South Carolina Bar
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Family Law Section

Friday, January 18

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Family Law Section

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Status of Custody in SC Sole vs. Joint

Kevin M. Barth

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Schaefer Bojilov, Respondent/Appellant,

v.

Blago Metodiev Bojilov, Appellant/Respondent.

Appellate Case No. 2015-000991

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

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

AFFIRMED IN PART AND REVERSED IN PART

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

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

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

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

FACTS/PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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[2] Husband's parents resided in Bulgaria.

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

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

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

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Husband's Appeal

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

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

A. Alimony

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

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

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

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

We find the family court did not err in awarding alimony to Wife. The family court analyzed the statutory factors extensively in determining its award. Among them, the family court stated Husband and Wife were in a marriage of about sixteen years, and found Husband's adultery and habitual deceit contributed to the

demise of the marriage. The court found that, after 2010, Husband earned a majority of the parties' income, with a net income of $2,334.21. However, the parties' net monthly incomes were similar due to Wife's $1,942.53 net income from wages and Wife's $1,107.90 income from the nonmarital Brown Advisory account. The family court found Wife's monthly expenses were reasonable and that Wife's September 2013 and November 2014 financial declarations reflected a post-separation reduction in her monthly expenses to $4,874.84. Conversely, the family court found Husband grossly overstated his monthly expenses and failed to report consistent income of at least $200 per month from side jobs. As a result, the court imputed $200 per month to Husband in additional income.

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

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

B. Custody

Husband contends, based upon the evidence presented, the family court erred in not awarding the parties joint legal custody of Son because (1) the record did not support the negative findings against Husband and (2) the finding that Husband repeatedly intimidated and bullied caretakers was based on inadmissible hearsay and improper pitting of witnesses. We address each argument in turn.

i. Negative Findings Against Husband

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

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

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

In considering the totality of the circumstances in this case, we find the preponderance of the evidence supports the view that it is in Son's best interest to award Wife sole legal and physical custody of Son. *See Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 ("The welfare and best interests of the child are paramount in custody disputes."); *Parris v. Parris*, 319 S.C. 308, 310, 460 S.E.2d 571, 572

(1995) ("In making custody decisions the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed."). Accordingly, we affirm the family court's finding on this issue.

ii. Admission of the GAL's Testimony

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

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

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

Regarding Husband's hearsay argument, we find the GAL's testimony was not inadmissible hearsay. A GAL's testimony and report, which contains evidentiary materials such as hearsay statements from persons interviewed by the GAL, is

admissible if the report is made available to the parties and the testifying witnesses are subject to cross-examination. *See Richmond v. Tecklenberg*, 302 S.C. 331, 334, 396 S.E.2d 111, 113 (Ct. App. 1990) (admitting the GAL's testimony and report over hearsay objections when the GAL interviewed forty-one witnesses, twenty of whom testified; the names of all persons interviewed were made available to counsel; each could have been deposed by the mother's counsel; and counsel had the full right to cross-examine the testifying witnesses); *Collins v. Collins*, 283 S.C. 526, 530, 324 S.E.2d 82, 85 (Ct. App. 1984) ("[W]he[n] the [GAL's] report contains statements of fact, the litigants are entitled to cross-examine the [GAL] and any witnesses whose testimony formed the basis of the [GAL's] recommendation."). The GAL interviewed sixteen witnesses; seven of the sixteen testified, including Dr. Poon. The GAL's report and the names of the witnesses were available to Husband. Husband had the opportunity to cross-examine the GAL and the testifying witnesses who formed the basis of the GAL's opinion. We find no reversible error.

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

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

appointment. We find that any error in regard to pitting was not unfairly prejudicial to Husband and find no reversible error.

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

C. Passport

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

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

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

D. Bulgarian Bank Account

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

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

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

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

E. Marital Residence

Husband claims the family court erred in awarding him only 40% of the marital residence because (1) Wife's nonmarital funds used for purchasing the marital residence transmuted into marital property; (2) both parties contributed equally to the mortgage during the years of living together in the marital residence; and (3)

the court failed to consider Wife's nonmarital property. Conversely, Wife, in her cross-appeal, argues her greater contribution to the down payment on the marital residence, coupled with her greater homemaking contributions and her equal contribution to the mortgage while the parties lived together entitled her to more than 60% of the marital residence. We agree with Wife's argument.

With certain exceptions, marital property is "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held." S.C. Code Ann. § 20-3-630(A) (2014). "Equitable distribution of marital property 'is based on the recognition that marriage is, among other things, an economic partnership.'" *Crossland v. Crossland*, 408 S.C. 443, 456, 759 S.E.2d 419, 426 (2014) (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). Moreover, "[u]pon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Id.* (quoting *Morris*, 335 S.C. at 531, 517 S.E.2d at 723).

