts of cruelty justified his wife in separating from him; that, while her behavior has not been faultless, her fault had such excuse as to make it insufficient to deprive her of support for herself and her child; that her claim is not barred by condonation; and that she had sufficient reason to decline her husband's invitation to go to his home as his wife.

The consideration of the mass of nauseous testimony will not leave in an impartial mind any hope of reconciliation of these parties. This complete alienation has come almost entirely from the gross misconduct of the defendant, and we cannot exempt him from the support of his penniless wife and dependent infant.

The judgment of this court is that the judgment of the circuit court be reversed, and that the cause be remanded to that court for the purpose of ascertaining and adjudging a proper allowance for the expenses of this suit and reasonable alimony for the plaintiff, having in view all the circumstances of the husband and wife.

Marcia K. MALLETT, Appellant-Respondent,
v.
John C. MALLETT, Respondent-Appellant.
No. 2516.
Heard April 2, 1996.
Decided May 28, 1996.
Rehearing Denied Aug. 22, 1996.

In domestic case, the Family Court, Beaufort County, Donald A. Fanning, J., entered order addressing alimony, child support, equitable apportionment and attorney fees. Both parties appealed, and wife also appealed judge's refusal to recuse himself. The Court of Appeals held that: (1) award of $4,500 monthly periodic alimony to wife would be increased, at least temporarily, to $6,300 per month; (2) award of $2,000 per month child support was reasonable; (3) husband would not be required to maintain life insurance for benefit of parties' son; (4) husband's employment termination benefits were improperly included in marital estate; (5) husband should have been required to reimburse wife for fees and costs associated with recusal motion; and (6) for purposes of calculating attorney fee award, wife's employment of two attorneys was unnecessary. Affirmed in part, reversed in part and modified in part.
***806 *143** Robert N. Rosen, of Rosen, Rosen & Hagood, Charleston, for appellant-respondent.

H. Fred Kuhn, Jr., of Moss & Kuhn, Beaufort, for respondent-appellant.

***144** PER CURIAM:
In this domestic case, both parties appeal the trial judge's order concerning alimony, child support, equitable apportionment and attorneys fees. The wife also appeals the trial judge's refusal to recuse himself. We affirm in part, reverse in part and modify in part.

John C. Mallett (husband) and Marcia K. Mallett (wife) were married in 1971. The husband began working for State Farm Insurance in Ohio and the wife worked as a home economist. Four years later, the parties' first child was born. At that time, the husband received a promotion and the family relocated to Florida. The couple also decided the wife would no longer work outside the home. A second child was born in 1981. In 1983, the family moved to Hilton Head Island where the husband opened his own insurance agency. The agency flourished and the family soon began to enjoy a very comfortable ***807** lifestyle. The husband's gross annual income rose from $79,498 in 1985 to $441,191 in 1992. The parties separated in 1990 and divorced in 1992.

I. Recusal of Trial Judge

The wife appeals the trial judge's refusal to recuse himself. On January 7, 1994, after learning of an alleged conversation between the trial judge and the wife's attorney, William Clark, the wife sent a letter to the trial judge requesting he immediately recuse himself from the case. The letter also complained of the trial judge's failure to timely issue a temporary support order. The trial judge immediately notified counsel for both parties of the wife's ex parte communication and his decision to treat her letter as a motion to recuse. On January 11, 1994, the trial judge issued a temporary order, pursuant to a hearing held in November, 1993. The temporary order awarded pendente lite alimony at $4,500 per month and child support of $2,000 per month.

On January 14, 1994, the trial judge issued an Order and Rule to Show Cause directing the wife to appear and show cause why he should recuse himself from the case. A

hearing followed on January 21, 1994, in which attorney Clark, attorney Fuge and the wife submitted affidavits containing allegations***145*** of bias and impartiality shown by the trial judge. Specifically, Clark's affidavit charged that in his presence, the trial judge referred to the present case as one of his "souvenir files" in which "Pete Fuge represented 'one of those Hilton Head women' who wanted money, and Clark [FN1] represented the husband, who said he didn't have any." The trial judge also allegedly stated Fuge, the wife's counsel, was his "chief nemesis" and that Fuge was "always bringing these cases that ought to be settled, and arguing for four days over issues that don't need to be heard." The wife's affidavit stated *inter alia:*

FN1. Apparently, Judge Fanning mistakenly believed Clark represented the husband. Clark, however, represented the wife along with Fuge.

Deponent does not feel she can receive a fair and impartial hearing because Judge Fanning has a bias against "Hilton Head women"; he has a very strong bias against her counsel; because of his actions in this case and the undue delay in issuing the Temporary Order; and because the Deponent asked Judge Fanning not to issue a temporary order because of the recent events and he issued the order anyway; and because the Judge issued the Rule to Show Cause against the Deponent which indicates to her a hostile personal attitude toward her.

At the recusal hearing, the trial judge made no effort to hide his irritation with the wife's lawyers. He refused to accept as true the affidavits presented by her counsel and criticized the accuracy of several statements in the affidavits. At one point the trial judge intimated he thought he was the one on trial. In the end, however, the judge went to great lengths to assure the wife he was not biased against her and would afford her a fair and impartial trial.

[1] [2] [3] [4] A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. *Murphy v. Murphy,* 319 S.C. 324, 461 S.E.2d 39 (1995). Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence***146*** of bias or prejudice. *Roper v. Dynamique Concepts, Inc.,* 316 S.C. 131, 447 S.E.2d 218 (Ct.App.1994). If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.,* 315 S.C. 283, 433 S.E.2d 856 (1993). In the final analysis, while appellate courts will accord "great weight to the trial judge's assurances of his own impartiality, [they will] find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." *Id.* at 285, 433 S.E.2d at 857.

In *Shaw v. State,* 276 S.C. 190, 277 S.E.2d 140 (1981) our Supreme Court addressed the authority of a trial judge to resolve a motion ****808*** for disqualification where he is the subject. The court held:

Our Court has apparently not specifically considered the authority of a judge to resolve a motion for disqualification of which he is the subject. After much consideration of the authorities, we conclude that as a general rule the judge, in determining whether to proceed, must accept as true the factual allegations of a motion to disqualify. However, this does not prevent the judge from exercising his right to consider the legal sufficiency of those facts. (Citations omitted). Additionally, the fair meaning of any remark must be interpreted in the light of the context in which it is uttered in determining whether the

remarks show personal bias or prejudice on the part of the judge sufficient to require that he be disqualified. (Citation omitted).

[5] [6] While our Supreme Court has not extensively treated the question of the legal sufficiency of facts necessary to warrant the disqualification of a judge, the federal courts have done so. In the federal arena, the courts have held, as has our Supreme Court, that the alleged bias must be personal as distinguished from judicial. *Davis v. Board of Sch. Comm'rs,* 517 F.2d 1044 (5th Cir.1975); *Roper,* 447 S.E.2d 218. Likewise, the bias must stem from extrajudicial sources and result in a decision on the merits based on considerations other than what the judge learned from his participation in the case. *Id.* A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related ***147** case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench. *United States v. Grinnell Corp.,* 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Berger v. United States,* 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921).

[7] It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution. *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). With these principles in mind, we review the affidavits presented at the recusal hearing for legal sufficiency. A review of the affidavits presented causes this court some concern. We disagree with the trial judge's view that Clark's allegations were "pure trivia." We question whether the trial judge could impartially decide the recusal issue given his apparent combative and defensive attitude exhibited during the recusal hearing. It does not appear to us unreasonable for the wife to have questioned the trial judge's impartiality in light of Clark's allegations. [FN2] We are convinced prudence and judiciousness would have dictated the trial judge disqualify himself. Nevertheless, we see no indication from the record the trial judge ever expressed an opinion on the merits of the case prior to his decision. *See Davis,* 517 F.2d 1044. It is, therefore, not all together clear to us that the trial judge's remarks and actions meet the bias test for recusal, nor are the trial judge's findings so unsupported by the record as to manifest impartiality. The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings. *Reading v. Ball,* 291 S.C. 492, 354 S.E.2d 397 (Ct.App.1987).

FN2. At the same time, we do not approve of the manner in which the wife made her complaint.

[8] In any event, the parties, through their respective counsel, agreed at oral argument that the trial judge's actions did not prevent the parties from fully litigating their respective claims. The wife's counsel specifically requested this court not to remand the case for a new trial, but decide the issues based on the appellate record. Because this is an equity case and the attorneys have asked us to decide the case on the record, we decline to remand this case for a ***148** new trial irrespective of our finding on the recusal issue. For purposes of this appeal, we view the recusal issue as moot.

II. Alimony

[9]  Both the husband and the wife appeal the trial court's award of $4,500 monthly periodic alimony to the wife.

[10]  Alimony is a substitute for the support which is normally incident to the marital relationship. ***809** Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977). Ordinarily, the purpose of alimony is to place the supported spouse, as nearly as is practical, in the position of support he or she enjoyed during the marriage. Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988), *cert. denied,* 298 S.C. 117, 378 S.E.2d 445 (1989).

This marriage lasted twenty-one years. The wife worked the first four years of the marriage and has a college degree. However, with the husband's consent, she left the work force in 1975 and spent the last seventeen years of the marriage in the home caring for the parties' children while the husband pursued his insurance career. The husband's career proved financially successful and the couple enjoyed an upper-middle-class lifestyle on Hilton Head Island. When the parties divorced, the husband had a gross annual income of $441,191.[FN3]

FN3. We are uncertain of the husband's net income.

We agree with the trial court that the husband provided the wife "with an affluent life style to which she has become accustom[ed] over the past twenty-two years. [The husband's] income is more than sufficient to sustain such a life style and to live comfortably himself." The trial court also found the wife's age, current work experience and standard of living during this marriage as well as the husband's assets dictate that she not be required to re-enter the work force. The court, nevertheless, found the wife was an able-bodied adult, who had since the separation of the parties had ample time to complete any further education or training which she felt would have been necessary for her to re-enter the work force. It concluded, "she is entitled not to work if she so desires, her ability to work is [a] factor to be considered in setting alimony and it has been considered together with all other applicable factors."

[11]  ***149** In her financial declaration dated August 8, 1994, the wife showed total monthly expenses for herself and the parties' minor son of $8,302. She noted that with the receipt of $6,500 in alimony and child support, she had a monthly deficit of $1,802. An award of alimony should not be set so high as to take away from the supported spouse, who has no good reason not to seek gainful employment, all incentive to find such employment. *See* Crim v. Crim, 289 S.C. 360, 345 S.E.2d 515 (Ct.App.1986). Notwithstanding this concern, we hold that in view of the unsettled nature of the wife's earning potential, the fact that the parties' teenage son could benefit from the wife being in the home full-time, and the husband's more than adequate income, he should be required to fully meet her needs, at least for the time being.[FN4] We therefore modify the wife's alimony award to $6,300 per month. In so doing, we are cognizant of the fact that we are not requiring the wife to contribute toward the support of the minor child in her custody, who as noted below, will receive generous support from the husband.

FN4. We specifically leave open an avenue for the husband to return to court after the wife has had an opportunity to fully explore employment opportunities and/or the parties' son can no longer benefit by the wife being in the home full-time.

III. Child Support

[12]  Both the husband and the wife appeal the trial court's award of $2,000 per month child support for the parties' teenage son.[FN5]

FN5. The court also ordered the husband to pay directly to the parties' emancipated daughter her college expenses. According to the wife's November 1993 Financial Declaration, these expenses amount to over $17,000 per year. Neither party appeals this aspect of the child support order.

The husband contends the award is excessive because it greatly exceeds the reasonable needs of the child. Due to the husband's income, the Child Support Guidelines do not cover this case. The general law, however, is well settled that a child is entitled to live and be supported in a life style commensurate with the current income of his parents. *Miller v. Miller,* 299 S.C. 307, 384 S.E.2d 715 (1989) (child support award should be sufficient to provide for the needs of the children and to maintain the children at the standard of living they would have been provided but for the divorce). We hold ***150** monthly child support of $2,000 is reasonable considering the husband's income, and the life style the child has enjoyed and is entitled to enjoy in the future.

****810** [13]  The wife contends the trial court erred in failing to require the husband to maintain health and life insurance for the benefit of the parties' son. We order the husband to maintain health insurance for his son until he is emancipated. However, we affirm the trial court's refusal to require the husband to maintain life insurance for the benefit of his children. While the court may require a supporting parent to maintain life insurance for the benefit of a minor child, there must be compelling reasons to do so. *Harlan v. Harlan,* 300 S.C. 537, 389 S.E.2d 165 (Ct.App.1990). We find no compelling reason in this case to require life insurance. The husband has more than adequate income to meet his support obligations and there is no indication he has shunned his child support obligation in any way.

IV. Equitable Apportionment

[14]  The husband contends the trial court erred when he awarded the wife 50% of the marital estate. Although we think the award was generous, we find no abuse of discretion.

[15]  [16]  The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership. *Johnson v. Johnson,* 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988). Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title. *Id.* Admittedly, the wife did not work outside the home after the parties' first child was born. However, our courts have long recognized a "homemaker's equity" in marital property where, as here, one spouse has foregone career opportunities at the behest of the primary wage-earning spouse, and throughout the marriage has remained in the home to rear children and provide a suitable environment for the family. *Parrott v.*

Parrott, 278 S.C. 60, 292 S.E.2d 182 (1982). Therefore, we affirm the trial court's equal apportionment of the marital estate.

***151 A. Business and Home**

[17] The wife contends the trial court erred in its computation of the value of the husband's business and the marital home. The wife's expert valued the husband's insurance business as of the date of the filing of this action at $158,928. He also testified the value of the business at the time of the hearing had decreased to $124,564. For the purposes of equitable apportionment, the trial court purposefully used the value of the business at the time of the hearing rather than the higher value at the time of the filing of this action. The trial court reasoned that the business asset represented "propriety equity" in policies owned by State Farm, and "although value is assigned to this business, it cannot be realized by sale." The court found the value of this marital asset "ha[d] declined through no fault of either [party]." Marital property is valued as of the date of the filing of the complaint. S.C.Code Ann. § 20-7-473 (Supp.1995); *Panhorst v. Panhorst,* 301 S.C. 100, 390 S.E.2d 376 (Ct.App.1990). Nevertheless, it would be grossly unfair to value this asset as of the date of the commencement of the action. *See Johnson,* 296 S.C. 289, 372 S.E.2d 107 (appellate court will look to the overall fairness of a distribution award). We therefore find no abuse in the court's valuation of the insurance agency business asset.

The wife also claims error in the trial court finding the marital home awarded to her had an equity value of $80,339. This was clearly a mathematical error because the trial court valued the home at $200,000. The house has a mortgage with a principal balance of $164,661.40, leaving equity of only $35,338.60. We correct this award accordingly.

B. Termination Benefits

[18] Both parties argue the trial court erred in its allocation of the husband's "termination benefits." We agree with the husband and reverse the trial court.

When the husband ceases to be employed by State Farm, he will be entitled to "termination benefits" payable every month for sixty months. The amount of these benefits is to be based on the husband's earnings during the year prior to termination. The husband argues because the benefits are based *only* on his earnings during the year prior to his termination, a time well beyond the date of valuation, the benefits cannot ***152** be considered marital assets. He likens the termination ****811** benefits to severance pay. *See Fisher v. Fisher,* 319 S.C. 500, 462 S.E.2d 303 (Ct.App.1995) (severance pay, unlike retirement benefits, is not marital property).

This precise issue was considered by the Arkansas Supreme Court in *Lawyer v. Lawyer,* 288 Ark. 128, 702 S.W.2d 790 (1986). In that case, as here, the husband's employment contract with State Farm provided that upon termination by either party, he would receive 60 monthly installments based upon a specified percentage of his earnings during his final year of employment. 702 S.W.2d at 791. In rejecting the wife's claim to an interest in the termination pay, the court stated:

The five-year termination benefits, described earlier, begin at termination if the agent has been employed for two years or more.... We are unable to agree with the chancellor's ruling that the five-year termination payments are vested marital property in this case. We are not concerned with State Farm's true retirement plan, only with the 60-month

stopgap that is evidently *intended to compensate the agent for lost renewal commissions* when the contract is terminated by the employer or by the agent himself. Lawyer was born in 1946 and will not reach 65 until the year 2011, twenty-five years in the future. When the suit was filed he had been with State Farm for 10 years.... There is no indication that he is likely to terminate his association with State Farm. It would be next to impossible to put a present value on the possibility that Lawyer will receive termination payments before he reaches retirement age. Certainly no such estimate is in the record as abstracted. (Emphasis added).

Id. at 792.

[19] In the case of *Mears v. Mears,* 305 S.C. 150, 406 S.E.2d 376 (Ct.App.1991), we adopted the reasoning of *Lawyer* for the proposition that "we agree with those jurisdictions that hold the proper classification of payments related to termination of employment depends on the purpose of the payments." *Id.* at 156, 406 S.E.2d at 380. We further agree with the Arkansas Court that the purpose of the payments***153** at issue is to replace renewal commissions the husband will necessarily earn after the date of commencement of this action. We therefore reverse the trial court's inclusion of these payments in the marital estate.

As a result of the above adjustments, the marital estate should have been valued at $321,140.60 instead of $366,141. In like manner, the wife's one-half share should have been $160,570.30 instead of $173,070.50 as found by the trial court. The items awarded the wife include the equity in the marital home of $35,338.60, the household goods and furnishings valued at $8,240, the wife's jewelry valued at $2,000 and an automobile valued at $20,000. The total value of these items should have been found to be $65,578.60 instead of the $123,579.00 found by the trial court. We accordingly modify the court's order to require the husband to pay to the wife the sum of $94,991.00 instead of $49,491.50 to effectuate an equal division of the marital estate.

V. Attorney Fees

Both the husband and the wife appeal the trial court's order requiring the husband to contribute $16,500 towards the wife's attorneys' fees.

[20] [21] [22] [23] In *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991) the Supreme Court outlined the factors to consider when determining the reasonableness of attorney fees. They are: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. The trial court found this case had "nothing remarkable or unusual about it." We disagree with that finding only to the extent the case litigated the novel issue of the treatment of the husband's termination benefits. We note, however, the husband, not the wife, ultimately prevailed on the issue. In awarding attorney fees, the trial court disallowed the wife's costs, expenses and attorney fees associated with the motion to recuse amounting to $2,625, finding the motion "unsuccessful and frivolous." The court disallowed another $1,056 in attorney fees and costs incurred "on witnesses whose testimony was not used." Finally, the court considered the fact the wife employed two attorneys as being an ***812** unnecessary expense and ***154** disallowed a request for $2,685. This court will not criticize a party for hiring more than one attorney, provided their work is not duplicated and the complexity of the case demands it. Except for the

personalities involved here, we are not convinced the case otherwise demands the attention of two attorneys. The estate was not large, and due to the long marriage and the parties' contributions, an equal division of the marital estate was almost evident. In light of the beneficial results obtained by the wife on appeal, and our finding there was merit to the wife's recusal motion, we modify the attorney fee award to replace fees and costs associated with the recusal and order the husband to reimburse the wife $24,000 in attorneys' fees and costs, which includes all attorney fees and costs the wife may be entitled to in this appeal. In establishing the award, we note the wife is realizing $94,991 in equitable distribution and, further, the husband was ordered to pay $7,200 in expert witness fees.

VI. Conclusion

In conclusion, we modify the trial court's order to award the wife $6,300 monthly permanent periodic alimony; order the husband to maintain health insurance for the parties' minor son; and award the wife a cash award of $94,991 to equalize her share of the marital estate. We also order the husband to pay $24,000 towards the wife's attorneys' fees and costs. We reverse the trial court's finding that the termination benefits are marital property. All remaining issues are affirmed.

AFFIRMED IN PART, REVERSED IN PART AND MODIFIED IN PART.

CURETON, GOOLSBY and ANDERSON, JJ., concur.

McElveen v. McElveen, 506 S.E.2d 1 (Ct. App., 1998)

Court of Appeals of South Carolina.
Della C. McELVEEN, Respondent/Appellant,
v.
Leland J. McELVEEN, Appellant/Respondent.
No. 2883.
Heard June 2, 1998.
Decided Sept. 14, 1998.

Action was brought for divorce. The Family Court, Richland County, John M. Rucker, J., entered decree awarding alimony, child support, and attorney fees, and equitably dividing marital property. Husband and wife appealed. The Court of Appeals, Hearn, J., held that: (1) for purposes of equitable distribution of marital property, the most probative evidence of the value of husband's interest in his medical practice was stock purchase agreement; (2) record did not support valuing medical practice at amount previously stipulated to by parties; (3) finding that husband did not present sufficient circumstantial evidence to prove that wife committed adultery was supported by evidence and, thus, wife was not barred from receiving alimony; (4) award of $11,000 per month in alimony was excessive; (5) award of $1,750 in child support was not excessive; (6) no compelling reason justified requiring husband to secure support obligations; and (7) cash award to wife in order to bring into balance the equitable division of marital property was appropriate.
Affirmed in part and reversed in part.
***3 *588** J. Mark Taylor, of Kirkland, Wilson, Moore, Allen, Taylor & O'Day, West Columbia, for appellant/respondent.

C. Dixon Lee, III, and James T. McLaren, of McLaren & Lee, Columbia, for respondent/appellant.

HEARN, Judge:

This is a cross-appeal from a divorce decree which, *inter alia,* awarded Della C. McElveen (Wife) alimony, child support, and attorney fees, and equitably divided the parties' marital property. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The parties were married in July, 1979. It was Wife's first marriage and the second marriage for Leland Joseph McElveen (Husband). They have one child, a son, who was ten years old at the time of trial.

Husband earned a medical degree shortly before the parties married and has practiced medical oncology and hematology since July, 1984. Husband now owns a 1/13 interest in South Carolina Oncology Associates, P.A., a professional corporation which operates a large scale medical practice providing care for cancer patients. His gross income is $41,666.67 per month or $500,000 annually. At the time of the divorce, he was forty-five years old.

When the parties met, Wife was a registered nurse employed at a hospital. After the marriage, she continued to work as a registered nurse, on at least a part-time basis, until the birth of the parties' child. She testified she and Husband earned substantially the same income throughout the first five years of the marriage while Husband completed his residency, ***589*** internship, and a fellowship in oncology and hematology. However, she has not been employed since the parties' child was born, and her nursing credentials are not current. She was forty-one years old at the time of the divorce and suffers from fybromyalgia, a degenerative condition which causes her to experience recurrent headaches, fatigue, and muscle pain.

Husband left the marital home on January 21, 1994. Wife instituted this litigation in November of 1994, seeking, *inter alia,* a divorce on the ground of adultery, *pendente lite* and permanent spousal and child support, equitable division of marital property, and attorney fees and costs. Husband answered and counterclaimed, admitting he had committed adultery with Bonnie Everett after***4*** the parties separated. By amended answer and counterclaim, Husband alleged Wife had committed adultery with Bonnie Everett's husband, Stephen Everett.

The family court issued a temporary order dated February 1, 1995, requiring Husband to pay Wife $8,850 per month in temporary spousal support and $2,500 per month in temporary child support. The court further ordered Husband to pay Wife a $20,000 advance on her equitable distribution award to be used for litigation fees and costs.

The trial of this case was held on June 5 through June 9, 1995. During trial, the parties stipulated the fair market value of Husband's interest in his medical practice was $250,000, specifically noting the stipulation was reached "independent of the experts' testimony and/or opinions, which are in substantial conflict."

By final decree of divorce dated October 6, 1995, the family court granted Wife a divorce on the ground of adultery. The court determined the marital property, including the parties' home and Husband's interest in his medical practice, should be divided on a substantially equal basis. In valuing the marital estate, the court utilized the stipulated value of Husband's interest in his practice and awarded that interest to Husband. The court awarded Wife, among other things, the marital home and $50,000 to complete

renovations to the home. Further, the court ordered Husband to pay Wife $11,000 per month in alimony, $1,750 per month in child support, and $65,000 in additional attorney fees and costs. ***590** The court also ordered Husband to secure his alimony and child support obligations by maintaining existing life insurance policies, designating Wife as sole beneficiary of seventy-five percent of the death benefits, and designating Wife as sole beneficiary of twenty-five percent of the death benefits in her capacity as trustee for the parties' child. Husband's motion to reconsider, alter or amend was, in relevant part, denied.

Subsequent to the trial but prior to entry of the October 6, 1995, final divorce decree, Wife moved to set aside the trial stipulation as to the value of Husband's interest in his medical practice, to re-open evidence, and for sanctions. In support of this motion, Wife argued she had learned of previously undisclosed negotiations to sell the medical practice. By order dated December 15, 1995, the family court granted Wife leave to undertake discovery relative to the post-trial motion and reserved the medical practice valuation and stipulation issues pending completion of the authorized discovery. Husband's motion for relief from this order was denied. Following completion of discovery, by order dated August 13, 1996, the family court found that negotiations to sell Husband's medical practice did indeed begin prior to the time of the stipulation, and that they were relevant and should have been disclosed during the original discovery process. On this basis, the court set aside the parties' stipulation and re-opened the case for the limited purpose of taking evidence on the fair market value of the practice and redividing the parties' marital property.

The hearing to redetermine the value of Husband's interest in his medical practice was held on October 11 and 18, 1996. During this hearing, Wife presented evidence establishing that negotiations to sell Husband's practice to a third party began in or about April of 1995, and ultimately resulted in a "Letter of Intent," dated October 2, 1995, signed and agreed to by all of the shareholder-physicians and the prospective purchaser, to sell the practice for a total of $23,635,000. The members of the practice subsequently withdrew from the Letter of Intent. Husband maintained at the post-trial hearing that the value of his interest in the medical practice was $183,000, as evidenced by a 1987 stock purchase agreement among the shareholder-physicians.

***591** By order dated November 20, 1996, the family court determined that although negotiations to sell the medical practice had transpired, the 1987 stock purchase agreement among the shareholder-physicians was controlling as to the value of Husband's interest in the practice. However, the court determined "the value stipulated to by the parties during trial is the correct value to be used in the division of marital property, and I therefore find that the interest of [Husband] has a value of $250,000." Pursuant to the same ***5** order, the court awarded Wife $12,000 in attorney fees and costs incurred as a result of Husband's failure to disclose the negotiations for the purchase of the practice during initial discovery.

STANDARD OF REVIEW

[1] In appeals from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Owens v. Owens,* 320 S.C. 543, 466 S.E.2d 373 (Ct.App.1996). This broad scope of review does not, however, require this court to disregard the findings of the family court. *Stevenson v. Stevenson,* 276 S.C. 475, 279 S.E.2d 616 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to

evaluate their credibility and assign comparative weight to their testimony. *Cherry v. Thomasson,* 276 S.C. 524, 280 S.E.2d 541 (1981).

DISCUSSION

I. Valuation of Husband's Medical Practice

[2] Both Husband and Wife appeal the family court's ultimate valuation of the husband's interest in his medical practice. Wife asserts the court erred in failing to find that the Letter of Intent, rather than the 1987 stock purchase agreement, was controlling as to the value of Husband's interest. Husband, on the other hand, contends the court erred in valuing his interest in an amount exceeding the $183,000 stock purchase price established by the 1987 agreement.

Until 1994, Husband practiced medicine as part of a nine-physician group known as Columbia Oncology Associates, ***592** P.A., and a related entity known as IntraCare of Columbia, Inc. This practice was governed by a 1987 stock purchase agreement which restricted the transfer of shares in the practice and contained a method for computing the sale price. On December 31, 1994, during the pendency of this action, a tenth doctor, Dr. Truesdale, was added as an additional shareholder-physician of the practice, purchasing her interest for $183,000. On January 1, 1995, the ten shareholder-physicians of Husband's practice merged with the three shareholder-physicians of Consultants In Oncology, to form the thirteen-member South Carolina Oncology Associates, P.A. Also on January 1, 1995, after the commencement of trial in this action, the shareholder-physicians entered into another stock purchase agreement.

At the October 1996 hearing, Wife's expert, Raymond E. McKay, Jr., testified the value of Husband's interest in the practice was equal to an adjusted 1/13th of the total sum offered to the shareholder-physicians by American Oncologist Resources, Inc. (AOR) pursuant to the October 1995 Letter of Intent. Considering the $23,635,000 offer, and adjusting the amount for applicable loss of benefits and salaries, Wife's expert opined the total value of the offer to the shareholder-physicians was $19,800,652 with a present value of $17,500,592. By dividing the $19,800,652 figure by thirteen, the expert concluded the per-physician value of the practice was $1,526,127 with a present value of $1,346,199. Further, the expert testified that the $1,346,199 figure represents the net economic benefit to each doctor excluding the future earnings component of the offer. However, Wife's expert admitted on cross-examination that a tangible assets approach resulted in a $183,000 valuation for Husband's individual interest in the practice.

Dr. Robert Smith, a member of Husband's practice, testified the October, 1995 Letter of Intent was nonbinding because the members of the practice could choose to reject or accept the offer within a thirty-day period. Dr. Smith further testified the offer from AOR included cash, stocks, and unsecured notes. The offer also required the shareholder-physicians to agree to practice with AOR as their managing agent for a minimum of five years, pay AOR seven percent of collections per year plus $286,898 per month in management fees, and repay AOR for "up front" money, stocks, and notes during the ***593** first five years of the contract. To pay AOR the amounts due under the agreement, the physicians would realize a twenty percent reduction in salary. Moreover, the offer included a noncompetition clause which would affect any shareholder-physician leaving the ***6** practice during the first five years. In addition, Dr. Smith stated that as to individual interests in the practice, the 1987 stock purchase agreement was in full force and effect through the end of 1994. According to Dr. Smith, the formulation set forth in the stock purchase agreement was representative of the fair market value of the practice

and was utilized on December 31, 1994, when Dr. Truesdale bought into the practice for $183,000.

Husband's experts, Dr. Oliver Wood, Jr., Woodrow W. Nunnery, and Richard Cox, CPA, testified that if Husband had sold his individual interest in his practice in November, 1994, the time of filing, he would have been subject to the terms and conditions of the 1987 stock purchase agreement and would have realized the amount the agreement specified. Moreover, Dr. Wood opined the stock purchase agreement "did not appear to be a device to transfer stock at below fair market value"; rather, the stock purchase agreement was entered into by unrelated parties with no contemplation of divorce and was reflective of the parties' view of the value of the practice. According to Dr. Wood, the agreement was executed for a bona fide business purpose, and the methodology set forth therein was reconfirmed "by an arms-length transaction with Dr. Truesdale."

We do not believe Husband's interest in his medical practice should be valued in accordance with AOR's offer to purchase. Initially, we note the Letter of Intent was not binding, and the offer was not accepted. Secondly, the AOR offer was for the entire practice; there is no evidence indicating Husband unilaterally could have sold his individual interest in the practice for more than the amount allowable under the stock purchase agreement. In fact, experts for Husband and Wife agreed that AOR would have no interest in purchasing Husband's individual interest in the medical practice. Moreover, the AOR offer includes a covenant not to compete, compensation for which is nonmarital in nature. *Ellerbe v. Ellerbe,* 323 S.C. 283, 473 S.E.2d 881 (Ct.App.1996). In short, the unaccepted ***594** AOR offer is of little probative value under the facts of this case.

We find the most probative evidence of the value of Husband's interest in the medical practice is the 1987 stock purchase agreement. Marital property is to be valued as of the date the marital litigation is filed or commenced. *See* S.C.Code Ann. § 20-7-473 (Supp.1997); *Jamar v. Jamar,* 308 S.C. 265, 417 S.E.2d 615 (Ct.App.1992). Here, Husband was bound by the terms of the 1987 stock purchase agreement at the time this litigation was commenced in November of 1994. Moreover, under its terms, Husband would have realized approximately $183,000 in economic benefit had he elected or been forced to sell his individual interest in the medical practice in November of 1994. This fact is bolstered by Dr. Truesdale's December, 1994 buy-in at $183,000. We do not intend by our holding to suggest that a stock purchase agreement, where applicable, will always provide the best evidence of fair market value. Our holding as to the determinative nature of the stock purchase agreement in this case should be viewed as limited to the facts presently before us.

[3] Finally, we note the record does not support the family court's finding that Husband's interest should be valued at $250,000. Our review of the record reveals no expert testimony from either party establishing the value of Husband's interest at $250,000 after the court set aside the parties' stipulation to that effect. The trial judge found the 1987 stock purchase agreement controlling on the issue of valuation of Husband's interest, but inexplicably determined the prior stipulated value was correct. This ruling was without evidentiary support. Once the trial judge set aside the stipulation, it was error for him to return to the value proposed in the stipulation without some evidence to support that figure. Accordingly, we reverse and hold the value of Husband's interest in the medical practice is, for purposes of equitable distribution, $183,000.

II. Alimony

A. Wife's Adultery

[4] Over one year after Husband left the marital home, but within weeks after the trial court issued a temporary ***595*** order setting Husband's***7*** *pendente lite* alimony obligation at $8,850 per month, Husband amended his answer to allege Wife had committed adultery with Stephen Everett, the spouse of Husband's paramour Bonnie Everett. Husband argues the court erred in failing to find that Wife committed adultery and is therefore barred from receiving alimony. We disagree.

Under S.C.Code Ann. § 20-3-130(A) (Supp.1997), no alimony may be awarded a spouse who commits adultery before the earlier of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.

[5] [6] To obtain a divorce based upon adultery, the evidence must be "clear and positive." *Nemeth v. Nemeth,* 325 S.C. 480, 484, 481 S.E.2d 181, 183 (Ct.App.1997). The infidelity must be established by a clear preponderance of the evidence. *Id.* The proof must be "sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed." *Id.* Because adultery is an activity that usually takes place in private, proof of adultery may be circumstantial. *McLaurin v. McLaurin,* 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct.App.1987). Circumstantial evidence showing opportunity and inclination to commit adultery is sufficient to establish a *prima facie* case. *Panhorst v. Panhorst,* 301 S.C. 100, 102, 390 S.E.2d 376, 377 (Ct.App.1990).

Whether Wife committed adultery with Stephen Everett is a close question. The evidence presented on this issue was entirely circumstantial; however, it established that Wife and Mr. Everett developed a close personal relationship. While Husband claims the circumstances connected with their relationship suggests sexual intimacy, Wife contends that she and Everett were simply two spurned spouses commiserating with one another.

Wife began communicating by phone with Mr. Everett in the summer of 1994 and continued to do so up until the time of trial. More than 600 calls were made between the two from August 1994 through April 14, 1995. The phone calls occurred ***596*** almost daily, and many of the conversations were lengthy. [FN1] Many of the calls occurred between 11:00 p.m. and 2:00 a.m., and many also occurred early in the morning when Wife and Mr. Everett called one another to make sure the other had risen.

FN1. Eighty-two calls lasted more than one hour, and 17 calls lasted more than two hours. On October 24, 1994, Wife called Mr. Everett at his work phone at 12:26 a.m. and the call lasted until 5:07 a.m., more than four hours. On Christmas Day, 1994, Wife and Mr. Everett spoke five times on the phone together for a total of 127 minutes. On New Year's Day, 1995, nine calls were made between the two for a total of 131 minutes. On January 10, 1995, twenty different phone calls were made beginning at 12:17 a.m. until 11:20 p.m., for a total of 171 minutes.

Wife spent three weekends out of town in 1995: January 7 (Fripp Island), January 20 (Fripp Island), and February 17 (Harbor Island). Despite the fact that there were 172 phone calls between Wife and Mr. Everett during the month of January and eighty-two calls during the month of February, no telephone conversations between the two took place during these three weekends once Wife arrived at the resorts. On both occasions when registering as a guest at Fripp Island, Wife used her father's credit card and her maiden name. The registrations list two adults. When Husband made allegations of

adultery against Wife, she drove back to Fripp Island, demanding that its employees delete her files and any record of her stay. Wife also called back on a later date to inquire whether the files had been deleted. Although the files were not deleted, they were altered so that an alias, rather than Wife's name, appeared on the records. Wife denied that anyone accompanied her to Fripp Island and testified she went alone to work on her "client novel." She explained she used her father's credit card because her own credit cards were at their maximum credit limit.

Prior to driving to Harbor Island, Wife drove evasively in a rented car to "lose" the private investigator following her. Wife had several telephone conversations with Mr. Everett en route. Wife testified she knew she ***8** was under surveillance and purposefully ran Husband's detective around because she was angry and wanted to cost Husband money.

Husband admitted into evidence the overnight registry maintained by the guard gate at Harbor Island. *See* exhibit 1, ***597** *infra.* Husband's handwriting expert, Marvin Dawson, testified that the entry immediately following Wife's had been altered from its original state. The registry shows an entry for McElveen, arriving on February 17, 1995. The next entry shows a "LEverHart, Jake" arriving eighteen minutes after Wife and staying in an adjacent unit.

Dawson testified that the license plate, which was designated a Georgia plate on the registry, had been changed from QG26411, Everett's plate number, to QG28476. Georgia Highway Department records showed no record of a license number QG28476. Dawson further testified that the name "Everett" was originally written in the guest registry, but was changed to LEverHart by a person with different handwriting than the original author. The first name Jake was also added later, again in a different hand.

Wife was registered to unit 5B, and LEverHart was registered to unit 6B. However Dawson testified the "6" had been altered by someone writing over the original number. Finally, Dawson testified both parties were originally recorded as leaving at the exact same time: 1304 on 2/19. LEverHart's entry, however, had been altered to "1809 2/18."

Wife presented no expert testimony to refute Dawson's testimony. Moreover, our own review of the document convinces us that it was indeed altered as Dawson testified.

Dawson also testified that when he went to Harbor Island to examine the document, he was told by the guard responsible for bringing it to him that it had blown out her car window, over a bridge railing, and into the marsh. However, when Dawson accompanied the guard to the bridge, he was able to recover the document moments before the tide engulfed it. The near loss of this critical piece of evidence raises additional questions about the Harbor Island incident.

Both Wife and Mr. Everett denied having been together on any of the three weekends in question. In fact, the two asserted that they had met in person on only one occasion when Wife delivered a carrot cake to Mr. Everett's place of employment in Georgia on February 14, 1995. Wife and Mr. Everett testified she gave the cake to him in a parking lot at his office as a gesture of gratitude for his assistance in helping ***598** her prove Husband had committed adultery. Also, Wife has given Mr. Everett's children gifts of a doll and video tapes.

We find that the Harbor Island guest registry, along with the absence of phone calls between Wife and Everett on those three weekends, and Wife's attempts to delete any record of her trips to Fripp Island, are all circumstantial evidence of opportunity. However, there is no evidence linking Wife to the alteration of the registry. As the trial

court pointed out, several other individuals had access to these records, including Husband. In addition, Everett's testimony that he was not present with Wife on these three weekends was corroborated by other witnesses who the trial court specifically found to be credible and convincing.

We find the numerous phone calls, the delivery of a cake to Mr. Everett in Georgia on Valentines' Day, and Wife's efforts to evade detection and cover up her trips to Fripp Island are circumstantial evidence of inclination. However, even if this court found, taking its own view of the evidence, that Everett was present with Wife on the weekends in question, there is virtually no evidence of a romantic or sexual relationship between the two. The trial judge commented in his final order on the lack of evidence to support a showing of inclination, noting there were no love letters, romantic cards, no hand-holding, hugging, kissing, or any other romantic demonstrations or actions between the two. The trial court found this lack of evidence compelling, especially in light of the fact that Husband spent thousands of dollars on private detectives in an attempt to uncover such evidence.

[7] [8] Husband bore the burden at trial, as he does on appeal, of convincing the court ***9** that Wife committed adultery.[FN2] While adultery may be proven by circumstantial evidence, such evidence must be "so convincing as to exclude any other reasonable hypothesis but that of guilt." ***599** *Fulton v. Fulton,* 293 S.C. 146, 147, 359 S.E.2d 88, 88 (Ct.App.1987). Furthermore, a divorce on the ground of adultery should be denied "if after due consideration of all the evidence proof of guilt is inconclusive." *McLaurin v. McLaurin,* 294 S.C. 132, 134, 363 S.E.2d 110, 111 (1987) (quoting *Odom v. Odom,* 248 S.C. 144, 146, 149 S.E.2d 353, 354 (1966)).

FN2. At the post-trial motion hearing, Husband introduced other evidence which tends to prove that Wife and Mr. Everett enjoy more than a platonic friendship, such as the fact that Wife has been attending Mr. Everett's church, spending weekends at his home, and is relocating to an area near there. However, all of this alleged conduct occurred post-divorce and is therefore not relevant to a determination of whether Wife committed adultery during the marriage. Thus, the trial judge properly refused to consider this evidence.

While we reiterate that this is an extremely close case, we feel the circumstantial evidence presented at trial falls short of the required "clear preponderance" of the evidence. Moreover, the able trial judge, who heard several days of testimony and observed first-hand the demeanor of the many witnesses in this case, was in a better position than this court to determine the credibility of those witnesses. *Cherry v. Thomasson,* 276 S.C. 524, 280 S.E.2d 541 (1981). We therefore defer to the trial court's decision that Husband did not present sufficient circumstantial evidence to prove Wife committed adultery.

B. Amount

[9] The trial court awarded Wife $11,000 per month, or $132,000 per year, in alimony. Husband argues this amount is excessive and would serve as a disincentive for Wife to work or to remarry. We agree.

[10] [11] Alimony is a substitute for the support that is normally incident to the marital relationship. *Doe v. Doe,* 324 S.C. 492, 504, 478 S.E.2d 854, 860

(Ct.App.1996). Ordinarily, the purpose of alimony is to place the supported spouse, as nearly as is practical, in the position of support he or she enjoyed during the marriage. *Id.* Alimony should not, however, serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support. *Brandi v. Brandi,* 302 S.C. 353, 358, 396 S.E.2d 124, 127 (Ct.App.1990); *Josey v. Josey,* 291 S.C. 26, 33, 351 S.E.2d 891, 896 (Ct.App.1986).

This court has previously increased an alimony award from $4,500 to $6,300. *Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). In *Mallett* the wife had been employed only for the first four years of the parties' seventeen-year marriage, and the husband's gross income was $441,191. *Id.* at 148, 473 S.E.2d at 809. Based on the affluent lifestyle to ***600** which the wife had become accustomed during the marriage, the husband's substantial income and the benefit to the parties' teenage son if the wife were in the home full-time, this court increased the alimony award to an amount commensurate with the figures listed as monthly expenses on the wife's financial declaration. *Id.* at 148-49, 473 S.E.2d at 809. *Mallett* 's award of $6,300 represents the highest award of periodic alimony in a reported appellate decision in South Carolina. The trial judge's award of $11,000 per month in alimony in this case eclipses the amount awarded in *Mallett* by $4,700 per month. We believe this amount is excessive.

Wife's living expenses, as stated in her financial declaration, are unnecessarily inflated.[FN3] Wife testified she is unsure of her ability to work full-time as a nurse due to her fybromyalgia. However, there is no medical evidence in the record which establishes that Wife's fibromyalgia precludes her from all employment. In fact, Wife testified that although Husband had been urging her for several years to return to work, she did not feel she could do so until their child was older and until the house was "renovated and ***10** organized." Thus, even Wife did not base her present inability to work solely on her medical condition. We recognize that Husband's income is substantial and that his adultery brought about the dissolution of this marriage. Nevertheless, these facts do not alter our view that $11,000 per month constitutes an excessive award. It is inconceivable to this court that such an award would not deter Wife from ever seeking to improve her financial circumstances. After careful review of Wife's financial declaration and monthly expenses, we hereby reduce Husband's monthly alimony obligation from $11,000 per month to $7,500 per month, effective immediately.

FN3. For example, Wife reports spending $1,105 per month for food and household supplies, $300 per month for laundry and cleaning, $900 per month for clothes, $960 per month for entertainment, $250 for child care, and $164 per month for pet expenses.

III. Attorney Fees and Costs

[12] Husband next argues the family court erred in awarding Wife attorney fees and costs. Specifically, Husband objects to the initial award of $85,000 ($20,000 in the *pendente lite* order and $65,000 in the final order) in fees and costs and ***601** the $12,000 awarded following the post-trial proceeding. The $85,000 in fees and costs awarded to Wife included, *inter alia,* approximately $46,000 in attorney fees, approximately $11,000 in paralegal fees, $24,256.32 in CPA fees,[FN4] and $10,767.22 to another attorney for constitutional research. We agree that the $85,000 award should be reduced by $10,767.22, the sum due for researching the constitutionality of South Carolina's bar of alimony based on adultery, and reverse the $12,000 awarded Wife from the post-trial proceeding.

FN4. Husband argues that the trial judge erred in approving fees to Raymond E. McKay, CPA, of $24,256.32 as costs included in the $85,000 award. We agree with Husband that

these fees appear to be unduly high; nevertheless, the record does not include Mr. McKay's testimony during the case in chief nor does it contain an affidavit by Mr. McKay setting forth the number of hours he devoted to this case and his hourly rate. The trial judge specifically approved Mr. McKay's time and charges as "reasonable and appropriate." Since Husband is challenging the award to Mr. McKay, he bears the burden on appeal of producing a record sufficient to illustrate the alleged error. *Doe v. Greenville Hosp. Sys.,* 323 S.C. 33, 448 S.E.2d 564 (Ct.App.1994).