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

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

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

Additionally, the record reveals that the parties were married for fifteen years; lived in the marital residence for seven years; and Husband engaged in marital misconduct, which caused the breakup of the marriage. Wife was the primary homemaker and the primary caregiver of Son. Both parties made similar income contributions during the marriage. The family court found that Wife's nonmarital accounts decreased throughout the marriage and continued to decrease post-filing, and Husband failed to provide reliable financial documentation or testimony regarding his finances. After de novo review, we find the family court's 60/40 split of the marital residence, in favor of Wife, resulted in an unfairly low apportionment to Wife in light of the aforementioned circumstances. *See Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 55 (Ct. App. 2006) ("Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is *fair*." (emphasis added)); *see also* S.C. Code Ann. § 20-3-620(B) (2014) (listing factors the family court must consider when making an equitable apportionment of marital property); *Fredrickson v. Schulze*, 416 S.C. 141, 149, 785 S.E.2d 392, 397 (Ct. App. 2016) (finding the wife's substantial down payment on the marital residence with premarital funds should be taken into account in determining the equitable distribution of the martial estate and affirming the $60,000 consideration given to the wife).

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

F. Attorney's Fees

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

In determining whether to award attorney's fees, the family court should consider the following factors: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). To determine the amount of an award of attorneys' fees, the court should consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). When a party's uncooperative conduct in discovery and litigation increases the amount of the other party's fees and costs, the court can use this as an additional basis to award the other party attorney's fees. *Spreeuw v. Barker*, 385 S.C. 45, 72–73, 682 S.E.2d 843, 857 (Ct. App. 2009).

In the instant case, the family court ordered Husband to pay $30,000 of the $46,407.01 that Wife requested for attorney's fees and costs at the time of trial.[6]

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

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

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

We decline to address the three aforementioned issues as these issues are not preserved for our review. We find that, by failing to substantiate issues one and two with supporting case law, Husband abandoned both issues on appeal. *See Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (holding the appellant bears the burden of convincing the appellate court that the preponderance of the evidence is against the family court's findings); *Tirado v. Tirado*, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct. App. 2000) (deeming an issue abandoned if the argument in the brief is not supported by authority or is only conclusory). Further, we find issue three unpreserved because Husband failed to raise the issue in his Rule 59(e) motion. *See Sweeney v. Sweeney*, 420 S.C. 69, 82, 800 S.E.2d 148, 154 (Ct. App. 2017) (finding because the husband did not raise an argument in his Rule 59(e) motion—thereby not allowing the family court the opportunity to rule upon

II. Wife's Cross-Appeal

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

A. Unaccounted-for Funds

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

For the family court to properly include property within the marital estate, two factors must coincide. *Shorb v. Shorb*, 372 S.C. 623, 632, 643 S.E.2d 124, 129 (Ct. App. 2007); *see also* S.C. Code Ann. § 20-3-630(A) (2014). "First, the property must be acquired during the marriage" and "[s]econd, the property must be owned on the date of filing or commencement of marital litigation." *Shorb*, 372 S.C. at 632, 643 S.E.2d at 129. The ownership prong may present problematic issues if the family court overlooks assets that should have been included in the marital estate, but were non-existent on the date of filing due to a party's misconduct. *Id.* "Consequently, if a party attempts to unfairly extinguish ownership of marital property before the date of filing or to improperly delay ownership of marital property until after litigation is commenced, the family court must include that property in the marital estate." *Id.* Concluding otherwise would "promote fraud, reward misconduct, and contravene legislative intent." *Id.* (quoting *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d 654, 659 (Ct. App. 2004)). However, such property will be included in the marital estate only if the party seeking to classify the property as marital property introduces clear and convincing evidence of fraud in relation to the disposal of the property. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options."); *see also Devlin*

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the issue or correct any alleged mistakes in its final order—the issue was not preserved on appeal).

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

v. Devlin, 89 S.C. 268, 272, 71 S.E. 966, 968 (1911) ("[F]raud will not be presumed, but [one] who alleges it must prove it."); *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("Fraud must be shown by clear and convincing evidence.").

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

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

With respect to the $29,821.37 Husband liquidated from his Bank of America CD and the $10,500 Husband withdrew from Bank of America on October 10, 2010, we find no error in the family court's exclusion of these funds from the marital estate. We find Husband's disposal of these funds before the date of filing negated the ownership prong necessary to classify the funds as marital property. *See Shorb*, 372 S.C. at 633, 643 S.E.2d at 130 (finding the sale of stock options, which were acquired during the marriage but were sold before the date of filing, negated the ownership prong, which was necessary to classify the proceeds from the sale of the options as marital). Thus, the $29,821.37 and the $10,500 would be considered marital property only if Wife introduced clear and convincing evidence of fraud, in relation to Husband's disposal of the funds. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options.").