[13] [14] Ordinarily, the award of attorney fees lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Cudd v. Arline,* 277 S.C. 236, 285 S.E.2d 881 (1981). The factors to be considered in awarding reasonable attorney fees and costs include: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Glasscock v. Glasscock,* 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The trial judge expressly considered each of the *Glasscock* factors in assessing fees in the final order, and we find no abuse of discretion in his award except for the fees incurred by Wife's constitutional lawyer. While we do not question the reasonableness of the fee to the constitutional lawyer, nor Wife's tactical decision to research this issue, we do not believe Husband should be required to pay for it. Wife did not raise the issue of the constitutionality of the bar to alimony at trial. Even if the trial judge had found her adultery barred her from receiving alimony, it would have been too late for Wife to raise the constitutional argument in a ***602** Rule 59(e) motion. *Patterson v. Reid,* 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995) (a party may not raise an issue for the first time in a Rule 59(e) motion which could have been raised at trial). Because this issue was never raised at trial it seems particularly inequitable to require Husband to pay the $10,767 .22 in fees. Wife was certainly free to explore any legal theory which might assist her in proving her case; nevertheless, where that theory did not provide any benefit to Wife and was not even raised at trial, Husband should not be responsible for the fees incurred thereby.

[15] Similarly, Husband should not be required to pay the $12,000 in fees and costs which Wife incurred in the post-trial proceedings. Wife did not gain beneficial results on this issue at trial because the trial judge returned to the stipulated value of $250,000. On appeal, we have determined that once the stipulation was set aside at Wife's request, it was error for the trial judge to reinstate the stipulated amount ***11** without evidentiary support in the record. Wife's post-trial motion thus resulted in the devaluation of Husband's medical practice by $67,000 from the figure to which the parties had previously stipulated. Husband incurred his own fees and costs in the post-trial proceedings and gained beneficial results, both at trial and on appeal, on this issue. Accordingly, it was error to require Husband to pay these fees and costs incurred by Wife.

Husband shall pay Wife attorney fees and costs in the total sum of $85,000, less the $10,767.22 for Wife's constitutional lawyer. We also reverse the $12,000 award of fees and costs made in connection with Wife's post-trial motion to reconsider the assigned value of Husband's interest in his medical practice.

IV. Child Support

[16] Husband next contends the family court's award of $1750 per month in child support was excessive when considered independently and in conjunction with the alimony award. We disagree.

[17] [18] [19] Given Husband's $500,000 per year income, the Child Support Guidelines do not cover this case. 27 S.C.Code Ann. Reg. 114-4710(A)(3) (Supp.1997) (The Child Support Guidelines provide for calculated amounts of child support for a combined parental gross income of up to $150,000 per year.) ***603** Husband appears to suggest the family court exceeded the " maximum" amount of support that may be awarded under the guidelines. There is no such "maximum" award. Cases wherein the parents' income exceeds the highest amount contemplated by the Guidelines are to be decided on a case by case basis. *Id.* Moreover, a child is entitled to live and be supported in a lifestyle commensurate with the current income of his parents. *Miller v. Miller,* 299 S.C. 307, 384 S.E.2d 715 (1989) (child support award should be sufficient to provide for the needs of the children and to maintain the children at the standard of living they would have been provided but for the divorce); *see also Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996) (monthly child support award of $2,000 held reasonable considering the father's income and the lifestyle the child had enjoyed and was entitled to enjoy in the future). In determining Husband's child support obligation in this case, the family court considered, *inter alia,* the child's history of attending private school and Husband's testimony indicating he is willing to continue paying the child's private school tuition. The child's tuition is currently $500 per month. In our view, monthly child support of $1,750 is reasonable considering Husband's income and the lifestyle the child has enjoyed and is entitled to enjoy in the future.

V. Security for Child Support and Alimony Obligations

[20] Husband further argues the family court erred in requiring him to secure his alimony and child support obligations with existing life insurance policies. We agree.

[21] Generally, the court may require a supporting spouse to secure his support obligation. S.C.Code Ann. § 20-3-160 (1985). However, there must be a compelling reason to do so. *Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996); *Harlan v. Harlan,* 300 S.C. 537, 389 S.E.2d 165 (Ct.App.1990); *Ivey v. Ivey,* 286 S.C. 315, 334 S.E.2d 123 (Ct.App.1985). The ability of the supporting spouse to pay (whether he or she earns adequate income to meet the obligation) and the spouse's willingness to pay are relevant factors. *See Mallett,* 323 S.C. at 150, 473 S.E.2d at 810; *Harlan,* 300 S.C. at 540, 389 S.E.2d at 167-68; *Ivey,* 286 S.C. at 318, 334 S.E.2d at 125.

[22] Wife does not argue the family court had a compelling reason to order Husband to secure his support obligations. ***604** Rather, she argues the issue is not preserved for appeal because it was neither presented to nor ruled upon by the trial judge. However, Wife's own Complaint requested that Husband be required to provide security for support. The trial judge clearly ruled on that issue in his order, finding that security for Husband's support obligations was "necessary". Husband argued the issue of the security requirement in his post-trial motion. Thus, we find this issue is preserved for appellate review.

***12** We find no "compelling reason" to justify requiring Husband to secure his alimony and child support payments. There is no indication Husband suffers from any major health problems, he has not shunned his support obligations, and he has adequate income to meet those obligations. Accordingly, we reverse that portion of the trial judge's order.

VI. $50,000 Cash Award

[23]  Husband argues the family court erred in awarding Wife $50,000 in cash to complete renovations on the parties' home. Specifically, Husband asserts the court should have valued and divided the home on an "as-is" basis instead of ordering Husband to pay prospective costs of completion. Husband further contends the finding was error because Wife had immediate plans to vacate the home. Husband also complains the $50,000 cash award amounts to a cash payment from his personal income because the court was unable to make an in-kind division. We find no error.

The court determined the marital property should be divided "approximately equally." The court valued the parties' marital home at $247,000, found the parties had $86,657 in equity therein, and awarded the home to Wife. The court went on to allocate specific properties, including assets and liabilities, to each party. Husband was awarded, among other things, his interest in his medical practice. The court's award of $50,000 to Wife, although designated as "cost to complete" in the divorce decree, was expressly made to equalize the equitable distribution award. The court noted, "the Court accepts Defendant-Father's appraisal [of the marital residence] at $247,000.00 and rejects the contention that [the] $50,000.00 cost to complete should be considered as a valuation matter. Rather, the Court finds that the $50,000 cost to ***605** complete should be allocated and considered in the overall division as a cash payment to bring the division into balance, as discussed below."

As to the court's failure to divide a tangible asset in order to equalize the award, we note the parties had very few "tangible" assets to divide. Those that could be divided on an in-kind basis were so divided. Husband does not suggest what asset the family court could have divided in order to equalize the award without requiring a cash payment. Thus, Husband has failed to meet his burden of showing error in this regard. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979) (appellant bears burden of convincing the appellate court that the family court erred.)

Although we affirm the trial judge's decision to equalize the equitable distribution award to Wife, we hereby reduce the award to $16,500 to reflect our previous holding on the valuation of Husband's medical practice. Because we hold Husband's medical practice should be valued at $183,000 rather than the family court judge's value of $250,000, the difference of $67,000 should be allocated between the two parties. Thus, Husband's obligation to Wife is reduced by $33,500.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART AND REVERSED IN PART.

ANDERSON and HOWARD, JJ., concur.

Raymond K. McKENZIE, Respondent,
v.
Elizabeth S. McKENZIE, Appellant.
No. 19073.
July 6, 1970.

Divorce action brought by husband on ground of physical cruelty. The Common Pleas Court of Florence County, J. A. Spruill, Jr., J., granted the divorce and awarded wife $250 per month alimony and specified items of household furnishings and other personal property, and wife appealed. The Supreme Court, Brailsford, J., held that husband who was unjustifiably shot at by wife four times from close range and who was seriously wounded was entitled to divorce on ground of physical cruelty.
Affirmed.
***373 **629** Kennedy & Price, Columbia, for appellant.

Philip H. Arrowsmith, Florence, for respondent.

***374** BRAILSFORD, Justice.

This action for divorce, brought by the husband against the wife in the Court of Common Pleas for Florence County, was tried by reference. The master recommended that the husband be granted a divorce on the ground of physical cruelty, that the wife be denied alimony, that she be denied any interest in the husband's property, and that the husband be awarded custody of a minor daughter. Upon hearing the wife's exceptions to the report, the circuit judge concurred in the master's findings with respect to the granting of a divorce and the custody of the minor child. However, he awarded the wife alimony of $250.00 per month and awarded her specified items of household furnishings and other personal property. So far as the record discloses, the wife did not except to the master's disallowance of her claim to an interest in the real estate to which the husband had title, and no issue as to this property was presented to or passed upon by the circuit judge. The wife has appealed to this court on a number of exceptions which are argued in the brief under four questions.

[1] [2] The wife first challenges the concurrent findings of the referee and circuit judge that her conduct amounted to physical cruelty within the meaning of the divorce statute. It appears that on the occasion relied upon the wife sought her husband out at a Florence social club, where he was seated at the bar with another couple. An argument ensued. As the husband was leaving the club, the wife took a pistol from her handbag and shot at him four times from close range. He was seriously wounded by one pistol ball which entered his chest. The wife seeks to justify this enormous battery on the ground of self-defense, a claim which finds scant support in her own testimony. We agree with the findings below that there was no justification for the shooting. We also agree that this case falls within the rule that a single act of physical cruelty which is 'so severe ***375** and atrocious as to endanger life,' absent justification, will constitute ground for divorce. Brown v. Brown, 215 S.C. 502, 509, 56 S.E.2d 330, 334 (1949).

****630** [3] [4] The wife next charges that the court erred in failing to award to her 'any part of the property acquired by the parties during their twenty-five years of marriage.' Two classes of property are involved, real estate and personal property in the family home. At the time of the final disruption of the marriage, the husband owned the residence, which had been acquired in 1962. He also owned a small tract of land in Florence County and three other residential lots in or near the city. The record is silent as

to how or when these parcels were acquired. In claiming that the court erred in not awarding her an interest in this real estate, the wife's reliance is upon the doctrine that a wife who has made a material contribution toward the acquisition of property by her husband during coverture acquires an equitable interest therein which, according to some authorities, will be recognized on divorce. See 27B C.J.S. Divorce s 293, p. 272 (1959); 24 Am.Jur.2d, Divorce and Separation, Sec. 928, p. 1057 (1966). We need not examine this doctrine because, as has been seen, the point was not raised in the circuit court. It is well settled that an issue which has not been presented to or passed upon by the circuit court will not be considered here.

[5]  The wife next contends that the award made to her of a portion of the furnishings and personal property from the home was wholly inadequate, because, according to the brief, the 'record on appeal overwhelmingly shows the vast majority of the parties' property was purchased by the wife or acquired from her family by inheritance.' This assertion is not supported by the record. We quote from the order appealed from:

'The parties are in almost complete disagreement about the personal property in the home which they formerly occupied. It is, of course, impossible for anyone to make an absolutely***376*** just and equitable disposition of the furniture and furnishings. However, the writer has studied the affidavits and counter-affidavits submitted by the parties and provides herein below what he considers to be a reasonable distribution of this personal property. * * *'

On this point, the record only contains exerpts from the testimony of the parties and an inventory submitted by the wife of the property claimed by her. The affidavits and counter-affidavits offered by the parties and relied upon by the court in arriving at its judgment are omitted. We have no sound basis for concluding that the circuit judge failed to make a just and reasonable distribution of the personal property in question.

[6]  The wife next contends that the award to her of $250.00 per month as alimony is grossly inadequate in the light of the husband's net worth and income and the standard of living to which the parties are accustomed.

The husband is a practicing attorney with a substantial income. The record does not indicate the value of his assets, but reflects liabilities of some $50,000.00. He has no income except from his law practice which apparently netted $22,000.00 in 1968. We have no information as to other years. The referee and the circuit judge found that he is in straitened circumstances. The wife owns a farm from which she derives an annual income of from $800.00 to $1,000.00.

The husband disclaimed any duty to pay alimony because of the wrong done to him by the wife, for which he has been awarded a divorce against her. The referee recommended that she be denied alimony on this ground. The circuit judge rejected this recommendation, stating:

'Here, the husband and wife have lived together for close to 25 years and she has borne him three children. In the writer's opinion, on the break-up of their tragic marriage, she should still be entitled to support. Unquestionably, the plaintiff's financial situation is straitened***631*** but his earnings ***377*** are substantial. To the writer it appears obvious that he will have to adjust his expenditures and it appears fair that such adjustment should not bear only to the detriment of his wife of many years. * * *

'The writer is well aware that any payment ordered will seem to the plaintiff to be oppressive and to the defendant to be inadequate. However, the writer believes it is fair and reasonable to order that the plaintiff pay $250.00 each month for the support of the defendant. Obviously, this will not maintain the defendant in the style to which she has been accustomed as the wife of the plaintiff. However, she is a woman of good ability and personality and she should be able to supplement her income and, by so doing, to increase her happiness and well-being.'

"A wife is never entitled to alimony as a matter of course; it is entirely discretionary with the court to allow her such alimony as, under the circumstances, is reasonable, just, and right, taking into consideration the amount of the husband's property, the extent to which she contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past.' * * *' Murdock v. Murdock, 243 S.C. 218, 224-225, 133 S.E.2d 323, 326 (1963).

'The allowance of alimony is a matter within the discretion of the trial judge, to be exercised in the light of the facts of each particular case, and will not be disturbed on appeal unless an abuse of discretion is shown. * * * ' Long v. Long, 247 S.C. 250, 252, 146 S.E.2d 873, 875 (1966).

We are persuaded that in awarding alimony to the wife, and in fixing the amount thereof, the judge, in the judicious exercise of his discretion, carefully considered all relevant factors disclosed by the evidence. We are not persuaded that his conclusion was unwise or unjust. Certainly, no abuse of discretion has been shown.

The evidence indicates that the wife is an accomplished secretary and bookkeeper and raises the expectation that she ***378** is capable of contributing substantially to her own support. Under the circumstances of this case the Court, quite properly, was influenced by this expectation in fixing the amount of the award. If this expectation should not be realized, despite good faith effort by the wife to secure employment, this would be tantamount to a change of condition, which would justify the circuit court in entertaining an application to review the award.

Affirmed.

MOSS, C.J., and LEWIS, BUSSEY and LITTLEJOHN, JJ., concur.

Mixson v. Mixson, 171 S.E.2d 581 (1969)

Supreme Court of South Carolina.
Melita Ann Team MIXSON, Appellant,
v.
Benjamin Eugene MIXSON, Jr., Respondent, (Two Cases).
No. 18994.
Dec. 18, 1969.

Proceeding on divorced wife's petition to have divorced husband adjudged in contempt for nonpayment of alimony and support. The Common Pleas Court of Richland County, John A. Mason, County Judge, entered orders and divorced wife appealed. The Supreme Court, Moss, C.J., held, inter alia, that divorced husband who deliberately withheld alimony and support money because he did not think divorced wife was properly spending such willfully violated court decree.

Reversed and remanded.

***438 **582** Robert J. Thomas, Columbia, for appellant.

Cromer & Louthian, Columbia, for respondent.

***439** MOSS, Chief Justice:

Melita Ann Team Mixson, the appellant herein, and Benjamin Eugene Mixson, Jr., the respondent herein, were married on July 7, 1959. Three children were born of this marriage, two daughters, Myrtle Graves Mixson, age nine, Melita Team Mixson, age seven, and a son, Benjamin Eugene Mixson, III, age four.

The appellant, on December 13, 1966, instituted an action in the Richland County Court for a divorce A vinculo matrimonii from the respondent on the ground of physical cruelty. Section 20-101(3) of the Code. On May 31, 1967, the appellant was granted an absolute divorce from the respondent on the ground of physical cruelty. In said decree, the permanent custody of the minor children was awarded to the appellant with reasonable visitation rights to the respondent. It was also provided that the respondent would pay to the appellant as alimony for her, the sum of $62.50 per week, and the sum of $62.50 per week for the support and maintenance of the children. The respondent was also required to transfer the ownership of certain life insurance policies to the appellant and to pay directly to her the premiums to become due under said policies.

The appellant instituted a proceeding on February 17, 1969, wherein she alleged that the respondent was in arrears in the alimony and support payments, the amount being ***440** $2,821.70, he was required by the divorce decree to pay to her. She prayed that the respondent be adjudged in contempt of court for his violation of the terms of the aforesaid decree and that he be ordered to make immediate payment to the appellant the amount in arrears, together with attorney's fee for prosecuting the action.

A hearing was held before The Honorable John A. Mason, Judge of the Richland County Court, on March 27, 1969, and at that time the appellant filed an amended and supplemental petition covering the period from May 3, 1968 through March 21, 1969, setting forth the arrearage for alimony and support payments, and accrued insurance premiums, the total amount being $3,261.37.

The respondent filed an answer and counterclaim in which he admitted that he was in arrears in his payments but not in the amount claimed by the appellant. He asserts that he is not guilty of willful contempt and alleges that he has been unable to pay the full amount required by the aforesaid decree because of his financial condition. He asks, because of a change in his financial condition, that the support and alimony payments be reduced and he ***583** asserts that it would be for the best interest of the minor children of the marriage that their custody be awarded to him.

On April 10, 1969, the trial judge signed an order stating that he was unable to determine accurately if there was any arrearage, but, nevertheless, he fixed the arrearage at $750.00, this being the amount that the appellant was behind in her house payments. He required the respondent to pay this sum, and if there was an arrearage that such amount would take care of it and bring the respondent up-to-date in his payments. He further found that the respondent's financial condition had changed and ordered a reduction in child support payments from $62.50 per week to $25.00 per week, effective April 25, 1969.

The trial judge also found that it would be in the best interest of the children to grant joint custody to the parties, ***441** provided the respondent provides a proper home for the minor children. It was required that during the times that the minor children of the parties were in school that the appellant should deliver to the home of the respondent the minor child who was not in school by 9:00 A.M. each morning, Mondays through Fridays. The respondent was required to pick up the two older children from school and all of them were to remain at his home until 7:00 o'clock P.M. when the appellant was required to pick them up at that place. During the summer months the appellant was granted uninterrupted custody of the children except for five weeks geginning July 1, at which time the respondent was granted uninterupted custody of the children. On weekends during school months the respondent was granted custody of the children from 1:00 o'clock P.M. Saturday until 9:00 o'clock A.M. on Sunday. At Christmas time custody of the minor children was awarded to the respondent for a period of three days, beginning at 5:00 o'clock P.M. December 25.

The trial judge found that the appellant should be responsible for her own medical bills and for her personal taxes.

The court found that the appellant was entitled to attorney's fees and that the sum of $250.00 was reasonable under the circumstances.

The appellant filed timely notice of appeal from the order of the county judge. The exceptions will be discussed in order. Following the notice of intention to appeal, the appellant presented to this court a petition asking that the custody provisions of the order of April 10, 1969, be superseded and stayed until the appeal in this case could be heard and disposed of on its merits by this court. We granted an order of supersedeas on May 13, 1969.

The first question for determination is whether the respondent was in arrears in the payment of alimony to his wife, support money for the children, and insurance premiums required by the divorce decree for the period from May 3, 1968, through March 21, 1969.

***442** A computation shows that for the period above stated the respondent was due to pay as alimony and support money the sum of $5,875.00, and insurance premiums of $436.37, making a total of $6,311.37. The evidence shows that the respondent made total payments of $3,105.00 and in addition thereto he was entitled to a credit of $139.40 for purchases made by the appellant on his Pure Oil Credit Card, and also the sum of $98.20, representing purchases made by the appellant on a Bank Americard of the respondent, making a total of $3,342.60. Subtracting the amount of payments made and credits due to the respondent from the amounts due under the divorce decree shows that he was in arrears in the amount of $2,968.77.

[1]  The respondent contends that he expended funds and made payments for the benefit of his wife and children and he should be allowed credit for same in reducing his arrearage. He claims a credit of $384.00 which he testified he had paid for hospital insurance for his children. He was not entitled to any credit for this because under the divorce decree this was ***584** an obligation of the respondent over and above the alimony and support payments which he was required to make.

The respondent also claimed a credit of $400.00 which was a part of a total of $1,000.00 paid to the appellant prior to May 3, 1969, as part of a compromise settlement of a dispute over his arrearage at that time. The respondent now admits that he was was not entitled to such credit.

[2] The respondent also claims credit for $400.00 which he said he spent on the children for a trip to the beach and a credit of $500.00 which he estimated he spent on the children at Christmans time. The respondent was not entitled to credit for these two expenditures.

[3] The general rule is that it is the obligation of the divorced husband to pay the specified amounts according to the terms of the decree and he should not be permitted to vary these terms to suit his own convenience. ***443** The amounts spent on the children for a trip to the beach and at Christmas time must be regarded as gifts or gratuities and they cannot be credited on his obligation to pay according to the terms of the decree. Fearon v. Fearon, 207 Va. 927, 154 S.E.2d 165.

In Nelson on Divorce (2d Ed.), section 16.27, it is stated:

'A husband, charged with contempt for nonpayment of alimony or support money, is entitled to credit for such amounts as he may have paid under the decree. The fact that he has made some payments, however, will not purge him of contempt or prevent his commitment therefor as default as to each new installment is a fresh contempt. Nor is he entitled to credit for payments made, enuring to the benefit or welfare of his wife or children, if they are not made pursuant to or for the purposes prescribed by the decree. * * *

Under circumstances short of abandonment of the child by the wife, the husband may be considered merely a volunteer with respect to his expenditures in the child's behalf while in his custody, therefore not entitled to credit for them as against payments due his wife by order of the court. * * *'

[4] The respondent asserts as a defense his inability to comply with the divorce decree because of a change in his financial condition. The appellant made out a prima facie case of contempt by pleading the order for the payment of alimony and child support and default in payment. The burden was upon the respondent to establish his defense and to show his inability to comply with the divorce decree.

The trial judge did not find, with reference to the arrearage, that the respondent was unable because of his financial condition to comply with the order for the payment of alimony and child support. The respondent is not in a position now to argue to the contrary.

***444** [5] Upon the testimony and pleadings of the respondent, we reach the conclusion that the respondent's violation of the court decree was willful. He argues that he 'was well within his rights in withholding this money for the benefit of the children so that it could be made pursuant to and for the purposes prescribed by the decree.' It thus appears that the respondent deliberately withheld the alimony and support money because he didn't think the appellant was properly spending such.

It is our conclusion that the respondent was guilty of contempt of court in willfully violating the terms of the divorce decree of May 31, 1967, by his failure to pay the alimony and support money required by such decree. It follows that the respondent should be committed to jail for his contempt until he purges himself thereof by the

payment of the amount of the arrearage in alimony and support money here found due. We have heretofore found that the arrearage in alimony and support payments was in the amount of $2,968.77. The respondent is ***585** entitled to credit against this amount the sum of $750.00 which was paid pursuant to and under the erroneous order of the county court dated April 10, 1969. This leaves due by the respondent to the appellant the sum of $2,218.77.


[6] The next question is whether the trial judge was in error in reducing the child support payments from $62.50 per week to $25.00 per week.

A quick answer to this question is the admission made by the respondent in his brief that the reduced sum is inadequate for child support. We point out that there is no evidence in the record justifying such a reduction.


[7] The appellant charges the trial judge with error in holding that she should be personally responsible for her own medical bills and personal taxes.

The original divorce decree required the respondent to pay any taxes accruing to the appellant as a result of the ***445** payment of support and alimony and also that he be required to pay all medical and dental bills incurred by the appellant and the children.

We think the trial judge was clearly in error in so holding because no issue was tendered to the court by either party with respect to these requirements of the original divorce decree.


[8] The next question for determination is whether a fee of $250.00 for the appellant's attorney was inadequate in amount. The record shows that the appellant's attorney prepared for her a petition and later an amended and supplemental petition. Her counsel had to appear in the lower court at a hearing where the testiomny was taken. He also prepared exceptions to the order of the lower court and a transcript for hearing in this court. It was necessary for her counsel to appear before this court upon a motion for supersedeas, which was granted. He also prepared a written brief and presented oral argument to this court. The beneficial results accomplished by her appeal is apparent. In view of the services rendered, we think the fee awarded was wholly inadequate. We have held that in fixing a fee there should be taken into consideration the nature, extent and difficulties of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of compensation and the beneficial results accomplished. Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552. The lower court is directed to fix a fee in keeping with what we have said.


[9] The next question for determination is whether the trial judge committed error in changing the child custody provisions of the original divorce decree.

Under the terms of the original divorce decree the custody of the three children of the parties was awarded to the appellant, with reasonable visitation rights to the respondent, including the right to have the children overnight on occasions provided he gave to the appellant reasonable notice of ***446** his intention to visit. Apparently, the provisions of the divorce decree were entirely satisfactory to the respondent until the appellant brought the present contempt proceeding against him for his failure to pay alimony and

support for the children in compliance with the aforesaid decree. For the first time he sought in a counter-claim to the petition for contempt a modification in the custody provisions.

In considering this question it should be remembered that we have held in numerous cases that the welfare of the children, and what is for their best interest, is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. Ford v. Ford, 242 S.C. 344, 130 S.E.2d 916. We have also held that changed circumstances may authorize a change of custody. Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619; Moore v. Moore, 235 S.C. 386, 111 S.E.2d 695. In order to change the custody, however, there must be a showing of changed circumstances***586** accruing subsequent to the entry of the decree and warranting a modification with a view to the personal welfare of the children. Ex Parte: Atkinson, 238 S.C. 521, 121 S.E.2d 4.

The order of the trial judge directs divided or alternating custody of the children between the divorced and separated parents on a daily basis, Monday through Friday of each week, during the school year, and every weekend and during the summer.

[10] The best interest and welfare of the children demand that divided custody should be avoided if possible, and it will not be approved except under exceptional circumstances or for strong and convincing reasons. 27B C.J.S. Divorce s 308d, p. 447. See also the annotation in 92 A.L.R.2d 695. Divided custody is usually harmful to and not conducive to the best interest and welfare of the children.

***447** In Nelson on Divorce (2nd Ed.), section 15.17, it is stated:

'The courts generally endeavor to avoid dividing the custody of a child between contending parties, and are particularly reluctant to award the custody of a child in brief alternating periods between estranged and quarrelsome persons. Under the facts and circumstances of particular cases, it has been held improper to apportion the custody of a child between its parents, or between one of its parents and a third party, for ordinarily it is not conducive to the best interests and welfare of a child for it to be shifted and shuttled back and forth in alternate brief periods between contending parties, particularly during the school term. Furthermore, such an arrangement is likely to cause confusion, interfere with the proper training and discipline of the child, make the child the basis of many quarrels between its custodians, render its life unhappy and discontented, and prevent it from living a normal life.'

The trial judge, without making any findings of fact, directed divided and alternate custody. We have carefully reviewed the entire record in this case and find no exceptional circumstances that would justify the direction made by the trial judge. It follows that the order of the trial judge granting divided and alternate custody should be reversed.

The order of the lower court dated April 10, 1969, which we have heretofore been considering, had to do with the amount owing by the respondent to the appellant up to and including March 24, 1969. Thereafter, another controversy arose between the parties pertaining to alimony and support payments for the period between March 24, 1969, and April 11, 1969. An informal hearing was had and the court concluded that the respondent was indebted to the appellant in the amount of $189.67 for the aforesaid period of time. There was no appeal from this order.

The appellant, by her petition of July 22, 1969, as supplemented by another petition dated August 11, 1969, sets ***448** forth that for the period from April 11, 1969, to

August 9, 1969, that the respondent was in arrears in his payments in the total amount of $1,216.35. The appellant asks that the respondent be adjudged in contempt for the failure to pay the aforesaid sum. When the matter came on for a hearing before the trial judge on August 11, 1969, the respondent objected to the hearing on the ground that there was an appeal from the order of April 10, 1969, and the county court had lost jurisdiction to hear the cause until there had been a final ruling by this court. However, the court directed that the testimony be taken and that he would withhold any ruling until after the evidence was presented. The trial judge, by his order of August 29, 1969, held that he had lost jurisdiction of the cause because the appellant had filed an appeal from his order of April 10, 1969, and dismissed the petition of the appellant. This court, upon petition by the appellant, on September 10, 1969, directed the Richland County Court to proceed to judgment on the issues presented by the petition of July 22, 1969, as supplemented by the petition of August 11, 1969.

***587** Thereafter, on September 17, 1969, the county judge issued his order in which he dismissed the petitions of the appellant and afforded her no relief. It is from this order that the appellant prosecutes this appeal.

The county judge found that under his orders of April 10, 1969, and April 18, 1969, the respondent was required to pay to the appellant $1,489.67, and had paid thereon the sum of $1,467.36. It is our conclusion that this holding was clearly erroneous as to the amount due by the respondent and the amount paid by him, and such finding is reversed.

We have heretofore reversed the county judge in reducing the child support payments from $62.50 per week to $25.00 per week and the original divorce decree of May 31, 1967 is reinstated. A simple mathematical calculation shows the amount due the appellant by the respondent for the period April 11, 1969, to August 9, 1969, to wit:

(a) Seventeen weeks for support and alimony at $125.00 per week,	$2,125.00
(b) Insurance premiums May-July,1969,	119.01
(c) Amount due under order of April 18,1969,	189.67
Total	$2,433.68

The

respondent made the following payments:	
(a) April 25, 1969,	$87.50
May 2, 1969,	87.50
July 8, 1969,	100.00
July 30, 1969,	207.00
August 9, 1969,	175.00
(b) Purchases on Credit Cards,	42.50
Total	$699.50

***449** It thus appears that the respondent, as of August 9, 1969, was in arrears in the payments of alimony, child support and insurance premiums in the amount of $1,734.18. The respondent was in contempt for his failure to comply with the original divorce decree of May 31, 1967.

[11] We should point out that the county judge was clearly in error in allowing a credit to the respondent of $750.00. This was the amount which he had been required to pay as arrarage accumulated prior to the hearing held on March 27, 1969, and it could not be credited against the amount accruing as alimony and child support subsequent to said date.

The appellant alleges error on the part of the trial judge in permitting the respondent to deduct from the alimony and support payments due to the appellant the amount of insurance premiums on any policies which he has issued upon his life for the benefit of his children. The trial judge held that no additional insurance premiums were due the appellant under his order of April 10, 1969, as they were considered in the total amount awarded to her. We point out that in the said order there was no mention of insurance ***450** policies but since we are reversing the order of April 10, 1969, and have reinstated the original divorce decree, this question becomes moot.

[12] It appears from the record that the respondent had certain life insurance policies which the original divorce decree required him to transfer the ownership thereof and pay directly to the appellant the premiums***588** due under said policies and making her liable to keep said policies in effect. It also appears from the record that the

respondent failed to pay to the appellant the sum of money necessary to keep these policies in force and effect, resulting in the cancellation of two of the policies. These policies should be reinstated and, if for any reason such cannot be done, there should be purchased insurance with similar coverage and the respondent required to pay the premiums thereon, in addition to the alimony and child support required under the original divorce decree. It was error to permit the respondent to purchase new policies of insurance and deduct the premiums from the alimony and support money due the appellant.

The order of the county judge modifying the custodial changes of the order of April 10, 1969, was erroneous and the exception posing this question is sustained.

[13]  The respondent alleges that he has been unable to pay the full amount required to be paid under the original divorce decree because of his financial condition. We have carefully reviewed all of the evidence regarding this issue and it is our conclusion that the trial judge was in error in reducing the alimony and support payments on this ground. The testimony does not justify such a reduction.

It is the established law in this State that in an equity case this court may reverse the findings of fact of a judge of a county court when the appellant satisfies this court that such findings are without evidentiary support or are against the clear preponderance of the evidence. ***451** Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552; Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353. We have reviewed the entire record in the light of the foregoing rule and conclude that the findings and conclusions of the county judge were without evidentiary support and clearly against the preponderance of the evidence.

The orders of the lower court dated April 10, 1969, and September 17, 1969, respectively, are reversed and the original divorce decree of May 31, 1967, is reinstated. The lower court is directed to hold the respondent guilty of willful contempt and should commit him to jail unless he purges himself by paying all arrearages along with counsel fees and the cost of all these proceedings. This case is remanded to the lower court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

LEWIS, BUSSEY and LITTLEJOHN, JJ., and LOUIS ROSEN, Acting Associate Justice, concur.

Moseley v. Mosier, 306 S.E. 2d 624 (1983)

Supreme Court of South Carolina.
Deborah C. MOSELEY, Appellant,
v.
John R. MOSIER, Respondent.
No. 21983.
Aug. 30, 1983.

Mother brought contempt action against father for failure to pay child support according to parties' separation agreement. The Common Pleas Court, Kershaw County, Frank E. Rector, Family Court Judge, found father in contempt but deferred sentencing, and modified support agreement, and mother appealed. The Supreme Court, Harwell, J., held that: (1) contempt order was improper, since record revealed father's failure to pay was not willful, and since failure to pay was not in violation of court order; (2) family court

has continuing jurisdiction to do whatever is in best interests of child regardless of what separation agreement specifies; (3) parties' agreement must be approved by family court; and (4) regardless of words of art in divorce decree, once separation has been approved by court, terms become part of decree and will be binding on parties and court, and modifiable by court and enforceable by contempt, unless agreement unambiguously denies court jurisdiction.
Reversed and remanded.
Lewis, C.J., dissented and filed opinion.
***625 *350** Jan L. Warner and C. Dixon Lee, III, Sumter, for appellant.

J. Kennedy DuBose, Jr., of Holland & DuBose, Camden, and Henry Hammer, of Hammer & Bernstein, Columbia, for respondent.

HARWELL, Justice:
Appellant alleges the family court erred in deferring respondent's sentence for contempt of court. Respondent replies that the family court did not have jurisdiction to hold him in contempt. We reverse the case and remand for a new trial.

Appellant petitioned the family court to hold respondent in contempt for failing to pay the full amount of child support as provided in the parties' separation agreement. The agreement, which provided $150 a week child support, was incorporated but not merged into the divorce decree. The family court found respondent in contempt but deferred sentencing. Because of a change in circumstances, it ordered him to pay $500 of the $2000 child support arrearages, attorney's fees of $200, and $75 a week future child support. It did not forgive any past ***351** or future remaining support ***626** payments but ordered that all arrearages would accrue and accumulate. Appellant alleges the court erred by altering the previous support obligation of the separation agreement. She argues that the obligation arises out of contract and cannot be judicially altered. On the other hand, respondent contends that if the separation agreement governs his support obligation, the family court was without jurisdiction to hold him in contempt. He alleges appellant's remedies are found in contract law.

[1] [2] [3] Initially, we address the child support jurisdiction issue. Family courts may always modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability. *Smith v. Smith,* 275 S.C. 494, 272 S.E.2d 797 (1980). Today we clarify the issue by stating that family courts have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies. Therefore, on remand the family court has jurisdiction to determine what is the best interests of the child.

[4] [5] [6] [7] Next, we address the contempt issue. We agree with respondent that the family court erred in finding him in contempt for failure to comply fully with the separation agreement. Contempt results from the willful disobedience of a court's order. The family court order fails to state facts showing that respondent *willfully* failed to pay child support. Before a court finds a person in contempt, the record must clearly and specifically reflect the contemptuous conduct. *Curlee v. Howle,* 277 S.C. 377, 287 S.E.2d 915 (1982). Contempt occurs when a parent ordered to pay child support voluntarily fails to pay. When the parent is *unable* to make the required payments, he is not in contempt. The record in this case reveals that respondent faithfully paid each week as much child support as he could afford.

[8] [9] [10] Furthermore, the second element of contempt, a court order, is absent in this case. Respondent's child support obligation arises out of a separation agreement, not a court order. Even if respondent willfully failed to pay, the court could not hold him in contempt. On remand, appellant's cause of action will be for breach of contract. If the court determines respondent is able to comply, it may order him to specifically perform the terms of the agreement. If he does ***352** not, the court then could hold him in contempt of its order. On the other hand, if the court determines that respondent cannot comply with the agreement, it may judicially set a smaller amount of temporary child support. In those circumstances, we believe the child's best interests are met by setting a smaller amount than by sentencing the child's supporter for contempt.

Both parties have briefed and argued extensively the subject matter jurisdiction issue of the separation agreement. Their divorce decree theoretically disposed of the issue by stating the agreement was approved by the court and incorporated without merger into the final decree. Words of art such as "ratified", "adopted", "approved", "incorporated and "merged", and "incorporated without merger" consistently have confused attorneys, judges and laymen in this state. We concluded in *Kelly v. Edwards,* 276 S.C. 368, 278 S.E.2d 773 (1981) that a separation agreement "incorporated but not merged" into a divorce decree was enforceable only as a contract and not as a decree. Therefore, we held the family court lacked subject matter jurisdiction to enforce the agreement.

Subsequently, in *Brooks v. Brooks,* 277 S.C. 322, 286 S.E.2d 669 (1982), we confused the matter by holding that the family court properly held appellant in contempt for violating a separation agreement that was not merged in the final decree. There the agreement provided that the family court retained jurisdiction to enforce the agreement but not to modify any payments other than those for child support. However, heretofore parties could not confer subject matter jurisdiction by agreement. 20 Am.Jur.2d *Courts* § 139 (1965).

More recently, in *Bryant v. Varat,* 278 S.C. 77, 292 S.E.2d 298 (1982), we ignored the *Brooks* case, once again followed *Kelly, ***627** and held that the family court lacked subject matter jurisdiction to hold appellant in contempt for failing to comply with a separation agreement that was incorporated but not merged into a divorce decree. We attempted to determine the parties' intent by looking at the language of the agreement.

[11] [12] The parties' intent is rarely revealed from the agreement's words of art. Generally, those terms are used without intending or implying any particular legal ***353** consequences. Later, courts impose the consequences upon the unsuspecting parties. Today, we overrule those cases which hold that words of art make a major distinction in the operation of divorce law. Furthermore, jurisdiction for all domestic matters, whether by decree or by agreement, will vest in the family court. In all decrees entered after this decision, the parties may contract concerning their property settlement and alimony, but the submitted agreement must be approved by the family court. The parties may specifically agree that the amount of alimony may not ever be modified by the court; they may contract out of any continuing judicial supervision of their relationship by the court; they may agree that the periodic payments or alimony stated in the agreement shall be judicially awarded, enforceable by contempt, but not modifiable by the court; they may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably. With the court's approval, the terms become a part of the decree and are binding on the parties and the court. However, unless the agreement unambiguously denies the court jurisdiction, the terms will be modifiable by the court and enforceable by contempt.

[13] Under our ruling today, family courts will retain their traditional powers of contempt and ability to modify support orders. However, an approved agreement, unambiguously stipulating that the terms may not be enforced by contempt and/or that they may not be altered, binds the court, as well as the parties, to those terms.

Today we attempt to eliminate the words of art from domestic law. We assume that any settlement in a divorce decree is intended to be judicially decreed unless there is some explicit, clear and plain provision in the court approved separation agreement or the decree. Family courts, of course, have continuing jurisdiction to modify child support. We base our reasoning in part on the West Virginia case of *In Re Estate of Hereford,* 250 S.E.2d 45 (1978).

Accordingly, we reverse the case before us. On remand, the family court will hear the case under its continuing judicial supervision of child support.

LITTLEJOHN, NESS and GREGORY, JJ., concur.

LEWIS, C.J., dissents.

***354** LEWIS, Chief Justice (dissenting):

The trial judge held the respondent in contempt for failure to make child support payments in accordance with a prior divorce decree. The provisions for child support were contained in a prior separation agreement which had been made a part of the decree by reference.

The questions of whether the lower court had jurisdiction to adjudge respondent guilty of contempt or the merits of such determination have not been raised by any exception on appeal and are not properly before the Court for determination.

The sole issue in this appeal is whether the Family Court erred in failing to enforce the provisions for child support as set forth in the separation agreement and made a part of the order of the court by reference.

The trial judge, in holding respondent in contempt for failure to make child support payments, deferred sentence upon respondent paying $500.00 on the arrearage and making future payments in the amount of $75.00 per week. The order provided that the arrearage under the prior divorce decree, above the amounts ordered to be paid in this matter, would accrue and accumulate. The original divorce decree, of which the separation agreement was a part, was ***628** therefore not modified, rather the payment of any arrearage was simply deferred.

I agree that the Family Court always has jurisdiction to modify child support upon a proper showing. This is in accord with our prior holding that no agreement of the parties can prejudice the rights of the children. *Johnson v. Johnson,* 251 S.C. 420, 163 S.E.2d 229. The court may, therefore, enforce an agreement of the husband and wife relative to their child or may modify such an agreement, as the best interest of the child dictates.

Regardless of what might have been the authority of the court with reference to other matters contained in the separation agreement, it is conceded that the court had jurisdiction at all times over questions concerning child support. In this case, the court reviewed the terms of the separation agreement as to child support, approved them, and

made these provisions a part of the divorce decree. No one knew better than respondent that he had agreed to support his children, the amount of the payments to be made, and that he was ***355*** under an order of court to pay. To now say, as does the majority, that there was no order directing the payment of child support is to completely ignore the plain facts contained in this record.

The only issue remaining is whether the trial judge properly deferred sentence on finding respondent guilty of contempt. The imposition of sentence for contempt is a matter resting largely within the discretion of the trial judge. Whether that discretion was properly exercised in this case should be determined in the light of the present facts. Since the order under appeal was issued about three (3) years ago, I would remand the question of sentence and the payment of arrearages to the lower court with instructions to forthwith reexamine these matters in the light of the present facts.

The order of the lower court should be affirmed and the cause remanded for reexamination of the issues of sentence and payment of the arrearage due.

I therefore dissent.

Murphy v. Murphy, 461, S.E.2d 39 (1995)

Supreme Court of South Carolina.
Rosemary MURPHY, Respondent,
v.
James Lee MURPHY, James Berl, Guardian ad Litem for Tyler Lee Murphy and Alexandra Russell Murphy, minor children, Defendants,
Of whom James Lee Murphy is Appellant.
No. 24295.
Heard May 31, 1995.
Decided Aug. 7, 1995.
Rehearing Denied Sept. 6, 1995.

Final divorce decree dividing marital property was entered, in the Family Court, Beaufort County, John T. Black, J., and husband appealed. The Supreme Court, Burnett, J., held that: (1) nonmarital portion of husband's pension fund was transmuted into marital assets; (2) family court judge did not abuse his discretion in disregarding distributions from investment account when determining wife's entitlement to account; (3) family court judge had inherent power to appointment sequestrator sua sponte to protect parties' interests in investment account, in light of depletion of substantial funds and stocks from account; and (4) family court judge's failure to recuse himself was not error, even though he was represented by wife's counsel in prior legal matter.
Affirmed.

***40 *326** C. Rauch Wise, of Wise & Tunstall, Greenwood, for appellant.

Peter Fuge, of Harvey & Battey, P.A., Beaufort, for respondent.

BURNETT, Judge:

In this domestic litigation, the family court judge (1) determined that Appellant's entire pension fund constituted marital property; (2) determined that Appellant's investment account, as well as the income produced from it, constituted marital property, and divided the account equally between the parties; (3) ordered sequestration of the investment account; and (4) denied Appellant's motion for recusal. We affirm.

FACTS

Rosemary and James Murphy were married in November of 1968. They have two children. Mr. Murphy was employed as a corporate attorney with the Martin-Marietta Corporation from June 1963 until he retired in May 1986. After Mr. Murphy's retirement, the family moved from Cleveland, Ohio, to Hilton Head, South Carolina. At that time, the family income consisted of Mr. Murphy's retirement benefits from Martin-Marietta (pension fund) and interest income from investments with A.G. Edwards & Sons, Inc. (investment account). During ***327** the marriage, Mrs. Murphy was primarily a homemaker; however, she was employed as a secretary during the period of separation. Prior to the final hearing in this matter, Mr. Murphy was admitted to practice law in South Carolina.

The parties separated in 1990. In a Temporary Order dated February 8, 1991, Mrs. Murphy was awarded possession of the marital home and custody of the children, and Mr. Murphy was ordered to pay monthly mortgage payments and child support. Both parties were enjoined from disposing, altering, or encumbering any marital assets, except as necessary for payment of private school tuition for the children. Mr. Murphy subsequently withdrew $4,670 from the investment account for the children's tuition, and the parties consented to using $575 from the investment account for repairs to the marital home.

When Mr. Murphy failed to make monthly mortgage payments after April 1991, the marital home went into foreclosure. The home sold prior to the final hearing on the merits leaving Mrs. Murphy and the children without housing or funds to procure such. Accordingly, Mrs. Murphy requested and was granted $2,500 for relocation expenses and $1,000 for temporary support. In addition, the family court ordered Mr. Murphy's final equitable distribution to be reduced by the difference between the actual payoff on the mortgages and what the payoff would have been if Mr. Murphy had timely paid the mortgage payments-the difference amounted to $12,796.48.

On the day before the final hearing, Mr. Murphy served and filed a motion requesting the family court judge to recuse himself contending that counsel for Mrs. Murphy had represented the judge in a previous legal matter. The motion was denied after a hearing.

In the final divorce decree, the judge determined that although Mr. Murphy had been enjoined from disposing, altering, or encumbering the investment account, he had withdrawn $47,915.68 and disposed of 2,711 ***41** shares of stock. Accordingly, he was ordered to provide a complete accounting of the investment account, and a sequestrator was appointed pursuant to S.C.Code Ann. § 20-7-475 (Supp.1994) to equitably distribute the marital assets and to otherwise carry out the terms of the decree.

*328 ISSUES

I. Was it error to consider the entire pension fund as marital property?

II. Did the judge abuse his discretion by dividing the investment account equally between the parties and holding that the profit produced from it was marital property?

III. Did the judge err by appointing a sequestrator *sua sponte* ?

IV. Did the judge err by not recusing himself?

I. Pension Fund

Mr. Murphy contends the portion of the pension fund attributable to the period of time that he was employed prior to marriage is non-marital property [FN1] and, therefore, the judge erred in considering the entire pension fund to be marital property. We disagree.