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

B. Tax Consequences

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

The family court is required to consider the tax consequences to each party resulting from equitable apportionment. *See* S.C. Code Ann. § 20-3-620(B)(11) (2014). However, if the apportionment order does not contemplate the liquidation or sale of an asset, then the family court should not consider the tax consequences from a speculative sale or liquidation. *Wooten v. Wooten*, 364 S.C. 532, 543, 615 S.E.2d 98, 103 (2005); *see also Bowers v. Bowers*, 349 S.C. 85, 97–98, 561 S.E.2d 610, 617 (Ct. App. 2002) (finding no error when the family court did not expressly consider the tax consequences resulting from its award to the wife of one-half the

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

value of the husband's 401(k) account because the court's order did not require or contemplate liquidation of the account).

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

C. Attorney's Fees

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

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

The family court awarded Wife $42,664.80 of the $59,071.81 in attorney's fees and costs that Wife incurred at the time of trial. The family court denied Wife's fee request for an additional $1,350 in attorney's fees and costs for defending Husband's motion to reconsider.[10] Accordingly, Wife is responsible for $17,757.01 of her own attorney's fees and costs. In considering each party's ability to pay their own attorney's fees, we note the family court awarded $41,164 in liquid assets to Husband and only $6,552 in liquid assets to Wife in the equitable distribution. Moreover, throughout the parties' marriage and subsequent filing, Wife's income

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

from her nonmarital Brown Advisory accounts decreased and will continue to decrease—creating a greater discrepancy between the parties' income—if Wife depletes her nonmarital Brown Advisory accounts to pay her attorney's fees and costs.

Consequently, given the allocation of liquid assets, the parties' respective financial conditions, each party's ability to pay their own attorney's fees, and our favorable disposition of Wife's equity in the marital residence on appeal, we reverse the family court's denial and award Wife the $1,350 in attorney's fees sought for defending Husband's motion to reconsider. *See E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816 (stating that when determining whether to award attorney's fees and costs the family court must consider: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living"); *see also Buist v. Buist*, 410 S.C. 569, 579, 766 S.E.2d 381, 386 (2014) (Pleicones, C.J., concurring) (recognizing "the threshold question of entitlement [to fees] always turns, at least in part, on the beneficial results obtained").

CONCLUSION

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

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maxie Burgess, Respondent/Appellant,

v.

Brooke L. Arnold, Appellant/Respondent.

Appellate Case No. 2016-000398

Appeal From Horry County
Timothy H. Pogue, Family Court Judge

Opinion No. 5531
Submitted December 4, 2017 – Filed January 24, 2018

REVERSED AND REMANDED

Michael J. Anzelmo, of Columbia, and Carolyn R. Hills and Jennifer D. Hills, both of Hills & Hills, P.C., of Myrtle Beach, for Appellant/Respondent.

Nicole Nicolette Mace, of West Palm Beach, Florida, for Respondent/Appellant.

GEATHERS, J.: In this child custody action, Brooke L. Arnold (Mother) seeks review of the family court's order awarding Maxie Burgess (Father) primary custody of their eight-year-old son (Son) should Mother relocate to Florida. Mother argues the family court erred by (1) creating a custody arrangement that penalizes Mother for relocating to Florida; (2) applying an initial custody analysis rather than a change-in-circumstances analysis; and (3) imposing a joint custody arrangement based on a finding that the parties had been operating under a joint custody

arrangement prior to Father's filing of this action. In Father's cross-appeal, he challenges the family court's ruling that automatically reinstates Mother's primary custodian status if she returns to South Carolina after relocating to Florida. Father argues a substantial change in circumstances must be shown before the family court may change custody and the family court did not have jurisdiction to make such a ruling. We reverse and remand.[1]

FACTS/PROCEDURAL HISTORY

Mother and Father were never married to each other, but they were in a committed relationship until Son was eighteen months old. Subsequently, Mother continued her sexual relationship with Father until 2012 "in hopes they would become a family." Except for a few months in 2008, Father has not paid child support, and prior to this action, Mother never sought a court order imposing child support payments on Father.

Mother met LaBaron Paschall, an Army Ranger instructor, in May 2012 during Bike Week. At that time, Paschall was stationed in Fort Bragg, North Carolina, and was vacationing in Myrtle Beach. Both Mother and Father were living in Surfside Beach. Mother's relationship with Paschall became romantic in July 2012. Within the following few months, Paschall moved to Florida, but he continued his relationship with Mother. By early 2014, Mother and Paschall decided to marry, and they began discussing Mother's relocation to Florida; however, their wedding was postponed until June 27, 2015.