FN1. According to testimony by an expert witness, the total value of the pension was $228,775, of which 23.91 percent was earned prior to marriage. Therefore, the expert assessed the prorated value of the pension, reflecting the portion coinciding with the marriage, to equal $174,300.

[1] [2] Vested retirement funds are considered marital property under the Equitable Apportionment of Marital Property Act; [FN2] however, the portion of a pension attributable to the period of time that a spouse is employed before the marriage is non-marital property. *Noll v. Noll,* 297 S.C. 190, 375 S.E.2d 338 (1988). Nevertheless, property which is non-marital may be transmuted into marital property during the marriage if it is utilized by the parties in support of the marriage or in some other manner which shows an intent by the parties to make it marital property. *Strickland v. Strickland,* 297 S.C. 248, 376 S.E.2d 268 (1989), *McDowell v. McDowell,* 300 S.C. 96, 386 S.E.2d 468 (Ct.App.1989).

FN2. S.C.Code Ann. §§ 20-7-471 to -479 (Supp.1994).

[3] Here, the record establishes that at no time prior to this appeal did Mr. Murphy claim any portion of the pension fund to be non-marital. In fact, after Mr. Murphy's retirement, the parties mutually agreed upon a "game plan" whereby the non-marital portion of the pension fund was commingled with the portion earned subsequent to marriage, and the *entire* pension fund was used to support the marriage. ***329** Furthermore, Mrs. Murphy waived her right to survivor's benefits in the whole pension fund so that the parties could receive accelerated retirement payments during the marriage.

Under these circumstances, we conclude that the non-marital portion of the pension fund was transmuted into marital assets when the parties utilized the entire pension fund in support of the marriage. Accordingly, the judge properly considered both portions to be marital property.

II. Investment Account

The judge determined that the investment account was marital property subject to equitable distribution and that Mrs. Murphy was entitled to fifty percent of its value. The judge calculated the value of the investment account to equal $134,792.92-its fair market value at the time of filing ($121,975.98) plus income produced in the form of dividends ($12,816.94). Mr. Murphy contends that the judge should have reduced Mrs. Murphy's entitlement to reflect the distributions [FN3] awarded prior to the final hearing and that the dividends should not have been held to be marital property. We disagree.

FN3. The family court authorized distributions from the investment account for the children's school tuition in the amount of $4,670, for repairs to the marital home in the amount of $545, for relocation expenses and temporary support of Mrs. Murphy and the

children in the amount of $3,500, and for Mr. Murphy's living expenses and attorney's fees in the amount of $10,000.

[4] Family court judges have wide discretion in determining how marital property is to be distributed. They may use any reasonable means to divide the property equitably, ***42** and their judgment will not be disturbed absent an abuse of discretion. *Peirson v. Calhoun,* 308 S.C. 246, 417 S.E.2d 604 (Ct.App.1992).

[5] Although the family court enjoined both parties from interfering with marital assets, the record establishes that Mr. Murphy inappropriately considered the investment account and the dividends generated from it to be *personal* assets rather than marital assets. For instance, Mr. Murphy listed the dividend income as his income on the financial declaration for consideration by the judge when determining his temporary child support payments. Moreover, between the commencement of litigation and the final hearing, Mr. ***330** Murphy sold 2,711 shares of stock and withdrew approximately $47,915 from the investment account. He replaced approximately $8,030. As a result of this conduct, Mr. Murphy received a net distribution of approximately $39,885, and the investment account incurred considerable losses.

On these facts, we conclude that it was not an abuse of discretion for the judge to disregard the distributions when determining Mrs. Murphy's entitlement to the investment account. In addition, we find that the judge appropriately considered the income produced from the investment account as marital property. Accordingly, we hold that the judge acted reasonably and equitably when dividing the investment account equally between the parties.

III. Appointment of a Sequestrator

[6] After concluding that Mr. Murphy had not provided a proper accounting of the investment account and that substantial funds and stocks had been depleted from it, the judge ordered sequestration of the investment account. Mr. Murphy contends that the judge erred in appointing a sequestrator *sua sponte* because sequestration of the investment account was not necessary and neither party petitioned for it. We disagree.

When apportioning marital assets, the language in S.C.Code Ann. § 20-7-476 (Supp.1994) provides the court with broad discretion by allowing it to use "any other reasonable means to achieve equity between the parties." Therefore, when considering Mr. Murphy's conduct regarding the investment account, we hold that the judge had inherent power to appoint a sequestrator *sua sponte* to protect the interests of the parties. *See* 79A C.J.S. *Sequestration* § 13 (1995) (judicial sequestration may be ordered *ex proprio motu* in exceptional cases); 70 Am.Jur.2d *Sequestration* § 33 (1987) (in exceptional circumstances courts of equity have inherent power to issue writs of sequestration to preserve property pending hearing and to enforce compliance with orders).

IV. Recusal

Mr. Murphy next contends that the presiding judge should have recused himself in this matter because he was represented by counsel for Mrs. Murphy in a prior legal matter. We disagree.

***331** [7] [8] A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Cannon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will be affirmed. *Ellis v. Procter & Gamble Dist. Co.,* 315 S.C. 283, 433 S.E.2d 856 (1993).

[9] The record contains substantial evidence supporting the judge's factual findings. Furthermore, our search of the record reflects no judicial bias or prejudice. We therefore conclude that Mr. Murphy has not established error in the judge's denial of the motion for recusal.

Accordingly, the judgment below is

AFFIRMED.

FINNEY, C.J. and TOAL, MOORE and WALLER, JJ., concur

O'Neil v. O'Neil, 359 S.E.2d 68 (Ct. App., 1987)

Court of Appeals of South Carolina.
Frank Quale O'NEILL, Appellant,
v.
Ramona Landry O'NEILL, Respondent.
No. 0990.
Heard June 15, 1987.
Decided July 20, 1987.

In domestic case, the Family Court, Charleston County, William K. Charles, Jr., J., granted wife a divorce from husband on ground of husband's adultery and awarded wife periodic alimony and attorney fees. Husband appealed. The Court of Appeals, Cureton, J., held that: (1) refusal to award lump-sum alimony to wife and award to wife $1,200 monthly periodic alimony was not abuse of discretion; (2) there was no error amounting to abuse of discretion in judge's finding that husband's adultery was primary cause for marital breakup, even though adultery occurred following husband's request for divorce; and (3) apportionment of marital debt of over $10,500 to wife and nearly $31,000 to husband was proper, based upon ability of parties to pay.
Affirmed.

***70 *114** Robert B. Wallace and Paul E. Tinkler, of Wallace and Tinkler, Charleston, for appellant.

Robert N. Rosen, of Rosen, Rosen and Hagood, Charleston, for respondent.

CURETON, Judge:
In this domestic case the family court granted the wife, Ramona O'Neill, a divorce from the husband, Frank Quale O'Neill, on the ground of adultery and awarded the wife

periodic alimony of $1,200.00 per month and $4,500.00 attorney fees. Each party was ordered to pay the creditors listed on their respective financial declarations. The husband appeals the awards of alimony and attorney fees and alleges the judge erred in apportioning the marital debt. We affirm.

The parties married in 1976. At that time, the wife earned $14,000.00 a year and received approximately $700.00 per month alimony from a prior marriage. Except for two brief periods of several months early in the marriage, the wife has not been employed. The husband is a journalist and novelist. His novel, *Agents of Sympathy,* was published in May 1985. At the time of the marriage he had an income of $18,000.00 a year from a residual trust. In 1977, the husband inherited $800,000.00. The couple soon thereafter purchased a $185,000.00 home on Church Street in Charleston with funds from the inheritance and approximately $23,000.00 netted by the wife from the sale of her condominium in ***115** Washington, D.C. The house was purchased in both parties' names but subsequently placed in the wife's name. Soon after purchasing the house, the parties mortgaged it for $150,000.00 and placed the proceeds in the husband's stock investment account. Following the inheritance the couple began an extravagant lifestyle, spending heavily on their home and furnishings, clothes, cars, and trips to Europe. By the time the case was tried in 1986 the entire $800,000.00 was depleted.

The marriage was apparently in difficulty from the beginning. In 1981 the couple separated briefly. In 1982 the husband testified he warned his wife that heavy spending and investment losses were depleting the inheritance. In November 1984 the wife moved to New York City to pursue a business venture importing Irish goods. A second mortgage for $125,000.00 was obtained on the Church Street home. The wife used $88,000.00 of this money to purchase an option on a $385,000.00 apartment in New York City. The remaining $35,000.00 was utilized by the wife for living expenses in New York. The parties planned to sell the Church Street house and rent a farmhouse in New York or Pennsylvania for the husband to occupy while he completed his second novel. In March 1985, however, he wrote the wife in New York requesting a divorce.

The wife's New York business venture never materialized. During the pendency of this action, the option on the apartment came due and, because there were no funds available to exercise it, the $88,000.00 previously paid was lost. The Church Street home finally sold in September 1985 for $375,000.00, substantially less than the parties had anticipated. This action was commenced as a separation action by the husband in June 1985. The wife counterclaimed alleging adultery and other misconduct, and praying for alimony, equitable division and attorney fees. A temporary order awarded the wife the net proceeds from the sale of the marital home in Charleston, approximately $29,000.00 after ***71** mortgages and other debts were deducted. The husband filed an amended petition before the final hearing praying for a divorce on one year's separation.

The case was tried in April 1986. The husband admitted at the hearing that he had committed adultery with two persons ***116** subsequent to the separation. In an order issued in May 1986 the judge awarded the wife a divorce on the ground of adultery, periodic alimony of $1,200.00 per month, and a $4,500.00 attorney fee. The court further awarded each party the personal property in their possession. Each party was ordered to pay the marital debts listed on their financial declaration, which amounted to $10,600.00 for the wife and approximately $31,000.00 for the husband. The couple owned no real property at the time of the final hearing.

ALIMONY

The husband argues several reasons why the judge erred in awarding the wife periodic alimony of $1,200.00 per month. We shall consider these arguments briefly.

First, the husband claims periodic alimony should have been denied because he had previously transferred to the wife assets totalling $216,000.00. These included the proceeds of the second mortgage on the Church Street house, $6,000.00 proceeds from the sale of the wife's Cadillac, $9,000.00 forwarded to the wife from a personal loan the husband obtained, a $46,000.00 stock portfolio given to the wife shortly after the inheritance, and the proceeds from the sale of the Church Street house given to the wife under the temporary order. He argues the transfer of these assets amounted to an award of lump sum alimony and he should be relieved from any further alimony obligation. Alternatively, he requests lump sum alimony be awarded in a small sum with credit for these previous transfers. To support this argument the husband claims the wife "entirely exhausted the husband's $800,000.00 inheritance (albeit partially with his acquiescence) in a period of eight years."

The trial court considered the propriety of awarding lump sum alimony in this case, despite the fact that it had not been prayed for, nor had the elements been proven at trial. As the trial judge noted, our courts have consistently held that lump sum alimony can only be awarded "where special circumstances require it or make it advisable, and an award of a lump sum as permanent alimony should be supported by some impelling reason for its necessity or desirability." ***117** *Millis v. Millis,* 282 S.C. 610, 612, 320 S.E.2d 66, 67 (Ct.App.1984). The court concluded since no special circumstance existed to warrant lump sum alimony, it could only award the wife periodic alimony.

The court did, however, enumerate and consider in its award the assets previously awarded to the wife. The court also considered the factors set forth in *Lide v. Lide,* 277 S.C. 155, 283 S.E.2d 832 (1981) and *Nienow v. Nienow,* 268 S.C. 161, 232 S.E.2d 504 (1977). Accordingly, the court noted the wife was 47 years of age, had never earned more than $14,000.00 per year in clerical jobs, had a high school diploma, had enjoyed a high standard of living with the husband which, admittedly, had to be adjusted, and currently had no income but expenses of $4,369.00 per month. The husband, while listing no income on his financial declaration, testified he would be able to earn a minimum of $50,000.00 per year as a novelist, or he would seek other employment.

[1] [2] An award of alimony rests within the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of discretion. *Nienow v. Nienow, supra ; Sumter v. Sumter,* 280 S.C. 94, 311 S.E.2d 88 (Ct.App.1984). In divorce cases this Court has jurisdiction to find facts in accordance with our own view of the preponderance of the evidence. *Shafer v. Shafer,* 283 S.C. 205, 320 S.E.2d 730 (Ct.App.1984). Based on the findings of the trial judge and our own review of the record, we find no abuse of discretion by the trial judge in refusing to award lump sum alimony to the wife and in awarding her $1,200.00 monthly periodic alimony. The record amply demonstrates the spending habits of both parties dissipated the inheritance. The husband has a ***72** degree from Oxford University, testified he can earn at a minimum $50,000.00 per year as a novelist, testified at trial he should inherit the proceeds of another trust from his mother in an amount close to $1,000,000.00, has an expectancy in another trust worth three to five million dollars, and is entitled to proceeds from the sale of some real estate in Great Britain. The husband failed to demonstrate why an award of lump sum alimony should be more appropriate in this case than the periodic alimony award.

***118** [3] The husband alternatively argues this is an appropriate case for rehabilitative alimony. We find no evidence in the record to support this claim. There is no indication the wife, now almost fifty years old, could successfully complete any further training to acquire new job skills, or that she would achieve success in the job market in an amount sufficient to completely support herself. *Eagerton v. Eagerton,* 285 S.C. 279, 328 S.E.2d 912 (Ct.App.1985). She testified at trial that her recent job searches indicated she could expect to earn $11,000.00 per year, and the trial judge found her capable of earning between $12,000.00 and $16,000.00 per year. The evidence, as indicated above, demonstrates the husband's capability to provide the wife with periodic alimony of $1,200.00 per month. We reject the husband's argument that this is an appropriate case for rehabilitative alimony.

[4] [5] The husband next argues the trial judge erred in finding his adultery to be the primary reason for the breakup of the marriage and then considering the husband's fault in arriving at the alimony award. The conduct of the parties is a factor to consider in determining alimony. *Nienow v. Nienow, supra ; Lide v. Lide, supra.* The husband admitted committing adultery with two persons, the first time in June 1985 following his March 1985 request for a divorce. He also admitted meeting his paramour, a former girlfriend, in March 1985 and becoming romantically involved with her in May of that year. We reject the husband's contention that the judge's finding is without evidentiary support, and find no error amounting to an abuse of discretion in the judge's finding that the husband's adultery was the primary reason for the marital breakup.

[6] The husband next alleges the judge should have found the wife at fault in failing to exercise the option on the New York apartment, resulting in a loss of the $88,000.00 option price. He claims the wife's substantial economic waste as illustrated in this instance and others negates the judge's finding that the wife contributed $23,000.00 to the marriage in the form of the equity from the sale of her Washington condominium which was used to purchase the Church Street house. He argues, conversely, that the wife's economic contribution to the marriage was ***119** substantially negative, so that the judge's finding of the wife's positive economic contribution in determining the alimony award was in error.

As we have previously stated, the record reveals both parties were at fault for extravagant spending habits and improper money management. The record reveals, moreover, that both parties were at fault in losing the option on the New York apartment. This was a joint undertaking in contemplation of a move from Charleston. Although he may have agreed to this venture reluctantly, the husband nevertheless by his own testimony agreed. He admits the equity eventually realized from the sale of the Church Street house was insufficient to exercise the option on the New York apartment. We reject this argument.

[7] Finally, the husband claims the judge erred in basing the award of alimony on the husband's estimated earning capacity. The judge found, based on the husband's testimony and his own findings, that the husband was capable of earning $50,000.00 per year as a novelist. The husband testified at trial that he believed he was capable of earning and will earn in the future $50,000.00 per year, adding, "if I did not think that I could earn fifty, I would seriously think of doing something else." The record reveals the husband has an excellent education and had a respectable career as a journalist prior to

becoming a ***73** novelist. At the time of the hearing he had an offer to publish his second novel and was shopping for a more lucrative contract. As we have indicated, he stands to inherit substantial amounts of money. We find no abuse of discretion in the judge's finding the husband was capable of earning $50,000.00 per year.

Since we find no merit to the husband's arguments regarding the award of $1,200.00 monthly periodic alimony to the wife, the alimony award is affirmed.

ATTORNEY FEES

[8] The husband alleges the judge erred in awarding the wife $4,500.00 attorney fees. The court found the wife's attorney fees totalled $12,568.61, of which she had paid $5,607.00 and owed $6,961.61. It is elementary that an award of attorney fees is discretionary with the trial judge. *Nienow v. Nienow, supra.* The court considered the ***120** factors enumerated in *Nienow* to justify such an award, and found the hourly rate consistent with that customarily charged for that type of legal service by attorneys with the standing and ability of the wife's attorneys. It also found the hours claimed consistent with the time devoted to the case through depositions and other discovery and research. The record reveals the beneficial results obtained for the wife through temporary support, and in receiving a divorce on the ground of adultery and periodic alimony. The record also reflects the husband's ability to pay the fees and the wife's inability to so pay. We therefore affirm the attorney fee award.

MARITAL DEBTS

Finally, the husband argues the judge erred in apportioning the marital debt. The judge ordered the wife to pay $10,607.87 in debts listed on her financial declaration and the husband to pay his debts listed at $30,900.00. The husband argues this is unfair because the figure listed on the wife's financial declaration included attorney fees, of which the husband was ordered to pay $4,500.00. He also argues the judge failed to consider the husband owes his publisher $25,500.00 from the advance on his book, and owes his mother $65,000.00 from an unsecured loan. He also argues the judge failed to consider the wife received $8,900.00 from the husband's $18,000.00 loan from South Carolina National Bank, and that the wife incurred the charges on the American Express account, both of which are debts listed on his financial declaration. We reject these arguments.

[9] [10] [11] [12] Marital debts are a factor to be considered by the court in determining equitable distribution. *Shaluly v. Shaluly,* 284 S.C. 71, 325 S.E.2d 66 (1985). The court may employ any reasonable means to effectuate division of the spouse's property. *Taylor v. Taylor,* 267 S.C. 530, 229 S.E.2d 852 (1976). Much discretion in this division is permitted, and the judge is not required as a matter of law to order the sharing of debts. *Levy v. Levy,* 277 S.C. 576, 291 S.E.2d 201 (1982). Regarding attorney fees, the judge properly and separately ordered the husband to pay $4,500.00. The judge obviously intended for the wife to absorb all of the remaining debt on her financial declaration. ***121** The debts to his publisher and his mother do not appear on the husband's financial declaration. The "debt" to the publisher will be repaid from book sales in the customary manner, and the existence of a "debt" to his mother is dubious. Evidence of the circumstances of the SCN loan and the American Express account was before the trial judge. Based on the ability of the parties to pay these debts, we find no abuse of discretion by the judge.

For the foregoing reasons, the judgment appealed from is

AFFIRMED.

GARDNER and SHAW, JJ., concur.

The Husband v. The Wife, 392 S.E.2d 811 (Ct. App. 1990)

Court of Appeals of South Carolina.

The HUSBAND, Respondent,

v.

The WIFE, Appellant.[FN1]

FN1. Because we do not want to cause this family any further pain, we have omitted the names of the mother and father, as well as the names of the children. *Cf. South Carolina Dept. of Social Servs. v. the Father and Mother,* 294 S.C. 518, 366 S.E.2d 40 (Ct.App.1988); *Doe v. Doe,* 286 S.C. 507, 334 S.E.2d 829 (Ct.App.1985) (cases in which we omitted the true names of the parties from our opinion).

No. 1504.

Heard April 16, 1990.

Decided May 29, 1990.

Wife appealed from order of the Family Court, Pickens County, R. Kinard Johnson, Jr., J., entered in divorce action. The Court of Appeals, Sanders, C.J., held that: (1) evidence was sufficient to establish that wife was guilty of adultery, and (2) awarding custody of parties' children to husband was not abuse of discretion.

Affirmed.

***811 *531** J. Redmond Coyle and R. Murray Hughes, Pickens, for appellant.

***532** R. Scott Dover, Pickens, for respondent.

***812** SANDERS, Chief Judge:

This is a sordid story. The husband sued the wife for a divorce on the ground of adultery. He also asked for custody of their two sons.[FN2] The trial judge decided the wife was guilty of adultery, but he did not give the husband a divorce on this ground. Rather, he gave the wife a divorce on the ground of physical cruelty. He did, however, give the husband custody of the children. The wife appeals. We affirm.

FN2. A third child, a daughter age seventeen, wanted to live with the wife. She has since turned eighteen, and her custody is not an issue in this case.

In this case, we can decide on our own what the facts are, but we do not have to ignore what the trial judge decided.[FN3] After all, he saw and heard the witnesses and was, therefore, better able to know who was telling the truth.[FN4]

FN3. *See Perry v. Perry,* 390 S.E.2d 480, 481 (S.C.Ct.App.1990). ("The Court of Appeals has jurisdiction in a divorce case to find facts based on its own view of the preponderance of the evidence; however, it is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to evaluate their testimony.")

FN4. *Id.*

[1] The wife presents two questions for us to answer. The first question is: "Did the trial court err in determining that the wife was guilty of adultery?" [FN5] The following is a fair summary of the important facts on the issue of adultery.

FN5. It may be difficult to see how the wife was prejudiced by the determination that she was guilty of adultery. As we have said, the divorce was granted on another ground. "No alimony shall be granted an adulterous spouse." S.C.Code Ann. § 20-3-130 (1985). But, alimony is not an issue in this case. At oral argument, counsel for the wife said he feared that the fact she had been found guilty of adultery might somehow prejudice her on the issue of custody. "[W]hile a parent's morality is a proper factor for consideration in a child custody case, it is limited in its force to what relevance it has, either directly or indirectly, to the welfare of the child." *Boykin v. Boykin,* 296 S.C. 100, 102, 370 S.E.2d 884, 885 (Ct.App.1988). In deciding who should have custody of the children, we have not considered the fact that the wife was determined to be guilty of adultery. We nevertheless address the issue of adultery, assuming without deciding that prejudice is inherent in being branded with "The Scarlet Letter." *See* N. Hawthorne, *The Scarlet Letter* (1850) (describing how, at one time, persons convicted of adultery were required to wear the letter A in scarlet cloth).

The hours kept by the wife can best be characterized as ***533** "odd." She worked until the wee hours of the morning. She would come home, get dressed, and leave again, not returning until just before the children left for school. At least twice, she rented a motel room for the night. Once, two days before Christmas, she checked into a motel, checked out the same day, checked back in later that day, and stayed until Christmas Eve. She explained that she did this because she wanted to be alone. But the husband testified he and the children were out of town at the time. Then there was the matter of the duffle bags in her car. The husband noticed one of the bags contained a number of personal items, including nightgowns, pajamas and underpants. He noticed the other bag contained condoms, things people do not usually carry with them when they want to be alone. The husband testified she admitted sleeping with a man in the motel but denied anything "took place between her and him." He did not believe her denial. Nor did the trial judge. Nor do we.[FN6]

FN6. To be sure, the wife had an explanation for all the evidence against her. For example, she said she put the condoms in the duffle bag as a practical joke. The mistreatment she received at the hands of the husband may very well excuse her behavior. But that is not for us to decide. We are asked simply to decide if she was guilty of adultery. Proof of adultery "must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence." *McLaurin v. McLaurin,* 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct.App.1987). The proof in this case meets the required standard. "[A]dultery may be proven by circumstantial evidence showing inclination and opportunity to commit adultery." *Panhorst v. Panhorst,* 390 S.E.2d 376, 377 (S.C.Ct.App.1990). "The same evidence which proves the opportunity can also prove the disposition. For example, where a married man is observed going upstairs in a bawdyhouse, unless something to the contrary appears, no other evidence is required to warrant a finding of adultery." *Prevatte v. Prevatte,* 297 S.C. 345, 351, 377 S.E.2d 114, 118 (Ct.App.1989). The same may be said where a married woman spends the night in a motel, sleeping with a man to whom she is not married.

***813** [2] The second question presented by the wife is: "Did the trial court err in awarding custody of the children to the husband?" The essential facts on the issue of custody may be summarized as follows.

The husband has had primary custody of the children since he and the wife separated. He lives with his mother who helps him take care of them. They have been well cared for during this period. He loves them. In deciding who should have their custody, the best interests of the children come ***534** first.[FN7] The wife has tended to put her rather active social life first.[FN8] Even before she took a night job, she stayed out several nights a week playing bridge. The question of who should have custody of children is normally left to the discretion of the trial judge.[FN9] Although we believe the wife also loves the children and that she is a fit parent, we are not convinced the trial judge abused his discretion. The wife will, of course, have the liberal rights of visitation granted her by the trial judge.[FN10] This way, the children can have the benefit of being cared for by two parents, both of whom love them.

FN7. *See* *Moore v. Moore,* 300 S.C. 75, ---, 386 S.E.2d 456, 458 (1989) ("The best interest of the child is the primary and controlling consideration of the Court in all child custody controversies.").

FN8. As we have said, in deciding the issue of custody, we have not considered the morality of the wife. We have, however, considered her behavior generally as it affects the welfare of the children. *Cf.* *Boykin,* 296 S.C. 100, 370 S.E.2d 884 (in deciding the issue of custody, the Court considered the fact that the mother, after working until midnight, drank beer and, on occasion, smoked marijuana until the early morning hours).

FN9. *See* *Ariail v. Ariail,* 295 S.C. 486, 489, 369 S.E.2d 146, 148 (Ct.App.1988) ("The issue of child custody is a matter largely within the discretion of the family court.").

FN10. The trial judge granted the wife visitation with the children every other weekend from 5 p.m. Friday until 5 p.m. Sunday, and for a three-week period during the summer. He also granted her visitation for five days at Christmas, on alternating Thanksgiving holidays, and on the birthdays of the children.

For these reasons, the decision of the trial judge is

AFFIRMED.

GARDNER and CURETON, JJ., concur.

Panhorst v. Panhorst, 390 S.E.2d 376 (Ct. App. 1989)

Court of Appeals of South Carolina.
John W. PANHORST, Jr., Respondent,
v.
Barbara P. PANHORST, Appellant.
No. 1464.
Heard Nov. 13, 1989.
Decided Feb. 20, 1990.

Husband's petition for divorce was granted by the Family Court, Greenville County, Willie T. Smith, Jr., J., and wife appealed. The Court of Appeals, Bell, J., held that: (1) sufficient evidence supported the finding that wife committed adultery; (2) gifts of money from husband to his mother during the marriage were not part of the marital estate subject to equitable distribution; and (3) wife received a reasonable time in which to vacate the marital premises.
Affirmed.
***377 *101** Vance B. Drawdy, Horton, Drawdy, Ward & Johnson, and Sally G. Young, Greenville, for appellant.

Kenneth C. Porter, of Porter & Rosenfeld, Greenville, for respondent.

BELL, Judge:

John W. Panhorst petitioned the family court for a divorce from his wife, Barbara P. Panhorst, on the ground of adultery. He also sought equitable division of the marital estate, custody of the younger of the two children of the marriage, child support, possession of the marital residence, and attorney's fees. Barbara denied the adultery and counterclaimed for separate maintenance and support, equitable division of marital property, temporary possession of the marital residence, and attorney's fees. The family court granted John's petition for divorce, gave him custody of the ***102** child, denied alimony and child support to each party, awarded the marital residence to John, and divided the rest of the marital estate on a ratio of 55% to John and 45% to Barbara. Each party was required to pay his or her own attorney's fees. Barbara appeals. We affirm.

I.

Barbara challenges the court's finding that she committed adultery. She asserts the court erred in refusing to let her testify that her alleged paramour, Lasater, is impotent and thus incapable of having normal sexual intercourse with her. The judge excluded the testimony on the ground that impotency must be established by expert medical testimony.

There was undisputed evidence that Barbara committed adultery with Seymour Wolfe in 1977. She admitted that Lasater accompanied her on most of the twenty-one nights she spent away from home on business during the year prior to the divorce action. She admitted they stayed at the same motels by prearrangement and spent much time together in their rooms. She also admitted she went with Lasater on a pleasure trip to Cancun, Mexico, where they stayed together in the same hotel room. Finally, she admitted she slept all night with Lasater in the same bed in a motel room in Rock Hill, South Carolina. A private investigator saw her leaving that room at 6:30 a.m. in a short, sheer, pink nightgown.

[1] This evidence showed both an inclination and the opportunity to commit adultery. Proof of inclination and opportunity is sufficient to establish a prima facie case. *See Hartley v. Hartley,* 292 S.C. 245, 355 S.E.2d 869 (Ct.App.1987) (adultery may be proven by circumstantial evidence showing inclination and opportunity to commit adultery). Barbara responds, however, that she was in a position to rebut the inference of adultery by testifying that Lasater is impotent. She was prevented from doing so, she argues, when the judge ruled she must establish impotence through a medical expert. Barbara contends her lay testimony on the issue was admissible because she "had special knowledge and first hand ***378** experience, which made her competent***103** to give her nonexpert opinion." [FN1]

FN1. We leave it to the reader to consider how she acquired her "special knowledge and first hand experience" of Lasater's lack of sexual prowess.

We need not decide whether expert testimony was required to prove Lasater's impotence. For purposes of this appeal, we assume sexual impotence can be established by a lay witness testifying from personal experience. We nevertheless hold that the exclusion of Barbara's testimony was harmless error.

This Court noted in *Doe v. Doe,* 286 S.C. 507, 334 S.E.2d 829 (Ct.App.1985), that the statute making adultery a ground for divorce [FN2] does not define the term "adultery." At common law, adultery is the illicit intercourse of two persons, one of whom, at least, is married. *Hull v. Hull,* 21 S.C.Eq. (Strob.) 174 (1848). Since there is nothing to show the Legislature intended a different meaning, we must understand the word to have been employed in this sense by the statute. *Id.*[FN3]

FN2. Section 20-3-10, Code of Laws of South Carolina, 1976, as amended.

FN3. Civil adultery is more extensive than its criminal counterpart. Consequently, definitions of adultery in criminal statutes are not applicable to matrimonial causes. *See* T. Reeve, *The Law of Baron and Femme* (1816), at 207; *see also Orford v. Orford,* 49 Ont.L.R. 15, 58 D.L.R. 251 (1921), distinguishing *State v. Frazier,* 54 Kan. 719, 39 P. 819 (1895), and similar authorities.

At common law, marriage is both a contract and a status. *Fennell v. Littlejohn,* 240 S.C. 189, 125 S.E.2d 408 (1962); *Garlock v. Garlock,* 279 N.Y. 337, 18 N.E.2d 521 (1939). As a status, it gives rise to rights and duties imposed by law on the marriage partners. *Id.* Among these are material support and consortium, i.e., the conjugal society, comfort, companionship, and affection of each other. *Id.; Bennett v. Bennett,* 116 N.Y. 584, 23 N.E. 17 (1889). Sexual fidelity is a fundamental duty of the marital relationship.[FN4] As far as the law is concerned, the contract of marriage is, in its essence, a consent on the part of a man and a woman to cohabit with ***104** each other and with each other only.[FN5] This means a husband and wife must confine their sexual activity exclusively to one another. Sexual relations with a person other than the marriage partner are illicit because they violate this marital duty of exclusiveness.

FN4. An early reason for the rule was to prevent the wife from conferring a spurious heir on the husband. J. Bishop, *Commentaries on the Law of Marriage and Divorce,* 4th ed., Sec. 704 (1864). Following this rationale, one common law court has held that artificial insemination of the wife with the sperm of a third party without the husband's consent constitutes adultery, although no act of sexual intercourse occurs. *See Orford v. Orford,* 49 Ont.L.R. 15, 58 D.L.R. 251 (1921) (essence of adultery consists, not in moral turpitude of the act of sexual intercourse, but in voluntary surrender of reproductive powers to the service or enjoyment of any person other than the husband or wife).

FN5. *Harrod v. Harrod* (1854) 1 K. & J. 4, 69 Eng.Rep. 344.

[2] Barbara's position rests on the unstated assumption that illicit sexual intercourse consists solely of the normal act of consummation between a man and a woman. We need not decide exactly what sex acts do and do not constitute adultery. Suffice it to say that where, as here, a married woman, with a history of having committed adultery, spends the night, undressed, in the same bed with a man, with whom it appears she is romantically involved and to whom she is not married, her actions warrant the finding that she has committed adultery.

Far from rebutting the prima facie case against her, her assertion that she has first hand knowledge and experience of Lasater's sexual abilities, if the family court had considered it, would have supported the court's finding of adultery. For this reason, she suffered no harm from the exclusion of her testimony.

II.

[3] Barbara also challenges the equitable distribution. During the marriage, John gave his mother gifts of money totalling between $25,000 and $30,000. The gifts were made over the course of twenty years and were typically $1000 to $2000 a year. Apparently, Barbara knew nothing ***379** about them and did not consent to them. She claims the family court should have treated them as part of the marital estate subject to equitable division. Her argument presents a question of first impression in South Carolina.

Marital property is that real and personal property acquired by the spouses during the marriage which is owned by them at the date of filing of marital litigation. Section 20-7-473, Code of Laws of South Carolina, 1976, as amended. The money in dispute here was not marital property because, at the time the action was filed, it no longer belonged ***105** to either of the Panhorsts as the statute requires. Thus, it was not subject to equitable distribution.

The statute embodies the Legislature's decision that the marital estate must be identified as of a fixed date. Given the vicissitudes of life, the parties' fortunes will change over the years of a marriage. Often the marital estate may have enjoyed a greater value in the past than it does at the dissolution of the marriage. It may be affected by changes in the incomes and earning capacities of the spouses, their spending habits, their savings and investments, and a host of other factors. By requiring the estate to be identified as of the date marital litigation is filed, the Legislature has elected to foreclose the spouses from litigating every expenditure or transfer of property during the marriage. One spouse or the other may have spent marital funds foolishly or selfishly or may have invested them unprofitably. The statute wisely prevents the other spouse from resurrecting these transactions at the end of the marriage to gain an advantage in the equitable distribution. Were it to do otherwise, human greed and vindictiveness would transform the courts into "auditing agencies for every marriage that falters." *In re Marriage of Getautas,* 189 Ill.App.3d 148, 151, 136 Ill.Dec. 509, 513, 544 N.E.2d 1284, 1288 (1989).

[4] Barbara cites a number of cases she claims support treating the money given to John's mother as part of the marital estate.[FN6] Without exception, these cases involve fraudulent transfers or dissipation of marital assets in contemplation of the breakdown of the marriage. This alone makes them distinguishable. In this case, there is no evidence that John gave his mother money in contemplation ***106** of divorce or with intent to deprive Barbara of her right to equitable distribution. Barbara's argument that the mother did not need the money is irrelevant. In the absence of fraudulent intent, it is not unlawful for spouses to make outright gifts to others during the marriage. Barbara's authorities are simply not in point.[FN7]

FN6. *Zohlman v. Zohlman,* 235 So.2d 532 (Fla.App.1970), *cert. denied,* 238 So.2d 430 (Fla.1970); *Parsons v. Parsons,* 68 Wis.2d 744, 229 N.W.2d 629 (1975), *overruled on other grounds, Bloomer v. Bloomer,* 84 Wis.2d 124, 267 N.W.2d 235 (1978); *Ahlo v. Ahlo,* 1 Haw.App. 324, 619 P.2d 112 (1980); *Karr v. Karr,* 628 P.2d 267 (Mont.1981); *In re Marriage of Smith,* 114 Ill.App.3d 47, 69 Ill.Dec. 827, 448 N.E.2d 545 (1983), *criticized, In re Marriage of O'Neill,* 185 Ill.App.3d 566, 133 Ill.Dec. 617, 541 N.E.2d 828 (1989), *followed, In re Marriage of Getautas,* 189 Ill.App.3d 148, 136 Ill.Dec. 509, 544 N.E.2d 1284 (1989), *overruling, In re Marriage of O'Neill, supra; In re Marriage of Paulsen,* 677 P.2d 1389 (Colo.App.1984); *Kuehn v. Kuehn,* 594 S.W.2d 158 (Tex.Civ.App.1980); *Roach v. Roach,* 72 Wash.2d 144, 432 P.2d 579 (1967).

FN7. More in point are the cases of *In re Marriage of Aud,* 142 Ill.App.3d 320, 96 Ill.Dec. 615, 491 N.E.2d 894 (1986), and *Robinette v. Robinette,* 736 S.W.2d 351 (Ky.App.1987), authorities not cited by either party.

Aud involved a husband's expenditure of $70,000 in marital funds to support his widowed mother. The court held the expenditure did not constitute dissipation of marital assets in contemplation of divorce and should not be considered in making the equitable distribution.

In *Robinette,* the court held that cash gifts of the wife to her sister were not dissipation of the marital estate, although they were made without the husband's knowledge. The court found the gifts were not made in contemplation of dissolution of the marriage or with intent to deprive the husband of his proportionate share of the marital property.

III.

[5] Finally, Barbara maintains the court erred in ordering her to vacate the marital residence by January 4, 1988, after expressly finding that ninety days was a reasonable time for her to find other accommodations.***380** Ninety days from the date of the order was February 20, 1988.

Barbara makes no showing that she could not find other accommodations by January 4, 1988. As we understand the record, she actually obtained another place to live on or before that day. Thus, we fail to see how she was prejudiced by the judge's order. She was not entitled to remain in the marital residence any particular length of time. As long as she received a reasonable time, in fact, to leave the marital residence, her interest was fully protected.

For the reasons stated, we affirm the judgment.

AFFIRMED.

SHAW and CURETON, JJ., concur.

Paparella v. Paparella, 531 S.E.2d 297 (Ct. App. 2000)

Court of Appeals of South Carolina.
John F. PAPARELLA, Jr., Appellant,
v.
Ami S. PAPARELLA, Respondent.
No. 3162.
Heard March 7, 2000.
Decided April 17, 2000.
Rehearing Denied July 8, 2000.

Husband filed complaint seeking custody of his three minor children and child support. Wife filed separate complaint requesting divorce on basis of one year's continuous separation. Husband counterclaimed for divorce based on wife's alleged adultery. Upon consolidation of the actions, the Family Court, Aiken County, Peter R. Nuessle, J., awarded divorce and sole custody of children to wife and ordered visitation. Husband appealed. The Court of Appeals held that: (1) there was sufficient evidence to support award of custody of minor children to mother at divorce, but (2) evidence did not support

restrictive visitation schedule.
Affirmed as modified.
***298 *188** J. Michael Taylor, of Golden, Taylor & Potterfield, of Columbia, for appellant.

John M. Hunter, Jr., of Bodenheimer, Busbee, Hunter & Griffith, of Aiken, for respondent.

Guardian ad Litem: James L. Verenes, of Fox & Verenes, of Aiken.

***299** PER CURIAM:
In this family court action, John F. Paparella, Jr. (father) appeals an order awarding sole custody of the parties' three children to Ami Paparella (mother). The father also appeals the visitation award. We affirm as modified.

The father and mother were married in September 1992 and separated in May 1996. The father filed a complaint seeking custody of the parties' three minor children and child support. The mother filed a separate complaint requesting a divorce on the basis of one year's continuous separation. The father, in turn, counterclaimed for a divorce based on the mother's alleged adultery and prayed for merger of the divorce and custody actions. The family court consolidated the actions. The court awarded the mother a divorce and sole custody of the children and granted the father visitation to include every other weekend, one week at Christmas, two two-week periods in the summer, and alternating holidays.

*189 I. Custody

[1] The father argues the family court erred in granting custody of the minor children to the mother. We disagree.

[2] [3] [4] [5] The paramount and controlling factor in every custody dispute is the best interests of the child. *Hooper v. Rockwell,* 334 S.C. 281, 513 S.E.2d 358 (1999). Although this court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *See Woodall v. Woodall,* 322 S.C. 7, 471 S.E.2d 154 (1996). In particular, an appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court." *Id.* at 10, 471 S.E.2d at 157. Our broad scope of review does not relieve appellant of his burden to convince this court the family court erred in its factual findings and conclusions. *See Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979).

[6] [7] In determining custody, the family court "must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child[ren]." *Woodall,* 322 S.C. at 11, 471 S.E.2d at 157. Because all relevant factors must be taken into consideration, the court should also review the "psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects" of each child's life. *Id.* In other words, the totality of circumstances unique to each particular case "constitutes the only scale upon which the ultimate decision can be weighed." *Parris v. Parris,* 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995).

First, the father contends the family court improperly ignored evidence that the mother involved the parties' children with her paramour. This argument is without merit. The family court found that the mother's affair did not have any adverse effect on the children. The court determined the affair occurred over one year after the parties' separation and involved only one or two overnight stays while the children were gone. While the father asserts error in the trial court's finding, he points to no evidence in the record to contradict it. We therefore agree that the father has failed to show any ***190** deleterious effect on the children stemming from the mother's admitted affair. *See* *Davenport v. Davenport,* 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975) ("The morality of a parent is a proper factor for consideration but is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child. Custody of a child is not granted a party as a reward or withheld as a punishment.").

Second, the father claims the court misunderstood the testimony and recommendations of the expert witnesses. In effect, the father argues the trial court erred in accepting the testimony of the mother's expert witnesses over his own witnesses' testimony. The family court heard testimony from the father's experts that the father should be awarded custody and testimony from the mother's experts that she should be awarded custody. Given the conflicting testimony of the experts presented, we cannot say that the family court erred. *See, e.g.,* *Woodall,* 322 S.C. at 10, 471 S.E.2d at 157 (appellate courts should ***300** be reluctant to supplant trial court's evaluation of witness credibility regarding child custody).

Third, the father also claims the family court ignored significant safety issues regarding the children. The father introduced a videotape, composed of various bits of film footage shot by the mother at home, which he maintains is evidence of the mother's lack of concern for the children's welfare. The trial court viewed the videotape and found nothing to suggest the mother had abused or neglected the children. In particular, the court noted that more than eighteen months had passed since the parties separated with no indication whatsoever that the mother was unfit or neglectful in caring for the children. We have viewed the videotape and, while portions do cause some concern, we agree the mother's actions do not rise to the level of neglect or unfitness.

Finally, the father argues the family court erred in failing to consider his fitness as a parent in making the custody determination. The trial court did not find the father was an unfit parent. To the contrary, we agree the evidence in the record clearly indicates the father is a concerned, loving parent. The question before us, however, is whether the trial court abused its discretion in awarding custody to the mother. Because the family court considered the totality of circumstances in determining***191** the custody arrangement best suited to the needs of the children, including the emotional and physical fitness of both parents, safety considerations, and particularly the recommendation of the guardian ad litem, we find no abuse of discretion in the court's decision.

II. Visitation

[8] The father claims the family court erred in restricting his visitation to alternate weekends, one week at Christmas, four weeks in the summer, and alternating holidays. We agree that the father's visitation should be expanded.

[9] [10] As with child custody, the welfare and best interests of the child are the primary considerations in determining visitation. *Id.* at 12, 471 S.E.2d at 158.

Similarly, visitation is addressed to the broad discretion of the family court and its decision will not be disturbed on appeal absent abuse. *Id.*

The father was awarded visitation with the children every other weekend, beginning on Friday at 6 p.m. and ending on Sunday at 6 p.m. The father does not think this is enough. In fact, the mother admitted during trial that she thought the father should be awarded more visitation than this. It is clear from the record that the father was involved in raising his children and in their day-to-day activities. While the parties were married, they worked as pharmacists at the same drugstore. They were able to arrange their schedules so that one parent was home with the children while the other parent was at work, thus eliminating the need for the children to be in daycare.

Under the circumstances, we agree with father that he should be allowed more visitation with the children. Pursuant to the family court order, the father's visits are twelve days apart. Therefore, we modify the visitation schedule to provide as follows: during the school year, the father will have the children every other weekend, beginning after school on Friday and ending when they return to school Monday morning. Then on the Thursday preceding the weekend when the father does not have visitation, the father will have the children after school until they return to school Friday morning. Also on the Tuesday following the weekend when he does not have visitation, the father will have them after school until they ***192** return to school Wednesday morning. This will permit the father to see his children more often.

The father's summer visitation is expanded so that he has the children half of the children's summer vacation. We encourage the parties to work out the details-considering each of their schedules as well as the children's schedules. In the event that they are unable to work out the details, they can petition the family court to order the specifics of the arrangement.

Furthermore, we encourage the parties to consider permitting the parent not in physical custody to have the children when the ***301** other parent is working, rather than leaving the children at daycare or with a babysitter.

AFFIRMED AS MODIFIED.

HEARN, C.J., STILWELL, J., and MOREHEAD, Acting Judge, concur.

Parris v. Parris, 460 S.E.2d 571 (1995)

Supreme Court of South Carolina.
Donald L. PARRIS, Respondent,
v.
Ruth H. PARRIS, Appellant.
No. 24296.
Heard Dec. 9, 1994.
Decided Aug. 7, 1995.

Father initiated action seeking custody of son. The Circuit Court, Beaufort County, Donald A. Fanning, J., awarded custody of son to father, and mother appealed. The Supreme Court, Waller, J., held that circuit court's award of custody to father did not reflect gender bias against working women but, rather, reflected best interests of child.
Affirmed.
***571 *308** J. Lee Murphy, Hilton Head Island, for appellant.

Peter L. Fuge of Harvey and Battey, Beaufort, for respondent.

Amicus Curiae: M. Malissa Burnette, of Gergel, Burnette, Nickles and Grant, Columbia, for NOW Legal Defense Educ. Fund, the League of Women Voters of S.C., S.C. NOW and the University of South Carolina's Professional Women on Campus.

***309** WALLER, Justice:

Appellant, Ruth Parris (Mother) appeals an order of the Family Court awarding custody of the parties' minor son, Maxfield Parris, to Respondent, Donald Parris (Father). We affirm.

FACTS

The parties were married in February, 1979. Maxfield was born on December 29, 1980. They lived on Hilton Head where Mother, over the years, became one of Hilton Head's leading realtors. Father worked on various real estate projects and commercial ventures but, in recent years, was less financially successful than Mother. In 1990, due primarily to the parties' financial problems, Mother told Father she wanted a divorce. Father moved out of the marital residence and instituted this action seeking custody of their son. Mother answered and sought full custody. After a hearing, Mother was granted temporary custody.[FN1] A final order was issued on December 30, 1991 granting Father permanent custody. Mother appeals.

FN1. The court specifically ruled, however, that the temporary custody award was of no precedential value.

ISSUES

1. Does the Family Court's award of custody to Father reflect a gender bias against working women?

***572** 2. Should the Family Court have awarded joint custody?

I. *CUSTODY*

Mother contends the award of custody to Father reflects a gender bias against working women and a predisposition on the part of the Family Court to award custody to Father due to her full-time career. Mother's characterization is not borne out by the record.

[1] The evidence reflects that both parties were found to be fit custodial parents by the Guardian ad Litem (GAL) and the court appointed psychologist. However, the record reveals that, prior to institution of these proceedings, Father exhibited a more active role in the day to day activities of the child. Although Mother assumed some of the ***310** parental responsibilities, Father was more actively involved in Maxfield's daily life, taking him, or carpooling, to doctors, baseball, swimming, soccer, parent/teacher conferences, signing report cards, doing yard work together, birthday parties, getting both children [FN2] up in the morning and off to school, making breakfast on weekends, cooking the family's Sunday dinner, etc. The Guardian ad Litem appropriately described the circumstances of this case, stating:

FN2. Mother had another child, Sharone, from a previous marriage.

This has been an extremely close call the whole way and both parties, I believe, are more than adequate care providers in both the intellectual stimulation and the mechanical care. But in the past, the history has shown that Ruth was not the person who provided it and Don was.[FN3]

FN3. Similarly, the pediatrician who had treated Maxfield for ten years and was a very close friend of the family testified that Father would be the better custodial parent, stating:

I really felt that, in the best interest of Max or for Max's best interest, that I really felt that [Father] was a better-not that Ruth wasn't a good parent or Don was a, you know-it was that I thought he was a better custodial parent and that that's what this was about ...

It's-you know, with Max, Don is, you know, he's kind, and he's patient, and he instructs, and "good job," you know. You know, it's very interested, and they're really in tune. It's like a-it's a good match. Ruth tries very hard, but it's like it's not really there; does not always hear what-not always hear what her son has to say or, you know, may hear the words but not really hear in his heart, and there's just a difference, and there's a difference in the way that both parents treat the children, you know, as far as I can see; it's just a different feel to it. And Ruth can be very erratic and she can-you know, I guess we all can be, but you know, varying times I've seen her get a little bit, you know, crazy or high strung or whatever but not always-does not always do things logically or, you know, sometimes has that emotional response and doesn't always hear what the child is really saying.

[2] [3] [4] The best interests of the child are paramount in custody disputes. The Family Court should consider "the character, fitness, attitude and inclinations on the part of each parent" as they impact on the child. *Epperly v. Epperly,* 312 S.C. 411, ----, 440 S.E.2d 884, 886 (1994). 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. *Glanton v. Glanton,* 314 S.C. 58, 443 S.E.2d 810 (App.1994). The trial judge, who observes the ***311** witnesses and is in a better position to judge their demeanor and veracity, is given broad discretion in determining custody. *McAlister v. Patterson,* 278 S.C. 481, 299 S.E.2d 322 (1982). This Court, however, has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Epperly, supra.*

The record before this Court reflects, not a gender bias against Mother or the fact that she is a career-oriented woman but, rather, a case in which, as between two parents who are fit to be the custodial parent, the best interests of the child will be served by awarding custody of the child to Father. The preponderance of the evidence clearly supports the Family Court's ruling and, accordingly, we affirm the award of custody to Father.

We are nonetheless constrained to comment upon mother's assertion that certain language in the Family Court's order reflects a gender bias against women. Specifically, Mother contends language characterizing her as a "very determined, easily angered career ***573** woman" who is "perceived in the business community as an aggressive competitive individual" demonstrates the Family Court's bias against awarding custody to working mothers. We disagree. The adjectives describing Mother's work ethic are gender neutral and would apply equally to a male parent.

We agree with Mother that the fact she is "aggressive" and "career oriented" is not, standing alone, relevant to a determination of custody. However, when considered in the context of the amount of time Mother spent with Maxfield on a daily basis, her work habits are highly relevant. Although not the sole factor, the amount of time a parent spends with the child has traditionally been a relevant consideration in determining which of two fit parents receives custody. Work habits necessarily impact upon this consideration. Where, as here, the record reveals a pattern of one parent as primary caretaker and the other parent as the primary wage earner, it would be incomprehensible for a court to disregard this fact in awarding custody. We decline to eliminate this factor from the Family Court's consideration.

Although we find the considerations here relevant, the terminology used could, as Mother's argument suggests, be taken out of context. Accordingly, in the future, we caution the Family***312*** Courts to use the utmost circumspection in phrasing orders to ensure that the language is not susceptible of connotations such as those imputed by Mother here.

2. *JOINT CUSTODY*

Mother also urges this Court to reconsider our long-standing prohibition against joint custody.[FN4]

FN4. This Court has repeatedly held that joint custody is to be avoided if at all possible and will be approved only under exceptional circumstances. *Avin v. Avin,* 272 S.C. 514, 252 S.E.2d 888 (1979); *Sharpe v. Sharpe,* 256 S.C. 517, 183 S.E.2d 325 (1971); *Mixson v. Mixson,* 253 S.C. 436, 171 S.E.2d 581 (1969); *see also* *Courie v. Courie,* 288 S.C. 163, 341 S.E.2d 646 (Ct.App.1986).

[5] Neither of the parties sought or requested joint custody but, rather, each party sought to be Maxfield's primary custodian. Moreover, Mother never moved to alter or amend the judgment and the trial court, therefore, was not given an opportunity to address the issue of joint custody. Accordingly, the issue is unpreserved for review. *Washington v. Washington,* 308 S.C. 549, 419 S.E.2d 779 (1992); *Mobley v. Mobley,* 309 S.C. 134, 420 S.E.2d 506 (Ct.App.1992). *Smith v. Smith,* 264 S.C. 624, 216 S.E.2d 541 (1975).

Accordingly, we need not decide in the present case whether to reconsider our position on joint custody.

The remainder of Mother's issues are without merit and are affirmed pursuant to Rule 220(b)(1), SCACR. The judgment below is

AFFIRMED.

CHANDLER, C.J., FINNEY and TOAL, JJ., and CURTIS G. SHAW, Acting Associate Justice, concur.

Anand B. PATEL, Petitioner,
v.
Nalini Raja PATEL, Respondent.
No. 25371.
Heard Aug. 7, 2001.
Decided Oct. 31, 2001.
Rehearing Denied Dec. 12, 2001.

Wife appealed from decision of the Family Court, Dillon County, Haskell T. Abbott, III, J., awarding the husband custody of children and denying wife's request for alimony. The Court of Appeals reversed, and husband petitioned for certiorari. The Supreme Court, Toal, C.J., held that: (1) in connection with developing a recommendation to family court in child custody cases, guardian ad litem shall conduct independent, balanced, and impartial investigation to determine facts relevant to the situation of the child and the family; and (2) guardian ad litem's actions and inactions so tainted decision of family court as to deny wife due process, and as such, admission of guardian ad litem's recommendation was not harmless error.
Remanded.
***387 *283** Robert L. Widener, McNair Law Firm, of Columbia; and John O. McDougall and Michael W. Self, of McDougall & Self, of Sumter, for petitioner.

Harvey L. Golden and J. Michael Taylor, of Golden, Taylor & Potterfield, of Columbia, for respondent.

Chief Justice TOAL.

Anand B. Patel ("Husband") was granted certiorari to review the Court of Appeals' unpublished decision in *Patel v. Patel,* Op. No.2000-UP-653 (S.C. Ct.App. filed October 26, 2000).

FACTUAL/PROCEDURAL BACKGROUND

On July 7, 1980, Husband and Nalini Raja Patel ("Wife") were married after a short engagement in Vancouver, British Columbia. Shortly thereafter, the parties moved to Chilliwack, where Husband worked as a pharmacist. The parties returned to Vancouver in 1982 and purchased a pharmacy. By this time, Wife had received her work permit, which took about two years to process, and began working in the pharmacy as a cashier or stock person. Wife worked in the pharmacy from approximately 9:00 a.m. to 6:00 p.m. She was never paid a salary.

Husband and Wife moved to Dillon, South Carolina in 1986, when Husband purchased a Days Inn Hotel. The parties lived on the premises as resident owners. Shortly after moving, their first child, Anish, was born on November 27, 1986. Husband and Wife had two more children, Ria, born on June 21, 1990, and Ashoo, born on June 22, 1992. Wife worked in the hotel with Husband until Ria was born. However, Wife did not receive a salary.

***284** The parties lived a modest lifestyle. Although the hotel business supplied a $15,000 a month income, the parties lived in a two bedroom " apartment" at the hotel. Wife slept with the three children in one bedroom, and Husband slept in the other. Their modest lifestyle allowed the parties to acquire a $2.6 million dollar marital estate.

Husband and Wife separated in October 1995. Husband then initiated this action against Wife. Pursuant to the Temporary Order issued by the family court, Husband was

awarded temporary possession of the marital "quarters" at the hotel, but was required to provide suitable accommodations for Wife outside the hotel. Husband purchased a house for Wife for approximately $75, 000. The Order also awarded Husband and Wife alternating temporary custody of the children.

A final divorce decree was issued on October 23, 1997. Under the terms of the divorce decree (1) Husband was awarded custody of the three children and child support; (2) the marital property was divided 65% to the Husband and 35% to the Wife; (3) Wife's request for alimony was denied; (4) Wife was ordered to pay $41,920.94 towards Husband's attorney's fees and costs; and (5) Wife was ordered to pay 14% of the fees and costs associated with the Guardian *Ad Litem* ("GAL").

Wife filed a Notice of Appeal on June 16, 1998. Two weeks later, Wife received a letter from Husband stating he intended to relocate with the children to Southern California. Wife filed a motion with the Court of Appeals to prevent Husband from moving with the children during the appeal. The Court of Appeals issued an Order, dated July 31, 1998, which remanded the issue to the trial court for consideration. The matter was heard on August 19, 1998, in front of the same judge who presided over the divorce proceedings. On August 25, 1998, the judge issued a ruling allowing Husband to relocate with the children to California. Husband moved with the children to California around ***388** September 6, 1998. On September 22, 1998, the judge issued a written order allowing the children to relocate. Wife filed a petition for supersedeas with the Court of Appeals. On October 20, 1998, the Court of Appeals issued an order directing Husband to return the children to South Carolina. However, after oral argument ***285** before a three-judge panel, the Court of Appeals vacated its prior order of October 20, 1998, and denied Wife's petition for supersedeas.

The Court of Appeals consolidated Wife's appeal from both the divorce decree and the Order allowing the children's removal from South Carolina. On October 26, 2000, the Court of Appeals issued an unpublished decision in which it (1) reversed the family court's custody award to Husband and ordered him to return the children to South Carolina; (2) reversed the denial of alimony to Wife and remanded the issue of her entitlement to alimony to the trial court; (3) reversed the award of attorney's fees to Husband; and (4) affirmed the equitable division award of 65% of the marital property to Husband and 35% to Wife.

Both Husband and Wife petitioned for certiorari. This Court granted Husband's petition on the issues of custody and alimony, and the issues before this Court are:

I. Did the Court of Appeals err in reversing the family court's custody decision, thereby awarding custody of the parties' children to Wife?

II. Did the Court of Appeals err in reversing the family court's denial of alimony to Wife?

LAW/ANALYSIS

I. Child Custody

Husband argues the Court of Appeals erred in reversing the decision of the family court and granting custody of the three children to Wife. We find Wife did not receive a fair hearing on child custody, and remand this case to the family court for a new hearing on child custody.

[1] [2] [3] In a custody case, the best interest of the child is the controlling factor. *Ingold v. Ingold,* 304 S.C. 316, 404 S.E.2d 35 (Ct.App.1991). The family court considers several factors in determining the best interest of the child, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children. *See* Roy T. Stuckey & F. Glenn Smith, *Marital Litigation in South Carolina* 446 (1997). ***286** When determining to whom custody shall be awarded, all the conflicting rules and presumptions should be weighed together with all the circumstances of the particular case, and all relevant factors must be taken into consideration. *Woodall v. Woodall,* 322 S.C. 7, 471 S.E.2d 154 (1996); *Ford v. Ford,* 242 S.C. 344, 130 S.E.2d 916 (1963).

The family court appointed a non-lawyer Guardian *Ad Litem* (GAL) in February of 1996 to review this case. The GAL testified at the final hearing in May of 1997, after having 15 months to review the case. As stated by the family court in its final divorce decree filed in October 1997, the GAL had "a substantial amount of personal involvement" in this case. However, the GAL's actions in this case give rise to concern. For example, the GAL did not keep notes of her observations during her investigation and failed to produce a written report. In addition, the GAL contacted Husband's counsel 19 times, but never contacted Wife's counsel. The GAL stated she had "some" telephone contact with Wife, but spoke on the phone with Husband "very frequent[ly]." After an incident with Wife, the GAL testified she did not feel comfortable enough to meet with Wife, and did not visit her from July 14 to October 21, 1996. During the time she did not feel comfortable meeting with Wife, she continued to meet with the children while in Husband's care. Furthermore, the GAL listened to a phone conversation between Husband and Wife without Wife's knowledge. The GAL also taped a conversation with Anish concerning an incident that happened while they were in Wife's custody. Finally, the GAL testified that "she was taken aback" by Wife's request that she be removed from the case. In sum, the GAL did not conduct an objective, balanced investigation. She did not afford each party a balanced opportunity ***389** to interact with her. Her method of evaluation created a high potential for bias towards Husband.

The record reveals the psychiatrist as well as the family court relied on the GAL's findings and testimony when deciding custody should be awarded to Husband. In fact, the family court explicitly stated it placed "a great deal of reliance" on the GAL's report when deciding the custody issue.

[4] After reviewing the testimony from the family court, we find Wife was not afforded a fair hearing due to the ***287** performance of the GAL appointed in this case. Furthermore, since the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record, we cannot find the admission of the GAL's recommendation was harmless error. Therefore, we find the GAL's actions and inactions so tainted the decision of the family court in this case, as to deny Wife due process. U.S. CONST. amend. XIV; *South Carolina Dep't of Soc. Serv. v. Beeks,* 325 S.C. 243, 481 S.E.2d 703 (1997) (recognizing the importance of due process in a child custody case).

A guardian *ad litem,* as the later phrase suggests, is a guardian for litigation. Traditionally, GALs were lawyers appointed by the court to appear in a lawsuit on behalf of a minor or incompetent. Over time, the role of the guardian was defined by statute as well as by common law. Lay persons as well as lawyers were appointed by the court in cases to protect those the court or legislature deemed could not protect themselves. For

example, GALs were appointed in cases of abuse and neglect, and in cases involving an incompetent person. The legislature has enacted some statutes regarding GALs. In the context of children, the legislature has enacted S.C.Code Ann. § 20-7-121 (Supp.2000) (creating a GAL program for children in abuse and neglect proceedings); Section 2-7-1570 (mandating the appointment of a GAL for children involved in a termination of parental rights proceeding); Section 20-7-952 (requiring a GAL in a paternity action); and Section 20-7-1732 (requiring the appointment of a GAL for children involved in an adoption proceeding).

[5] Over time, it has become the custom in this state, and many others, for the family court to appoint GALs in private custody disputes. The GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view. *Fleming v. Asbill,* 326 S.C. 49, 483 S.E.2d 751 (1997); *Townsend v. Townsend,* 323 S.C. 309, 474 S.E.2d 424 (1996). Standard setting for GALs in this "new" role has been very ad hoc. The legislature has set standards for a GAL appointed in ***288** abuse and neglect cases.[FN1] However, there has been no comprehensive or coherent approach for the setting of standards for the use of GALs in private custody disputes. The judicial, legislative, and executive branches need to take a broader look at GALs who function in this capacity. [FN2]

FN1. S.C.Code Ann. § 20-7-122 (Supp.2000) provides

The responsibilities and duties of a guardian ad litem are to:

(1) represent the best interest of the child;

(2) advocate for the welfare and rights of a child involved in an abuse or neglect proceeding;

(3) conduct an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs;

(4) maintain accurate, written case records;

(5) provide the family court with a written report, consistent with the rules of evidence and the rules of court, which includes without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case;

(6) monitor compliance with the orders of the family court and to make motions necessary to enforce the orders of the court or seek judicial review;

(7) protect and promote the best interest of the child until formally relieved of the responsibility by the family court.

FN2. In July 2001, Senator Glenn McConnell, President Pro Tempore of the South Carolina Senate announced the formation of a task force to make recommendations regarding the use of GALs. To date, this task force has conducted several public hearings throughout the state.

**390 [6] [7] While a more complete approach is being examined by the three branches of government, this Court will set forth some base line standards. In connection with developing a recommendation to the family court, a GAL shall: (1) conduct an *independent, balanced, and impartial* investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case; (2) advocate for the child's best interests by making specific and clear recommendations, when necessary, for evaluation, services, and treatment for the child and the child's family; (3) attend all court hearings and provide accurate, current information directly to the court; (4) maintain a complete file with notes rather than relying upon court files; *289 and (5) present to the court and all other parties clear and comprehensive written reports, including but not limited to a final report regarding the child's best interest, which includes conclusions and recommendations and the facts upon which the reports are based. In consideration for their services, GALs should receive reasonable compensation.

In conclusion, because the evidence in this case does not clearly weigh in favor of either Husband or Wife as custodial parent, the untrustworthy opinion of the GAL denied Wife a fair hearing on the custody issue. Accordingly, we remand the case for a new custody hearing.[FN3]

FN3. The children in this case have been through a tremendous ordeal, and this Court hopes a final determination of custody can be made in a reasonable time. This Court's order is not an expression of preference for one party over the other as the custodial parent for the minor children.

II. Alimony

[8] Husband argues the Court of Appeals erred in reversing the family court's denial of alimony to Wife. We disagree.

The family court denied Wife's request for alimony. The court reasoned there was no need for alimony based on the following findings: (1) Wife was awarded 35% of the marital estate ($913,278), which should provide her with approximately $5,000 in living expenses per month; (2) Husband was granted custody of the children; (3) the parties had a modest standard of living during the marriage; and (4) although Wife had only a 12th grade education and had no work experience during the 15 year marriage other than working in the family business without pay and caring for the minor children, the equitable division would provide Wife with adequate monthly income so that Wife's need to become employed was "questionable."

The Court of Appeals reversed the decision of the family court and remanded for a determination of an alimony award. The Court of Appeals found Wife's lack of appropriate education, her unsalaried work in both family businesses, her role as a homemaker, and the fact the parties lived well below their means entitled her to alimony. After considering all the factors provided in S.C.Code Ann. § 20-3-130(c) (Supp.2000), we agree with the Court of Appeals.

*290 Section 20-3-130(c) sets forth thirteen factors to be considered in arriving at an award of alimony: (1) the duration of the marriage and the ages of the parties at the

time of the marriage and separation; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse and the need for additional education; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated income of each spouse; (8) the marital and nonmarital properties of the parties; (9) the custody of any children; (10) marital misconduct or fault; (11) the tax consequences of the award; (12) the existence of support obligations to a former spouse; and (13) other factors the court considers relevant.

[9] The family court discussed the duration of the marriage, the ages of the parties, the physical and emotional condition of each spouse, the standard of living established during the marriage, the custody of the children, the lack of marital misconduct by either***391** party, and the tax consequences. However, the family court overlooked several important factors when it denied Wife's request for alimony: (1) Wife's lack of employment history and earning potential; (2) her educational needs to obtain adequate employment; (3) her sacrifice of a salaried job to work in the family business; and (4) her role as a primary caretaker for the children and the marital home for more than 15 years. Furthermore, it was inappropriate to hold Wife to the "standard of living enjoyed during the marriage" when Husband refused to improve the quality of the living quarters and lifestyle even though there were funds to do so. Husband deliberately chose to keep his family in a two bedroom hotel apartment, made Wife and three children share a bedroom, and refused to allow them to move into a home. Husband's deliberate choice to allow his family to live well below their means in inadequate housing should not be used against Wife in determining the monthly income she would need to maintain the standard of living she enjoyed during the marriage. The family court should look at all the fruits of the marriage in determining whether alimony is appropriate.

Without alimony, Wife, who has no employment history because she was a homemaker allowing her husband to pursue ***291** a career and has considerable less education than Husband; will be required to live substantially below the standard of living Husband will enjoy. *See McMurtrey v. McMurtrey,* 272 S.C. 118, 249 S.E.2d 503 (1978), *Eagerton v. Eagerton,* 265 S.C. 90, 217 S.E.2d 146 (1975) (taking into account the net wealth of the paying spouse); *See also* 27B C.J.S. *Divorce* § 369 (1986) ("Permanent alimony is awarded on considerations of equity and public policy. The responsibility of the court is to provide a just and equitable adjustment of the economic resources of the parties so that they can reconstruct their lives, by attempting to insure that the parties separate on as equal a basis as possible.").

Based on the foregoing, we find the Court of Appeals correctly reversed the family court's decision to deny alimony to Wife. Accordingly, we remand the case to the family court for a determination of alimony.

CONCLUSION

Based on the foregoing reasons, we **REMAND** this case to the family court for a new custody hearing and for a determination of alimony.

MOORE, WALLER and BURNETT, JJ., and Acting Justice ALISON RENEE LEE, concur.

Peterkin v. Peterkin, 360 S.E.2d 311 (1987)

Supreme Court of South Carolina.
William G. PETERKIN, III, Respondent-Appellant,
v.
Helen I. PETERKIN, Appellant-Respondent.
No. 22772.
Heard May 19, 1987.
Decided Aug. 24, 1987.

Divorce decree was issued by the Family Court, Calhoun County, Donald A. Fanning, Family Court Judge, and both husband and wife appealed. The Supreme Court, Ness, C.J., held that: (1) marital property is property acquired during coverture, but gifts to one spouse and property inherited by one spouse remains separate property of that spouse unless they have been transmuted into marital property; (2) husband's interest in two tracts of land, vested interest in trust, and stocks acquired through gift and inheritance were his separate property; and (3) husband's life estate in farm acreage was transmuted into marital property subject to equitable distribution.
Affirmed in part, reversed in part, and remanded.

***312 *311** David R. Gravely and Preston B. Haines, III, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Myrtle Beach, for appellant-respondent.

Jean H. Toal and D. Cravens Ravenel, of Belser, Baker, Barwick, Ravenel, Toal & Bender, Columbia, for respondent-appellant.

***312** NESS, Chief Justice:

Wife appeals an order granting a divorce, identifying and distributing marital property and awarding wife child support and alimony. Both parties appeal a subsequent order awarding wife attorney fees and costs. We affirm in part, reverse in part, and remand.

The parties were married for twenty-nine (29) years and have five children, one of whom is a minor. Husband is a farmer. Wife was primarily responsible for raising the children, running the household, and other marital duties. She was also the farm bookkeeper and assisted in the management of the farm operation.

Prior to and during the marriage, husband acquired, by gift and inheritance, interests in land and a trust, and stocks. Wife asserts the following properties were transmuted into marital property and should have been included in the equitable division: a) Husband's vested interest in a trust, inherited during the marriage; b) Stock given to husband prior to the marriage and stock inherited by husband during the marriage; c) Husband's life estate interest in the Lang Syne Farm acreage; and, d) Husband's interests in two (2) other tracts of land.

Income generated by these properties was placed into the parties' personal account and used for personal expenses of the family or placed into the farm account and drawn upon for family expenses. In addition, marital property was mortgaged and the proceeds used to purchase husband's father's one-half interest in the farm operation and to pay a farm debt. Wife also asserts her direct and indirect contributions increased the value of the property.

[1] Marital property is property acquired during coverture. *Miller v. Miller,* 358 S.E.2d 710 (S.C.1987); *Trimnal v. Trimnal,* 287 S.C. 495, 339 S.E.2d 869 (1986).

However, gifts to one spouse and property inherited by one spouse remain the separate property of that spouse unless they have been transmuted into marital property. *Id.*

313** Transmutation "may occur when the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such a manner as to evidence an intent by the parties to make it marital property." *Trimnal, supra,* quoting313** *Hussey v. Hussey,* 280 S.C. 418, 312 S.E.2d 267 (Ct.App. *en banc* 1984).

[2] The trial judge properly found husband's interests in the two (2) tracts of land, his vested interest in the trust and the stocks acquired through gift and inheritance were his separate property. Merely using the income derived from these items in support of the marriage does not transmute them into marital property. *See Brooks v. Brooks,* 289 S.C. 352, 345 S.E.2d 510 (Ct.App.1986) (Inherited property does not lose its separate nature because a portion of the inheritance is used in furtherance of the marriage).

[3] The trial judge also found the Lang Syne Farm acreage was husband's separate property. However, he found the farm house, its contents and the farm equipment had been transmuted into marital property. In our opinion, husband's life estate in the farm acreage lost its nonmarital character as well, and became subject to equitable distribution when it was ultilized in support of the marriage. In contrast to the other properties husband brought into the marriage, the Lang Syne Farm, and not merely the income the farm produced, was used in support of the marriage. Therefore, the trial judge erred in failing to find husband's life estate in the Lang Syne Farm acreage was transmuted into marital property subject to equitable distribution. *See Rampey v. Rampey,* 286 S.C. 153, 332 S.E.2d 213 (Ct.App.1985); *Cooksey v. Cooksey,* 280 S.C. 347, 312 S.E.2d 581 (Ct.App.1984); *cf. Canady v. Canady,* 289 S.C. 512, 347 S.E.2d 115 (Ct.App.1986); *Cooper v. Cooper,* 289 S.C. 377, 346 S.E.2d 326 (Ct.App.1986).

In light of the increase in the marital estate, we remand for reconsideration of the allocation of husband's life estate interest in the Lang Syne Farm acreage.

The parties' remaining issues are without merit and are disposed of pursuant to Supreme Court Rule 23.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

GREGORY, HARWELL, FINNEY, JJ., and BRUCE LITTLEJOHN, Acting Associate Justice, concur.

Phipps v. Phipps, 57 S.E.2d 417 (1950)

Supreme Court of South Carolina.
PHIPPS
v.
PHIPPS.
No. 16313.
Jan. 31, 1950.

Action by Eugene Phipps, by Ethel Phipps, his duly appointed guardian ad litem, against Ethel Louise Phipps to annul a marriage.

The Court of Common Pleas of Horry County, G. Duncan Bellinger, J., confirmed a report of the master, entered judgment for defendant, and plaintiff appealed.
The Surpeme Court, Taylor, J., held that evidence failed to establish that plaintiff was forced to marry defendant under duress which dominated marriage ceremony to such an extent that plaintiff was not and did not act as a free agent, and that evidence supported findings of fact concurred in by trial court.
Judgment affirmed.
***418** F. A. Thompson, Conway, J. Reuben Long, Conway, for appellant.

L. B. Dawes, Loris, R. D. Epps, Conway, for respondent.

TAYLOR, Justice.

Appellant in this action sought to have annulled and declared void, on the ground of duress, a marriage entered into with the respondent, Ethel Louise Phipps, on September 9, 1947.

The matter was referred to Honorable J. K. Dorman, Master for Horry County, for the purpose of having him take the testimony and report the same, together with his findings, both of law and fact. After taking the testimony, the Master made his Report, dated December 17, 1948, in which he recommended that the Complaint be dismissed.

In due time, the appellant filed his exceptions to the Report of the Master, and the matter was argued before his Honor, Judge G. Duncan Bellinger, who rendered his Decree, dated April 25, 1949, confirming the Report of the Master, and overruling the exceptions thereto.

Appellant and respondent first met each other in September, 1946. From that time they saw each other regularly about three times a week up until March or April when the visits were reduced to approximately one every two weeks. In November, 1946, they became engaged and planned to be married the first of the year.

In January of 1947 appellant induced the respondent to have improper relations with him, which resulted in her becoming pregnant and giving birth to a child on October 15, 1947.

When the respondent realized her condition, she informed the appellant, who stated that he would marry her and continued to promise that he would up until August 22nd, when he informed her that he was not going to do so.

The respondent's parents learned of her condition on September 7, 1947. That night the respondent and her parents rode into Conway and tried to find the appellant, but were unable to do so. The following morning, the respondent's father, Mr. George Spivey, and two of her brothers went to the home of the appellant's sister with whom he lived. Upon being informed of the situation, appellant attempted to run, but was restrained by Mr. Spivey, who held him by the belt. Upon being questioned about a prior statement to respondent that he had procured a marriage license, he denied having done so and it was then that appellant, according to his testimony, was placed in Mr. Spivey's car and they proceeded to the Courthouse, whereupon Mr. George Spivey went into the Courthouse and returned shortly, when the following transpired, according to appellant's testimony:

'Q. Goes in where? A. In the courthouse. He comes back out and he said: 'You are a little bit smarter than I though you were.' He was speaking to me. Preston said: 'You know what we should do with him? I said: 'What, shoot me?' He said: 'That's exactly

right.' Mr. George said: 'This is too good for him. We should take him to the river and tie a rock around his neck and toss him in.''

It certainly doesn't sound reasonable that appellant was actually in fear of being injured***419*** or he would never have suggested that he be shot. Further, the father of respondent, after returning to the car from the Probate Judge's office told appellant that he was correct in stating that he had not procured a marriage license and that he was going to have him arrested and went back into the courthouse. Appellant with respondent and three of her brothers were in the car and it was at this time that Mr. Preston Spivey, one of the brothers, proposed that the appellant and respondent get married, and he would pay the cost of a divorce if appellant stayed with respondent until the child was born.

As to this, appellant testified as follows:

'Q. How did you finally agree to go to the Probate Court and get a license? A. We agreed that if he would put it in writing, that if I would marry her, I wouldn't have to live with her and that as soon as the child was born, he would pay for the divorce, all doctor bills and hospital bills and support her.

'Q. You and which one agreed to that? A. Preston.

'Q. Was Mr. Spivey, Sr., there? A. Yes, sir.

'Q. Was Miss Louise there? A. Yes, sir.

'Q. Did she agree to that? A. Yes, sir.

'Q. Mr. Spivey agree to it? A. Yes, sir.

'Q. When were you to put that in writing? A. The next morning before I got married.

Q. You agreed to that? A. Yes, sir.'

Appellant and respondent then proceeded to the Probate Judge's office alone and applied for a marriage license. The testimony further shows that while they were parked at the courthouse all of the occupants left the car except appellant and respondent and that appellant then went to the drug store and procured soft drinks for himself and respondent and were sitting in the car. When the others returned, they then proceeded to appellant's home where he went into the house alone and got his clothes. There was a telephone there but he made no attempt to call for help but rejoined the party in the car and accompanied them to the respondent's home. Being questioned as to his intent at this time, appellant said:

'Q. Isn't it a fact, that having made this agreement, you intended to stick-up to it like a gentlemen? A. If they had done like they said they would do.

'Q. You are willing to go ahead and carry out your part of the agreement if they had done that they said they would do? A. That's right.

'Q. That is, put it in writing? A. That's right.

'Q. You expected to carry out the agreement if they had carried out their part of the agreement? A. If they had carried out their part of the agreement.

'Q. You expected to carry out your part of it? A. Yes, sir.'

It appears from the testimony that when they all went back to the home of Mr. George Spivey, several of the men, if not all of them, left the house, and the plaintiff remained at the house and slept in a room by himself that night, with the windows open.

It further appears that the sister of the plaintiff, Miss Ethel Phipps, together with her friend, Miss Lelia Mishoe, drove out to the Spivey home that afternoon and there was quite a lot of conversation among the parties, and that the plaintiff went out and got in the car with Miss Lelia Mishoe and talked to her for some time. These facts are cited for the purpose of showing that if the plaintiff had wished to run away, he had ample opportunity for doing so. Although Miss Ethel Phipps thought that the plaintiff was being restrained of his liberty, he, himself, when asked if, at that time, while Miss Phipps was at the Spivey home, he still intended to carry out the agreement, testified that he did.

It is therefore seen that appellant was willing to comply with the agreement provided that it be reduced to writing before the marriage. This is strong evidence that he was exercising his own will and not being coerced.

***420** The next morning appellant accompanied respondent's father to the office of a Mr. Cartrette where the agreement was to be reduced to writing. Not finding Mr. Cartrette in, Mr. Spivey left the appellant there alone. Returning some time later and finding that Mr. Cartrette had not yet arrived at his office, they proceeded to the courthouse, Mr. George Spivey going in while appellant remained outside with others. Shortly thereafter, Mr. Spivey came out, accompanied by Mr. Lonnie D. Causey, a reputable member of the Conway Bar. Mr. Causey suggested that the thing for appellant to do would be to go ahead and get married and then in ten or twelve days come in and get 'divorce papers.' The original agreement was that the appellant, after the marriage, would return to the Spivey home and remain until the child was born, but, at the suggestion of Mr. Causey, the agreement was not put in writing as he informed them that such a contract would not be binding. Appellant and respondent then decided to have the marriage ceremony performed and each to go separate ways, whereupon they proceeded to the office of the Probate Court alone where the marriage ceremony was performed by the Probate Judge. Appellant then escorted the respondent back to the car and returned to his home, while she returned to the home of her father.

[1] If duress, as is contemplated by the law, was at any time during the negotiations exercised by respondent or her family, it must clearly have dominated throughout the transaction to such an extent that appellant could not and did not act as a free agent. The violence or threats must have been of such a nature as to inspire a great fear of bodily harm. There is ample evidence to the contrary in the case at bar. Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784.

The Master in his Report to the Circuit Court recommended that the complaint be dismissed. Upon exceptions being taken thereto, the matter was heard in the Court of Common Pleas by the Honorable G. Duncan Bellinger, who, in his Decree, dated April 25, 1949, confirmed the findings of the Master and overruled all exceptions.

[2] It is well-settled law that the findings of fact concurred in by the Circuit Judge will be sustained by this Court unless it is found that they are against the clear preponderance of the evidence or without any evidence to sustain them. Cohen v. Goldberg, 144 S.C. 70, 142 S.E. 36; Kaminski Hardware Co. v. Holden Trunk and Bag

Co., 150 S.C. 244, 147 S.E. 874; Farrow v. First National Co., 158 S.C. 435, 155 S.E. 736; Carolina Savings Bank v. Ellis, 174 S.C. 69, 176 S.E. 355, 366; Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102; Ulmer v. Bookhart, 178 S.C. 87, 182 S.E. 162; First Carolina Joint Stock Land Bank of Columbia v. Knotts, 183 S.C. 68, 190 S.E. 114; Riley v. Berry, 189 S.C. 4, 199 S.E. 866.

[3] We are of the opinion that the findings of the Master, concurred in by the Circuit Judge, are amply sustained by the evidence. Therefore, all exceptions should be overruled and it is so ordered.

Judgment affirmed.

BAKER, C. J., and FISHBURNE, STUKES and OXNER, JJ., concur.

Pirayesh v. Pirayesh, 596 S.E.2d 505 (Ct. App. 2004)

Court of Appeals of South Carolina.
Michael M. PIRAYESH, Respondent/Appellant,
v.
Mary Alice PIRAYESH, Appellant/Respondent.
No. 3793.
Heard March 10, 2004.
Decided May 11, 2004.

Background: The parties petitioned for divorce. The Family Court, Greenville County, Robert N. Jenkins, Sr., J., granted divorce, awarded husband custody of the parties' children but prohibited them from traveling outside of the United States, granted wife visitation, and ordered wife to pay child support. Husband and wife appealed.

Holdings: The Court of Appeals, Hearn, C.J., held that:
(1) guardian ad litem's child custody recommendation was not the product of an independent, balanced, and impartial investigation, and thus the trial court erred in relying on the recommendation;
(2) remand for reconsideration of order requiring husband and wife to split the cost of the guardian ad litem's fee was required;
(3) order banning husband from traveling outside of the United States with the parties' children was proper; and
(4) apportionment of marital debt was not an abuse of discretion.

Affirmed in part; reversed in part; remanded.
*****507 *287*** J. Falkner Wilkes, of Greenville, for Appellant-Respondent.

Bobby H. Mann, of Greenville, for Respondent-Appellant.

HEARN, C.J.:
Michael M. Pirayesh (Husband) and Mary Alice Pirayesh (Wife) were granted a divorce on the ground of one year's continuous separation without cohabitation. Husband was granted custody of the parties' two children, but was prohibited from traveling with the children outside the United States. Wife was granted visitation rights and was ordered to pay child support. The parties were ordered to split the guardian ad litem fees and pay their own attorney's fees. Both parties appeal this order. We affirm in part, reverse in part, and remand.

FACTS

Husband, who was born in Iran, moved to the United States in 1978 and has since become a United States citizen. On June 11, 1984, he and Wife married. The parties had two children during their marriage, a son, now fifteen years old, and a daughter, now thirteen years old. Although Wife and children have always lived together in Greenville, South Carolina, Husband worked for six months in Portland, Oregon in 1996 and thereafter in Atlanta, Georgia until 1998. At the time of the divorce hearing in March 2001, Husband had obtained a job in Charlotte, North Carolina, and had been living there for approximately one year. The children resided with Wife during the couple's one year's separation as well as during the pendency of this litigation.

Husband claims the marital breakdown was a result of Wife's inability to handle the family finances and the accrual ***288** of a large amount of credit card debt. When asked if he and Wife tried to budget their money, Husband testified:

Yes, we did.... Like for example, we said we don't have ... certain money to spend on certain things.... [W]e said, if you are going to make a long distance phone call let's just keep it under a hundred dollars.... She did not follow that. As a matter of fact, I have one conversation that she had with her mom for a hundred and twenty minutes. My ear get[s] hurt after fifteen (15) minutes.... Grocer[ies] for example, you know. We bought grocer[ies]; that's fine. Half of the grocery throw away (sic). Either she burned it cooking or she didn't like to eat left over food.

Husband also testified that Wife had been un- or under-employed for much of the marriage despite the fact that she has always been in good health.

***508** Wife contended that the failure of the marriage was largely a consequence of Husband's emotional and physical distance from her and the children, due namely to his out of town employment and his preoccupation with playing tennis. According to Wife, the couple's problems began when, on the day of their daughter's birth, Wife called Husband to inform him that their newborn had to be monitored because she had stopped breathing. Wife testified as follows:

[T]hat evening I had fed Debra, she stopped breathing. And I tried to wake her up. And nothing was happening.... And I rang the nurse's station from the bed.... They came and they got her to start breathing again. I called [Husband and] told him what had happened.... It was probably 10 o'clock when I called back. And his response was, "[Wife], I was asleep." And he hung up.

Wife testified that Husband's response to their daughter's health problems made her "wonder[ ] what kind of man [she] had married" and that their marital problems only increased from then on.

Both parties sought custody of their two minor children. During the presentation of Husband's case, Husband and three witnesses testified on his behalf. The witnesses, all of whom knew Husband through his tennis hobby, testified that *both* Husband and Wife were loving parents. Husband testified that his primary reason for seeking custody was because, ***289** during the pendency of the litigation, the water in the Wife's home was cut off twice, the phone was disconnected five times, and the electricity was also turned off. He also complained that Wife was late dropping the children off to visit with him a number of times and that Wife did not effectively discipline the children while they were in her care. Husband felt he was the better parent because he had a flexible job that paid $60,000 a year, he knew how to budget his money, and he could control the children.

During the presentation of Wife's case, seven witnesses testified that Wife was a good parent.[FN1] One of those witnesses was a neighbor who has lived next door to the couple for six years. The neighbor testified that he and his wife had to care for Wife after she had a hysterectomy because Husband was in Atlanta during the week and playing tennis on the weekend. [FN2] The neighbor also testified that Husband seemed volatile with the children. Another witness testified that she helped Wife with her daughter's birthday party, and at the party, Husband complained to the witness about Wife. The witness testified that Husband seemed "very alienated and angry."

FN1. Two of Wife's witnesses testified that Husband was a fine parent as well.

FN2. After Husband testified on direct that Wife had no health problems, he was specifically asked on cross-examination about Wife's hysterectomy. Husband claimed he did not know she had one. Wife testified she had a hysterectomy in December of 1997, before the parties separated. Husband then returned to the stand on reply, recalled the hysterectomy, and claimed he took nine days off from work in order to care for her and the children.

***290** Wife testified that, in addition to having primary custody of the children during the couple's separation, she had been the primary caretaker for the children during the marriage. In addition to Husband working out of state for two-and-a-half years, she claimed Husband played tennis five days a week, no matter what was going on in their children's lives.[FN3] She also testified that Husband gets agitated easily and that he was always critical of her and the children.

FN3. During Husband's cross-examination, he admitted playing tennis every other day during the marriage.

Wife testified that she has worked during most of the marriage and that the periods during which she was unemployed occurred when the children were newborns or when they were ill.[FN4] While she admitted that she had trouble paying the utilities during the parties' separation, she pointed out that she and Husband were having trouble paying their bills while they were a two-income family and that those problems were amplified during the separation. She further explained that she missed several days of work ***509** during the parties' separation when she severely burned her leg from her knee to her hip, which put a further strain on her finances.

FN4. The parties' son had ear problems when he was little and now cannot hear out of his right ear. Their daughter was born with three kidneys.

On cross-examination, Wife was asked about counseling appointments the children had missed.[FN5] Wife explained that the December visit was rescheduled because the counselor was on vacation. Wife testified that she rescheduled the next visit because she was working with a woman who was nine-and-a-half months pregnant, and Wife felt she could not leave the woman alone. On the third attempted visit, Wife and children went to the office, but when they arrived, they found out that the fee had increased from ten to fifteen dollars; when Wife did not have the extra money, she was told she would have to reschedule. On the fourth attempt at rescheduling, the brakes on Wife's car went out on the way to the appointment.

FN5. The children had seen the counselor regularly from June 2000 to November 2000; however, at the time of the divorce hearing, they had not been to a session in four months.

Wife was also asked about why the parties' daughter had not had a psychological evaluation, as previously ordered by the family court, and why the daughter had missed three dentist appointments. Wife explained that she could not afford the psychological evaluation and Husband would not help her pay for it because he did not agree that the daughter needed to be evaluated. As for the missed dentist appointments, Wife claimed daughter had been ill.

In addition to custody of the children, another major issue was whether or not Husband would be allowed to travel with the children to Iran. When questioned about his desire to bring the children to Iran, Husband explained he wanted his ***291** children to visit his parents and other Iranian relatives.[FN6] However, he stressed that he had no desire to relocate to Iran and said he wanted Wife to remain a major part of their children's lives.

FN6. Husband's father is ninety-one years old; thus, travel by him to America is not feasible.

According to Wife, Husband threatened on more than one occasion to move back to Iran and take the children with him. Wife offered the testimony of Christine Uhlman to show the inherent risks to children in travel to Iran, the specific risks of parent/child abduction in similar situations, and the lack of any legal remedy should this occur. Due to her extensive experience in this area, Uhlman was qualified by the court as an expert witness on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predicament. The court found, however, that she did not have an adequate education or background to be qualified as an expert on the law of Iran, and limited her qualification to the topics listed above.

The family court also heard the guardian ad litem's final report concerning Husband's travel outside of the United States and custody of the two children. The guardian testified that she believed Wife's fears that Husband would abduct and relocate the children were baseless, but acknowledged that travel restrictions may nevertheless be warranted. She also testified to some psychological, social, and physical problems of both the children and her perception that these problems were not being adequately addressed. The guardian was also troubled by Wife's apparent inability to meet the basic health and day-to-day living needs of the children. In her opinion, Husband appeared to be in a better position to meet these needs and it was therefore in the best interests of the children to grant him custody. The guardian made this recommendation to the court.

The family court followed the guardian's custody recommendation, granting Husband custody of both children and granting Wife standard visitation rights. The family court also prohibited Husband from taking the children out of the United States. The parties were ordered to pay for their own ***292** attorney's fees, and the cost of the guardian was split between them. Both parties appeal this order.

ISSUES ON APPEAL

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

***510** II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

III. Did the family court err by requiring each party to pay half of the guardian ad litem's fees?

IV. Did the family court err by ordering the parties to pay their own attorney's fees and costs?

V. Did the family court err by restricting Husband from traveling outside of the United States with the children?

VI. Did the family court err in the apportionment of the marital debt?

STANDARD OF REVIEW

[1] [2] [3] On appeal from the family court, this court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. *Murdock v. Murdock,* 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct.App.1999). This court, however, is not required to disregard the family court's findings; nor should we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. *Badeaux v. Davis,* 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct.App.1999); *Smith v. Smith,* 327 S.C. 448, 453, 486 S.E.2d 516, 519 (Ct.App.1997). Because the appellate court lacks the opportunity for direct observation of witnesses, it should give great deference to the family court's findings where matters of credibility are involved. *Kisling v. Allison,* 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct.App.2001); *Dorchester County Dep't of Soc. Servs. v. Miller,* 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct.App.1996). This is especially true in cases involving the welfare and best interests of children. *Id.; see also Cook v. Cobb,* 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978) (stating that the welfare and best interests of children are the primary, paramount, and ***293** controlling considerations of the court in all child custody controversies).