By May 2014, Father was concerned about Mother taking Son to Florida with her, and he filed this action seeking custody of Son. Mother later filed an answer and counterclaim seeking custody of Son. In June 2014, Mother sought counseling for Son to address his anxiety over the possibility of moving to Florida as well as disciplinary issues between Mother and Son.

The family court conducted a final hearing from August 3 through August 5, 2015. At the time of the hearing, Paschall was stationed at Elgin Air Force Base near Fort Walton Beach, Florida, and he had plans to retire by February 1, 2016, and start a private security business. Also, at this time, Mother was pregnant with Paschall's child. On September 28, 2015, the family court filed its final order granting Mother and Father joint custody of Son, with Mother having primary

[1] We granted the parties' joint motion to decide this case without oral argument.

custody "over all issues except education" and granting Father primary custody of Son in the event that Mother relocated to Florida.

Mother and Father filed cross-motions to alter or amend the final order, and the family court granted in part and denied in part each motion. Specifically, as to the issues relevant to this appeal, the family court granted Father's request to address Mother's possible return to Horry County after relocating to Florida and ruled that Mother's primary custody of Son would be reinstated should such a contingency occur. The family court denied Mother's request to reconsider its finding that the parties had a joint custody arrangement before Father filed this action. The family court also rejected Mother's arguments that it should have applied a change-in-circumstances analysis to its custody determination and it should have awarded sole custody to Mother. These cross-appeals followed.

ISSUES ON APPEAL

1. Was the family court's joint custody award in Son's best interests?

2. Was the family court's award of primary custody to Father in the event Mother relocates to Florida in Son's best interests?[2]

STANDARD OF REVIEW

"In appeals from the family court, [the appellate c]ourt reviews factual and legal issues de novo." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "Thus, [the appellate c]ourt has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence; however, this broad scope of review does not require the [c]ourt to disregard the findings of the family court, which is in a superior position to make credibility determinations." *Id.* In fact, "[t]he burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings." *Simcox-Adams v. Adams*, 408 S.C. 252, 260, 758 S.E.2d 206, 210 (Ct. App. 2014).

LAW/ANALYSIS

[2] In light of our disposition, we need not decide Mother's and Father's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

I. Joint Custody

Mother argues the family court erred by awarding joint custody to both parents rather than awarding Mother sole custody. Mother also challenges the family court's finding that Mother and Father had been operating under a joint custody arrangement prior to this action. We conclude the family court correctly characterized the parties' custody arrangement prior to this action.[3] However, we agree with Mother that the family court should have awarded her sole custody.

The family court's finding that the parties had been operating under a joint custody arrangement prior to this action was supported by not only the testimony of the parties but also the report of the Guardian ad Litem. However, we disagree with the family court's perception that continuing the prior arrangement is in Son's best interests. "In custody decisions, the best interest of the child is the paramount consideration." *Gandy v. Gandy*, 297 S.C. 411, 414, 377 S.E.2d 312, 313 (1989); *see* S.C. Code Ann. § 63-15-230(A) (Supp. 2017) ("The court shall make the final custody determination in the best interest of the child based upon the evidence presented."). "Custody is based on a determination of the character, fitness, attitude[,] and inclinations on the part of each parent." *Gandy*, 297 S.C. at 414, 377 S.E.2d at 313–14.

Further, "[a]lthough the legislature gives family court judges the authority 'to order joint or divided custody [when] the court finds it is in the best interests of the child,' . . . joint or divided custody should only be awarded [when] there are exceptional circumstances." *Patel v. Patel*, 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004) (quoting S.C. Code Ann. § 20-7-420(42) (Supp. 2003)[4]). "[G]enerally, joint custody is disfavored" and will be awarded only when exceptional circumstances dictate that such an arrangement is in a child's best interests. *Scott v. Scott*, 354 S.C. 118, 125, 579 S.E.2d 620, 624 (2003); *see also Lewis v. Lewis*, 400 S.C. 354, 365, 734 S.E.2d 322, 327 (Ct. App. 2012) (noting South Carolina courts have determined joint custody "is usually considered harmful to and not conducive to the best interest

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[3] This finding was merely one of several findings on which the family court relied in determining the totality of the circumstances. *See Paparella v. Paparella*, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000) (requiring consideration of the "totality of circumstances unique to each particular case" in an initial child custody determination). The family court did not rely on this finding to require either party to show a change in circumstances.

[4] The current version of this statute is found at S.C. Code Ann. § 63-3-530(42) (2010).

and welfare of a child"); *but see* S.C. Code Ann. § 63-15-230(C) (Supp. 2017) ("If custody is contested or if either parent seeks an award of joint custody, the court *shall consider all custody options, including, but not limited to, joint custody*, and, in its final order, the court shall state its determination as to custody and shall state its reasoning for that decision." (emphasis added)).