LAW / ANALYSIS

Wife challenges the custody order by arguing: (1) that the guardian's recommendation to the court was a product of an incomplete and biased investigation; and (2) that the family court improperly relied on the guardian's recommendation. We agree.

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

[4] In *Patel v. Patel,* 347 S.C. 281, 555 S.E.2d 386 (2001), the Supreme Court of South Carolina set the base line standards for the responsibilities and duties of a guardian ad litem. Foremost in the court's list of duties, the guardian shall:

... conduct an **independent, balanced, and impartial** investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Id. at 288, 555 S.E.2d at 390 (emphasis in original); *see also* South Carolina Private Guardian Ad Litem Reform Act, S.C.Code Ann. § 20-7-1549 (Supp.2003) (codifying the *Patel* guidelines with more specificity, but only directly applicable to guardians ad litem appointed after January 15, 2003).

In *Patel,* the guardian's investigation reflected overwhelmingly favorable treatment toward the husband and negligible consideration of the wife's capacity to competently parent the children. For example, the guardian contacted the husband's attorney nineteen times, but failed to contact the wife's counsel once. The guardian had frequent contact with the husband but minimal contact with the wife, and the guardian only met with the children when they were with the husband. The guardian even secretly listened in on phone conversations between husband and wife while visiting with the husband. *Id.* at 286, 555 S.E.2d at 388-89. The *Patel* court held that the actions and inactions of the guardian so tainted the ***294** decision of the family court that the wife was not afforded due process, and the court remanded the issue of custody to the family court. *Id.* at 286-87, 291, 555 S.E.2d at 389, 391.

****511** We recognize that the case at hand is different from *Patel* in that Wife's argument stems, not from the guardian's incomplete investigation of her, but rather from the guardian's allegedly superficial investigation of Husband's parenting abilities. However, we believe the requirements set forth in *Patel* were meant not only to protect the parents who are the subjects of the guardian's investigation but also to ensure that the fate of a child's living arrangements does not rest in the hands of a guardian whose investigation is biased or otherwise incomplete. Thus, a parent, whether the focus of the guardian's investigation or largely ignored by the investigation, may appeal a custody decision if that parent believes the family court's order was tainted by the guardian's improper investigation.

Here, the guardian visited Wife's home several times to interview her and the children. However, there is no indication that she ever interviewed Husband and the children while they visited his home in Charlotte. Instead, she testified she met with him and the children at a McDonald's restaurant one time. She further testified that she went to Charlotte to view Husband's residence and the schools the children would attend if custody was changed and talked on one occasion to a college student who babysat the children during their two-week summer visitation with Husband.

The guardian testified that her recommendation was largely based upon the concerns of the children's counselor regarding counseling appointments they had missed and a psychological evaluation that had still not been scheduled for the parties' daughter. Apparently, the guardian blamed Wife for the missed appointments and did not believe Husband had any responsibility to make sure these appointments were made. However, the record indicates that the counselor had sent a letter to both Husband and Wife about the missed counseling sessions. Furthermore, where Wife at least attempted to schedule a psychological evaluation, there was no evidence that Husband did anything to ensure that the evaluation was completed. On cross-examination, the guardian was asked:

***295** Q: [Y]ou have concerns too about the father ... as far as your investigations?

A: Right

Q: But your concerns aren't listed necessarily on your report because you didn't mention them in your report that you had concerns that the father had not complied with the psychological evaluation for [the daughter], and not attended counseling, and not attended co-parenting counseling, and has also exposed the children as far as to more-that both parents have exposed the children to the divorce related issues. So those aren't reflected on your report on the second page that I was able to see?

A: Right

When asked whether she wanted to explain why she had not mentioned Husband's shortcomings in her report, the guardian merely stated that she did not omit them for any particular reason and again pointed out that the children spent more time with Wife.

Additionally, the record indicates that the guardian was mistaken about some of the facts she reported to the family court. For instance, the guardian testified that the parties' daughter had nine absences from school, which contradicted Wife's testimony. However, at the hearing for reconsideration, the school verified Wife's assertion that daughter had five absences. While this mistake by the guardian appeared to be inadvertent, the guardian was adamant during her testimony that the daughter had four additional unexcused absences.[FN7] Thus, the guardian's recommendation was at least partially biased because of her mistaken belief that the daughter had several unexcused absences while in Wife's care.

FN7. In fact, the daughter did not have any unexcused absences. When questioning the guardian, Wife's attorney attempted to explain that the lower case "u's" on the daughter's attendance record denoted a tardy; however, the guardian stated: "Your eyes might be better than mine. I can't-I just see it as a U."

Based on the guardian's superficial investigation of Husband, her failure to hold Husband partially responsible for the children not attending counseling, and her over-reporting the number of absences daughter has had at school, we agree with ***296** Wife that the ****512** guardian's recommendation did not result from a fair and impartial investigation.

II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

[5] [6] [7] In determining the best interest of the child in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including the guardian, expert witnesses, and the children); and the age, health, and sex of the children. *Patel,* 347 S.C. at 285, 555 S.E.2d at 388. Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life. *See* *Woodall v. Woodall,* 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996); *Epperly v. Epperly,* 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994); *Wheeler v. Gill,* 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct.App.1992). When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration. *Woodall,* 322 S.C. at 11, 471 S.E.2d at 157 (1996); *Ford v. Ford,* 242 S.C. 344, 351, 130 S.E.2d 916, 921 (1963).

A key component of the supreme court's decision to remand the custody order in *Patel* was the fact that "the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record." 347 S.C. at 286-87, 555 S.E.2d at 389. Since there were no substantial considerations made on record as to the issue of custody apart from the guardian's recommendation, the court refused to declare harmless the judge's reliance on a biased guardian's report. *Id.* Here, a total of ten witnesses (not counting the Husband, Wife, and the guardian) testified about each party's parenting abilities. All ten, three of whom were called by Husband, described Wife as a loving and caring mother. Five witnesses testified that Husband was a capable parent,

but ***297*** two specifically questioned his parenting ability.[FN8] Thus, aside from Husband, the guardian was the *only* witness who believed Husband was the better parent.

FN8. The parties' next-door neighbor testified that Husband seemed volatile with the children. Another witness described Husband as "very alienated and angry."

Because the family court obviously gave a great deal of weight to the guardian's recommendation, which we have found was based on a biased and incomplete investigation, we reverse the award of custody and remand the case for a new custody hearing.[FN9]

FN9. Because we remand the issue of custody, we also remand the issue of attorney's fees and costs.

III. Did the trial court err by requiring Wife to pay half of the guardian's fees?

[8]  Wife next argues that the family court erred by requiring her to pay half of the guardian's fees because the guardian failed to conduct an independent, balanced, and impartial investigation. We reverse and remand this issue to the family court.

Section 20-7-1553(B) of the South Carolina Code (Supp.2003) provides that a court-appointed guardian "is entitled to reasonable compensation, subject to the review and approval of the court." That subsection goes on to list the following factors to guide family courts when awarding guardian fees:

(1) the complexity of the issues before the court;

(2) the contentiousness of the litigation;

(3) the time expended by the guardian;

(4) the expenses reasonably incurred by the guardian;

(5) the financial ability of each party to pay fees and costs; and

(6) any other factors the court considers necessary.

While the ultimate work product of the guardian is not specifically listed under section 20-7-1553, it certainly qualifies as another factor "the court considers necessary." Thus, we remand this issue along with the issue of custody. Upon remand, the family ***513*** court should consider the guardian's incomplete investigation, along with the other factors listed in ***298*** section 20-7-1553, in determining the amount of fees owed to the guardian.

IV. Did the trial court err by restricting Husband from traveling outside of the United States with the children?

[9]  Husband first contends that the family court erred in restricting his travel with the children because the court wrongfully relied on testimony from Wife's expert that went beyond her qualification as an expert witness. We disagree.

Wife's expert witness was qualified by the court as an expert on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predicament. The court went on, however, to limit that qualification to those precise topics and expressly held that she was not qualified as an expert on the law of Iran. Husband contends that her subsequent testimony on legal remedies for the recovery of abducted children and the recognition of American passports in Iran was admitted in error as it overstepped the limitations of her qualification as an expert.

[10]  Permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error. *See* *Nelson v. Taylor,* 347 S.C. 210, 218, 553 S.E.2d 488, 492 (Ct.App.2001). We find, however, that the specific testimony at issue here fell within the expert's qualification. While the family court expressly found that the expert witness was not an expert in the law of Iran, certain issues relating to that law are so intertwined with the parameters of the expert's qualification as to be manifestly compounded. One would be hard pressed to discuss the remedies for child abduction in Iran without at least tangentially touching on the law of Iran. Therefore, we find that Wife's expert witness's testimony fell within that narrow area of Iranian law applicable to her qualification as an expert.

[11]  Second, Husband asserts error by the family court on the merits of the restriction itself. Citing cases from other jurisdictions which held that fear of abduction and lack of foreign remedy, without more, are an insufficient showing to reverse a family court on a custodial parent's right to travel with his children, Husband argues that the family court erred ***299** in limiting his right to leave the United States with his children. *See* *Long v. Ardestani,* 241 Wis.2d 498, 624 N.W.2d 405 (Ct.App.2001) (finding that difficulty of obtaining the return of the child in the event of abduction is but one factor for a court to consider in imposing restrictions and deferring to the family court); *Al-Zouhayli v. Al-Zouhayli,* 486 N.W.2d 10 (Minn.Ct.App.1992) (deferring to the family court's decision not to restrict travel despite threats of abduction and lack of Saudi remedies). We disagree with this argument as well.

The prevailing rule gleaned from the cases to which Husband cites is that appellate courts generally defer to a family court's decision regarding a parent's ability to travel with his or her children. We agree with the Wisconsin Court of Appeals that:

We are satisfied that the standard of the best interests of the child, comprehensive as it is, permits a full consideration of concerns both about a parent's intention in abducting a child and about the lack of a remedy should that occur. We are also satisfied that there is no need to alter the deference appellate courts give to trial courts' decisions on a child's best interests in order to insure a full consideration of those concerns.

Long, 624 N.W.2d at 417-18.

At trial, Wife presented evidence of both specific threats by Husband to relocate the children to Iran as well as testimony concerning the inherent dangers in these types of situations. Testimony was also presented regarding the generalized dangers in travel with children born of Iranian descent to that country and the possibility that Husband could easily fly from another country into Iran if he was allowed to travel with the children outside the United States. Furthermore, even if Husband had every intention to return the children after their visit to Iran, if he were to become incapacitated while he and the children were there, Wife could do very little to retrieve the children. Based on the evidence regarding Husband's threats, ***514** the risks of abduction, and the lack of legal

recourse in a country which is not a signatory to the Hague Convention, we affirm the family court order banning Husband from travel with the children outside the United States.

***300** **V. Did the family court err in the apportionment of the marital debt?**

[12] Husband argues the family court erred in not equally splitting the parties' debts between them. He contends that since all the debt was accrued during the marriage, the entirety of the debt should be split between the parties regardless of whose name it is in. We disagree.

[13] Marital debt should be divided in accord with the same principles used in the division of marital property and must be factored into the totality of equitable apportionment. *See* S.C.Code Ann. § 20-7-472 (Supp.2003); *Jenkins v. Jenkins,* 345 S.C. 88, 103, 545 S.E.2d 531, 539 (Ct.App.2001); *Thomas v. Thomas,* 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct.App.2001). The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. *Thomas v. Thomas,* 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct.App.2001).

[14] There are many factors which the family court may consider in the apportionment of marital property. On review, the appellate court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that the appellate court may have weighed specific factors differently than the family court is irrelevant. *Johnson v. Johnson,* 296 S.C. 289, 300-301, 372 S.E.2d 107, 113 (Ct.App.1988). In this review, our focus is on whether the family court addressed the statutory factors governing apportionment with sufficiency for us to conclude that the court was cognizant of these factors. *Doe v. Doe,* 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct.App.1996).

In its final order, the family court noted the income of each party, the absence of an alimony grant to Wife and her duty to pay child support, the sale of the marital residence, the tax benefits of the apportionment to each party, and the child custody arrangements. Because these specific findings of the family court comport with those considerations mandated by section 20-7-472, we are satisfied that the court was, in fact, cognizant of the statutory factors of marital apportionment when allocating the marital debt between the parties. Therefore, the family court acted within its discretion in ordering Husband to pay all debts held in his name.

***301** **CONCLUSION**

For the foregoing reasons, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON and BEATTY, JJ., concur.

Pirri v. Pirri, 631 S.E.2d 279 (Ct. App., 2006)

Court of Appeals of South Carolina.
Roberta Selleck PIRRI, Respondent/Appellant,
v.
John S. PIRRI, Appellant/Respondent.
No. 4113.
Heard Dec. 6, 2005.
Decided May 22, 2006.
Rehearing Denied June 30, 2006.

Background: Alleged common-law wife filed divorce action. Alleged common-law husband counterclaimed, denying existence of marriage and requesting certain property and accounting in case court found marriage existed. Following a hearing, the Family Court, Abbeville County, Billy A. Tunstall, Jr., J., found that common law marriage existed, granted husband a divorce, divided property, denied wife's request for alimony, granted wife use of maiden name, and awarded wife attorney fees. Husband and wife appealed.

Holdings: The Court of Appeals, Beatty, J., held that:
(1) trial court was free to accept wife's valuation of marital home over husband's valuation;
(2) wife was entitled to award of attorney fees;
(3) wife was entitled to award of alimony; and
(4) wife failed to prove transmutation of husband's separate property.

Affirmed in part, reversed in part, and remanded.
***282** Adam Fisher, Jr., of Greenville, for Appellant-Respondent.

J.P. Anderson, Jr., of Greenwood, for Respondent-Appellant.

BEATTY, J.:
*262 In this domestic cross-appeal, John Pirri ("Husband") argues the court erred in valuing marital property and in awarding attorney's fees to Roberta Pirri ("Wife"). Wife argues the court erred in failing to award her alimony, failing to find certain property was marital, and failing to find certain property was transmuted into marital property. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife began living together in Connecticut in 1971. They never had a ceremonial wedding. However, Wife began using "Pirri" as her last name sometime in the 1970s, and the parties filed joint income tax returns from the 1970s on. Husband adopted Wife's then nineteen-year-old daughter, Julia, in 1981, and changed her name to Julia Pirri. The parties referred to each other as "husband" and "wife," and Husband's will left his estate to "Mrs. Pirri."

*263 Husband was a successful veterinarian, and Wife worked in the clinic he owned from 1971 until 1978. In 1978, the parties closed the veterinary clinic and converted the property to an indoor shooting range. Husband and Wife continued to work at the shooting range until 1994. Husband later leased the property to the Widewater hotel development corporation in 1998. The parties maintained an affluent lifestyle, with joint checking accounts and investments, although Husband also had substantial investments in his own name.

In 1990, the parties purchased 216 acres in Abbeville County, South Carolina, titled the property in both of their names, and built a large house upon the land. They moved to South Carolina in 1996. In addition to the house and acreage, Husband purchased an airplane after the parties moved to South Carolina. The parties did not have any debt on these assets.

The parties separated in 2002 when Wife discovered sexually explicit emails between Husband and other men. Although Husband testified he was only having "cybersex" and not actual physical encounters, Wife and the parties' daughter, Julia, testified that Husband admitted having sexual encounters with two individuals with whom he was exchanging e-mails. Wife left the home and filed the underlying action seeking: a finding by the family court of a common law marriage; a divorce on the ground of adultery; equitable division of all of the marital estate; alimony; and attorney's fees. Husband counterclaimed, denying the existence of a marriage and requesting certain property and an accounting in the event the court found a marriage existed.

At the beginning of the final hearing, the parties stipulated that a common law marriage existed in South Carolina. Husband was also allowed to amend his pleadings to include a claim for divorce based on one year of continuous separation. After hearing the evidence, the family court issued a final order declaring a common law marriage came into existence between the parties in 1996, when they moved to South Carolina. The court granted Husband a divorce based upon one year of continuous separation, divided the parties' property that was either jointly titled or obtained after 1996, denied Wife's request for alimony, granted Wife's request to return to ***264** the use of her maiden name, and awarded Wife $15,000 in attorney's fees. The court denied the motion to alter or amend the judgment, and both Husband and Wife appealed.

STANDARD OF REVIEW

[1] [2] In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. *Woodall v. Woodall,* 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). However, this broad scope of review does not require us to disregard the findings of the family court. *Stevenson v. Stevenson,* 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). ****283** We are mindful that 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. *Bowers v. Bowers,* 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct.App.2002)

LAW/ANALYSIS

I. Husband's Appeal

A. Valuation of the Marital Home

[3] Husband argues the family court abused its discretion in adopting Wife's valuation of the marital home and acreage over his valuation. We disagree.

[4] [5] [6] [7] [8] In making an equitable distribution of marital property, the family court must identify real and personal marital property and determine

the property's fair market value. *Cannon v. Cannon,* 321 S.C. 44, 48, 467 S.E.2d 132, 134 (Ct.App.1996); *Noll v. Noll,* 297 S.C. 190, 192, 375 S.E.2d 338, 340 (Ct.App.1988). "In the absence of contrary evidence, the court should accept the value the parties assign to a marital asset." *Noll,* 297 S.C. at 194, 375 S.E.2d at 340-41. The family court has broad discretion in valuing the marital property. *Roe v. Roe,* 311 S.C. 471, 478, 429 S.E.2d 830, 835 (Ct.App.1993). A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented. *Woodward v. Woodward,* 294 S.C. 210, 215, 363 S.E.2d 413, 416 (Ct.App.1987) (affirming the family court's valuation of property that was within the range of evidence ***265** presented); *Smith v. Smith,* 294 S.C. 194, 198, 363 S.E.2d 404, 407 (Ct.App.1987) (noting that the family court is within its discretion to accept one party's valuation over the other party's).

There was evidence in the record to support the family court's valuation of the marital home. Both parties presented evidence regarding the value of the Abbeville County acreage and house. Wife had the acreage and 4,500 square foot house appraised by Robert J. Deering. According to the Deering appraisal, the house and land were valued at $725,000 as of September 26, 2002. Husband had the land and house appraised by Keith Ridgeway, who valued the property at $567,400. Although the final divorce decree had "$567,400" typed as the value adopted by the court, the family court judge crossed through this amount, wrote "$725,000" as the value, and initialed the change. Thus, the final written order adopted Wife's value for the acreage and home.

Because the family court was free to accept Wife's valuation over Husband's, we find no abuse of discretion in the valuation of the marital home.

B. Attorney's Fees

[9] Noting that Wife did not receive a divorce based on adultery, alimony, or transmutation of property, Husband argues Wife's attorney did not obtain a beneficial result and, thus, the family court erred in awarding her $15,000 in attorney's fees. We disagree.

[10] [11] [12] [13] The family court may order payment of attorney's fees to a party pursuant to statute. S.C.Code Ann. § 20-3-130(H) (Supp.2004). Whether to award attorney's fees is a matter within the sound discretion of the trial court, and the award will not be reversed on appeal absent an abuse of discretion. *Bakala v. Bakala,* 352 S.C. 612, 633-34, 576 S.E.2d 156, 167 (2003). In determining whether an award of attorney's fees should be granted, the family court should consider: the parties' ability to pay their own fee; the beneficial results obtained by counsel; the financial conditions of the parties; and the effect of the fee on each parties' 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 ***266** attorney's fees, the court should consider: the nature, extent, and difficulty of the services rendered; the time necessarily devoted to the case; counsel's professional standing; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. *Glasscock v. Glasscock,* 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In awarding attorney's fees to Wife, the family court noted it had considered all of the factors in determining whether to award attorney's fees and the appropriate amount of ****284** fees. The family court noted that the case involved many issues, including novel issues of law, and that Wife's attorney devoted a great deal of time to the case. The court

specifically stated that although "the court was not persuaded as to all the relief sought by [Wife's] attorney, beneficial results were clearly obtained."

We agree with the family court. Although Wife was unsuccessful in her attempt to use Connecticut law to obtain property purchased prior to 1996 and to receive a finding that property had been transmuted, she was successful in obtaining a finding that the parties were common law married, she received half of the post-1996 marital estate, and she was allowed to resume her pre-marital name. The family court adequately considered the factors, and we find no abuse of discretion.

II. Wife's Appeal

A. Alimony

[14] [15] Wife argues the family court erred in denying her alimony because the court failed to give adequate weight to the statutory factors by placing too much emphasis on the length of the marriage.[FN1] We agree.

FN1. Wife also argues the court erred by failing to require security for the payment of support. It does not appear that this issue has been raised below. Thus, it is not preserved for appeal. *Staubes v. City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues not raised to or ruled upon by the trial judge are not preserved for appellate review).

[16] [17] [18] "An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." ***267** *Allen v. Allen,* 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct.App.2001). "Alimony is a substitute for the support which is normally incident to the marital relationship." *Craig v. Craig,* 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). The purpose of alimony is to place the supported spouse in the position he or she enjoyed during the marriage. *Id.*

[19] [20] Factors to be considered in making an alimony award include: (1) 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 during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and non-marital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C.Code Ann. § 20-3-130(C) (Supp.2004). "Our inquiry on appeal is not whether the family court gave the same weight to particular factors as this court would have; rather, our inquiry extends only to whether the family court abused its considerable discretion in assigning weight to the applicable factors." *Allen v. Allen,* 347 S.C. 177, 186, 554 S.E.2d 421, 425 (Ct.App.2001). "No one factor is dispositive." *Id.* 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").

At the time of trial, Wife was sixty-seven years old and Husband was seventy-five years old. The parties lived together from 1971 until 2002. Their common law marriage came into existence when the couple moved to South Carolina in 1996, and the marriage

lasted until the parties divorced nearly eight years later in 2004. Nothing in the record indicated that either party suffered from ill health other than "infirmities of age." Husband was a retired veterinarian while Wife only had a high school education. Wife received $415 a month in social security income. Husband admitted he had "vastly more" income and resources than Wife, grossing more than $99,000 in 2002 from social security, retirement accounts, ***268** investment income, and $8,000 per month from the Connecticut rental property.

The parties maintained a high standard of living, living in a large house with no debt. Wife was awarded fifty percent of the marital property, minus amounts she withdrew during***285** the litigation, for a total award of $464,850. In addition to his award of fifty percent of the marital estate, Husband had access to substantial property, including: a gun collection valued at $200,000; rental property in Connecticut; and separate Fidelity accounts valued at $159,000. There was a specific finding by the family court in apportioning the marital property that there was "marital misconduct on the part of [Husband] which the court believes contributed significantly to the breakup of the marriage."

Although the family court indicated that it considered the appropriate factors in denying Wife alimony, the family court focused primarily on the length of the parties' marriage, stating as follows:

The court denies [Wife's] application for alimony and finds that the duration of the marriage, from 1996 forward, with the final separation of the parties occurring in 2002, to be the conclusive factor. While the court recognizes that the other factors including financial conditions of the parties, needs of the party seeking alimony, respective earning capacities and individual wealth, conduct of the [Husband], ability to pay alimony, and actual income of the parties would militate in favor of [Wife], the court feels these do not outweigh the factor of the duration of the marriage.

The court denied Wife's argument on reconsideration that the court should have awarded alimony considering the statutory factors and "abundant caselaw."

We agree with Wife that the family court abused its discretion in denying alimony. Despite language in the order stating the family court had considered all the statutory factors and they militated in favor of Wife receiving alimony, the entire decision hinged on the length of the marriage.[FN2] Our ***269** 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 that in the present case. *See* *Nienow,* 268 S.C. at 172, 232 S.E.2d at 510 (remanding the issue of alimony for the family court to consider permanent periodic alimony to the wife in a fourteen-month marriage in light of "wife's accustomed standard of living, the disparity between the parties' wealth, and their respective earning capacities"); *McDowell v. McDowell,* 300 S.C. 96, 100, 386 S.E.2d 468, 470 (Ct.App.1989) (affirming an award of alimony to the wife in a marriage of less than three years duration, despite the " relatively short" length of the marriage, after considering the other factors relevant to an alimony award); *Johnson v. Johnson,* 296 S.C. 289, 301-03, 372 S.E.2d 107, 114-15 (Ct.App.1988) (finding the family court erred in not awarding permanent periodic alimony in a fourteen-month marriage where the factors favored alimony). Further, Husband's fault led to the breakup of the marriage, and he should not be rewarded in the consideration of alimony based upon the marriage's length. *Johnson,* 296 S.C. at 302-03, 372 S.E.2d at 115 ("An at fault spouse cannot destroy a marriage and then claim its short duration entitles him to more favorable consideration when economic adjustments attendant to divorce are made.").

FN2. It appears the family court found the length of the common law marriage was to be measured only by the six years the parties lived together in South Carolina. However, the marriage lasted nearly eight years until the parties' divorce was final in 2004.

Considering all the factors militating in favor of an award of alimony to Wife, especially the parties' standard of living, their relative incomes, and Husband's fault in the breakup of the marriage, the family court abused its discretion in only considering the length of the marriage. Wife is entitled to alimony. We remand this matter to the family court for a determination of the proper amount of alimony.

B. Nonmarital property

[21] Wife argues the family court erred in failing to find that property obtained in Husband's name prior to the move to South Carolina was transmuted into marital property.[FN3] We disagree.

FN3. Wife further argued in her brief that the property obtained while the parties lived in Connecticut should be considered marital property by this court because the parties considered themselves married while they lived there. Wife's counsel abandoned this argument at oral argument. We therefore decline to address it.

***270** [22] [23] [24] [25] Property acquired prior to the marriage is generally considered nonmarital. S.C.Code Ann. § 20-7-473(2) (Supp.2004). ****286** Nonmarital property may be transmuted into marital property. In determining whether property has been transmuted, courts must consider whether the property: (1) "becomes so commingled with marital property as to be untraceable;" (2) is titled jointly; or (3) "is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." *Jenkins v. Jenkins,* 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct.App.2001). "Transmutation is a matter of intent to be gleaned from the facts of each case." *Id.* The burden is on the spouse claiming transmutation to produce objective evidence that the parties considered the property to be marital during the marriage. *Id.*

In 1958, Husband purchased the property that housed his veterinary clinic, then became the shooting range, and later was leased in 1998 to Widewater for hotel development. Wife did not draw a salary after 1973, and her support was always from Husband's income from the clinic and shooting range. Wife testified at the final hearing that she did not have control over the money from the lease of the Connecticut property and that sometimes the money was placed in the parties' joint account while it went "other places" at times. Husband testified at the hearing that he used money from the rental property to purchase equipment for the farm.

The family court determined that any transmutation must have occurred, if at all, after the 1996 date of the common law marriage. Reviewing the evidence, the court determined that Wife failed to meet her burden of proving transmutation of the Fidelity Investment account and the profits of the Connecticut property.

We agree with the family court. Although money from Husband's separate property was used to purchase items for the farm or to benefit the parties, nothing in the record shows Husband's intent to transmute the property or that the proceeds from the lease became commingled with marital ***271** property. Further, mere use of the income from Husband's separate property in support of the marriage does not transmute them into

marital property. *Peterkin v. Peterkin,* 293 S.C. 311, 313, 360 S.E.2d 311, 313 (1987) (noting that Husband's separate property inherited or given to him was not transmuted into marital property merely by the use of income derived from this property in furtherance of the marriage). Accordingly, Wife failed to prove transmutation of Husband's separate property acquired prior the 1996 marriage.

CONCLUSION

The family court did not err in determining the value of the marital home, awarding Wife attorney's fees, and in determining certain property acquired in Husband's name prior to the 1996 common law marriage was nonmarital and not transmuted. However, we find the court abused its discretion in considering only the length of the marriage to the exclusion of all of the other statutory factors in denying Wife alimony. We find Wife was entitled to alimony and remand the matter to the family court for a determination of the appropriate amount. Accordingly, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and HUFF, J., concur.

Poliakoff v. Poliakoff, 70 S.E.2d 625 (1952)

Supreme Court of South Carolina.
POLIAKOFF
v.
POLIAKOFF.
No. 16622.
April 30, 1952.

Divorce proceeding by husband on grounds of physical cruelty. The wife asked for custody of their 6 year old child and allowance of alimony pendente lite and attorneys fees. The Common Pleas Court, Spartanburg County, Charles M. Pace, J., denied temporary alimony and suit money and awarded custody of child to husband, and wife appealed. The Supreme Court, Oxner, J., held that refusal to allow temporary alimony and attorneys fees was error and granted wife custody of child.
Order reversed and case remanded for further proceedings in accordance with opinion.

***625** Lyles & Lyles and J. Davis Kerr, all of Spartanburg, for appellant.

Thomas W. Whiteside, Charles C. Moore, Spartanburg, for respondent.

***626** OXNER, Justice.
This is an action by a husband against his wife for a divorce a vinculo matrimonii on the ground of physical cruelty, and for the custody of their six year old son. The wife denied the charges contained in the complaint, alleged that her husband's conduct and attitude toward her became unbearable, compelling her to leave the home, and asked that she be given custody of the child and an allowance of alimony pendente lite and counsel fees. The case is here on appeal by the wife from an order refusing temporary alimony and suit money and awarding custody of the child to the husband during the pendency of the action.

Appellant and respondent have only one child. They were married on January 2, 1944. Shortly thereafter they moved to Spartanburg where respondent has for a number of years been engaged in the practice of law. In January, 1950, he suffered a serious heart attack which incapacitated him for some time from pursuing his profession. In May, 1951, on account of his health, the couple moved to Florida but ceased living together on July 17, 1951. There is a sharp dispute as to the cause of the separation. He alleges that she voluntarily left the home while he was in a serious physical condition. She claims that she was compelled to leave on account of his intolerable conduct and that she returned the next day to get the child but, in the meantime, respondent had surreptitiously left Florida with their son and returned to Spartanburg. It seems to be undisputed that he is now actively engaged in the practice of law in Spartanburg.

It is alleged in the complaint 'that over a period of time and particularly since plaintiff suffered his first heart attack in January, 1950, the defendant has pursued a course of cruel, inhuman, abusive and brutal treatment toward the plaintiff with utter disregard for plaintiff's life and physical well being, she well knowing of his grave condition.' Various acts of alleged cruelty are then enumerated. It is further alleged that 'the defendant is mentally and emotionally unstable, and that she is not a fit and proper person to have the care and custody of their minor child.'

Upon the verified complaint, the County Judge of Spartanburg County, on July 23, 1951, issued an order requiring appellant to show cause before him on July 30, 1951, why the custody of the child should not be awarded to respondent during the pendency of the action.

A return was duly filed by appellant. After denying the charges contained in the complaint, she alleged that they lived happily together until sometime after the birth of their son, when respondent began to assume an attitude of 'distrust and verbal abusage' and thereafter on numerous occasions accused her of being mentally unbalanced and unchaste. She further alleged that her husband was not a fit and suitable person to have custody of their child. Attached to this return were two affidavits by appellant's physicians, stating that she was a fit and suitable person to have custody of the child, and a large number of affidavits to the effect that she was a considerate and dutiful mother.

In reply to the foregoing showing on the part of appellant, respondent submitted an affidavit by their servant that he was 'kind and good' to his wife and child; that she 'acted downright mean' to both her husband and child on numerous occasions; and that several times appellant had whipped or slapped the child 'when he hadn't done nothing to deserve it.' There were two affidavits by respondent's physicians as to his cardiac condition, which they stated was considerably aggravated by the tension between the parties. Respondent's brother made an affidavit in which he stated that he visited the apartment of this couple in Florida on July 17, 1951, and found his brother in a serious physical condition, and that appellant had left, taking her clothing and other personal effects.

A hearing was had before the County Judge on August 7, 1951. He had before him the verified pleadings and the various affidavits heretofore mentioned. He also conferred informally with appellant and respondent, together and separately, and examined the little child, who indicated a desire to remain with his father. Thereafter on August 22, 1951, an order was filed refusing appellant's application for temporary***627*** alimony and counsel fees and awarding custody of the child to respondent during the pendency of the action.

We shall first determine whether the court below erred in refusing temporary alimony and suit money. Section 8 of our divorce statute, Act No. 137 of the 1949 Acts, 46 St. at L. 216, provides:

'In every action for divorce from the bonds of matrimony, the wife, whether she be plaintiff or defendant, may in her complaint or answer or by petition pray for the allowance to her of alimony and suit money, and for the allowance of such alimony and suit money pendente lite; and, if such claim shall appear well founded, the court shall allow a reasonable sum therefor.'

[1] It was stated in Jeffords v. Jeffords, 216 S.C. 451, 58 S.E.2d 731, 733 that the foregoing section 'appears to be merely an enactment of the rule which had already crystallized in our former decisions with respect to suits for alimony.' Under the rule mentioned, the wife is regarded as the privileged suitor and in determining whether temporary alimony and counsel fees shall be allowed, it is not necessary to examine into the merits of the controversy. Armstrong v. Armstrong, 185 S.C. 518, 194 S.E. 640. But to entitle the wife to such relief, it is incumbent upon her to establish a prima facie case. Hornsby v. Hornsby, 187 S.C. 463, 198 S.E. 29; Jeffords v. Jeffords, supra.

[2] [3] Where the action is one for divorce and not merely for separate maintenance and support, it is generally held that if the wife applies for temporary alimony or suit maney, 'she must show prima facie that she has a probable cause for divorce * * *, or, if she is defendant, that she has a valid defense to the action.' Nelson on Divorce and Annulment, 2nd Ed, Vol. 1., Section 12.26. 'There is some distinction, however, accordingly as the wife complains or is complained against.' Suydam v. Suydam, 79 N.J.E. 144, 80 A. 1057, 1058. Generally speaking, where the husband sues the wife for divorce and the only showing before the court is his verified complaint and a verified answer by the wife denying the grounds for divorce and showing that she is without funds to defend the suit or maintain herself during the pendency of the action, a prima facie case is made for the allowance of temporary alimony and counsel fees. Suydam v. Suydam, supra; Holloway v. Holloway, 214 N.C. 662, 200 S.E. 436; Ex parte Austin, 245 Ala. 22, 15 So.2d 710; 27 C.J.S., Divorce, § 208(b), page 896. However, if it appears that 'her denial is not made in good faith, but is merely sham and for the purpose of protracting the period during which the injured husband may be compelled to support her,' application for suit money and temporary alimony will be denied. Suydam v. Suydam, supra.

[4] [5] Considering the showing before the County Judge in the light of the foregoing principles, we think there was error in denying appellant temporary alimony and counsel fees. Apparently these parties have reached a point where they can no longer live together in harmony. It is respondent who is asking for the divorce. The charges of cruelty made by him are denied by appellant. The affidavits introduced at the hearing throw little light on this issue. Neither can much, if any, corroboration be found in the affidavits as to the respective contentions of the parties on the disputed issue of whether appellant was justified in leaving the Florida apartment. She claims that respondent abused her and repeatedly made false accusations of unchastity. If so, she was warranted in leaving the home. Machado v. Machado, S.C., 66 S.E.2d 629, and cases therein cited. Whether respondent was guilty of such conduct as to make cohabitation intolerable, thereby compelling the wife to leave, can only be determined on the trial of the case.

[6] In reaching the foregoing conclusion, we have not overlooked the wellestablished rule that the allowance of temporary alimony and counsel fees is a matter largely addressed to the discretion of the trial judge, but we think in the instant case there was manifest legal error in denying such relief. We are satisfied that the County Judge did not give full consideration to the principles heretofore stated governing temporary alimony and suit money. Moreover, ***628** he apparently misconceived the nature of the issue before him and considered the case on the merits, at least, he intimated very strongly his opinion thereabout.

[7] [8] We next consider the question of the custody of the child. Most of the affidavits relate to this issue. Quite a number of the most prominent citizens in the city of Spartanburg, some of whom were close neighbors, attest to the good character and fitness of the mother as custodian. It should also be stated that the record does not show that the father is an unfit person to have charge of his child. While we do not know what may develop on the trial of the case, on the record before us now it is fair to assume that either the mother or the father is a proper custodian. Under all the circumstances, including the age of the child, we do not think much significance can be attached to his wishes. In view of his tender years, we think the mother, who has been without him for approximately nine months, should be given custody, subject to the terms and conditions hereinafter stated, until there can be a trial and determination of the issue on the merits.

In Wolfe v. Wolfe, S.C., 68 S.E.2d 348, 350, the husband brought a suit against his wife for divorce on the ground of desertion and also sought custody of their two minor children, three and five years of age. His action for a divorce was sustained. On the question of the custody of the children, we found 'that there is little to choose between the situation presented by the husband and that of the wife', and that nothing appeared in the record 'that would impel the Court to deprive either of the parents of the custody of the children, but for their living separate and apart.' Under these circumstances, it was held that due to the tender age of the children, they should remain for the present in the custody of their mother.

[9] The question of the amount of counsel fees and temporary alimony which should be awarded to appellant, who states that she is without funds, has given us much concern, particularly in view of the meager information in the record as to respondent's net worth and the lack of information as to his earnings since he has resumed the practice of law. Due to these uncertainties, we proceed with caution. Temporary alimony is fixed at the sum of $75 a month and counsel fees at $100. It may develop at the trial of the case on the merits, which should not be delayed, that the foregoing allowances are wholly inadequate. But if appellant prevails, the court can then fix adequate compensation for her attorneys and determine a proper amount for permanent alimony.

For the reasons stated, the order appealed from is reversed, and it is ordered:

(1) That within five days after the filing of the remittitur in this case, respondent shall pay to counsel for appellant a fee of $100 and to appellant temporary alimony in the sum of $75; and that respondent shall further pay a like amount of temporary alimony on the same day of each and every month thereafter until a final decree is entered in this cause.

(2) That on or before June 1, 1952, respondent shall deliver custody of the minor child to appellant, provided appellant shall on or before said date file with the Clerk of Court of Spartanburg County a bond in the sum of $3,000, with sufficient surety to be approved

by the Clerk conditioned upon her complying with any and all further orders that may be issued by the courts of this state in reference to the custody of said child. The right of the mother to custody has been deferred to the above date in order to enable the child to complete the year at the school he is now attending. In the event the court below does not enter a final decree relating to the custody of said child before September 1, 1952, respondent is given leave at any time after said date to apply to the court below for the right to visit said child on such occasions and at such times as the court may deem reasonable.

The case is remanded for further proceedings in accordance with the views herein expressed.

BAKER, C. J., FISHBURNE and TAYLOR, JJ., and E. H. HENDERSON, A. A. J., concur.

Pountain v. Pountain, 503 S.E.2d 757 (1998)

Court of Appeals of South Carolina.
Laura D. POUNTAIN, Respondent,
v.
James H. POUNTAIN, Jr., Appellant.
No. 2849.
Submitted May 5, 1998.
Decided June 8, 1998.

Divorced mother brought action to modify child custody order under which maternal grandmother had physical custody. Father answered and counterclaimed, also seeking custody. The Family Court, Laurens County, Robert H. Cureton, J., entered order granting mother sole custody, and father appealed. The Court of Appeals, Cureton, J., held that best interests of child were served by awarding sole custody to mother.
Affirmed.
***758 *132** John Michael Turner, of Culbertson, Whitesides, Turner & Able, Laurens, for appellant.

Julius B. Aiken, Greenville, for respondent.

CURETON, Judge:
In this child custody case, James Pountain (the father) appeals from an order of the family court granting Laura Pountain (the mother) sole custody of the parties' minor child based on a change of circumstances. We affirm. [FN1]

FN1. Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

***133 PROCEDURAL HISTORY:**
The parties married in March 1989 and their only child was born in October 1989. In 1991, the mother brought an action against the father and obtained an order for separate support and maintenance. At that time, the family court adopted the parties' agreement regarding custody of their child. Pursuant to the agreement, the parties were awarded joint custody with physical custody being granted to the maternal grandmother. The agreement further provided that both parents would have reasonable visitation privileges.

During the time that the maternal grandmother retained physical custody of the child, both the mother and the father regularly exercised their visitation rights. In June 1995, the grandmother requested the father keep the child "for awhile," and the child remained with him for two or three weeks. The grandmother retrieved the child on June 29, 1995. Thereafter, the child has resided with the mother who commenced the instant action for change of custody on July 11, 1995. The father answered and counterclaimed, also seeking custody of the child.

A temporary hearing was held on September 11, 1995. This hearing resulted in an order awarding the mother temporary custody of the child with liberal visitation to the father. At the final hearing in November 1996, the family court awarded custody of the child to the mother with liberal visitation for the father. This appeal followed.

FACTS:

At trial, the mother testified her circumstances have changed in several respects since the time of the joint custody order. The mother remarried in July 1995, and she and her current husband live in a three bedroom home located in a subdivision. The child has his own bedroom in the home. Although her husband testified he is financially able to provide for the mother and the child, the mother is employed part-time as a bookkeeper. The mother testified she is able to arrange her work schedule around the child's school schedule. The mother, who ***759** professed to be a Christian, pays for the child to attend a private Christian school.

It is uncontested that the child suffered a broken arm when he fell from a swing while under the supervision of the ***134** mother's husband. The child was immediately taken to the hospital, where he was fitted with a cast. However, the mother admitted she missed two of the child's follow-up medical appointments. When questioned about why she missed the follow-up appointments, the mother explained that her car broke down on both occasions.

The mother also admitted that she has written several "bad checks," but attested that she has since "taken care" of them. Regarding the fraudulent check charges that were pending at the time of the trial of this case, the mother testified she had not seen the checks, and she believed they were written in 1994 by an unknown third party from a checkbook that was stolen from her then. The mother further stated that in any event, her husband had taken over management of the family finances.

The father testified his circumstances have also greatly improved since the time of the joint custody order. He remarried in February 1995. He and his wife live in a two bedroom mobile home in Laurens County. The child has his own bedroom. At the time of trial, the father had been gainfully employed at a fabric company for five years. The father's wife is employed at a boy's home in Clinton, South Carolina.

Although the father is agnostic, he testified he would not teach his child to be agnostic and in fact would "make sure that [the child] would go to church on Sunday." The father's wife, who is not agnostic, testified that although she had never taken the child to church, she is willing to do so.

The guardian ad litem opined that this case is a "really tough call." According to the guardian, the child dearly loves both parents and their spouses. The guardian was of the opinion that both parents are fit and both stepparents are "extraordinary people." The guardian expressed concerns, however, about both the mother and the father. Regarding the mother, the guardian stated he was concerned about the mother's history of writing fraudulent checks. Also, the guardian was not satisfied with the mother's explanation as

to why she failed to take the child to his doctor appointments after he broke his arm. Finally, the guardian questioned the sincerity of the mother's religious convictions. As to the ***135** father, the guardian stated his "questions about [the father] deal mostly with the fact that he is an agnostic." The guardian's concerns in this regard related to the impact of removing the child from the environment with the maternal grandmother who took the child to church "nearly every time the door opened" to an entirely different environment. Ultimately, however, the guardian recommended that custody be placed with the father because the father had a better value system.

DISCUSSION:

[1] On appeal, the father argues the family court erred in failing to award him custody. Specifically, the father asserts the court erred in (1) determining that the best interests of the child warranted awarding custody to the mother, (2) granting prejudicial effect to the temporary order, (3) failing to give adequate consideration to the recommendation of the guardian ad litem, and (4) placing undue weight upon the parties' religious beliefs.

On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with our own view of the preponderance of the evidence. *Epperly v. Epperly,* 312 S.C. 411, 440 S.E.2d 884 (1994); *Chester County Dep't of Social Services v. Coleman,* 303 S.C. 226, 399 S.E.2d 773 (1990). We are not, however, required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Cherry v. Thomasson,* 276 S.C. 524, 280 S.E.2d 541 (1981). Further, this broad scope of review does not relieve the appellant of the burden of convincing this court that the family court committed error. *Skinner v. King,* 272 S.C. 520, 252 S.E.2d 891 (1979). Because this court is not afforded the opportunity for direct observation of the witnesses, we must accord great deference to the trial ***760** court's findings where matters of credibility are involved. *See* *Aiken County Dep't of Social Services v. Wilcox,* 304 S.C. 90, 403 S.E.2d 142 (Ct.App.1991). This is especially true in cases involving the welfare and best interests of children. *Id.*

[2] [3] [4] [5] In all child custody controversies, the welfare and best interests of the children are the primary, paramount, and controlling considerations of the court. ***136** *Cook v. Cobb,* 271 S.C. 136, 245 S.E.2d 612 (1978). The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. *Epperly v. Epperly,* 312 S.C. 411, 440 S.E.2d 884 (1994). As well, psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life should be considered. *Wheeler v. Gill,* 307 S.C. 94, 413 S.E.2d 860 (Ct.App.1992). In deciding to whom custody should be awarded, the family court should weigh all the conflicting rules and presumptions together with all of the circumstances of the particular case, and all relevant factors must be taken into consideration. *Woodall v. Woodall,* 322 S.C. 7, 471 S.E.2d 154 (1996); *Ford v. Ford,* 242 S.C. 344, 130 S.E.2d 916 (1963). Indeed, 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." *Wheeler v. Gill,* 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct.App.1992) (quoting *Davenport v. Davenport,* 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)).

[6] [7] In order for a court to grant a change of custody, the party seeking the change must meet the burden of showing changed circumstances occurring subsequent to the entry of the order in question. *Baer v. Baer,* 282 S.C. 362, 318 S.E.2d 582 (Ct.App.1984). "[A] change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the [child] will be served by the change." *Thompson v. Brunson,* 283 S.C. 221, 227, 321 S.E.2d 622, 626 (Ct.App.1984) (quoting *Skinner v. King,* 272 S.C. 520, 523, 252 S.E.2d 891, 892-93 (1979)). Custody decisions are matters left largely to the discretion of the trial court. *Stroman v. Williams,* 291 S.C. 376, 353 S.E.2d 704 (Ct.App.1987).

While we agree with the guardian that this is indeed a close case, we find no abuse of discretion in the family court's decision to award custody of the child to the mother. In support of its decision, the family court noted the mother taught the child to brush his teeth, comb his hair, and potty trained him at the appropriate age. It found the mother also regularly reads to the child and plays games with him. Importantly, the mother is able to arrange her work schedule around the child's school schedule and has continued to expose ***137** the child to the same religious influences the child became accustomed to while in the care of the grandmother. Finally, the grant of custody to the mother serves the end of allowing the child to remain in the environment with which he has become familiar since the entry of the temporary order.

We decline to second-guess the family court's fitness determination. Although we are concerned with the mother's check writing habits, in any event, both the mother and her husband testified the husband has now taken over management of their checkbook. Further, we note, as did the family court, that the mother has voluntarily taken a parenting skills class. While we share in the guardian ad litem's concern that the mother was unable to take the child to his follow-up doctor's appointments, there is no indication in the record that the mother was being less than candid in testifying that her failure in this regard was due to car trouble. *See* *Woodall v. Woodall,* 322 S.C. 7, 471 S.E.2d 154 (1996) (the appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court).

We find no merit in the father's contention that the mother's marriage to her new husband is a "marriage of convenience" which is "destined to fail." There is simply no evidence in the record, other than the proximity of the events themselves, to support the father's claims in this regard. Indeed, the guardian ad litem characterized both the mother's new husband and the father's new wife as "extraordinary" people. In our view, ****761** the mother's remarriage is a factor properly considered in favor of granting her custody of the child. *See* *Fisher v. Miller,* 288 S.C. 576, 344 S.E.2d 149 (1986) (remarriage is a circumstance which when considered with other change of circumstances, may warrant a change of custody); *Barrett v. Barrett,* 261 S.C. 111, 198 S.E.2d 532 (1973) (remarriage is normally relevant to show improved circumstances on the part of a remarried parent seeking to obtain custody).

Additionally, we find no merit to the father's contention the family court gave prejudicial effect to the temporary custody order. Although the family court did expressly consider the fact that the child has been in the mother's custody since the time of the temporary order, we find the child's sense of ***138** security and stability are proper considerations in determining the child's best interest.

[8] We further disagree with the father's contention that the family court failed to give adequate consideration to the recommendations of the guardian ad litem. The role of the guardian ad litem in making custody recommendations is to aid, not direct, the court. Ultimately, the custody decision lies with the trial judge. *See* Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (Ct.App.1990) (the guardian ad litem does not usurp the judge's function). Here, the family court considered but rejected the guardian's recommendation. Under the facts of this case, where the guardian was of the opinion that "this is not a clear case by any means," we find no abuse of discretion in the court's decision not to adopt the guardian's recommendation.

[9] Finally, we find no merit in the father's argument that the family court placed undue weight upon the parties' religious beliefs. Although the religious beliefs of parents are not dispositive in a child custody dispute, they are a factor relevant to determining the best interest of a child. *See e.g.,* Driggers v. Hayes, 264 S.C. 69, 212 S.E.2d 579 (1975) (grandparents who had provided an orderly home where child had received love and religious training permitted to retain custody); Mathis v. Johnson, 258 S.C. 321, 188 S.E.2d 466 (1972) ("religious advancement" of child was a consideration in custody award); Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (Ct.App.1990) (father's "interest in the education and religious training of children" was a factor in awarding custody to father). Our reading of the family court's order in this case does not convince us that the family court gave too much weight to the "protestations of religious faith on the part of the [wife]" *Id.* at 460, 395 S.E.2d 441. Rather, the court properly considered the wife's professed religious beliefs as those beliefs relate to the advancement of the child's sense of stability and well-being.

For the foregoing reasons, the decision of the family court is

AFFIRMED.

HOWELL, C.J., and GOOLSBY, J., concur.

Prevatte v. Prevatte, S.E.2d 114 (Ct. App. 1989)

Court of Appeals of South Carolina.
Sandra Jean PREVATTE, Respondent,
v.
Harry PREVATTE, Appellant.
No. 1277.
Heard Dec. 7, 1988.
Decided Jan. 23, 1989.

Common-law wife sought divorce on grounds of adultery. The Family Court, Marion County, ruled that husband did not have standing to attack decree divorcing common-law wife and third party. Husband appealed. The Court of Appeals reversed and remanded in unpublished opinion. On remand, the Family Court, A.E. Morehead, III, J., reaffirmed prior order granting divorce, awarding alimony and attorney fees, and equitably divided property. Husband appealed. The Court of Appeals, Sanders, C.J., held that: (1) common-law marriage arose after divorce between third party and wife; (2) evidence established husband's adultery; and (3) family court could award to wife 40% interest in certain real property.

Affirmed.

***115 *346** Ronald M. Childress of Childress & Mille, Columbia, for appellant.

Mary E. Buchan of Whittington & Buchan, Mullins, for respondent.

SANDERS, Chief Judge.

This is an appeal from an order of the Family Court reaffirming a prior order of the Court. The prior order concluded that a common law marriage existed between appellant Harry **Prevatte** and respondent Sandra Jean **Prevatte**, granted Mrs. **Prevatte** a divorce on the ground of adultery, and awarded her certain ancillary relief including alimony, an equitable division of marital property and attorney fees. During the proceedings which led to the prior order, Mr. **Prevatte** attempted to attack the validity of a certain divorce decree purporting to end a previous marriage of Mrs. **Prevatte**. He alleged that the Court which issued that decree was without jurisdiction. The Family Court ruled that Mr. **Prevatte** did not have standing to attack the decree. He appealed. We reversed and remanded, holding "a stranger may collaterally attack a decree of divorce for want of jurisdiction in the court entering it, where his property rights are injuriously affected thereby." *See* *Ex parte Nimmer,* 212 S.C. 311, 319, 47 S.E.2d 716, 719 (1948). Our opinion was filed as *Prevatte v. Prevatte,* Memorandum ***347** Opinion No. 87-MO-08 (S.C.Ct.App. filed Jan. 28, 1987). On remand, the Family Court considered the attack by Mr. Prevatte on the validity of the decree, rejected the attack and reaffirmed the prior order. He again appeals. We affirm.

Our standard of review in this case is routine. We have jurisdiction to find facts based on our own view of the evidence, but we are not required to disregard the findings***116** of the trial judge who saw and heard the witnesses and was in a better position to evaluate their testimony. *Ray v. Ray,* 296 S.C. 350, 372 S.E.2d 910 (Ct.App.1988). We find essentially the same facts as those found by the trial judge.

Broadly stated, the issues presented on appeal are whether the trial judge erred: (1) in concluding that a common law marriage existed between Mr. and Mrs. **Prevatte**; (2) in granting Mrs. **Prevatte** a divorce on the ground of adultery; and (3) in awarding Mrs. **Prevatte** alimony, an equitable division of marital property and attorney fees.

I

We first address the issue of whether the trial judge erred in concluding that Mr. and Mrs. **Prevatte** were married to each other.

In September 1959, Mr. and Mrs. **Prevatte** purported to marry by participating in a marriage ceremony. Mrs. **Prevatte** was, at the time, already married to one Allard Owens. Both Mr. and Mrs. **Prevatte** were aware of this fact.

Mr. and Mrs. **Prevatte** lived together as husband and wife for more than twenty-five years. A child, whom they raised to adulthood, was born to them.

In January 1977, Mr. Owens obtained a divorce decree purporting to end his marriage to Mrs. **Prevatte**. He had served her by publication as ordered by the Clerk of Court for Florence County. Neither Mr. **Prevatte** nor Mrs. **Prevatte** became aware of the decree until some time in 1985.

Except for brief periods in 1982 and 1983, Mr. and Mrs. **Prevatte** continued to live together as if they were married until they permanently separated in October 1984. They held themselves out as husband and wife, filed joint tax returns, and Mr. **Prevatte** carried insurance on Mrs. **Prevatte** listing her as his wife.

***348** In April 1985, Mrs. **Prevatte** petitioned the Court for a divorce from Mr. **Prevatte**. Previous actions had been filed in 1983 and 1984. In the 1984 action, Mr. **Prevatte** answered and admitted the marriage to Mrs. **Prevatte**.

The appealed order upheld the validity of the decree ending the marriage of Mr. Owens and Mrs. **Prevatte**, and reaffirmed the prior order which had concluded that a common law marriage thereafter arose between Mr. and Mrs. **Prevatte**.

A

[1] Mr. **Prevatte** attacks the validity of the divorce decree obtained by Mr. Owens, arguing that the Court which issued the decree had no jurisdiction over Mrs. **Prevatte** .

"A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record." *Yarbrough v. Collins,* 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987). Mr. Prevatte does not point to any jurisdictional defect apparent on the face of the record. Instead, he appears to argue that the Court lacked jurisdiction over Mrs. Prevatte because Mr. Owens undertook to serve her by publication without first making a duly diligent effort to find her. *See* Section 20-3-70, Code of Laws of South Carolina, 1976 (in a divorce action, service by publication is authorized only when the person to be served "cannot, after due diligence, be found within the State."). In the absence of fraud or collusion, the decision of the officer issuing an order of publication is final. *Yarbrough,* 293 S.C. 290, 360 S.E.2d 300. Mr. Prevatte does not contend that Mr. Owens obtained the order by fraud or collusion. Therefore, his attack on the validity of the divorce decree must fail.

B

[2] Mr. Prevatte further argues that, even if the divorce decree obtained by Mr. Owens was valid, his relationship with Mrs. Prevatte was not thereafter converted into a common law marriage.

"The presumption that an illicit relationship continues to be unlawful as long as the parties live together is generally ***349** held to be overcome, in states recognizing common-law marriages, by evidence that the parties could not originally marry because ****117** of a legal impediment affecting one or both of them, and that during their cohabitation such impediment was removed." 52 Am.Jur.2d *Marriage* § 139 (1970).

In South Carolina, however, "[a] relationship illicit at its inception does not ripen into a common law marriage once the impediment to marriage is removed. Instead, the law [in this State] presumes that the relationship retains its illicit character after removal of the impediment. In order for a common law marriage to arise, the parties must agree to enter into a common law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties." *Yarbrough v. Yarbrough,* 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct.App.1984) (citations omitted). South Carolina

has not been alone in following this presumption. *E.g.,* *United States Fidelity & Guar. Co. v. Britton,* 106 U.S.App.D.C. 58, 269 F.2d 249 (1959) (stating District of Columbia law); *Pierce v. Pierce,* 355 Pa. 175, 49 A.2d 346 (1946); *Appeal of Reading Fire Ins. & Trust Co.,* 113 Pa. 204, 6 A. 60 (1886); *Williams v. Williams,* 46 Wis. 464, 1 N.W. 98 (1879); *Howard v. Howard,* 459 S.W.2d 901 (Tex.Civ.App.1970).

There appears to be a split of authority among the states requiring an agreement after removal of the impediment as to whether the parties must have knowledge that the impediment has been removed. Some of the earlier cases required knowledge of the removal of the impediment. The courts, in many of these cases, reasoned that unless the parties had such knowledge, there could be no agreement following the removal of the impediment. *E.g.* *Cartwright v. McGown,* 121 Ill. 388, 12 N.E. 737 (1887); *Rice v. Randlett,* 141 Mass. 385, 6 N.E. 238 (1886); *Compton v. Benham,* 44 Ind.App. 51, 85 N.E. 365 (1908). Other courts have expressly rejected knowledge that the impediment has been removed as a criterion in deciding such cases. *E.g.* *Hess v. Pettigrew,* 261 Mich. 618, 247 N.W. 90 (1933); *In re Wells,* 123 App.Div. 79, 108 N.Y.S. 164 (1908), aff'd, 194 N.Y. 548, 87 N.E. 1129 (1909). We need not decide here which of these views to adopt.

Mr. and Mrs. Prevatte knew of the impediment to their marriage at the time they first began living together as ***350** husband and wife. Thus, they recognized, from the outset, the illicit nature of their relationship. It is clear, however, that at least by 1984, they had come to the conclusion that they were married. After all, they both represented to the Court that they were married at that time. Mr. Prevatte made this representation when it was contrary to his best interest. It follows, therefore, that at least by 1984, they had somehow come to the conclusion that the impediment to their marriage no longer existed. In fact, the impediment had been removed. Finally, it is clear from their conduct that they thereafter gave every indication of their agreement to be married. The fact that they did not know exactly when the impediment to their marriage had been removed or even how it had been removed is of no consequence, under the circumstances.

II

We next address the issue of whether the trial judge erred in granting Mrs. **Prevatte** a divorce on the ground of adultery. Mr. **Prevatte** argues that "the evidence [on this issue] was circumstantial and inconclusive."

[3] The evidence is, in fact, extraordinarily ordinary (or, perhaps more accurately stated, uncommonly common).[FN1] Mrs. **Prevatte** became suspicious that Mr. **Prevatte** was carrying on an illicit relationship with another woman. The adult child of the parties testified that he saw Mr. **Prevatte** and the woman parked at night in a graveyard. Mr. **Prevatte** was sitting in the front seat on the left side. The woman was sitting in the middle of the front seat. Another witness testified that he saw Mr. **Prevatte** and the woman get in a car together on another night and drive down a dead-end dirt road. They returned an hour and a half later, and the woman dropped off Mr. **Prevatte** at his own car. Mrs. ***118** **Prevatte** testified that, when she questioned Mr. **Prevatte** as to his whereabouts, he responded, "If I tell you the truth I know you won't ever stay with me again." The testimony of the two witnesses and Mrs. **Prevatte** was uncontradicted.

FN1. Oscar Wilde said, "In love, one always begins by deceiving oneself and ends by deceiving others; that is what the world calls a romance." Of course, we do not necessarily agree.

***351** [4] [5] Because "adultery, by its very nature, is an activity which takes place in private, it may be proved by circumstantial evidence." *McLaurin v. McLaurin,* 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct.App.1987). Indeed, if it were not for circumstantial evidence, the practice of adultery would scarcely be known to exist. A finding of adultery is allowed where there is evidence of both the opportunity to commit adultery and the disposition to commit adultery. *Hartley v. Hartley,* 292 S.C. 245, 355 S.E.2d 869 (Ct.App.1987). State of mind can be inferred from circumstances. For example, it can be inferred that a piano player in a bawdyhouse knows what is going on upstairs. The same evidence which proves the opportunity can also prove the disposition. For example, where a married man is observed going upstairs in a bawdyhouse, unless something to the contrary appears, no other evidence is required to warrant a finding of adultery.

The opportunities available to Mr. Prevatte are apparent. His disposition can be inferred from the circumstances in which he was observed, coupled with his response when questioned regarding his whereabouts. When two people, a man and a woman, park by themselves at night in lonely places and purposely sit very close together, unless some other reason appears for their behavior, even the most dispassionate observer may very well infer that they are romantically disposed toward each other. Such is life.

Moreover, insufficiency of proof "should not be allowed to defeat a divorce where the court is fully convinced adultery has been committed and a party has had full opportunity to defend or refute the charge." *McLaurin,* 294 S.C. at 134, 363 S.E.2d at 111. Our Supreme Court, in at least one case, has affirmed a finding of adultery where there was no evidence of the disposition to commit adultery. *See Anders v. Anders,* 285 S.C. 512, 331 S.E.2d 340 (1985) (dissenting opinion: the only evidence of adultery was the fact that the appellant was seen on several occasions in nightclubs and once in the apartment of another person when others may have been present).[FN2]

FN2. *Cf. Loftis v. Loftis,* 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct.App.1985) (the finding of adultery was affirmed where the only evidence of the disposition to commit adultery was a statement by the appellant that he and a woman "were living together just like they were married.").

***352** The trial judge, not having been born yesterday, was fully convinced that Mr. Prevatte had committed adultery. So are we.

III

We finally address the issues of whether the trial judge erred in awarding Mrs. Prevatte alimony, an equitable division of marital property and attorney fees.

A

[6] Mr. Prevatte argues that the trial judge "erred in awarding alimony to [Mrs. Prevatte] when there was no evidence of need therefor."

The record in the first appeal of this case reveals that Mr. Prevatte excepted to the alimony award on one ground only: "there was never any valid marriage between the appellant and the respondent." In the proceedings which led to the prior order, the

Family Court considered need as one of the factors relevant to an award of support. The Court specifically found that Mrs. Prevatte, "due to her health, is unemployable." Mr. Prevatte took no exception to any finding on the issue of need. Thus, these findings became the "law of the case." *See* Walters v. Canal Ins. Co., 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct.App.1987) ("Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.' ").

In any event, the evidence supports the award of alimony by the trial judge.

B

[7] Mr. Prevatte argues that the trial judge erred in awarding Mrs. Prevatte a ***119** forty percent interest in certain real property acquired during the marriage in that she "enjoyed no special equity and made no material contribution to its acquisition."

Mrs. Prevatte was employed prior to suffering health problems which resulted in her being hospitalized. When she was released from the hospital, Mr. Prevatte told her he ***353** would rather she not work. She thereafter made substantial contributions as a homemaker. Her homemaking activities consisted of cooking, cleaning, washing, caring for the child of the parties and extended even to keeping a garden for the benefit of the family and caring for the ailing mother of Mr. Prevatte in their own home.

The equitable division was made prior to the adoption of the Equitable Apportionment of Marital Property Act.[FN3] At that time, the law of this state provided:

FN3. Codified as Sections 20-7-471 through 20-7-479, Code of Laws of South Carolina, 1976, as amended.

[W]here, as here, one spouse has forgone career opportunities at the behest of the primary wage-earning spouse, and throughout a long marriage has remained in the home to rear children and provide a suitable environment for the family, the homemaker spouse shall have upon divorce an equitable interest in real property acquired by the wage-earner spouse during the marriage.

Parrott v. Parrott, 278 S.C. 60, 63, 292 S.E.2d 182, 183 (1982). "The trial court has wide discretion in determining equitable distribution of marital property and its judgment will not be disturbed on appeal absent a showing of abuse of discretion." *Martin v. Martin,* 296 S.C. 436, 373 S.E.2d 706, 709 (Ct.App.1988). We find no abuse of discretion.

C

[8] Mr. Prevatte argues the trial judge erred in "affirming its award to [Mrs. Prevatte] of attorney fees when the underlying judgment had been reversed." He points out that one of the factors to be considered in awarding attorney fees is "the beneficial results accomplished." *See* Henry v. Henry, 296 S.C. 285, 372 S.E.2d 104 (Ct.App.1988).

When we reversed the prior order because of the ruling on the issue of standing, we specifically expressed "no opinion as to the other issues raised by Mr. Prevatte on appeal." On remand, the Family Court reaffirmed the results reached by the prior order on all issues. The attorneys for Mrs. Prevatte ***354** have obviously accomplished

beneficial results for her. The fact that their efforts were temporarily derailed should not defeat her claim for attorney fees, now that the results have been obtained. Mr. Prevatte does not challenge the award of attorney fees on any other basis.

For these reasons, the order of the Family Court is

AFFIRMED.

GARDNER and GOOLSBY, JJ., concur.

Ray v. Ray, 296 S.C. 350, 372 S.E.2d 910 (Ct. App. 1988)

Court of Appeals of South Carolina.
Eunice H. RAY, Appellant,
v.
Horace Edward Riley RAY, Respondent.
No. 1217.
Heard April 11, 1988.
Decided Sept. 26, 1988.

Wife sought divorce, equitable distribution of marital property, alimony and other relief. The Family Court, Bamberg County, Kaye Gorenflo Hearn, J., granted divorce on ground of one year continuous separation and awarded other relief. Wife appealed. The Court of Appeals held that: (1) wife failed to establish that marital home, given to husband by husband's stepmother during marriage, was transmuted into marital property, and (2) trial judge's failure to mention health insurance in order required remand for determination of issue.
Affirmed in part and remanded in part.

***911 *351** F. Glenn Smith, Columbia, for appellant.

Richard B. Ness, Bamberg, for respondent.

PER CURIAM:
Eunice H. Ray commenced this action against her husband, Horace Edward Riley Ray, seeking a divorce on the grounds of physical cruelty, equitable distribution of marital property, alimony, and other relief. She subsequently amended her complaint to allege one year continuous separation as a ground for divorce. Prior to trial the parties reached an agreement as to the division of all household furnishings except guns and tools. The family court granted the divorce on the ground of one year continuous separation, approved the personal property agreement, identified and divided the remaining marital property, granted the wife permanent alimony, and ordered certain other relief ***352** not material to this appeal. The wife appeals the equitable distribution and alimony awards. We affirm in part, and remand in part.

I.

The wife argues the trial judge erred in finding that neither party was at fault, in finding that she had removed $22,000.00 in cash from a safe in the marital home, and in valuing a 40 acre tract of land.

Although we have jurisdiction in a divorce case to find facts based on our own view of the preponderance of the evidence, we are not required to disregard the findings of the

trial judge who saw and heard the witnesses and was in a better position to evaluate their testimony. *Hartley v. Hartley,* 292 S.C. 245, 355 S.E.2d 869 (Ct.App.1987).

The crux of the wife's argument is that the trial judge erred in believing the husband's testimony and the testimony of his witnesses rather than her own. We have reviewed the record and note that there is a conflict in testimony. The trial judge, however, was in a better position to evaluate this testimony, since she was able to hear and observe the witnesses. Thus, her findings will not be disturbed.

II.

The wife contends that the trial judge erred in failing to find that the marital residence was transmuted to marital property.

[1] Ordinarily, property acquired by one of the spouses during the marriage as a gift from a third party is nonmarital property. *See* Section 20-7-473(1), Code of Laws of South Carolina, 1976, as amended; *Barr v. Barr,* 287 S.C. 13, 336 S.E.2d 481 (Ct.App.1985). In certain circumstances, however, nonmarital property may be transmuted into marital property. *Johnson v. Johnson,* 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988).

[2] [3] As a general rule, transmutation is a matter of intent. *Id.* The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as common property of the marriage. *Id.* The mere use of separate property ***353** 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.*

The parties moved into the marital home in 1971. They substantially remodeled the house-lowered the ceilings, added a bath and utility room, and put in new flooring. At that time the house was owned by the husband's step-mother. In 1976 the husband acquired title to the house as a gift from his step-mother. The parties remained in the home until they separated in 1985.

[4] [5] The wife has failed to show transmutation. At the time of the remodeling, the house was owned by the step-mother; hence any evidence regarding the remodeling efforts cannot be considered as evidence of an intent to transmute the house since it was not the husband's property to transmute. The only evidence of transmutation after the husband acquired title is that the parties lived in the house for nine ****912** years. As we have noted, the mere use of nonmarital 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.

III.

Next the wife asserts that the trial judge erred in failing to address several crucial factors in making the equitable distribution award.

She complains the trial judge erroneously valued the property at the date of separation rather than the date of filing or commencement of the action as required by Section 20-7-471, Code of Laws of South Carolina, 1976, as amended. She, however, asserts no prejudice, nor does any appear from the record. *See Cumbie v. Cumbie,* 245 S.C. 107, 139 S.E.2d 477 (1964) (appellant must show not only error, but resulting prejudice).

[6] She further contends the trial judge erred in failing to value the personal property. Most of the personal property was disposed of by an agreement of the parties. The wife presented no evidence as to the value of the remaining property. The wife cannot fail to offer evidence as to the value at trial, then come to this court asserting error for failure to value the personal property. *See* ***354** *Honea v. Honea,* 292 S.C. 456, 357 S.E.2d 191 (Ct.App.1987).

IV.

The wife also argues the trial judge erred in his apportionment of the marital property.

Apportionment of marital property is a matter within the sound discretion of the family court, and her ruling will not be reversed on appeal unless a clear abuse of discretion is shown. *Bryan v. Bryan,* 296 S.C. 305, 372 S.E.2d 116 (Ct.App.1988).

We have reviewed the briefs and records in this case, and we discern no abuse of discretion in the apportionment of the marital property.

V.

[7] Finally, the wife argues that the trial judge erred in failing to rule on her request to be included on the husband's health insurance.

At trial the husband agreed to further inquire into the possibility of including the wife on his health insurance after the divorce. The trial judge makes no mention of the health insurance in her order. Accordingly, we remand this case for a determination on the issue of health insurance. *See Holme v. Holme,* 287 S.C. 68, 336 S.E.2d 508 (Ct.App.1985).

All other issues raised by the wife in this case are manifestly without merit. Section 14-8-250, Code of Laws of South Carolina, 1976, as amended; *Polin v. Polin,* 295 S.C. 129, 367 S.E.2d 433 (Ct.App.1988).

AFFIRMED IN PART, AND REMANDED IN PART.

Sexton v. Sexton, 416 S.E.2d 649 (Ct. App. 1992)

Court of Appeals of South Carolina.

Janet T. SEXTON, Respondent,

v.

Patrick B. SEXTON and Neely Hunter Sexton, Sr., and Neely Hunter Sexton, Sr., as personal representative of the estate of Frieda P. Sexton, deceased, Appellants.

No. 1789.

Heard Jan. 22, 1992.

Decided March 16, 1992.

Rehearing Denied April 13, 1992.
Certiorari Granted Sept. 9, 1992.

Wife brought divorce action, and husband and father-in-law answered. The Family Court, York County, Paul S. McChesney, Jr., J., decreed divorce, and awarded alimony, support, and custody, and husband and father-in-law appealed. The Court of Appeals, Cureton, J., held that: (1) court's first order was not res judicata; (2) award of alimony was not supported; (3) court did not equitably divide house; (4) award of attorney fees to wife was supported; (5) father's agreement to convey house to husband and wife was enforceable; (6) agreement to convey land along with house was not enforceable; and (7) court had authority to require father to insure house.
Affirmed in part, reversed in part, and remanded in part.

***651 *39** Thomas F. McDow, and Jack Leader, Rock Hill, for appellants.

Melvin L. Roberts, York, for respondent.

CURETON, Judge:

In this divorce action, Patrick B. Sexton (husband) appeals from the award of alimony, the division of property, and the award of attorney fees to the wife. Neely Hunter Sexton, Sr., father of the husband (father), appeals from the trial court's holding that property titled in his name was marital property. We affirm in part, reverse in part, and remand in part.

HUSBAND'S APPEAL

The husband appeals from two orders of the family court. The first is dated October 21, 1988, and the second is dated October 26, 1989.

The 1988 order divided the personal property, decreed the divorce, determined custody, and set child support. The 1989 order divided the real property, awarded alimony, addressed marital debts, and granted attorney fees.

[1] The husband first asserts the trial judge erred in finding the October 1988 order was unappealed and res judicata. We agree. It is clear the October 1988 order either reserved for later determination or did not address several ***40** issues. The October 1988 order was not immediately appealable because it did not dispose of the whole subject matter in litigation. *Bolding v. Bolding,* 283 S.C. 501, 323 S.E.2d 535 (Ct.App.1984).

[2] The husband next asserts the trial court erred in adopting findings and rulings from a temporary order in establishing the alimony award in this case. A temporary hearing was held before the Honorable Kenneth M. Powell. The temporary hearing resulted in an order dated March 10, 1988. Pursuant to former Family Court Rule 52, the findings of fact in that order were based only upon the affidavits of the parties, their financial declarations, and the statements of their attorneys. Judge Powell found the husband worked twenty-four hours per week and earned $13.00 per hour. Based on this hourly rate of pay, he then found the husband had an earning capability of over ***652** $500.00 per week. Judge Powell ordered payment of child support in the amount of $95.00 per week.

At the divorce hearing on October 5, 1988, the husband did not appear after notice. At that hearing before Judge Mendenhall, the only mention of the husband's employment was a statement by the wife that the husband was still capable of working and paying support. Judge Mendenhall granted the wife a divorce and confirmed previous orders. He also reserved alimony, attorney fees, and the matter of delinquent child support until the husband could be apprehended and brought before the court. Additionally, Judge Mendenhall awarded sole ownership of a jointly owned automobile and the parties' furniture to the wife. He credited the husband with one-half of the value of the personal property against delinquent child support.

In March 1989, the husband sought a reduction in child support. The request resulted in a hearing before Judge Wilburn on March 20, 1989. Judge Wilburn held the husband had reduced his income by his own voluntary act. The husband's request for a reduction was denied.

The next hearing was before Judge McChesney in August 1989. According to Judge McChesney's order of October 26, 1989, it was "a final hearing and determination of alimony, equitable distribution of the marital assets, attorney fees, and apportionment of the marital debts." The husband's unrebutted ***41** testimony at this hearing was he earned $4.00 per hour at his regular employment and up to $44.00 per day building decks.[FN1] Judge McChesney ordered the husband to pay alimony of $375.00 per month. The order stated in part:

FN1. Although not clear from the record, it is inferable the husband worked forty hours per week at the $4.00 per hour job and built the decks on the weekends and after working hours.

Nevertheless, the Court has consistently found, and I find from the testimony before me that [the husband] has an earning capacity in excess of $500 per week based upon the record and his further testimony at this hearing that he is employed at a regular job and in addition thereto, works refinishing furniture and carpenter work, having two jobs in progress at this time. His testimony concerning his earnings from outside his employment is not credible and I find he has the earning capacity to earn in excess of $500 per week, his earning capacity never having been reduced as shown by any competent testimony. I find he is deliberately keeping his income low in an attempt to reduce the support he may be ordered to pay.

We have read the transcript and cannot arrive at an earning capacity of $500.00 per week. The husband testified at the final hearing he earned $4.00 per hour on his present job. He did not testify how many hours he worked per week. Assuming he works a normal workweek of forty hours, he would earn a gross salary of $160.00 per week. He also testified he was building decks which earned him $44.00 per day but gave no hint of how much time he spent on this job or his average earnings from it. Assuming he worked on the weekend when he was off from the other job, he would earn only $88.00 per week from that endeavor. While the trial judge disbelieved this testimony, he gave no basis for concluding the husband could then earn $500.00 per week except for the fact he relied on previous orders. Referring now to the temporary hearing before Judge Powell, the only evidence before the court showed the husband worked twenty-four hours on the weekend at a tire company and earned $13.00 per hour. By multiplying $13.00 by the usual workweek of forty hours, Judge Powell concluded the husband was capable of earning over ***42** $500.00 per week. No evidence suggests the husband could have worked a full forty hours per week at the tire company or would have been paid $13.00 per hour for weekday work as opposed to weekend work. Also, there is no evidence in the record explaining why the husband is no longer employed at that job. In her complaint, the wife

sought combined child support and alimony ***653** in the amount of only $125.00 per week.[FN2]

FN2. The wife did not move to amend her complaint. The combined awards of child support and alimony amount to $182.20 per week.

[3] The decision to grant alimony and the amount granted are discretionary with the trial judge. *Williams v. Williams,* 297 S.C. 208, 375 S.E.2d 349 (Ct.App.1988). At the time the alimony award was entered, nine factors were to be considered in awarding alimony including the ability of the husband to pay. *Johnson v. Johnson,* 288 S.C. 270, 341 S.E.2d 811 (Ct.App.1986). While conceivably there may have been some basis to award alimony in the amount ordered, we must reverse the award where, as here, the award is based on an unsupported finding of the husband's earning capacity.

We, therefore, reverse the alimony award and remand for a redetermination based on the husband's present earning ability and such other appropriate factors as are set forth in S.C.Code Ann. Section 20-3-130 (1976 and Supp.1991).

[4] The husband next argues that assuming the house is marital property, the court did not equitably divide it. The only property before the court at the final hearing was the house. Both the husband and his father claimed the house belonged to the father because the father had never conveyed title to the parties. The issue of ownership is addressed below. We discuss here only the division.

The wife's testimony indicates she and the husband contributed approximately $17,000 to the construction of the house. She testified both she and the husband provided labor in the construction of the house. She acknowledged a portion of the $17,000 contribution came from some sort of lump-sum payment from the husband's past employer.[FN3] She also testified they owed the father approximately $18,000 in construction costs. The husband, his father, and several other witnesses ***43** testified the house was constructed entirely by the father and his family and the wife did no work on the house. It is clear from the record the father was the primary contractor for the house. While there is conflicting testimony as to the amount of labor performed by the husband, the father agreed it was at least ten percent. It is also clear the labor performed by the wife was insubstantial.

FN3. The payment was in the gross amount of $25,000.

[5] The house has an approximate value of $50,000.[FN4] The trial judge divided the marital real property equally finding "[t]he unappealed decree of divorce apportioned the marital property on a fifty-fifty basis which I find to be reasonable under the circumstances and to which I should be bound in apportioning the real property. I independently find the marital real property should be apportioned on a fifty-fifty basis." The judge further stated he had considered the equitable distribution of marital property statute and the cases decided under it and found the fifty-fifty division to be appropriate.[FN5]

FN4. The trial court valued the house and three acres of land at $56,000.

FN5. The divorce decree in 1988 divided only the personal property on a fifty-fifty basis.

The trial judge made no specific findings regarding any of the factors enumerated in S.C.Code Ann. Section 20-7-472 (Supp.1991). The mere recitation that he considered the statute and case law provides us with no means to review his reasoning for the award. Our independent review of the record convinces us the judge abused his discretion in awarding the wife fifty percent of the house. We base this on the following facts: (1) the husband apparently earned more than the wife during the marriage; (2) presumably much of the money paid toward the construction of the house came from the husband's settlement with his employer; (3) the husband and his family contributed substantially all of the labor to build the house; (4) the husband's father advanced construction costs; (5) the parties lived in the house only one year prior to the initiation of this action; and (6) no value was placed on the wife's indirect contributions to the accumulation of this asset. ***654** The fact a substantial portion of the value of the house is attributable to contributions made by the husband's family should be a consideration in this case. See ***44** *Bowyer v. Sohn,* 290 S.C. 249, 349 S.E.2d 403 (1986); *Bungener v. Bungener,* 291 S.C. 247, 353 S.E.2d 147 (Ct.App.1987). We, therefore, remand this issue to the family court for a more equitable division of the real estate.

[6] The husband appeals the court's award of attorney fees of $9,000 to the wife. The attorney fee affidavit was introduced into the record without objection. The affidavit addresses most pertinent attorney fee factors. A detailed statement of time and charges is attached to the affidavit. The award of $9,000 was less than the requested amount of $12,000. The husband now claims proper findings were not made, or if made, they lacked support in the evidence. We disagree. The record adequately supports the award. *Lynn v. Lynn,* 290 S.C. 359, 350 S.E.2d 403 (Ct.App.1986).

FATHER'S APPEAL

[7] The appellant, Neely H. Sexton, Sr., is the father of Patrick B. Sexton and the personal representative of his deceased wife, Frieda P. Sexton. According to the wife's complaint, Neely H. Sexton, Sr. and his wife were made parties to the divorce action "to have the court fully inquire into the marital assets ... and apportion the property found in the name of [the husband's parents]." The father's answer denies this allegation. His answer alleges he offered to build a house for the wife and husband for cost with title to be transferred upon payment of his costs. He then asserts that because he has not received payment of costs, the wife has no interest in the house. Additionally, the husband's father and mother signed an affidavit in July 1988 which stated the father agreed to build *the husband* a house for costs. Indeed, the father confirmed in his testimony and brief that he agreed to build the parties a house for costs.

[8] [9] The trial court found an oral agreement by the husband's mother and father to build and convey a house to the husband and wife for costs. While not specific, the court implicitly found the father's answer and the affidavit were sufficient writings to satisfy the statute of frauds.[FN6] We ***45** find the answer of the father together with his affidavit are sufficient writings to satisfy the statute of frauds. See *Walker v. Preacher,* 188 S.C. 431, 199 S.E. 675 (1938) (pleading admitting a parol agreement may constitute sufficient writing). We hold the love and affection the father and mother had for their son and daughter-in-law together with their promise to pay the father his actual costs is sufficient consideration to support the agreement to convey title of the house upon payment of costs. 17 C.J.S. *Contracts* Sections 91, 92 (1963). Additionally, a loss or detriment to the promisee has been held sufficient consideration for a contract. *Theodore*

v. Mozie, 230 S.C. 216, 95 S.E.2d 173 (1956). The husband and wife suffered a detriment by putting their money into the construction of the house based on the father's acquiescence and promise to convey upon completion. Thus, the father's argument concerning an incomplete gift and the lack of standing by the wife to demand specific performance is without merit. [FN7]

FN6. While the law of part performance as a means of removing an oral contract from the operation of the statute of frauds is mentioned in the "Law" section of the appealed order and is argued by both parties on appeal, the trial judge made no findings on this theory. We do not think his ruling was premised on that principle.

FN7. We do not understand the father to argue he should not be required to convey the house upon payment of his costs if we hold the contract is valid and enforceable.

[10] [11] The question, however, of how much land the father would convey to the husband and wife is a problem. The father claims he only agreed to convey the house and his son and daughter-in-law could buy as much land as they wanted at the time they paid him the costs for building the house. There is a bare assertion by the wife that the father was to convey three ***655** acres of land. However, the long and short of the wife's testimony is she thought the father agreed to treat her and the husband the same way he treated his other son, Neely H. Sexton, Jr. (Neely). The father and relatives also built a house for Neely. The testimony of the father and Neely was Neely had not paid the father the construction costs and had no title to the house although the house was built in 1979. The father, Neely, and the husband all testified no more than an acre and a half of land was anticipated being transferred with the house. The husband testified the agreement was he would pay separately for the land. In order to satisfy the statute of frauds requirement of a sufficient written memorandum, the contract must be so clearly described that no oral testimony is needed to supply any necessary terms and conditions. *Walker,* 188 S.C. 431, 199 S.E. 675.

***46** [12] Neither the father's answer nor the affidavit address the amount of land to be conveyed. It is only from the wife's testimony that we can find any semblance of an agreement to convey three acres of land free of charge along with the house. We, therefore, hold the answer and affidavit do not satisfy the statute of frauds as to acreage. See *Cousar v. Shepherd-Will, Inc.,* 300 S.C. 366, 387 S.E.2d 723 (Ct.App.1990) (parol evidence cannot be relied upon to supplement a vague and uncertain description in a contract of sale of land). We also hold the alleged agreement as to the amount of land to be conveyed is not so clear and unequivocal that part performance, if present here, will remove the agreement from the statute of frauds. *Scurry v. Edwards,* 232 S.C. 53, 100 S.E.2d 812 (1957). We do hold the agreement must necessarily have contemplated the transfer of some amount of land along with the completed house. In fact, the father agrees he was to convey the amount of land the husband and wife were able to purchase.[FN8] However, the answer and affidavit simply do not address the amount or the consideration for the land. We, therefore, remand this issue to the trial judge for reconsideration of the amount of land to be conveyed and the sum the husband and wife are to pay the father for the land.[FN9] The order on remand should be more specific on the location and configuration of the land to be conveyed by the father.

FN8. The law will recognize some amount of land necessarily must be conveyed to support the foundation of the house.

FN9. The value may be determined by appraisal.

[13] [14] Finally, the father claims the family court lacked the authority to require him to insure the marital home until it was sold and to order the husband and wife to reimburse him for the cost of insurance. We disagree. The family court may make such orders necessary to carry out and enforce its order concerning the division of property. S.C.Code Ann. Sections 20-7-420(2) and (30) (1976 and Supp.1991).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART.

GARDNER and BELL, JJ., concur.

Sharpe v. Sharpe, 416 S.E.2d 215 (Ct. App. 1992)

Court of Appeals of South Carolina.
Russell Larry SHARPE, Appellant-Respondent,
v.
Dorothy H. SHARPE, Respondent-Appellant.
No. 1804.
Heard Feb. 18, 1992.
Decided April 13, 1992.

Divorce was granted to husband, in the Family Court, Lexington County, Robert H. Cureton, J., and both husband and wife appealed. The Court of Appeals, Gardner, J., held that: (1) spouses' contentions that they were entitled to divorce on grounds of physical cruelty would be rejected, where no exception was taken to trial judge's finding of fact that husband was entitled to divorce on grounds of one year separation; (2) trial judge properly provided that husband purchase wife's interest in marital estate by payment of $1,500 per month together with annual payment of $5,000; (3) trial court properly awarded wife alimony by requiring husband to maintain health insurance through his business; and (4) alimony did not have to be barred on grounds that wife confessed that she conspired to kill husband.
Affirmed.
Cureton, J., concurred in separate opinion.
***215 *540** J. Mark Taylor, West Columbia, for appellant-respondent.

***216 *541** J. Michael Taylor and Ken H. Lester, Columbia, for respondent-appellant.

GARDNER, Judge:
Dorothy H. Sharpe (the wife) instituted this action for divorce in 1986. The action was not pursued. Russell Larry Sharpe (the husband) brought an action for divorce in 1989. The appealed order granted the husband a divorce on the grounds of a one year separation and required the husband, by way of alimony, to maintain medical insurance for the wife through his septic tank business and also to pay all other reasonable medical expenses not covered by insurance. The appealed order also awarded the wife a 35 percent equitable distribution interest in the marital estate and $5,000 in attorney fees. Both parties appeal. We affirm.

On appeal the husband contends the trial judge erred by: (1) not granting a divorce based on physical cruelty, (2) awarding the wife alimony, (3) awarding the wife a portion of the marital property, and (4) awarding the wife attorney fees.

The wife contends the trial judge erred by: (1) allowing the husband to purchase the wife's interest in the marital estate at no interest over a period of years exceeding the wife's life expectancy, (2) only awarding the wife a 35 percent share of the marital estate, (3) not awarding her periodic alimony, and (4) not granting her a divorce on the grounds of physical cruelty.

The parties enjoyed a happy marriage for many years but encountered multiplying problems over the last several years of the marriage. Because of the complexity of the facts and events that occurred during the marriage, the parties stipulated (1) that the husband owns his own business that specializes in installing septic tanks and clearing land, and this business is profitable, (2) that the husband also owns a small grocery store and several acres of improved property, and (3) that the husband has life insurance policies with a cash value of $4,846 and the husband maintains medical insurance on the wife through the septic tank business.

The parties also stipulate that (1) the wife has a Social Security income of $257.34 per month, (2) she has personal property***542** valued at $815, (3) the husband owns personal property valued at $3,010, (4) the wife has a van with a net value of $981.15, (5) the wife withdrew $25,000 from several banks where the parties had accounts, and (6) the wife has cancer and a life expectancy of less than five years.

The husband is guilty of post-separation adultery. The wife admitted that she conspired with others to kill the husband, but the attempt failed because the husband became aware of the conspiracy.

[1] We reject the contentions of both parties that they were entitled to a divorce on the grounds of physical cruelty. No exception was taken to the trial judge's finding of fact that the husband was entitled to a divorce on the grounds of one year separation. We reject these contentions.

[2] We find no error in the equitable distribution for either party. The equitable distribution of the marital estate is within the sound discretion of the trial judge, and the trial court's decision will not be disturbed absent abuse of discretion. *Coxe v. Coxe,* 294 S.C. 291, 363 S.E.2d 906 (Ct.App.1987). We find no abuse on the part of the trial judge. We hold that the preponderance of the evidence supports the findings of fact made by the trial judge and the division of the marital estate he ordered.

[3] We also reject the wife's contention that the trial judge erred in providing that the husband purchase her interest in the marital estate by a payment of $1,500 per month together with an annual payment of $5,000. The family court may employ any reasonable means by which to equitably divide marital property. *See Jones v. Jones,* 281 S.C. 96, 314 S.E.2d 33 (Ct.App.1984).

[4] [5] We also reject the husband's contention that the trial judge erred in awarding the wife alimony by requiring maintenance of health insurance through the husband's business. We find no abuse of discretion, and affirm the award and the amount of alimony. In making this award, ***217** the trial judge obviously had in mind the wife's terminal cancer. We find no abuse. In all probability, the wife would not be able to find health insurance elsewhere. We affirm this award. In so doing we also reject the

husband's contention that alimony to the wife should be barred because she confessed that she conspired ***543*** to kill him. Under the circumstances of this case, we are quite confident that the trial judge took this factor into consideration when requiring the husband to protect the wife's remaining years of life with health insurance already in place. We find no error in this reasoning.

We also reject the husband's contention that attorney fees should not have been awarded the wife. We find no abuse here.

For the above reasons, we affirm the appealed order.

AFFIRMED.

BELL, J., concurs and CURETON, J., concurs in separate opinion.

CURETON, Judge: (Concurring).

I concur in the affirmance of the trial court's decision, but would expound further on one of the husband's contentions. The husband makes the novel argument that the wife should be barred of all interest in the marital estate because of her participation in the murder for hire scheme. In support of his argument, the husband cites *D'Arc v. D'Arc,* 164 N.J.Super. 226, 395 A.2d 1270 (Ch.Div. 1978), aff'd in part and rev'd in part, 175 N.J.Super. 598, 421 A.2d 602 (App.Div.1980). In that case a husband who attempted to hire a contract killer to murder his wife was barred from receiving equitable distribution of any assets derived from the wife. *D'Arc,* 421 A.2d at 603. [FN1]

FN1. Our reading of this case reflects that one of the primary reasons the court did not award the husband any assets was the fact he contributed little, if anything to the marriage, and indeed, reaped handsome financial benefits during the marriage from his wealthy wife. The primary asset the husband sought was the enforcement of an ambiguous agreement whereby the wife had agreed to pay the husband $10,000 per month tax free.