In *Scott*, our supreme court found exceptional circumstances warranted joint custody due to "the potential for the custodial parent to effectively alienate [the child] from the non-custodial parent" in a sole custody arrangement between those particular parents. 354 S.C. at 126, 579 S.E.2d at 624. The court also noted the family court "fashioned the joint custody to alternate in four-week intervals" that would not be as disruptive as shorter intervals. *Id.*

Here, Son expressed a desire to continue the joint custody arrangement that was in place before this action was filed. However, the record indicates this arrangement has been stressful for him due to Mother and Father's contrasting parenting styles. Further, Mother has indicated a willingness to allow Father generous visitation with Son even if she relocates to Florida. Father has also indicated a willingness to accommodate Mother's relationship with Son. Nevertheless, we are troubled by Father's recording of conversations in which Son recounted certain actions taken by Mother and Father questioned Son about the reasons for, and morality of, these actions.

The record also indicates Mother is more attuned to Son's emotional needs and more open-minded about her own need for self-improvement. Critically, Mother has recognized the need to have Son tested for Attention Deficit Disorder and the need for counseling to address his emotional needs, whereas Father has been close-minded about these concerns despite his active involvement in Son's education. While Father argues he has cooperated with Mother in these two areas, we are concerned that if he has primary custody of Son upon Mother's relocation to Florida, he would be less likely to follow through with counseling or testing. Moreover, whereas Mother's parenting style was initially undisciplined, she has recognized the need for more structure and consistency in her discipline of Son and her enforcement of school assignments, and she has improved in these areas.

On the other hand, the family court recognized that Father "has a very controlling personality" and "[i]n his mind, his way is the right way and <u>he knows</u> what is best for his child." (family court's emphasis). The record supports the family court's assessment of Father's personality, including his troubling habit of recording conversations with Son and also with Mother without her knowledge.

Additionally, both the family court and the Guardian ad Litem expressed "great concern" over Son's "perceived fear of [Father]." The Guardian ad Litem noted Son was more comfortable expressing his feelings with Mother and seemed more relaxed with Mother. We are also concerned about Son's statement to his counselor that Father "gets women pregnant, they have babies, and he leaves them" and Son's perception that Father lies to him "a great deal." While Son's fear of Father has not discouraged Son from wanting to spend time with Father, Father's continued joint custody of Son, and the possible increase in time Son would spend with Father should Mother relocate to Florida, would eventually take its toll on Son's emotional well-being.

Finally, the new reality of Mother's marriage to Paschall removes the primary reason for the parties' previous joint custody arrangement, i.e., the long hours and travel that Mother's job required of her. Both Mother and Paschall testified Paschall earns enough income to allow Mother to stay at home with Son and her other child. In the alternative, Mother will have the freedom to take a job that would not require her to work as many hours as her then-current job required. Any initial instability Son may experience in adjusting to a new custody arrangement will be outweighed not only by the long-term benefit of living with Mother and her new family but also the potential long-term harm to Son should the parties' joint custody arrangement continue. We further discuss Son's best interests in the following section addressing Mother's possible relocation to Florida.

II. Mother's Relocation

Mother asserts the family court erred by awarding Father primary custody of Son should Mother relocate to Florida because the court focused too heavily on Father's decreased time with Son rather than whether the relocation would be in Son's best interests.

"[T]he question of whether relocation will be allowed requires a determination of whether the relocation is in the best interest of the children, the primary consideration in all child custody cases." *Rice v. Rice*, 335 S.C. 449, 454, 517 S.E.2d 220, 222 (Ct. App. 1999); *see also Latimer v. Farmer*, 360 S.C. 375, 382, 602 S.E.2d 32, 35 (2004) ("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."); *id.* at 380, 602 S.E.2d at 34 (overruling *McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982), to the extent it "established a presumption against

relocation"). In *Rice*, the mother moved to Maine after the father filed a divorce action against her but before either party requested any temporary relief. 335 S.C. at 452, 517 S.E.2d at 221. The family court granted custody of the parties' children to the mother but ordered the mother "to return to South Carolina or to any other location within 250 miles of Conway as long as the [f]ather resided there." *Id.* at 452, 517 S.E.2d at 222. Our supreme court reversed the family court's order requiring mother to return from Maine. *Id.* at 466, 517 S.E.2d at 229.

Here, Mother has not yet moved to Florida but is seriously contemplating relocating because her husband lives there. The family court found, "A relocation out of [s]tate will most certainly interrupt one parent's ability to maintain as close a relationship with [Son] as he or she is free to do currently." The family court also found, "It is clear from the comparison of his existing residences and the proposed residences that [Son] would be much more stable in his present residences."

We acknowledge that Son's relocation to Florida with Mother will involve the initial instability that inevitably accompanies the relocation of any family. There will be an adjustment period for Son. Nevertheless, the family court gave undue weight to this factor at the expense of the critical factors we discussed in Part I as well as the benefits of living with Mother in Florida. *See id.* at 460, 517 S.E.2d at 226 (finding the quality of life for the parties' children would be "vastly improved" in the state of the mother's relocation (Maine), "which strongly suggest[ed] that the best interest of the children would be served by allowing them to remain with the [m]other in Maine"); *Gandy*, 297 S.C. at 414, 377 S.E.2d at 313–14 ("Custody is based on a determination of the character, fitness, attitude[,] and inclinations on the part of each parent.").

While Son's opportunity to spend more time with Mother will undoubtedly come at the expense of less time with Father and his paternal grandparents,[5] Mother's sole custody of Son, regardless of whether she relocates to Florida, is in Son's overall best interests. *See Rice*, 335 S.C. at 465–66, 517 S.E.2d at 229 (placing priority on the child's best interests over the decreased time the child would have with the father). In addition to the factors discussed in Part I, we note Son has a good

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[5] Again, Mother has indicated a willingness to allow Father generous visitation with Son even if she relocates to Florida, and the family court has the discretion to fashion a visitation schedule serving Son's best interests. *See Arnal v. Arnal*, 363 S.C. 268, 291, 609 S.E.2d 821, 833 (Ct. App. 2005) (holding the determination of child visitation is within the family court's discretion and is controlled by the child's best interests), *modified on other grounds by* 371 S.C. 10, 636 S.E.2d 864 (2006).

relationship with Paschall and Son's relocation with Mother will allow him to be not only with his half-brother but also with his two step-sisters and his maternal grandmother, who plans to move to Florida with Mother. Son has never met Father's other son, who had become an adult by the time Father filed the present action.

In sum, the preponderance of the evidence shows Son's long-term interests will be best served by Mother's sole custody of him even if she relocates to Florida.

CONCLUSION

Accordingly, we reverse the family court's order granting joint custody and remand for entry of an order granting Mother sole custody of Son and a determination of Father's visitation schedule.

REVERSED AND REMANDED.

SHORT, J., concurs.

KONDUROS, J., concurs in a separate opinion.

KONDUROS, J.: I write separately to clarify my position regarding the majority's finding the family court "correctly characterized the parties' custody arrangement prior to this action" as a joint custody arrangement. A family court should not interpret parents' conduct as a custody agreement affecting the standard under which first-time custody determinations are evaluated. *See Purser v. Owens*, 396 S.C. 531, 534, 722 S.E.2d 225, 226 (Ct. App. 2011) (rejecting the notion the conduct of the parties created a de facto custody agreement sufficient to warrant the application of a change in circumstances standard in determining child's custody). However, the family court in this case found the parties had, prior to the initiation of the action, shared responsibility for and time with Son—conduct generally consistent with joint custody. This was a permissible factual finding appropriately used in the court's evaluation of the totality of the circumstances.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tyrus J. Clark, Respondent,

v.

Amika T. Clark, Appellant.

Appellate Case No. 2015-002326

Appeal From Greenville County
David Earl Phillips, Family Court Judge

Opinion No. 5558
Heard November 6, 2017 – Filed May 2, 2018

AFFIRMED

Jessica Ann Salvini and Liza Marie Deever, both of Salvini & Bennett, LLC, of Greenville, for Appellant.

Gwendolynn Wamble Barrett, of Barret Mackenzie, LLC, of Greenville, for Respondent.

KONDUROS, J.: In this divorce action, Amika T. Clark (Wife) appeals the family court's awarding joint custody to her and Tyrus J. Clark (Husband) of their daughter (Child). She contends the court erred in finding exceptional circumstances supported such an award. She also maintains the family court erred in granting Husband's motion to reconsider the parties' settlement agreement in regards to the equitable division of property. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 2006 and Child was born in December of 2009. Husband has another daughter, who was born in 2002, as a result of a previous relationship, who lives with her mother in Arizona.

In 2012, Husband initiated divorce proceedings against Wife but the matter was later administratively dismissed. He filed another action against Wife on October 28, 2013, but did not serve Wife. The parties continued to reside together. On March 16, 2014, the parties had a physical altercation at their home. Both parties called the police and alleged physical abuse by the other party.[1] Wife was arrested for criminal domestic violence.

On March 24, 2014, Wife filed an action against Husband seeking a divorce and sole custody of Child, alleging physical and verbal abuse. She also sought an order of protection against Husband. The family court held a hearing and denied Wife's request for the order of protection, consolidated Husband's and Wife's actions, and issued a joint restraining order. Husband amended his pleadings to allege Wife physically abused him and sought a restraining order. He also requested primary custody of Child and served Wife with the pleadings. Shortly thereafter, the family court held an expedited temporary hearing and as result, issued a temporary order providing the parties would have joint custody of Child and share parenting time on a week-to-week basis.