On the other hand, the wife contends this single act of misconduct occurring after separation did not cause dissolution of the marriage, nor diminish the estate, nor cause any actual injury. Further, she argues the husband comes into court with unclean hands because he committed adultery and mistreated her during the marriage. She further argues her single act of misconduct should not trigger a windfall to the husband and because it occurred after a *pendente lite* order was entered it ***544*** should not be considered at all under S.C.Code Ann. Section 20-7-472(2).

The few states that have dealt with this issue seem to hold that even in the face of statutes prohibiting the use of fault to affect equitable division, an attempted murder of a spouse is such an egregious act as to constitute outrageous misconduct which should be considered in equitable distribution. As we read the cases, none of the courts have held as the husband asks us to hold that a spouse who attempts to murder the other spouse should be barred of all property rights as a matter of public policy. *See Brancoveanu v. Brancoveanu,* 145 A.D.2d 395, 535 N.Y.S.2d 86 (1988) (court awarded the husband who participated in an attempted murder for hire of his wife forty percent of the proceeds from the sale of the marital residence, but refused to grant him any share of the wife's dental practice); *Stover v. Stover,* 287 Ark. 116, 696 S.W.2d 750 (1985) (wife's conspiracy to murder husband justified unequal division in his favor); *contra, D'Arc,* 421

A.2d 602 (husband's attempt to murder his wife should not be ignored especially where he had made no meaningful contribution to the marital estate).

The approach taken by the majority (if not all) of the courts is to evaluate each case on its merits. I, too, would not hold as a matter of public policy that in every case where one spouse participates in an attempt to murder the other spouse, the offending spouse should be barred from a property division. I would take the approach taken by a majority of the courts and evaluate the misconduct of the offending spouse in each case.

***218** I would hold the trial judge did not abuse his discretion in awarding the wife a thirty-five percent interest in the marital estate. The marriage lasted for eighteen years; the misconduct of the wife occurred after the separation and did not result in an undue economic burden on the husband; the husband was guilty of misconduct during the marriage; the wife was disabled and unable to earn a living, and the parties' marriage was generally a stormy one.

Stroman v. Williams, 353 S.E. 2d 704 (1987)

Court of Appeals of South Carolina.
Thomas STROMAN, Appellant,
v.
Joanne T. WILLIAMS, Respondent.
No. 0883.
Heard Jan. 26, 1987.
Decided Feb. 23, 1987.

Father brought action for change of custody of daughter from mother to father and, alternatively, reduction in his child support obligation. The Family Court, Orangeburg County, Robert H. Burnside, Family Court Judge, denied change of custody but reduced child support award from $65 to $55 per week. Father appealed. The Court of Appeals, Goolsby, J., held that: (1) mother's homosexuality not adversely affecting child did not mandate change in custody, and (2) refusal to halve child support obligation on attainment of majority by one of two children was not an abuse of discretion. Affirmed.
Sanders, C.J., concurred and filed separate opinion.
***705 *377** Zack E. Townsend, Orangeburg, for appellant.

Robert C. Elliott, Columbia, for respondent.

GOOLSBY, Justice:
In this domestic case, the father Thomas Stroman seeks a change of custody of his minor daughter from the mother Joanne T. Williams and, in the alternative, a reduction in the amount of child support he is required to pay the mother each month for the support of his daughter. The trial court held there had been no change of circumstances sufficient to warrant a change in custody from the mother to the father; however, it reduced the amount of weekly child support from $65 to $55. The father appeals, contending the trial court abused its discretion in not transferring custody of his minor daughter and in not reducing the amount of weekly child support to $32.50. We affirm.

The parties separated in 1980. In 1981, the mother and the parties' two children, both girls, began living with another woman and her daughter. The mother admits to having a homosexual relationship with the other woman.

The father and mother divorced in 1984. The divorce decree awarded custody of the parties' children to the mother. At the time of the divorce, the father knew of the mother's homosexuality.

***378** In July, 1985, the older daughter, who had reached her majority and had graduated from high school, moved from the mother's home.

The father then instituted the present action alleging that the mother's homosexual relationship within the household rendered the mother "an unfit mother as a matter of law" and that the attainment by the older daughter of her majority constituted a change in circumstances entitling him to a reduction in the amount of child support he was required to pay to the mother.

I.

[1] [2] In determining the question of a child's custody, the paramount consideration is the welfare of the child. *Davenport v. Davenport,* 265 S.C. 524, 220 S.E.2d 228 (1975). The party seeking modification of a child's custody "has the burden of showing [a] material change of circumstances since entry of the judgment or order in question, and that the child's best interests require modification." 67A C.J.S. *Parent & Child* § 46b at 310 (1978); *Heckle v. Heckle,* 266 S.C. 355, 223 S.E.2d 590 (1976). A parent's morality, while a proper factor for consideration, "is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child." *Davenport v. Davenport,* 265 S.C. at 527, 220 S.E.2d at 230. The award of a child's custody is a matter that rests largely within the discretion of the trial court. *Adams v. Adams,* 262 S.C. 85, 202 S.E.2d 639 (1974). Custody is not to be used to penalize or reward a parent for his or her conduct. *Davenport v. Davenport, supra.*

[3] The father failed to prove that a material change in circumstances has occurred since the entry of the order granting the mother custody and that the child's best interests require a change of custody from the mother to the father.

As we mentioned, the father knew of the mother's homosexuality at the time of their divorce in 1984. The father conceded that he found out about her staying with another woman when the mother left Orangeburg and moved to the Columbia area. The mother came to the Columbia area with ***379** the parties' two daughters in 1981, some three years prior to the divorce.

Although the father claims the younger daughter has been substantially affected by the mother's lesbian relationship with the other woman, he points to no evidence that supports his claim. Our own examination of the record did not uncover any evidence that the daughter was being exposed to deviant sexual acts or that her welfare was being adversely affected in any substantial way. *D.H. v. J.H.,* 418 N.E.2d 286 (Ind.App.1981); *A. v. A.,* 15 Or.App. 353, 514 P.2d 358 (1973).

In fact, the evidence reveals, as the trial court found, that the child, who has her ***706** own bedroom in "a brick suburban house with a swimming pool in the back," is a normal and above-average child and is "properly-adjusted and healthy." The evidence also shows that she is "an A and B student" at school and is "well-behaved" and "mannerly" and that the older daughter is heterosexual, intelligent, and well-mannered after having lived with the mother and the other woman for a five-year period.

In addition, a psychiatrist at the Orangeburg Area Mental Health Center, who treated the mother for several years, testified that he was not aware of the mother having any difficulty functioning as a parent. When asked in general whether a homosexual might make a good parent, the psychiatrist responded that some "homosexual people make good parents and some don't."

We therefore find no abuse of discretion on the part of the trial court in refusing to change custody from the mother to the father. *Bezio v. Patenaude,* 381 Mass. 563, 410 N.E.2d 1207 (1980); *see Guinan v. Guinan,* 102 App.Div.2d 963, 477 N.Y.S.2d 830 (1984) (the mere fact that a parent is a homosexual does not alone render the parent unfit and a parent's sexual indiscretions are a consideration in a custody dispute only if they are shown to adversely affect the child's welfare); *In the Matter of the Marriage of Cabalquinto,* 100 Wash.2d 325, 669 P.2d 886 (1983) (holding that homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation); *D.H. v. J.H., supra* (homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the ***380** homosexual parent unfit as a matter of law to have custody of the child); *Nadler v. Superior Court of Sacramento County,* 255 Cal.App.2d 523, 63 Cal.Rptr. 352 (1967) (a mother who is a homosexual is not an unfit mother as a matter of law).

Our decision to uphold the trial court's conclusion that custody of the younger daughter should remain with the mother is consistent with the principle that an appellate court should be reluctant to substitute its own evaluation of what the evidence dictates in terms of child custody for that of the trial court. *Guinan v. Guinan, supra.* Our decision is also consistent with the view that custody of a child is not to be granted as a reward or withheld as punishment. *In the Matter of the Marriage of Cabalquinto, supra.*

II.

[4] We likewise find no abuse of discretion in the failure of the trial court to reduce the amount of the father's weekly child support payments to $32.50.

The amount to be allowed a custodial parent for child support rests within the sound discretion of the trial court whose determination will not be disturbed on appeal absent a showing of an abuse of discretion. *Zeigler v. Zeigler,* 267 S.C. 9, 225 S.E.2d 849 (1976); *Bentrim v. Bentrim,* 282 S.C. 333, 318 S.E.2d 131 (Ct.App.1984). Where a support order "provides for payments for the benefit of two or more children, the marriage or emancipation of one minor child does not automatically affect the liability of the father for the full sum prescribed in the order." 24 Am.Jur.2d *Divorce and Separation* § 1050 at 1041 (1983). The mere fact, then, that the older daughter has reached her majority and no longer resides with the mother did not require the trial court, as the father contends, to reduce the amount of weekly child support by half. *See Estes v. Estes,* 192 Ga. 100, 14 S.E.2d 680 (1941) (a judgment awarding the wife a stated monthly sum for joint support of herself and a minor child is not vitiated *pro tanto* upon the child reaching majority).

AFFIRMED.

CURETON, J., concurs.

***381** SANDERS, C.J., concurs in separate opinion.

SANDERS, Chief Judge (concurring):

I think perhaps we should say a little more, lest what we have said be misunderstood by the anxious reader.

The result which we reach on the issue of custody should not be construed as implying our approval of the lifestyle of the mother. No moral judgment by us has ***707** been necessary because there is no evidence that her lifestyle had any relevancy to the welfare of the child. *See* *Marshall v. Marshall,* 282 S.C. 534, 540-41, 320 S.E.2d 44, 48 (Ct.App.1984) ("The morality of a parent is a proper consideration in determining child custody but it is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.").

We are not in the business of gratuitously judging the private lives of other people.

Taylor v. Taylor, 508 S.E. 2d 50 (Ct. App. 1980)

Court of Appeals of South Carolina.
Edwin S. TAYLOR, Appellant,
v.
Delores S. TAYLOR, Respondent.
No. 2899.
Submitted Oct. 6, 1998.
Decided Nov. 16, 1998.

Divorced wife sought attorney fees following divorced husband's unsuccessful action to reduce alimony and child support. On remand from the Court of Appeals, the Family Court, Charleston County, Judy C. Bridges, J., held that wife was entitled to attorney fees, and husband appealed. The Court of Appeals, Huff, J., held that award of $13,352 68 in fees for wife's defense in family court, and $9.906.19 to cover costs of appeal, was supported by evidence.
Affirmed.

***52 *212** L. Mendel Rivers, Jr., of Mt. Pleasant, for appellant.

Marvin I. Oberman and Harold A. Oberman, of Oberman & Oberman, of Charleston, for respondent.

HUFF, Judge:

In this domestic action, Edwin S. Taylor (Husband) appeals from the family court's award of attorney's fees to Delores S. Taylor (Wife). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The action is before us for the second time, but represents the third time Husband has sued Wife. The parties were divorced in January 1984. An agreement between the parties settled issues of equitable distribution, alimony and child support, and was incorporated by the family court into the divorce decree.

In 1988 Husband sued Wife seeking permanent, sole custody of their minor child. In a detailed 26-page opinion, the family court ruled against Husband. It further ordered him to pay $11,183.63 of Wife's attorney's fees and costs. Husband ***213** initially appealed this decision, but ultimately asked that the appeal be dismissed.

In 1989 Husband again sued Wife, this time seeking a reduction or termination of alimony, a reduction in child support, and an allocation of the support payments between alimony and child support. The court made a number of findings with regard to Husband's credibility, including:

19. [Husband]'s financial declarations do not coincide with his testimony in Court under oath. He has consistently failed to reflect ownership interest of his parents and alleged partners in his financial declarations prepared to secure loans from institutions, while testifying to such relationships when in court.

20. While [Husband] shows a boat or boats valued at Twenty-One Thousand ($21,000.00) Dollars on his January 1, 1989 Financial Statement, he now claims it belongs to his [current] wife and that it is relatively valueless.

. . . . .

22. [Husband] has chosen to vacillate in his testimony concerning the values of his property interests between Financial Declarations, depositions and court testimony to the extent that the credibility of his testimony is highly in doubt.

23. The evidence reflects that [Husband] is the owner of 78% of the Atlantic House ***53** Restaurant, with his mother owning 13% and his father owning 9%. This sheds no light on and makes [Husband]'s testimony of turning One Hundred Thousand ($100,000.00) Dollars of the insurance proceeds over to his mother totally illogical.[FN1]

FN1. At the time of the divorce, Husband was a restauranteur operating The Atlantic House restaurant. In 1990 Hurricane Hugo completely destroyed the restaurant, and Husband received $330,000 in insurance proceeds.

. . . . .

26. [Husband] by his deceptive and deliberate efforts to mislead and manipulate the court has created a situation where he has little credibility and has worsened his dilemma by his failure to be honest and forthright.

***214** The court further found Husband, "in spite of his alleged losses," "to be substantially wealthier" than when he divorced Wife. For a number of reasons, however, the court decreased Husband's support payments. The court also ordered Husband to pay $2,000 towards Wife's legal expenses. Although Husband appealed this order as well, the appeal was subsequently dismissed when Husband did not pursue it. Wife was thereafter awarded $1,500 under Rule 222, SCACR, in payment of appellate attorney's fees.

Husband sued Wife again in 1993, again seeking a reduction of alimony and child support, claiming he had a "negative net worth." The court declined to find a change in circumstance sufficient to justify Husband's claims. Rather, the court found Husband's real estate holdings had appreciated in value and some had been sold at a substantial profit. Husband was employed and receiving rental income and royalties.

Husband had transferred several properties to family members for a $5.00 consideration; however, the court found Husband "in reality retains a strong equitable interest in the properties and their rental income." The court concluded Husband

cannot use the "transfer" to family members, be it real or otherwise, to feign a reduction in income and personal net worth, to ask the Court to lessen his child support and alimony obligations, especially in light of the original Divorce Decree and Agreement in which [Husband] retained control of the vast majority of real property in exchange for his support obligations.

Although the court refused Husband's request for a reduction in alimony or child support, the court denied Wife's request for attorney's fees, as "[s]he did not present a case in chief for herself, but relied exclusively on a very full and detailed cross examination to disprove [Husband]'s case."

Again, Husband appealed and, again, abandoned the appeal. Wife, however, pursued an appeal of the court's attorney's fees decision. We reversed the court on this point, finding the court erred in not considering proper factors in making its decision. *Taylor v. Taylor,* Opinion No. 95-UP-239 (filed September 25, 1995). We remanded the case to the family court judge to receive evidence de novo to determine if ***215** attorney's fees should be awarded. We also ordered Husband to pay Wife appellate attorney's fees in excess of $750, the amount to be decided by the family court.

On remand a hearing was held during which Wife's two attorneys were examined and cross-examined. Wife's attorneys submitted affidavits, copies of bills submitted to Wife, and the parties' financial declarations. Wife also presented expert testimony on the issue of attorney's fees. The court found, among other things, that Wife had achieved beneficial results. The court also found that at the time of the fee hearing, husband still had substantially more assets and income earning potential than wife and was no longer required to pay child support. Further, Husband had instituted various actions and appealed from these actions such that, if attorney's fees were not allowed, Husband would be able to decrease wife's standard of living despite the fact he did not prevail on the merits of his cases. The court found Wife was entitled to the full amount of her attorney's fees and awarded $13,352.68 for her defense below, and $9,906.19 to cover the costs of the appeal. Husband again appeals.

**54 LAW/ANALYSIS

[1] In appeals from family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Ellerbe v. Ellerbe,* 323 S.C. 283, 473 S.E.2d 881 (Ct.App.1996). We are not, however, required to disregard the findings of the trial judge, who saw and heard the witnesses and is in a better position to evaluate credibility. *Id.*

[2] [3] Generally, attorney's fees are not recoverable unless authorized by statute or contract. *Burns v. Burns,* 323 S.C. 45, 448 S.E.2d 571 (Ct.App.1994). South Carolina Code Ann. § 20-7-420(38) (Supp.1997) authorizes the family court to order payment of suit money to either party. *Green v. Green,* 320 S.C. 347, 465 S.E.2d 130 (Ct.App.1995). The award of attorney fees and costs is a matter within the sound discretion of the trial judge. *Calhoun v. Calhoun,* 331 S.C. 157, 501 S.E.2d 735 (Ct.App.1998). The award will not be reversed on appeal absent an abuse of discretion. *Id.* at 166, 501 S.E.2d at 739.

*216 ATTORNEY'S FEES AND COSTS

Husband maintains generally the family court judge erred in awarding Wife the total of her requested fees. He makes the following contentions in particular.

1. *Number of attorneys; number of hours; difficulty of case*

[4] [5] Husband contends Wife did not need to employ two attorneys. This court, however, will not criticize a party for hiring more than one attorney, provided their work is not duplicated and the complexity of the case demands it. *Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). Husband has not shown the attorneys duplicated services. *See* *Josey v. Josey,* 291 S.C. 26, 351 S.E.2d 891 (Ct.App.1986) (wherein court affirmed award for two attorneys where record failed to disclose duplicated attorney services, but showed clear delineation of duties). In fact, Wife has shown by hiring two attorneys, who were partners, she was actually able to incur lower attorney's fees. The less experienced attorney charged at a lower rate; he could, therefore, perform time-consuming duties that did not require greater experience at a cheaper cost than his more-experienced, higher-priced colleague. We find no abuse of discretion.

[6] Husband adds the attorneys spent far too many hours on the case. He complains these same attorneys were involved with the previous three cases and, thus, should not have had to spend so much time on the instant suit. We disagree.

[7] The reasonableness of the number of hours billed is determined according to (1) the nature, extent, and difficulty of the case, and (2) the time necessarily devoted to the case. *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991). Husband was the cause, in large part, of the considerable amount of time Wife's attorneys spent on this case. Because of Husband's lack of cooperation, Wife was forced to make a motion for discovery, as well as prepare a motion to compel discovery. When Husband finally responded to discovery requests, he produced boxes full of unorganized documents which contained many irrelevant materials.

***217** Wife's attorneys introduced, without objection, a letter to Husband's counsel detailing their strenuous efforts to depose Husband. Husband's deposition took 2 1/2 hours and involved 55 exhibits. Cross-examination of Husband during trial took 2 hours and Wife's attorneys presented 40 exhibits. Because of Husband's transfers of assets, the attorneys had to review old depositions and search the public records to determine what happened to various pieces of property. They were forced to retrieve records from Husband's bank and subpoena his personal records. Without the efforts of her attorneys, Husband would have presented unchallenged testimony to the court that he had a significant negative net worth. Instead, the court found Husband to be better off financially than at the time of the divorce. On this record, we find substantial support for the court's decision to award Wife all the requested fees.

[8] Husband decries the court's award of 10 additional hours spent by Wife's attorneys in preparing for the fees hearing, without the support of an affidavit. We do not see the ***55** need for an affidavit in this case. The attorneys were both attendant at trial, under oath, and subject to cross-examination. We find no error.

2. *Expert fees*

[9] Wife engaged an attorney to testify as to the reasonableness of her attorneys' billing rate and the time expended; their reputation in the community; their skills, and the quality of their work. Husband contests on appeal the $800 fee charged by Wife's expert for his four hours of work. Given the expertise and position of high professional standing of Wife's expert, we fail to detect an abuse of discretion in this portion of the award.

3. *Costs*

[10] Husband argues the family court erred in awarding Wife's costs of litigation because Wife's attorneys charge for overhead expenses, in addition to an hourly rate. He asserts "costs should not be charged to a client, if the attorney is also going to charge the client a standard hourly billing rate."

***218** Husband relies, mistakenly, on *In the Matter of Jennings,* 321 S.C. 440, 468 S.E.2d 869 (1996). Jennings had randomly chosen a client to which to bill a Lexis subscription rate when she had not used Lexis for this client. The supreme court held Jennings should not have charged an overhead item to a client, "particularly an overhead item from which the client received absolutely no benefit." *Id.* 321 S.C. at 445, 468 S.E.2d at 872. Husband has not shown Wife did not receive the benefit of the costs charged to her. We find no abuse in Wife being charged for items such as photocopies, courier service, facsimiles, reporting costs, extra postage and filing fees.

4. *Lack of attorney's fees affidavit*

[11] Husband complains the court erred in awarding attorney's fees when Wife's attorneys did not prepare an affidavit or request a bifurcated hearing as to attorney's fees in the initial action, thereby prolonging the litigation and inflating the attorneys' hours. We find no merit to this argument. During the hearing on fees, both of Wife's attorneys testified, although not reflected in the prior record, a decision was made between counsel and the court to wait until the court made a decision as to who would prevail in the action before submitting evidence on attorney's fees.

5. *Finding on prevailing party*

[12] Husband charges the court erred in finding he did not prevail "on the merits of his cases." Husband correctly states he did procure a reduction of support payments in the second case. However, it is clear from the various actions and appeals instituted by Husband, the wife has prevailed entirely on all the cases, with the exception of the initial action in the second case. Even there, Husband sought, alternatively, a termination of alimony, but was unsuccessful in that endeavor. The record also shows Husband initially appealed from that order. Thus, the extent to which he prevailed in that action is questionable. Even though the finding was minimally inaccurate, Husband was not prejudiced by this finding and, therefore, we find no error. *See* *Doe v. Doe,* 324 S.C. 492, 478 S.E.2d 854 (Ct.App.1996) (appellant seeking reversal must show both error and prejudice).

***219** 6. *Standard of living*

[13] Husband asserts the court erred in finding Wife's standard of living would decrease should she have to pay her own attorney's fees. Similarly, Husband contends the court erred in finding his standard of living would not decrease if Husband was ordered to pay the fees. We disagree.

The family court's 1994 order in the instant action noted Husband's substantial real estate holdings and the fact that he was a substantially wealthier man than at the time of his divorce. The order further found Husband received rental income of over $15,000 per year; earned salary of $2,000 per month; received royalty income; and held a $122,536 note that would be payable, at least in part to him, in 1996. These findings were not appealed and thus are the law of the case. *See* *Lindsay v. Lindsay,* 328 S.C. 329, 491 S.E.2d 583 (Ct.App.1997), cert. denied (June 18, ***56** 1998) (unchallenged ruling is the law of the case). Wife's financial declaration reveals her only income is alimony of $1,400 per month and a salary of $859.32 per month. Wife's only asset is her home.

Based on this record, we have no trouble affirming the family court's decision. Although the payment of attorney's fees may cause Husband some hardship, the payment for Wife would be impossible.[FN2] We find no abuse of discretion.

FN2. Husband argues Wife has already paid all but some $5,000 of the fees, but testimony at the hearing showed Wife borrowed money from her mother and others to do so. We are not here concerned with the ability of Wife's mother to pay the fees, but rather the effect the payment by Wife would have on Wife's standard of living.

7. *Husband's condemnation award*

[14] Husband maintains the family court erred in finding he received a large condemnation award following the loss of his restaurant. We find no merit in this argument as Husband himself testified to the amount he received and how he spent it, including the expenditure of $100,000 to open a new business. Further, even if we were to find error in the ruling, such error was harmless, as this finding is not needed to support the court's award.

***220** CONCLUSION

In *Anderson v. Tolbert,* 322 S.C. 543, 473 S.E.2d 456 (Ct.App.1996), this court opined:

The appellate courts of this state have not been careful to separate the question of entitlement to attorney fees from the question of determining the appropriateness of the amount of the award. However, S.C.Code Ann. § 20-3-120 (1985) makes it clear that in order for a spouse to be entitled to suit money, the claim must be "well founded." The burden of proving that a claim is well founded is on the party seeking suit money. *Darden v. Witham,* 263 S.C. 183, 209 S.E.2d 42 (1974) (overruled in part on other grounds by *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991)); *Gainey v. Gainey,* 279 S.C. 68, 301 S.E.2d 763 (1983).

322 S.C. at 547, 473 S.E.2d at 458.

In the case at hand, the evidence shows Husband has brought three family court actions against Wife and appealed all three. Considering the overall merits of the cases and the appeals from same, Wife has consistently prevailed on most of the issues, yet this has not tempered Husband's propensity to haul Wife back into court time and time again. Husband clearly is in a financial position to afford these suits, while Wife is not. We further have the "added dimension of an uncooperative husband who did much to prolong and hamper a final resolution of the issues in this case. An adversary spouse should not be rewarded for such conduct." 322 S.C. at 549, 473 S.E.2d at 459. To quote our late colleague: "One who intends to build a tower should first count the cost, whether he has sufficient to finish it. Luke 14:28. This court does not sit to relieve self-inflicted wounds." *Rish v. Rish,* 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct.App.1988) (Bell, J., concurring). We find Wife's claim to be well-founded, and conclude the family court's decision to award Wife attorney's fees, as well as the amount awarded, is fully supported by the record.

For the reasons set forth above, the decision of the family court awarding Wife all her attorney's fees and costs is hereby

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

Towles v. Towles, 182 S.E.2d 53 (1971)

Supreme Court of South Carolina.
Henrietta M. TOWLES, Appellant,
v.
John O. TOWLES, Respondent.
No. 19244.
June 17, 1971.

Action by wife against husband for support. The Court of Common Pleas, Charleston County, C. B. Pearce, Family Court Judge, dismissed on ground action was barred by terms of previous reconciliation agreement, and wife appealed. The Supreme Court, Lewis, J., held that reconciliation agreement in which wife agreed to never again institute any action against husband, as condition of resumption of marriage relationship, had effect of relieving husband of his marital obligations including duty to support wife and thus was void as against public policy.
Reversed and remanded.
308 **53 Joseph P. Riley, Jr., of Riley & Barr, Charleston, for appellant.

Brockinton & Brockinton, Charleston, for respondent.

****309*** LEWIS, Justice.
This action by the wife against her husband for support was dismissed by the lower court on the ground that it was barred by the terms of a previous reconciliation agreement between the parties whereby the wife agreed to never prosecute thereafter any action against the husband. The validity of the agreement of the wife not to sue is at issue in this appeal.

The parties were married on April 29, 1967. During the marriage, there have been previous disagreements and litigation between them. The last prior action between the parties was for divorce, instituted in July 1968 by the husband against the wife upon the

grounds of alleged physical cruelty and adultery. The wife denied the charges and filed a cross action against the husband for divorce on the ground of physical cruelty. That action resulted in a reconciliation between the parties upon the basis of a written agreement signed by them on November 13, 1968, which contained, among others, a provision that the wife would not thereafter bring any action against the husband.

Subsequently, this action was instituted by the wife against the husband, on November 13, 1969, in The Family Court of Charleston, in which she alleged that the husband had, without any justification, refused to support her since June 4, 1969. ***54** Upon the basis of the verified complaint, the judge of The Family Court issued an ex parte order allowing the wife temporary support and counsel fees.

***310** An answer was thereafter filed by the husband in which he plead the foregoing agreement as a complete bar to the present action. The entire agreement was made a part of the answer and a copy attached to the pleading. The husband also noted a motion to vacate or modify the order for temporary support and counsel fees. The motion stated that it was based upon the pleadings and such affidavits as might thereafter be submitted. Subsequently, the motion was heard upon the pleadings in this action, the prior agreement, and the proceedings in the prior divorce action, resulting in the issuance of an order dismissing the entire action upon the ground that it was barred by the foregoing agreement. This appeal is from that order.

The agreement in question recites in its preamble that there was pending a divorce action between the parties, in which the issues had been joined and an order issued providing for support for the wife; and that the parties had agreed to resume their marital relationship upon the dismissal of that action and the execution of the agreement. The agreement then provided in paragraph I as follows:

The parties agree to resume their marital relationship, and the second party (the wife) agrees and promises that she will never again bring any suit at law or in equity against the first party (the husband) for any reason whatsoever, and it is further agreed and promised by the second party (wife) that she will not pursue any action against the first party (husband), including the above pending action, and that she agrees and promises that she will try and endeavor in every way possible to be a good wife for her husband, * * *.

Following the quoted provision, the parties agreed that a house and lot previously purchased and paid for by the husband, title to which was, for convenience, taken in the name of the wife, would be sold and the proceeds used to purchase or build another house which would be owned by the parties as joint tenants with the right of survivorship, ***311** neither to convey or devise their interest therein without the consent of the other. Finally, it was agreed that the then pending divorce action would be dismissed and that the husband would pay the costs of that action including the fee for the wife's attorney.

After the execution of the foregoing agreement, a consent order of dismissal was issued by the court, reciting as its basis only 'that the parties in this matter have reached a reconciliation and wish the case to be dismissed.' There is no showing that the written agreement was considered or approved by the court in issuing the order of dismissal of the previous divorce action.

The question to be decided involves the validity of the agreement whereby the wife promises to never again institute any action against the husband. The contention of the husband, sustained by the lower court, is that the agreement was one to restore the marital relationship and that such inducement constituted sufficient consideration for the

promise by the wife to refrain from bringing any further actions against him. The position of the wife is that the agreement not to sue is tantamount to a release of the husband of his duty to perform his essential marital obligations and is, therefore, void as against public policy.

[1] The marriage contract is one in which the State has a vital interest. Once entered into, the law imposes upon the parties certain mutual obligations and liabilities which have long been considered essential incidents to the marital relationship. These incidents to marriage are deemed so important to its preservation and stability until any agreement which has the effect of materially varying or altering them, as a condition of the relationship, is ordinarily***55** considered against public policy and, therefore, void.

[2] [3] Among the essential incidents to marriage is the duty of the husband to support his wife. 41 Am.Jur.(2d), Husband and Wife, Sections 329 and 330; State v. Bagwell, 125 S.C. 401, 118 S.E. 767. An ***312** agreement whereby the husband is relieved of this obligation to support his wife, as a condition of the marital relationship, is against public policy and void.

[4] While the agreement of the wife to never bring an action against the husband does not specifically say that the husband is relieved of the duty to perform his marital obligations, it has that effect. For, if the agreement is valid, it deprives the wife of every means to force the husband to do so, and leaves the performance of his obligations solely dependent upon his whim or fancy. The agreement has the effect of relieving the husband of his marital obligations, as a condition of his resumption of the marital relationship, including the duty to support his wife.

We therefore hold that the agreement by the wife that she would never bring an action against her husband again, as a condition of the resumption of the marriage relationship, is against public policy and therefore void. The right of the wife to support from her husband must be determined without regard to the agreement not to sue.

Our decision herein is not inconsistent with the established public policy to encourage and promote reconciliation between estranged spouses. That policy contemplates preservation of the marriage under conditions which recognize the mutual obligations and liabilities of the parties. The present resumption of the marital relationship was not on that basis.

Questions concerning the possible effect of our decision upon the status and rights of the parties with reference to the issues involved in the prior divorce proceeding and other matters are not before us, and no opinion is indicated thereabout.

The judgment of the lower court is reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

MOSS, C.J., and BUSSEY, BRAILSFORD and LITTLEJOHN, JJ., concur.

Jenifer TROXEL, et vir., Petitioners,
v.
Tommie GRANVILLE.
No. 99-138.
Argued Jan. 12, 2000.
Decided June 5, 2000.

Paternal grandparents petitioned for visitation with children born out-of-wedlock. The Superior Court, Skagit County, Michael Rickert, J., awarded visitation, and mother appealed. The Court of Appeals, 87 Wash.App. 131, 940 P.2d 698, reversed, and grandparents appealed. The Washington Supreme Court, Madsen, J., affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother, as applied to permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation.
Affirmed.
Justice Souter concurred in judgment and filed opinion.
Justice Thomas concurred in judgment and filed opinion.
Justice Stevens dissented and filed opinion.
Justice Scalia dissented and filed opinion.
Justice Kennedy dissented and filed opinion.
**2055 *57 Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
Washington Rev.Code § 26.10.160(3) permits "[a]ny person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. Petitioners Troxel petitioned for the right to visit their deceased son's daughters. Respondent Granville, the girls' mother, did not oppose all visitation, but objected to the amount sought by the Troxels. The Superior Court ordered more visitation than Granville desired, and she appealed. The State Court of Appeals reversed and dismissed the Troxels' petition. In affirming, the State Supreme Court held, inter alia, that § 26.10.160(3) unconstitutionally infringes on parents' fundamental right to rear their children. Reasoning that the Federal Constitution permits a State to interfere with this right only to prevent harm or potential harm to **2056 the child, it found that § 26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.
Held: The judgment is affirmed.
137 Wash.2d 1, 137 Wash.2d 1, 969 P.2d 21, affirmed.
Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice GINSBURG, and Justice BREYER, concluded that § 26.10.160(3), as applied to Granville and her family, violates her due process right to make decisions concerning the care, custody, and control of her daughters. Pp. 2059-2065.
(a) The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain

fundamental rights and liberty interests," Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551. Pp. 2059-2060.

(b) Washington's breathtakingly broad statute effectively permits a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. A parent's estimation of the child's best interest is accorded no deference. The State Supreme Court had the opportunity,*58 but declined, to give § 26.10.160(3) a narrower reading. A combination of several factors compels the conclusion that § 26.10.160(3), as applied here, exceeded the bounds of the Due Process Clause. First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. There is a presumption that fit parents act in their children's best interests, Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children, see, e.g., Reno v. Flores, 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1. The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests. More importantly, that court appears to have applied the opposite presumption, favoring grandparent visitation. In effect, it placed on Granville the burden of disproving that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right. The court also gave no weight to Granville's having assented to visitation even before the filing of the petition or subsequent court intervention. These factors, when considered with the Superior Court's slender findings, show that this case involves nothing more than a simple disagreement between the court and Granville concerning her children's best interests, and that the visitation order was an unconstitutional infringement on Granville's right to make decisions regarding the rearing of her children. Pp. 2060-2064.

(c) Because the instant decision rests on § 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation or to decide the precise scope of the parental due process right in the visitation context. There is also no reason to remand this case for further proceedings. The visitation order clearly violated the Constitution, and the parties should not be forced into additional litigation that would further burden Granville's parental right. Pp. 2064-2065.

**2057 Justice SOUTER concluded that the Washington Supreme Court's second reason for invalidating its own state statute-that it sweeps too broadly in authorizing any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard-is consistent with this Court's prior cases. This ends the case, and there is no need to decide whether harm is required or to consider the precise scope of a parent's right or its necessary protections. Pp. 2065-2067.

*59 Justice THOMAS agreed that this Court's recognition of a fundamental right of parents to direct their children's upbringing resolves this case, but concluded that strict scrutiny is the appropriate standard of review to apply to infringements of fundamental

rights. Here, the State lacks a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties. Pp. 2067-2068.
O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and GINSBURG and BREYER, JJ., joined. SOUTER, J., post, p. 2065, and THOMAS, J., post, p. 2067, filed opinions concurring in the judgment. STEVENS, J., post, p. 2068, SCALIA, J., post, p. 2074, and KENNEDY, J., post, p. 2075, filed dissenting opinions.

Mark D. Olson, for petitioners.

Catherine W. Smith, Howard Goodfriend, for respondent.

*60 Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice GINSBURG, and Justice BREYER join.
Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed*61 the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. In re Smith, 137 Wash.2d 1, 6, 969 P.2d 21, 23-24 (1998); In re Troxel, 87 Wash.App. 131, 133, 940 P.2d 698, 698-699 (1997).
In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev.Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The **2058 court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At

trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash.App., at 133-134, 940 P.2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash.2d, at 6, 969 P.2d, at 23; App. to Pet. for Cert. 76a-78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash.2d, at 6, 969 P.2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

"The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners*62 can provide opportunities for the children in the areas of cousins and music.

"... The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' [sic] nuclear family. The court finds that the childrens' [sic] best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. Id., at 60a-67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash.App., at 135, 940 P.2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. Id., at 138, 940 P.2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. *63 137 Wash.2d, at 12, 969 P.2d, at 26-27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. Id., at 15-20, 969 P.2d, at 28-30. Second, **2059

by allowing " 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. Id., at 20, 969 P.2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." Ibid., 969 P.2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." Id., at 21, 969 P.2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. Id., at 23-43, 969 P.2d 21, 969 P.2d, at 32-42.
We granted certiorari, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and *64 grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children-or 5.6 percent of all children under age 18-lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. i (1998).
The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons-for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice STEVENS' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." Post, at 2072 (dissenting opinion). Rather, our terminology is intended to highlight the fact that these *65 statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

[1] The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." **2060 Washington v. Glucksberg, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Id., at 720, 117 S.Ct. 2258; see also Reno v. Flores, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[2] The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535, 45 S.Ct. 571. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary *66 function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166, 64 S.Ct. 438.

[3] In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child");

Glucksberg, supra, at 720, 117 S.Ct. 2258 (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children” (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

*67 Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental**2061 parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, “[a]ny person may petition the court for visitation rights at any time,” and the court may grant such visitation rights whenever “visitation may serve the best interest of the child.” § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, e.g., 137 Wash.2d, at 5, 969 P.2d, at 23 (“[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm”); id., at 20, 969 P.2d, at 30 (“[The statute] allow[s] ‘any person’ to petition for forced visitation of a child at ‘any time’ with the only requirement being that the visitation serve the best interest of the child”).

[4] *68 Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son-the father of Isabelle and Natalie-but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

[5] [6] First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in Parham: “[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled

with the high duty, to recognize and prepare [their children] for additional obligations. ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U.S., at 602, 99 S.Ct. 2493 (alteration in original) (internal quotation marks and citations omitted). Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the *69 best decisions concerning the rearing of that parent's children. See, e.g., Flores, 507 U.S., at 304, 113 S.Ct. 1439. **2062 The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

"The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in In re Troxel, No. 93-3-00650-7 (Wash.Super.Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." Id., at 214, 113 S.Ct. 1439.

[7] The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See Parham, supra, at 602, 99 S.Ct. 2493. In that respect, the court's presumption*70 failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., e.g., Cal. Fam.Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me.Rev.Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn.Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb.Rev.Stat. § 43-1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R.I. Gen. Laws § 15-5-24.3(a)(2)(v) (Supp.1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was

reasonable); Utah Code Ann. § 30-5-2(2)(e) (1998) (same); Hoff v. Berg, 595 N.W.2d 285, 291-292 (N.D.1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

*71 Finally, we note that there is no allegation that Granville ever sought to cut off **2063 visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash.App., at 133, 940 P.2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash.App., at 133, 940 P.2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash.App., at 133-134, 940 P.2d, at 699; Verbatim Report 216-221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, e.g., Miss.Code Ann. § 93-16-3(2)(a) (1994) (court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore.Rev.Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); *72 R.I. Gen. Laws §§ 15-5-24.3(a)(2)(iii)-(iv) (Supp.1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

[8] Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in

support of its visitation order. First, the Troxels “are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music.” App. 70a. Second, “[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' [sic] nuclear family.” Ibid. These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: “I look back on some personal experiences .... We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.” Verbatim Report 220-221. As we have explained, **2064 the Due Process Clause does not permit a State to infringe on the fundamental right *73 of parents to make child rearing decisions simply because a state judge believes a “better” decision could be made. Neither the Washington nonparental visitation statute generally-which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted-nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court-whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best “elaborated with care.” Post, at 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.FN* See, e.g., *74 Fairbanks v. McCarter, 330 Md. 39, 49-50, 622 A.2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); Williams v. Williams, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

FN* All 50 States have statutes that provide for grandparent visitation in some form. See Ala.Code § 30-3-4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz.Rev.Stat. Ann. § 25-409 (1994); Ark.Code Ann. § 9-13-103 (1998); Cal. Fam.Code Ann. § 3104 (West 1994); Colo.Rev.Stat. § 19-1-117 (1999); Conn. Gen.Stat. § 46b-59 (1995); Del.Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga.Code Ann. § 19-7-3 (1991); Haw.Rev.Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind.Code § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); Kan.

Stat. Ann. § 38-129 (1993); Ky.Rev.Stat. Ann. § 405.021 (Baldwin 1990); La.Rev.Stat. Ann. § 9:344 (West Supp.2000); La. Civ.Code Ann., Art. 136 (West Supp.2000); Me.Rev.Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn.Stat. § 257.022 (1998); Miss.Code Ann. § 93-16-3 (1994); Mo.Rev.Stat. § 452.402 (Supp.1999); Mont.Code Ann. § 40-9-102 (1997); Neb.Rev.Stat. § 43-1802 (1998); Nev.Rev.Stat. § 125C.050 (Supp.1999); N.H.Rev.Stat. Ann. § 458:17-d (1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); N.C. Gen.Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent.Code § 14-09-05.1 (1997); Ohio Rev.Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore.Rev.Stat. § 109.121 (1997); 23 Pa. Cons.Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.C.Code Ann. § 20-7-420(33) (Supp.1999); S.D. Codified Laws § 25-4-52 (1999); Tenn.Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam.Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va.Code Ann. § 20-124.2 (1995); W. Va.Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7-101 (1999).

Justice STEVENS criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). Post, at 2068 (dissenting opinion). Justice KENNEDY likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." Post, at 2079 (dissenting opinion). **2065 We respectfully disagree. There is no need to hypothesize about how the Washington courts might apply § 26.10.160(3) because the Washington Superior Court did apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed *75 entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See supra, at 2060-2061. There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice KENNEDY recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." Post, at 2079. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

Justice SOUTER, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more. The issues that might well be presented by reviewing a decision addressing the specific application of the *76 state statute by the trial court, ante, at 2061-2064, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. Moore v. East Cleveland, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case. FN1 Its ruling rested on two independently sufficient grounds: the **2066 failure of the statute to require harm to the child to justify a disputed visitation order, In re Smith, 137 Wash.2d 1, 17, 969 P.2d 21, 29 (1998), and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, id., at 20-21, 969 P.2d, at 30-31. Ante, at 2058-2059, 969 P.2d 21. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests*77 standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

FN1. The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. In re Smith, 137 Wash.2d 1, 6-7, 969 P.2d 21, 23-24 (1998). The court also addressed two statutes, Wash. Rev.Code § 26.10.160(3) (Supp.1996) and former Wash. Rev.Code § 26.09.240 (1994), 137 Wash.2d, at 7, 969 P.2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also ante, at 2057-2058, 969 P.2d 21. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash.2d, at 13-21, 969 P.2d, at 27-31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, as written, the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." Id., at 5, 969 P.2d, at 23 (emphasis added); see also id., at 21, 969 P.2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511

(1978); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997). As we first acknowledged in Meyer, the right of parents to "bring up children," 262 U.S., at 399, 43 S.Ct. 625, and "to control the education of their own" is protected by the Constitution, id., at 401, 43 S.Ct. 625. See also Glucksberg, supra, at 761 (SOUTER, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash.2d, at 10-11, 969 P.2d, at 25-27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," id., at 20-21, 969 P.2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev.Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to award visitation rights. As the court understood it, the specific best-interests provision in the *78 statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash.2d, at 20, 969 P.2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision").FN2 On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons." Id., at 21, 969 P.2d, at 31.

FN2. As Justice O'CONNOR points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." Ante, at 2061, 969 P.2d 21.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but Meyer's repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed **2067 he "could make a 'better' decision" FN3 than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled *79 to prevail over a parent's choice of private school. Pierce, supra, at 535, 45 S.Ct. 571 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out

of the general population merely because the judge might think himself more enlightened than the child's parent.FN4 To say the least (and as the Court implied in Pierce), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

FN3. Cf. Chicago v. Morales, 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (BREYER, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

FN4. The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash.2d, at 21, 969 P.2d, at 31 (citation omitted).

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,FN5 see Chicago v. Morales, 527 U.S. 41, 55, n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (opinion of STEVENS, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. I therefore respectfully concur in the judgment.

FN5. This is the pivot between Justice KENNEDY'S approach and mine.

*80 Justice THOMAS, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.FN*

FN* This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause. See Saenz v. Roe, 526 U.S. 489, 527-528, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (THOMAS, J., dissenting).

**2068 Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice KENNEDY, and Justice SOUTER recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even

a legitimate governmental interest-to say nothing of a compelling one-in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice STEVENS, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme*81 Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev.Code § 26.10.160(3) (Supp.1996) was invalid on its face under the Federal Constitution.FN1 Despite the nature of this judgment, Justice O'CONNOR would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. Ante, at 2059-2060, 2060-2061, 2064 (plurality opinion). I agree with Justice SOUTER, ante, at 2065-2066, and n. 1 (opinion concurring in judgment), that this approach is untenable.

FN1. The State Supreme Court held that, “as written, the statutes violate the parents' constitutionally protected interests.” In re Smith, 137 Wash.2d 1, 5, 969 P.2d 21, 23 (1998).

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate under the *82 statute.FN2 Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, **2069 and an independent assessment of the facts in this case-both judgments that we are ill-suited and ill-advised to make.FN3

FN2. As the dissenting judge on the state appeals court noted, “[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this.” In re Troxel, 87 Wash.App. 131, 143, 940 P.2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, “[t]he findings necessary

to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." Ibid.

FN3. Unlike Justice O'CONNOR, ante, at 2061-2062, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt Justice O'CONNOR quotes from the trial court's ruling, ante, at 2062, says nothing one way or another about who bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption against the parents' judgment, only a " 'commonsensical' " estimation that, usually but not always, visiting with grandparents can be good for children. Ibid. The second quotation, " 'I think [visitation] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children,' " ibid., sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in In re Troxel, No. 93-3-00650-7 (Wash.Super.Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, ... trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." Ibid. The judge then went on to reject the Troxels' efforts to attain the same level of visitation that their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. Troxel is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of a deceased parent, per say [sic], as far as whole gamut of visitation rights are concerned." Id., at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." Id., at 222-223.