A final hearing was held May 19 through 21, 2015.[2] At the beginning of the hearing, the family court sent the parties out of the courtroom to give them more time to reach an agreement in the case. When the parties returned to the courtroom about an hour later, they advised the court they had reached a partial settlement agreement resolving the equitable division of property. The parties agreed they would each keep the personal property they had in their possession. Husband would reimburse Wife $3,000 for the difference in the value of property they had in their possession. The parties provided they agreed to a 50/50 split and gave the

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[1] Police were called to the parties' home eleven times between 2012 and 2014.

[2] At the time of the final hearing, the domestic violence charge against Wife was still pending. Wife testified she chose not to participate in a pretrial intervention program because she believed it would require her to admit to guilt. As a result, a no contact order, which prevented the parties from communicating, remained in effect at the time of the final hearing.

family court a list of assets and debts. Some of the balances of accounts were missing but were to be filled in by the parties with the balances at the time of filing. Also, alimony was waived. Both parties were questioned as to whether they wanted the family court to approve their settlement agreement and if they knew the agreement would not be reviewable and would be final in nature. Both parties agreed. The family court approved the agreement, and the hearing proceeded on the remaining contested matters.

At the hearing, both parties as well as two of Child's teachers testified Child was doing well and was happy. Wife visited Child each day at preschool for thirty minutes during the weeks Husband had custody of Child. Husband did the same but less often than Wife. Husband called Linda Hutton to testify, who the parties stipulated was an expert in the field of psychotherapy for adolescents and children. Hutton testified Child was doing well with the week-to-week custody arrangement and at the current time did not need therapy. Hutton indicated she did not know how a change in custody might affect Child.

The guardian ad litem (GAL) testified she did not have any concerns with Child's health and well-being with either party. However, the GAL noted the parties have a difficult time making joint decisions. She also indicated Child first began seeing Hutton because the GAL believed Child was "drawing back a little bit." Yet, according to the GAL, Hutton found Child was in the normal range and did not observe the behavior the GAL had noticed. Still, the GAL continued to notice the drawing back but acknowledged Hutton was an expert in the field, whereas she was not. The GAL believed Child would, like anyone, experience some stress from changing the custody situation but that she was resilient. She stated Child had "done remarkably well so far." The GAL determined Child enjoyed and appreciated the time she spent with Husband. The GAL provided some of her concerns could be alleviated by parents' decision-making responsibilities being divided with one parent making the final decision in certain areas and the other parent making the final decision in other areas, instead of them trying to make decisions together. The GAL described Child as being a joy to work with and very polite, articulate, kind, smart, empathetic, and perceptive. The GAL stated her "biggest concern here is that ability to get to a final conclusion that they could move forward on" because "it's very difficult for these parties to move forward."

Husband testified he currently works out of his home for a computer science business. He provided he travels some for work but only when Child was not in his custody. He indicated his negotiations for employment with his current

employer included his getting to pick and choose when he travels in order to accommodate the custody schedule. He stated his previous job with IBM involved a lot of mandatory travel. Husband also testified that when Child was in his custody he encouraged Child to call Wife and tell her she loves her frequently. Husband believed a change in the custody schedule would hurt Child because it would break the routine to which she has become accustomed and cause her anxiety. He thought it took Child a long time to overcome Wife's arrest and she had "finally stabilized and . . . taken off."

Wife testified she typically works Monday through Friday from 8:00 a.m. to 5:00 p.m. On Fridays when Child is scheduled to go to Husband's for the week, Wife works from 11:00 a.m. to 7:00 p.m. to spend more time with Child that morning. She provided her employer is flexible with her schedule. She indicated she travels sometimes for her job and Child stays with her parents at those times. Wife asserted that during the marriage, she had been Child's primary caregiver because Husband was often out of town for work or busy working even when he was home. Wife was not in favor of the current week-to-week custody schedule because she believed Child was accustomed to her being the primary caregiver. Wife thought Child needed a "home base" to do her homework assignments timely, which Wife did not believe Husband would ensure. Wife indicated she believed Husband was a good father.

The family court issued a final order and divorce decree awarding the parties joint custody of Child, alternating placement from week to week,[3] with Wife being the final decision maker. The court noted it had concerns about the parties' inability to communicate with one another. Based on the totality of the record, the court determined exceptional circumstances existed warranting joint physical custody to continue and that it was in Child's best interest. The court found because Child had thrived for the fourteen months prior to the final hearing under the current placement schedule, it was best to continue it. The family court was concerned about the effect of adding a change in custody when Child was soon to begin a new school program.