However one understands the trial court's decision-and my point is merely to demonstrate that it is surely open to interpretation-its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

*83 While I thus agree with Justice SOUTER in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.FN4 As I read the State Supreme Court's opinion, In re Smith, 137 Wash.2d 1, 19-20, 969 P.2d 21, 30-31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev.Code § 26.10.160(3) (Supp.1996)-content that might well be gleaned from that State's own statutes or decisional law employing the same phrase in different contexts, *84 and from the myriad other state statutes and court decisions at least nominally applying the same standard.FN5 Thus, **2070 I believe that Justice SOUTER'S conclusion that the statute unconstitutionally imbues state trial court judges with " 'too much discretion in every case,' " ante, at 2067, n. 3 (opinion

concurring in judgment) (quoting Chicago v. Morales, 527 U.S. 41, 71, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (BREYER, J., concurring)), is premature.

FN4. Justice SOUTER would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash.2d, at 21, 969 P.2d, at 31, that the state court has "authoritatively read [the 'best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," ante, at 2066 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, infra.

FN5. The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, e.g., Wash. Rev.Code § 26.09.240(6) (Supp.1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions-just as if the phrase had quite specific and apparent meaning. See, e.g., In re McDole, 122 Wash.2d 604, 859 P.2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); McDaniels v. Carlson, 108 Wash.2d 299, 310, 738 P.2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion,*85 and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash.2d, at 20, 969 P.2d, at 30, nor the absence of a provision requiring a "threshold ... finding of harm to the child," ibid., provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail

whenever a statute has “a ‘plainly legitimate sweep,’ ” Washington v. Glucksberg, 521 U.S. 702, 739-740, and n. 7, 117 S.Ct. 2258 (1997) (STEVENS, J., concurring in judgment).FN6 Under the Washington statute, there are plainly any number of cases-indeed, one suspects, the most common to arise-in which the “person” among “any” seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing “any person” to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

FN6. It necessarily follows that under the far more stringent demands suggested by the majority in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (plaintiff seeking facial invalidation “must establish that no set of circumstances exists under which the Act would be valid”), respondent's facial challenge must fail.

The second key aspect of the Washington Supreme Court's holding-that the Federal Constitution requires a showing of actual or potential “harm” to the child before a court may *86 order visitation continued over a parent's objections-finds no support in this Court's case law. While, as **2071 the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see infra this page and 2072, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.FN7 The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

FN7. The suggestion by Justice THOMAS that this case may be resolved solely with reference to our decision in Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), is unpersuasive. Pierce involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies-the child.

It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the “fundamental” liberty interests implicated by the challenged state action. See, e.g., ante, at 2059-2060 (opinion of O'CONNOR, J.); Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258 (1997); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included*87 most often in the

constellation of liberties protected through the Fourteenth Amendment. Ante, at 2059-2060 (opinion of O'CONNOR, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest-absent exceptional circumstances-in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); see also Casey, 505 U.S., at 895, 112 S.Ct. 2791; Santosky v. Kramer, 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also ante, at 2061-2062 (opinion of O'CONNOR, J.).
Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests " 'do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' " Id., at 260, 103 S.Ct. 2985 (quoting Caban v. Mohammed, 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)).
**2072 Conversely, in Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent. As a result of the *88 presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, e.g., id., at 123, 109 S.Ct. 2333; see also Lehr, 463 U.S., at 261, 103 S.Ct. 2985; Smith v. Organization of Foster Families For Equality & Reform, 431 U.S. 816, 842-847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); Moore v. East Cleveland, 431 U.S. 494, 498-504, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).
A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as parens patriae, see, e.g., Reno v. Flores, 507 U.S. 292, 303-304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); Santosky v. Kramer, 455 U.S., at 766, 102 S.Ct. 1388; Parham, 442 U.S., at 605, 99 S.Ct. 2493; Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, Santosky, 455 U.S., at 760, 102 S.Ct. 1388.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S., at 130, 109 S.Ct. 2333 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.FN8 At a minimum, our prior cases recognizing*89 that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See ante, at 2059-2060 (opinion of O'CONNOR, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.FN9

FN8. This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See Parham v. J. R., 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (liberty interest in avoiding involuntary confinement); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506-507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech); In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (due process rights in criminal proceedings).

FN9. Cf., e.g., Wisconsin v. Yoder, 406 U.S. 205, 244-246, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today .... It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of school-related decisions by the Amish community.

**2073 This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law includes a strong presumption that a parent will act *90 in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n.

3, supra, I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.
But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.FN10 Far from guaranteeing that *91 parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual-with whom a child may have an established relationship-the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. **2074 It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.
FN10. See Palmore v. Sidoti, 466 U.S. 429, 431, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. Collins v. City of Harker Heights, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in allocating responsibility for resolving disputes of various kinds in our federal system. Ankenbrandt v. Richards, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). But the instinct against overregularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.
Accordingly, I respectfully dissent.

Justice SCALIA, dissenting.
In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men ... are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of

Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative *92 democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children FN1-two of them from an era rich in substantive due process holdings that have since been repudiated. See Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Wisconsin v. Yoder, 406 U.S. 205, 232-233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Cf. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (overruling Adkins v. Children's Hospital of D. C., 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to stare decisis protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

FN1. Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), purports to rest in part upon that proposition, see id., at 651-652, 92 S.Ct. 1208; but see Michael H. v. Gerald D., 491 U.S. 110, 120-121, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see Stanley, supra, at 658, 92 S.Ct. 1208.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice KENNEDY'S opinion rightly points out) not only a judicially crafted definition of parents, but also-unless, as no one believes,*93 the parental rights are to be absolute-judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we **2075 embrace this unenumerated right, I think it obvious-whether we affirm or reverse the judgment here, or remand as Justice STEVENS or Justice KENNEDY would do-that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.FN2

FN2. I note that respondent is asserting only, on her own behalf, a substantive due process right to direct the upbringing of her own children, and is not asserting, on behalf

of her children, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.
For these reasons, I would reverse the judgment below.

Justice KENNEDY, dissenting.
The Supreme Court of Washington has determined that petitioners Jenifer and Gary Troxel have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:
"Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev.Code § 26.10.160(3) (1994).
*94 After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. In re Smith, 137 Wash.2d 1, 969 P.2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.
The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.
Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person *95 at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this Court. These include not only the protection the **2076 Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Stanley v. Illinois, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232-233, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Santosky v. Kramer, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Pierce and Meyer, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. Prince, supra, at 166, 64 S.Ct. 438. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction*96 given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded " '[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " 137 Wash.2d, at 19-20, 969 P.2d, at 30 (quoting Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn.1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash.2d, at 20, 969 P.2d, at 30. While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20th-century phenomenon.**2077 See, e.g., 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed.1994); 2 J. Atkinson, Modern *97 Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, Succession of Reiss, 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"-a conclusion which

appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See Douglass v. Merriman, 163 S.C. 210, 161 S.E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); Solomon v. Solomon, 319 Ill.App. 618, 49 N.E.2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); Consaul v. Consaul, 63 N.Y.S.2d 688 (Sup.Ct. Jefferson Cty.1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," Campbell v. Campbell, 896 P.2d 635, 642, n. 15 (Utah App.1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, e.g., Prince, supra, at 168-169, 64 S.Ct. 438; Yoder, supra, at 233-234, 92 S.Ct. 1526, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's traditional presumption has been "that natural bonds of affection lead parents to act in the *98 best interests of their children," Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," id., at 603, 99 S.Ct. 2493. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, e.g., Moore v. East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise-perhaps a substantial number of cases-in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a **2078 marriage is a child of the marriage); Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural

father who had not legitimated the child); see also Lehr v. Robertson, 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (“ ‘[T]he importance of the familial relationship, to the individuals involved*99 and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot[ing] a way of life” through the instruction of children ... as well as from the fact of blood relationship’ ” (quoting Smith v. Organization of Foster Families For Equality & Reform, 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), in turn quoting Yoder, 406 U.S., at 231-233, 92 S.Ct. 1526)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that “in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child,” 137 Wash.2d, at 20, 969 P.2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See ante, at 2064, 969 P.2d 21, n. (plurality opinion). Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are given respect. Many States *100 limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, e.g., Kan. Stat. Ann. § 38-129 (1993 and Supp.1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N.C. Gen.Stat. §§ 50-13.2, 50-13.2A, 50-13.5 (1999) (same); Iowa Code § 598.35 (Supp.1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp.1999) (visitation authorized under certain circumstances for “a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child”). The statutes vary in other respects-for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, e.g., N.H.Rev.Stat. Ann. § 458:17-d (1992), and some apply a presumption that parental decisions should control, see, e.g., Cal. Fam.Code Ann. §§ 3104(e)-(f) (West 1994); R.I. Gen. Laws § 15-5-24.3(a)(2)(v) (Supp.1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga.Code Ann. § 19-7-3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia Constitutions, see Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769, cert. denied, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995).

**2079 In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself " 'implicit in the concept of ordered liberty.' " Glucksberg, 521 U.S., at 721, 117 S.Ct. 2258 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's right vis-a-vis a complete *101 stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. Ankenbrandt v. Richards, 504 U.S. 689, 703-704, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, e.g., American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in third-party visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling requiring*102 the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49, 68 USLW 4458, 00 Cal. Daily Op. Serv. 4345, 2000 Daily Journal D.A.R. 5831, 2000 CJ C.A.R. 3199, 13 Fla. L. Weekly Fed. S 365

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• 1999 WL 1272929 (Appellate Brief) REPLY BRIEF (Dec. 29, 1999)
• 1999 WL 1146868 (Appellate Brief) BRIEF FOR RESPONDENTS (Dec. 13, 1999)
• 1999 WL 1186733 (Appellate Brief) BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND AND GAY AND LESBIAN ADVOCATES AND DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Dec. 13, 1999)
• 1999 WL 1186735, 13 Fla. L. Weekly Fed. S 365 (Appellate Brief) AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT (Dec. 13, 1999)
• 1999 WL 1186737 (Appellate Brief) Brief of the Domestic Violence Project Inc./Safe House (Michigan); the Pennsylvania Coalition Against Domestic Violence, Inc.; the Florida Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, and the Missouri Coalition A gainst Domestic Violence as Amici Curiae in Support of Respondent. (Dec. 13, 1999)
• 1999 WL 1186738 (Appellate Brief) BRIEF OF THE INSTITUTE FOR JUSTICE, ALABAMA FAMILY ALLIANCE, AND THE MINNESOTA FAMILY INSTITUTE AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Dec. 13, 1999)
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• 1999 WL 1186752 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENT (Dec. 13, 1999)
• 1999 WL 1204477 (Appellate Brief) BRIEF AMICUS CURIAE CENTER FOR CHILDREN'S POLICY PRACTICE & RESEARCH AT THE UNIVERSITY OF PENNSYLVANIA IN SUPPORT OF RESPONDENT (Dec. 13, 1999)
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• 1999 WL 1128258 (Appellate Brief) BRIEF OF THE COALITION FOR THE RESTORATION OF PARENTAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Dec. 08, 1999)
• 1999 WL 1050035 (Appellate Brief) BRIEF OF AMICUS CURIAE OF GRANDPARENTS UNITED FOR CHILDREN'S RIGHTS, INC. (Nov. 19, 1999)
• 1999 WL 1034462 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL

ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPP ORT OF PETITIONERS (Nov. 12, 1999)
• 1999 WL 1034463 (Appellate Brief) BRIEF AMICI CURIAE OF AARP AND GENERATIONS UNITED IN SUPPORT OF PETITIONERS (Nov. 12, 1999)
• 1999 WL 1034464 (Appellate Brief) BRIEF FOR THE GRANDPARENT CAREGIVER LAW CENTER OF THE BROOKDALE CENTER ON AGING AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 12, 1999)
• 1999 WL 1079965 (Appellate Brief) BRIEF FOR PETITIONERS (Nov. 12, 1999)
• 1999 WL 33611372 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Jul. 06, 1999)  Original Image of this Document with Appendix (PDF)
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Woodside v. Woodside, 350 S.E.2d 407 (Ct. App. 1986)

Court of Appeals of South Carolina.
Shirley M. WOODSIDE, Appellant-Respondent,
v.
Archie G. WOODSIDE, Jr., Respondent-Appellant.
Shirley M. WOODSIDE, Respondent,
v.
Archie George WOODSIDE, Jr., Appellant.
Shirley McRoberts WOODSIDE, Appellant,
v.
Archie George WOODSIDE, Respondent.
No. 0816.
Heard Sept. 17, 1986.
Decided Nov. 3, 1986.

Action was brought for divorce. The Family Court, Lexington County, Marc H. Westbrook, J., entered divorce decree and both parties appealed. The Court of Appeals, Cureton, J., held that: (1) permanent periodic alimony award was inadequate; (2) child support award was not abuse of discretion; (3) trial court failed to consider factors necessary for award of attorney fees; (4) trial court erred in failing to determine whether wife was entitled to enhancement of equitable distribution award because of foregone career opportunities; (5) divorce decree provisions for mortgage payments and attorney fees were stayed pending appeal; and (6) finding that husband was not in contempt for three-month arrearage in alimony payments was not abuse of discretion.
Affirmed in part, reversed in part and remanded.
***409 *368** Edmund H. Monteith, of Monteith & Monteith, Columbia, for appellant-respondent.

Robert L. Hallman, Columbia, for respondent-appellant.

CURETON, Judge:
This divorce action involves three appeals. Both parties ***369** appeal a 1984 divorce decree with respect to alimony, child support, equitable distribution and attorney fees. Both parties petitioned the Supreme Court for supersedeas. The Court refused supersedeas, but remanded the case to the family court to address the matter of mortgage payments during the pendency of the appeal. On remand the family court issued its order which was in turn appealed by the husband. The third appeal is brought by the wife upon refusal of the family court to hold the husband in contempt of court for

failure to pay attorney fees, alimony, and his share of mortgage payments during this appeal. We affirm in part, reverse in part and remand.

The parties separated in 1983 after nineteen years of marriage. They have three children, one of whom is emancipated. The wife is 43 years of age and the husband is 42. Both parties are well educated. The husband earned a Ph.D. degree from Pennsylvania State University and the wife an M.A. degree from the same institution.

The parties enjoyed a high standard of living. At the time of the divorce hearing, the husband was a full professor at the University of South Carolina. He also earned other income from conducting seminars, writing books, and operating a consulting firm through a close corporation called ARC Consultants, Inc. The wife taught at the University of South Carolina from 1975 until 1983.

The wife was awarded a divorce on the ground of adultery. The husband admitted to an adulterous relationship with one of his students. The wife, however, does not appear to have been blameless in the marital breakup. She admitted that she had been suggesting a divorce for five years.

I.

ALIMONY

The trial judge ordered the husband to pay the wife $600.00 per month as permanent alimony and $600.00 per month for five years as rehabilitative alimony. Both parties concede that it was improper to award rehabilitative alimony. We therefore reverse that award.

[1] The wife argues that the permanent alimony award was inadequate, while the husband argues it was excessive. We agree with the wife, and find the $600.00 per month permanent alimony award to be inadequate.

***370** The wife earned over $18,000.00 as an instructor at the University of South Carolina in 1982. The trial judge found that she had a potential to earn $18,000.00 per year. Her net monthly income was only $545.00 at the time of the divorce hearing. The judge found that she was not earning at her capacity. According to the husband's financial declaration and Federal tax return, his 1983 gross earnings were $85,000.00. ***410** The wife disputes the husband's represented earnings and instead asserts that his earnings were closer to $115,000.00. The trial judge found that the husband's earned income was $85,000.00 in 1983 from three jobs, but concluded that he could not continue that pace for long.

[2] [3] [4] The real disagreement the parties have about the husband's income stems from the fact that he operates his consulting firm through a corporation called ARC Consultants, Inc., of which he owns a ten percent stock interest. The remainder of the stock is owned by the parties' children. The wife claims that the corporation's income should be constructively allocated to the husband. To support this contention, the wife introduced the testimony of a certified public accountant. When asked on cross examination why he would disregard the corporate structure and allocate its income to the husband, the CPA replied that since the husband was the operator of

the consulting business, "he had some flexibility as to where" he placed the earnings of the firm. The wife's attorney argued during oral argument that the husband also used some of the corporation's assets personally. The corporate form may be disregarded only where equity requires the action to assist a third party. *Sturkie v. Sifly,* 280 S.C. 453, 313 S.E.2d 316 (Ct.App.1984). The party asserting that the corporate entity should be disregarded has the burden of proof. *Id.* We have reviewed the record and are unable to find a sufficient basis for disregarding the corporate structure and constructively allocating its income to the husband.

[5] The wife argues next that because the trial judge found that the husband would not be able to continue to work at three jobs for very long, he necessarily anticipated a change of circumstances on the husband's part which was improper. The husband testified without objection that he could not continue his present "pace." The judge ***371** obviously believed this testimony. Therefore, the record supports the trial judge's finding that the husband could not continue his three jobs. Aside from the trial judge's one reference to the husband having to lessen his "pace," there is no other indication in the order that the amount of support is based on a lesser anticipated income for the husband. We therefore reject this argument.

[6] [7] The trial judge found that while the wife was awarded a divorce on the grounds of adultery, "the facts of this case are not sufficient to serve as a justification for substantially increasing the alimony award." The wife argues that the husband's fault should have been considered in the alimony award. In making an alimony award the court should consider the conduct of the parties. *Lide v. Lide,* 277 S.C. 155, 283 S.E.2d 832 (1981). The trial judge states in his order that he considered the *Lide* factors that must be reviewed and determined that the husband's conduct did not justify a substantial increase in the alimony award. Where, as here, there is no evidence that the husband's adultery contributed to the marital break-up, we find no abuse of discretion on the part of the trial judge in not weighing heavily the husband's fault.

[8] The wife prayed in her complaint for the use of the marital home. [FN1] The court did not explicitly rule upon her request, but ordered the house sold and the proceeds divided. Until the house was sold each party was ordered to pay one-half of the mortgage payment. The wife argues that the trial judge committed error in requiring her to pay one-half of the mortgage payment since she was awarded only a one-fourth interest in the marital home. By so doing, she claims that one-half of her portion of the mortgage payment goes to preserve the husband's three-fourths interest in the property. While such would be true if the house were left vacant or rented for a sum insufficient to make the mortgage***411** payment, here the wife had the use of the home during the pendency of the appeal. We see no abuse of discretion in requiring her to pay a disproportionate share of the mortgage payment to account for the value of her use of the property.

FN1. It is not clear whether the wife seeks use of the home as an incident of child support, as an element of alimony, or both.

***372** We remand to the trial court the issue of alimony with instructions to award the wife a proper amount of permanent periodic alimony. *Voelker v. Hillcock,* 288 S.C. 622, 344 S.E.2d 177 (Ct.App.1986). We leave to the sound discretion of the trial judge the amount to be awarded, but note that under the circumstances of this case, $600.00 per month is inadequate.

II.

CHILD SUPPORT

The parties' two unemancipated daughters were born in 1968 and 1971. The judge ordered the husband to pay a total of $600.00 per month child support, maintain medical and dental insurance on them, and pay half of their medical and dental expenses not covered by insurance. The wife contends that the child support award is insufficient because it will reduce the children's standard of living and that the use of the home as an incident of child support should have been considered by the trial judge. The husband argues that the amount awarded is excessive in view of the almost equal division of marital property, and also because he cannot afford it.

[9] [10] The matter of how much child support to award in a case is addressed to the sound discretion of the trial judge whose decision will not be disturbed absent an abuse of discretion. *Bradley v. Bradley,* 285 S.C. 170, 328 S.E.2d 647 (Ct.App.1985). In determining the amount of support to award, the court should consider both parent's ability to support the children and the needs of the children. *Casey v. Casey,* 289 S.C. 462, 346 S.E.2d 726 (Ct.App.1986). Further, the amount of the award should, to the extent possible, permit the children to continue to live at the standard of living to which they have become accustomed. *Id.* Upon consideration of these factors, we find no abuse of discretion. Likewise, we see no abuse of discretion in the judge's refusal to award occupancy of the home as an element of child support. The trial judge found that the mortgage payments were extraordinarily high and it would be a burden on the parties to have to continue to make the payments. There is substantial support for this finding.

[11] Finally, the husband argues that the family court committed reversible error in failing to consider the ***373** tax ramifications of the child support award. Because the tax laws have changed to permit the custodial parent to claim a child as his or her dependent irrespective of the amount of support furnished the child, he asserts that the court should have required the wife to waive her right to claim the children as dependents and execute the IRS documents evidencing the waiver. We see nowhere in the record that this was requested of the trial court. Moreover, while the husband claims that he alone fully supports the children, the record does not bear him out. We hold that there was no abuse of discretion in the court's failure to provide that the children would be the husband's dependents for tax purposes.

III.

ATTORNEY FEES

[12] The wife incurred attorney fees of $10,367.50, $5,466.50 of which she had paid prior to trial leaving a balance of $4,901.00. The trial judge ordered the husband to pay $3,000.00 of this sum. The wife asserts this is not enough; the husband says it is too much. The family court found that the wife's attorney had earned the $10,367.50 in fees and lauded his efforts saying that he had "demonstrated in this action why he enjoys an excellent reputation among the bar and bench." The trial judge then concluded, without

explanation, that the husband should be required to contribute $3,000.00 toward the wife's attorney fees. In addition to the professional standing of the wife's counsel, the trial judge was required***412** to consider the other factors set out in *Nienow v. Nienow,* 268 S.C. 161, 232 S.E.2d 504 (1977) and *Atkinson v. Atkinson,* 279 S.C. 454, 309 S.E.2d 14 (Ct.App.1983). There is no indication that the trial judge considered these other factors. Accordingly we remand this issue to the family court pursuant to Family Court Rule 27(C) to make specific findings regarding these factors and to enter an appropriate award.

IV.

EQUITABLE DISTRIBUTION

Both parties take issue with the equitable distribution award. The wife claims that the award was inadequate because the trial judge did not: (1) give her one-half of the ***374** marital property as he stated in his order; (2) consider the fact that she had foregone career opportunities; (3) consider the husband's marital misconduct; (4) include the husband's retirement account as marital property; (5) include the assets of ARC Consultants, Inc. in the marital estate; and (6) include in her marital contribution family gifts totaling over $18,000.00. The husband's principal argument is that while the trial judge found that the wife's total direct and indirect contributions to the accumulation of the marital estate were twenty-five percent, he nonetheless awarded her forty-six percent of the marital property. He further contends that the award is excessive because the wife squandered over $73,000.00 in marital assets during a four month period prior to and immediately following the separation of the parties and the trial court did not consider this in making its award.

[13] The wife first argues that the trial court erred in not enhancing her equitable distribution award because of the husband's fault. We find no indication in the divorce decree that the trial judge considered the fault of the husband in the equitable distribution award. This court stated in the case of *Rogers v. Rogers,* 280 S.C. 205, 207, 311 S.E.2d 743, 745 (Ct.App.1984) that the "court may also consider who was at fault in causing a divorce and, while the circumstance of fault is not controlling and does not justify a severe penalty, it has persuasive force." Expanding on the language of *Rogers,* we believe that the conduct factor becomes important in equitable distribution when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship. As stated in the case of *Bannen v. Bannen,* 286 S.C. 24, 331 S.E.2d 379 (Ct.App.1985), marriage is an economic partnership to which both spouses contribute. When the conduct of one of the parties causes the other party to assume more than his or her share of the partnership load, it is appropriate that such misconduct should affect the distribution of the property of the marriage. *See Burtscher v. Burtscher,* 563 S.W.2d 526 (Mo.Ct.App.1978). Our review of the record amply demonstrates that the husband's misconduct neither caused the dissolution of the marriage nor caused the wife to assume additional burdens during the marriage. We find no error in the failure of the trial judge to consider the fault of the husband.

***375** We likewise see no merit to the wife's argument that the husband's retirement account should have been characterized as marital property. A careful reading of the divorce decree indicates that although the trial judge awarded each party their respective retirement accounts as part of their shares of the marital estate, he also included both parties' retirement accounts in the marital estate.

The wife next argues that the entire value of ARC Consultants, Inc. (not just the husband's ten percent interest) should be designated marital property. The corporation was established as a tax sheltering device, a mechanism to adopt a medical reimbursement plan for the family, and a device to provide a fund for the children's college expenses. At oral argument, the husband's attorney indicated the corporation is now inactive and there is no reason why it should not be liquidated and its ***413** assets divided, provided the division considers the tax aspects of the liquidation. We decline to accept this invitation to divide the entire assets of the corporation because the children appear to have vested rights to ninety percent of the assets of the corporation. We remand this issue for a determination of the children's interest in the corporation and whether liquidation of it would prejudice their rights.

The wife also argues that the trial judge failed to give her credit for more than $18,000.00 given by her family to the marriage. We find no exception addressing this issue. The absence of an exception precludes our review of the issue. *Evans v. Bruce,* 245 S.C. 42, 138 S.E.2d 643 (1964).

Regarding the amount of the marital estate awarded the wife, the wife first argues that it was error for the trial judge to find that she was entitled to one-half of the marital estate, yet not award her that amount of property, citing *Rampey v. Rampey,* 286 S.C. 153, 332 S.E.2d 213 (Ct.App.1985). This contention is premised upon a finding by the trial court "that following the equitable division of assets set forth hereinafter, that both parties will have basically the same financial assets." We do not view the finding to entitle the wife to an award of one-half of the marital assets, but to be simply an observation by the judge.

[14] The wife's final argument is that the trial judge failed to consider the value of her foregone career opportunities to the accumulation of the marital estate. We agree. While the court states in its conclusions that ***376** it has "carefully considered the factor of foregone opportunities of either party," it makes no finding on the matter. Both parties presented expert witnesses who testified to the value of the wife's direct and indirect contributions. The wife's expert testified her total contributions to the marital estate were thirty-seven percent while the husband's expert testified to twenty-three percent. The court found that the husband made direct and indirect contributions of seventy-five percent and the wife twenty-five percent. While the interruption of personal careers and educational opportunities may be a factor in an equitable distribution award, *Campbell v. Campbell,* 202 Neb. 575, 276 N.W.2d 220 (1979); *Matter of Marriage of Browning,* 28 Or.App. 563, 559 P.2d 1314 (1977), the court made no finding that the wife was entitled to an enhancement of her award by reason of her foregone career opportunities, but awarded the wife approximately forty-six percent of the marital property. Just as it was error in *Rampey* for the court to award the wife less property than it found she was entitled to, it is also error to award more than she is entitled to. We therefore remand this issue for a determination of whether the wife is entitled to an enhancement of her award because of foregone career opportunities.

Finally, the husband argues that the wife squandered over $73,000.00 in marital assets during the four month period immediately preceding and following the couple's separation and should be required to reimburse him for seventy-five percent of that sum. The wife denies that any amount was squandered and claims that the amount of assets in question is around $30,000.00. The record is inadequate for this court to determine what sums were used by the wife during this period. It is clear that substantial sums were spent but it is also clear that the husband paid no support during this period. Moreover, the record shows that over $8,000.00 of these funds were paid into the wife's retirement account which has been included as a marital asset. Further, some of the funds went to

buy furniture and stocks which were also included as marital property. The husband has the burden of presenting an adequate record for review of this issue. *Dargan v. Metropolitan Properties, Inc.,* 243 S.C. 324, 133 S.E.2d 821 (1963). Because he has failed to do so, we find no abuse of discretion on the part of the family court in failing to provide for reimbursement.

***377** V.

MORTGAGE PAYMENTS DURING APPEAL


[15] After entry of the divorce decree, both parties requested that portions of the ***414** Decree be superseded and alternate provisions made by the South Carolina Supreme Court. The Court rejected both applications, but granted the wife's motion to remand. On remand, the husband took the position that because the family court ordered the house sold and the wife had refused to place the house for sale, he should not be required to pay his one-half of the mortgage payments. The wife's position was that the appeal stayed the order of sale. The trial judge agreed with the wife. He further ruled that "since the Decree did not make the Respondent's (husband's) mortgage obligations contingent on the sale being in process, the Respondent still has the duty to help with the payments." The judge then ordered the husband to pay three-fourths of the mortgage payments until his arrearage was eliminated. The husband appeals this order.

The husband argues first that having to pay one-half of the mortgage payments during the pendency of the appeal would be inequitable and would result in a hardship; and secondly, permitting the wife to remain in the house during the appeal amounts to the granting of exclusive use by the wife without the court making a finding that there was a compelling reason to do so as stated in *Thompson v. Brunson,* 283 S.C. 221, 321 S.E.2d 622 (Ct.App.1984).

The order of remand from the Supreme Court does not contain provisions as to what was remanded. It simply states "Motion to remand granted." However, the Statement of the Case indicates that on remand the family court had before it only the issue of whether the husband should be required to make mortgage payments during the appeal. The trial judge properly held that the appeal stayed the equitable division award, including the order to sell the house. *Chris v. Chris,* 287 S.C. 161, 337 S.E.2d 209 (1985). The trial judge was also correct that the divorce decree did not make the husband's contribution to the mortgage payment dependent upon an active effort on the wife's part to sell the house. Moreover, as we read *Chris,* an appeal by either party of the equitable distribution award stayed the award. Since the husband also appealed the award, he can hardly be heard to complain that the wife's appeal or the order of sale ***378** has caused a hardship to him. Finding no abuse of discretion, this aspect of the order of the trial judge is affirmed.

VI.

THIRD APPEAL OF HUSBAND

In late 1985, the wife filed three petitions in the family court alleging that the husband had not, pursuant to previous orders, paid: (1) his share of mortgage payments; (2) alimony and medical bills; and (3) attorney fees. She asked that he be held in contempt

of court. The trial court ruled that: (1) the order requiring the husband to make mortgage payments during the appeal was stayed by the appeals, inasmuch as the mortgage payments were not in the nature of support; (2) payment of attorney fees was stayed by the appeal; and (3) although the wife had presented a prima facie case of contempt on the matter of alimony, the husband had proven his failure to pay was not willful, and thus he would not hold him in contempt. The court did not address the matter of the medical bills.

[16]  We agree with the trial court that the appeals stayed the provisions of the decree regarding the mortgage payments. Since the decree required that the house be sold, it is apparent that the provision for payment of the mortgage was intended to preserve the property and not provide support to the wife. We therefore hold that this provision was automatically stayed by the appeals. Rule 41, Section 1(A), Rules of Practice in the Supreme Court of South Carolina.

[17]  We also agree with the trial court that the provision for attorney fees was stayed by the appeal. Supreme Court Rule 41, Section 1(A) provides that subject to the exceptions listed in Section 1(B), every appeal taken to the Supreme Court shall automatically operate as a stay of proceedings ****415*** in the court below. Nothing in Section 1(B) expressly precludes attorney fees from the operation of the general rule stated in Section 1(A). Arguably, however, attorney fees are money judgments and are excepted under provisions of Section 1(B)(1). Historically, in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal. Until then, it is more in the nature of a disbursement.****379*** Our study of Sections 14-21-40, 20-3-120, 20-3-125, 20-3-130, and 20-3-145, Code of Laws of South Carolina, 1976 leads us to this conclusion.

Attorney fees in divorce actions ordinarily mean the money necessary to enable a spouse to carry on or defend the matrimonial action, and are awarded to insure the spouse an efficient preparation of the case and a fair and impartial trial. *Keena v. Keena,* 245 So.2d 665 (Fla.App.1971). Under our divorce statute, attorney fees are termed "suit money". Section 20-3-120. Moreover, Section 20-3-125 provides that enforcement shall be by petition to the family court to enforce payment of such fees, which enforcement is ordinarily by contempt. We hold that attorney fees awarded in domestic actions are subject to the automatic supersedeas provision of Supreme Court Rule 41, Section 1(A).

[18]  The husband was in arrears in his alimony payments for three months at the time of the trial court's order. The trial judge enumerates several reasons for not holding the husband in contempt for his failure to pay alimony which includes the fact that the wife harassed him at his residence and at his place of work causing him to seek employment outside the state. According to the husband, this change of employment necessitated expenditures which included a $14,000.00 loan.

A person is in contempt of court when he willfully disobeys a court order. *Curlee v. Howle,* 277 S.C. 377, 287 S.E.2d 915 (1982). Where a contemner is unable, without fault on his part to comply with a court order, he should not be held in contempt. *Hicks v. Hicks,* 280 S.C. 378, 312 S.E.2d 598 (Ct.App.1984). While a determination of contempt is within the sound discretion of the trial judge, it is subject to reversal where based on a finding that is without evidentiary support or where there has been an abuse of discretion. *Pratt v. South Carolina Department of Social Services,* 283 S.C. 550, 324 S.E.2d 97, 98 (Ct.App.1984). Although this court would be disposed were we sitting as

trial judges to hold the husband in contempt, we cannot say that there is no evidentiary support for the trial judge's holding nor will we find that he abused his discretion in refusing to hold the husband in contempt.

Finally, we agree with the wife that the trial court erred ***380** in failing to address the medical bills issue. This issue is remanded to the family court for proper disposition.

Accordingly, the issues of alimony, attorney fees, equitable division and payment of the children's medical bills during the pendency of this appeal are remanded to the trial court for disposition not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

BELL and GOOLSBY, JJ., concur.

Woodside v. Woodside, 471 S.E.2d 154 (1996)

Supreme Court of South Carolina.
Gary Michael WOODALL, Appellant,
v.
Mary Helen WOODALL, Respondent.
No. 24434.
Heard March 6, 1996.
Decided May 20, 1996.

In divorce proceedings, the Family Court, Richland County, Berry L. Mobley, J., entered decree awarding custody to former wife, establishing visitation and child support, and ordering former husband to pay portion of former wife's attorney fees and costs. Former husband appealed. The Supreme Court, Burnett, J., held that: (1) family court did not abuse its discretion by applying tender years doctrine to award custody of child to former wife, by awarding standard visitation schedule, or by ordering former husband to pay portion of attorney fees and costs incurred by former wife, and (2) remand was required for determination of whether former wife's child care costs were incorrectly included in determination of former husband's child support obligation.
Affirmed in part and remanded in part.
****156 *9** Douglas K. Kotti, Columbia, for Appellant.

Michael S. Pauley and Marne Sherman, both of Lide, Montgomery & Potts, Columbia, for Respondent.

Leslie K. Riddle, Columbia, Guardian Ad Litem.

BURNETT, Justice:
Mary Helen Woodall (Wife) and Gary Michael Woodall (Husband) were married on May 11, 1990. Their only child, Lawrence Moultrie Woodall (Son), was born on October 14, 1990. After a brief marriage, the parties were separated on May 28, 1991. On appeal, Husband asserts the family court erred in (1) awarding custody of Son to Wife, (2) ordering standard visitation rights, (3) computing his child support obligation, and (4) awarding attorney's fees and costs to Wife.

FACTS

Son was born premature and required special physical and emotional care. Wife, a certified public accountant, was not employed full time during the marriage, but did occasional part-time accounting work. She ultimately decided to return to college to become a mathematics teacher in order to have a less demanding career which would be more conducive to caring for Son. Husband holds a GED and maintained steady employment as a computer programmer throughout the marriage.

It is uncontroverted that Husband and Wife mistrusted each other and that their short marriage was fraught with arguments and accusations. Some of the altercations between the parties involved physical violence.

On July 12, 1991, the family court issued a *pendente lite* order which provided, *inter alia,* that the parties would share joint physical custody of Son and that Husband would make monthly child support payments in the amount of $185.00. The family court issued a second *pendent lite* order on May 27, 1993, which discontinued the child support payments and changed the times of the custodial periods. A final decree of divorce was issued on September 30, 1993, awarding full and ***10** complete custody of Son to Wife, ordering standard visitation rights to Husband, and computing Husband's child support obligation to be $588.60 per month.

Wife incurred attorney's fees and costs in the amount of $36,155.00. On September 23, 1994, the family court issued an order requiring Husband to contribute $15,000.00 toward her attorney's fees and costs and requiring each party to pay one-half of the guardian *ad litem* 's total bill-the total bill amounted to $7,308.75. Husband sought a new trial and/or alteration, amendment and vacation of the final decree. The family court disposed of Husband's post-trial motion by merely making minor modifications to the final decree. This appeal followed.

ISSUES

Did the family court err in:

I. Awarding custody of Son to Wife?

II. Ordering standard visitation rights to Husband?

III. Computing Husband's child support obligation?

****157** IV. Awarding attorney's fees and costs to Wife?

DISCUSSION

[1] [2] [3] When reviewing the factual determinations of the family court, an appellate court may take its own view of the preponderance of the evidence. *Hough v. Hough,* 312 S.C. 344, 440 S.E.2d 387 (Ct.App.1994). However, where evidence is disputed, the appellate court may adhere to the findings of the trial judge, who saw and heard the witnesses. The trial judge was in a superior position to judge the witnesses' demeanor and veracity and, therefore, his findings should be given broad discretion. *McAlister v. Patterson,* 278 S.C. 481, 299 S.E.2d 322 (1982); *Hough v. Hough, supra; Sealy v. Sealy,* 295 S.C. 281, 368 S.E.2d 85 (Ct.App.1988). Furthermore, the appellate court should be reluctant to substitute its own evaluation of the evidence on child custody

for that of the trial court. *Stroman v. Williams,* 291 S.C. 376, 353 S.E.2d 704 (Ct.App.1987).

I. Custody

Husband contends that based upon the evidence presented, the family court abused its discretion in awarding custody of Son to Wife. In addition, Husband argues that the family ***11*** court erred in awarding custody on the basis of the "tender years doctrine".

[4] [5] The welfare and best interests of the child are paramount in custody disputes. The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. *Epperly v. Epperly,* 312 S.C. 411, 440 S.E.2d 884 (1994). In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life should be considered. *Wheeler v. Gill,* 307 S.C. 94, 413 S.E.2d 860 (Ct.App.1992). Thus, when determining to whom custody shall be awarded, all 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. *Ford v. Ford,* 242 S.C. 344, 130 S.E.2d 916 (1963).

The "tender years doctrine", in which there is a preference for awarding a mother custody of a child of tender years, was abolished effective May 18, 1994.[FN1] However, when custody of Son was determined on September 30, 1993, the health, age, and sex of a child-often referred to as the "tender years doctrine"-were factors to be considered in awarding custody of a young child. *See Wheeler v. Gill, supra.*

FN1. S.C.Code Ann. § 20-7-1555 (Supp.1995).

[6] In this case, when the family court ascertained what was best for Son, it did not rely exclusively upon the "tender years doctrine", but considered all applicable doctrines and tests. For example, the court examined the following factors: (1) which parent evolved as the primary caretaker; (2) the conduct, attributes, and resources of each parent; (3) the opinions of third parties, including the guardian *ad litem;* and (4) the age, health, and sex of the child. In the final decree, the family court decided that neither parent evolved as Son's primary caretaker. When considering the attributes and resources of each parent, the family court recognized that Wife was the better educated parent, but Husband had the larger residence. In addition, the court concluded that both parents would be able to spend a substantial amount of time with Son.

The family court also considered the testimony offered by ***12*** several witnesses attesting to the fact that Wife was an honest and ethical person, as well as a conscientious mother who was totally prepared to meet the custodial needs of Son. Witnesses characterized Husband as a loving and caring father. In addition, after the guardian *ad litem* interviewed twenty-five persons, she concluded that each parent was a fit and capable caretaker making both equally fit to be the custodial parent. Nonetheless, because joint custody is presumed to be harmful to and not conducive to the best interest of a child, the court applied the "tender years doctrine" and determined that Wife should be the custodial parent.

***158** The award of custody in this matter was a close call. Nevertheless, when determining the welfare and best interest of Son, the family court judge considered a

wide range of topics including: each parent's character, fitness, attitudes, attributes and resources; the opinions of third parties; and the age, health, and sex of Son. The judge then weighed all of the circumstances together with the applicable doctrines. Accordingly, because the judge was in a unique position to observe the parties as well as to judge the credibility of the witnesses and resolve the conflicts in their testimony, we find no abuse of discretion.

II. Visitation

The family court awarded visitation as follows: every other weekend, from 6:00 pm Friday until 6:00 pm Sunday; four weeks during the summer months, to consist of two consecutive week periods; alternate Easter, July 4th, Labor Day, Thanksgiving, and Christmas Holidays; Husband was awarded visitation with Son every Father's Day; and Wife would have Son every Mother's Day. Husband claims this "standard" visitation schedule is unduly restrictive. We disagree.

[7] [8] When awarding visitation, the controlling consideration is the welfare and best interest of the child. *King v. Gardner,* 274 S.C. 493, 265 S.E.2d 260 (1980); *Hyde v. Hyde,* 302 S.C. 280, 395 S.E.2d 186 (Ct.App.1990). As with child custody, the issue of child visitation falls within the discretion of the trial judge, and his findings will not be disturbed absent an abuse of discretion. *Cudd v. Arline,* 277 S.C. 236, 285 S.E.2d 881 (1981); *Hyde v. Hyde, supra.* Visitation that is analogous to divided custody is to be avoided. *Johns v. Johns,* 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992).

***13** [9] The record establishes that Son appears to be the basis of many arguments between the parties. In fact, the parties quarrel in the presence of Son which causes difficulties when they effect visitation exchanges. Clearly, under these circumstances, it would not be conducive to the best interests and welfare of Son to be shifted and shuttled back and forth for alternate brief periods of time. We conclude that Husband has failed to establish that the visitation schedule awarded in this matter is unduly restrictive or that the judge abused his discretion.

III. Child Support

Husband asserts that the family court erred by requiring him to pay monthly child support in the amount of $588.60. He contends that Wife voluntarily left the work force and, therefore, the child support calculation should be based on a determination of her potential income. Husband also argues that Wife's day care expenses should not have been included when computing the child support award.

[10] The South Carolina Child Support Guidelines (Guidelines), codified at 27 S.C.Code Ann.Reg. 114-4710 to -4750 (Supp.1995), govern all actions involving questions of child support. *Price v. Ozment,* 318 S.C. 168, 456 S.E.2d 427 (Ct.App.1995). However, the family court retains a certain amount of discretion when making the final award. *Id.; White v. Cook,* 312 S.C. 352, 440 S.E.2d 391 (Ct.App.1994).[FN2] When calculating child support based upon a determination of potential income, the court may take into account the presence of young or handicapped children who must be cared for by the parent necessitating the parent's inability to work. 27 S.C.Code Ann.Reg. 114-4720(A)(5) (Supp.1995).

FN2. Criteria for deviation from the Guidelines is described in 27 S.C.Code Ann.Reg. 114-4710(B) (Supp.1995).

The Guidelines rely primarily on the incomes of both parents. In the present case, the family court relied upon the financial declarations provided. It determined that Wife had a gross income in the amount of $385.00 monthly, and Husband had a gross income in the amount of $2,115.32 monthly, from which he set aside a pre-tax medical deductible in the amount of $70.00 per month. Husband also provided Son with medical insurance which cost him $50.74 per month. The court also ***14** found that Husband ****159** was not paying monthly rent of $450.00 or monthly child care expenses of $200.00 as set forth in his financial declaration. Further, Husband's sister testified that he did not owe her $3,650.00 as he had set forth in his financial declaration.

[11] Husband's financial declaration was included in the record on appeal. Although several child support obligation work sheets were included in the record, Wife's financial declaration was not provided, and no reference was made in the final decree to Wife's child care costs. Consequently, we cannot positively ascertain whether the family court considered these costs when calculating support obligations. Nevertheless, one of the work sheets appears to be based upon Wife's financial declaration. This work sheet includes "work related" child care costs of Wife in the amount of $346.00, and calculates Husband's child support obligation to be $588.60. Because Wife was a full-time student, her child care costs were not "work related".

Under these circumstances, we remand the issue of child support to the family court to determine whether Wife's child care costs were incorrectly calculated into the child support determination. Moreover, if Wife is presently employed, a change in circumstances may be established warranting review and modification by the family court of Husband's child support obligation.

IV. Attorney's Fees and Costs

Husband maintains that the family court erred in ordering Husband to pay counsel for Wife the sum of $15,000.00 in attorney's fees-Wife's total attorney's fees amounted to $36,155.00. We disagree.

[12] Award of attorney's fees and costs is within the sound discretion of the family court judge. *Perry v. Perry,* 315 S.C. 373, 433 S.E.2d 911 (Ct.App.1993). The determination of attorney's fees in connection with divorce proceedings requires consideration of the following factors: the nature, extent, and difficulty of the services rendered; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the beneficial results accomplished; and the customary fees charged for similar legal services. *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991).

***15** [13] Two hearings were held concerning this issue at which counsel for Wife testified and submitted documents verifying the costs incurred for litigating divorce and custody issues. Two independent expert witnesses testified concerning the reasonableness of the fees billed. Husband testified and submitted pertinent documents.

The family court applied the *Glasscock* factors to the circumstances in this matter and made the following conclusions. Husband necessitated and insisted upon a merits hearing requiring Wife's attorney to aggressively prepare for a lengthy trial. In addition, the services of Wife's attorney were necessary to achieve favorable results, and Wife's attorney charged a reasonable and customary rate and expended a reasonable number of hours. Husband was employed full time and Wife, a full-time student, was not. Husband had the capacity to contribute, and Wife did not. Husband had more assets than Wife. The judge also questioned the credibility of certain entries on Husband's financial declaration, and he concluded that Husband's allegations concerning Wife were unfounded. Nevertheless, the judge determined that by requiring Husband to contribute to Wife's fees, his standard of living would be affected. Hence, even though the judge concluded that Husband should pay all of the expenses incurred by Wife, due to his financial ability, the judge ordered Husband to pay a portion of them.

After careful review of the record, we conclude that the judge did not abuse his discretion in awarding attorney's fees.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART AND REMANDED IN PART.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.