The family court later filed a supplemental order, which included the distribution of assets. Wife filed a motion for reconsideration, arguing the family court should have awarded her sole custody and Husband visitation only. The family court denied her motion. Husband filed a motion to reconsider and alter or amend

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[3] During summer, the rotation would be month-to-month.

judgment pursuant to Rules 52, 59(e), and 60, SCRCP, arguing a twelve-foot trailer included in the marital estate was accounted for twice in the supplemental order. The family court amended the supplemental order to include the trailer only once. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The appellate court generally defers to the findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor. *Id.* at 385, 391, 709 S.E.2d at 651-52, 655. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. *Id.* at 388-89, 709 S.E.2d at 653-54.

Our supreme court recently reiterated its holding from *Lewis*, stating:

> In *Lewis*, this [c]ourt extensively analyzed the applicable standard of review in family court matters and reaffirmed that it is de novo. We noted that, while the term "abuse of discretion" has often been used in this context, it is a "misnomer" in light of the fact that de novo review is prescribed by article V, § 5 of the South Carolina Constitution.
>
> We observed that de novo review allows an appellate court to make its own findings of fact; however, this standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility[] and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge.

Stoney v. Stoney, Op. No. 27758 (S.C. Sup. Ct. refiled April 18, 2018) (Shearouse Adv. Sh. No. 16 at 9, 10-11) (per curiam) (footnote and citation omitted).

LAW/ANALYSIS

I. Custody

Wife contends the family court erred in finding exceptional circumstances warranted Husband and Wife having joint custody of Child. We disagree.

"The paramount and controlling factor in every custody dispute is the best interests of the children." *Brown v. Brown*, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004); *see also Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003) (finding in a child custody case, the welfare of the child and the child's best interests are the primary, paramount, and controlling considerations of the court). "[T]he appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court." *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). "This is especially true in cases involving the welfare and best interests of children." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct. App. 1999) (quoting *Aiken Cty. Dep't of Soc. Servs. v. Wilcox*, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991)). "[A] determination of the best interest[s] of the children is an inherently case-specific and fact-specific inquiry." *Rice v. Rice*, 335 S.C. 449, 458, 517 S.E.2d 220, 225 (Ct. App. 1999).

> (A) The court shall make the final custody determination in the best interest of the child based upon the evidence presented.
> (B) The court may award joint custody to both parents or sole custody to either parent.
> (C) If custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody, and, in its final order, the court shall state its determination as to custody and shall state its reasoning for that decision.
> (D) Notwithstanding the custody determination, the court may allocate parenting time in the best interest of the child.

S.C. Code Ann. § 63-15-230 (Supp. 2017).

> 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 [the guardian ad litem], expert witnesses, and the children); and the age, health, and sex of the children.

Patel v. Patel (*Patel I*), 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001), *superseded by statute on other grounds by* S.C. Code Ann. §§ 20-7-1545 to -1557. "The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional[,] and recreational aspects of the child's life should be considered." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 (citation omitted). "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." *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975). "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." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157. Although a parent's morality "is a proper factor for consideration," it is only relevant if it directly or indirectly affects the welfare of the child. *Davenport*, 265 S.C. at 527, 220 S.E.2d at 230. "Custody of a child is not granted a party as a reward or withheld as a punishment." *Id.*

> In South Carolina, in custody matters, the father and mother are in parity as to entitlement to the custody of a child. When analyzing the right to custody as between a father and mother, equanimity is mandated. We place our approbation upon the rule that in South Carolina, there is no preference given to the father or mother in regard to the custody of the child. The parents stand in perfect equipoise as the custody analysis begins.

Brown, 362 S.C. at 91, 606 S.E.2d at 788 (quoting *Kisling v. Allison*, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001)).

The family court has jurisdiction to order joint custody when it finds it is in the child's best interests. S.C. Code Ann. § 63-3-530(A)(42) (2010). However, "[a]lthough the legislature gives family court judges the authority to order joint or divided custody whe[n] the court finds it is in the best interests of the child, . . . joint or divided custody should only be awarded whe[n] there are exceptional circumstances." *Lewis v. Lewis*, 400 S.C. 354, 365, 734 S.E.2d 322, 327 (Ct. App. 2012) (omission by court) (quoting *Patel v. Patel* (*Patel II*), 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004)). "Absent exceptional circumstances, the law regards joint custody as typically harmful to the children and not in their best interests." *Spreeuw v. Barker*, 385 S.C. 45, 61, 682 S.E.2d 843, 851 (Ct. App. 2009); *see Patel II*, 359 S.C. at 528, 599 S.E.2d at 121) (noting joint custody should be ordered only under exceptional circumstances); *Courie v. Courie*, 288 S.C. 163, 168, 341 S.E.2d 646, 649 (Ct. App. 1986) ("Divided custody is avoided if at all possible[] and will be approved only under exceptional circumstances.").

> In determining joint custody is usually considered harmful to and not conducive to the best interest and welfare of a child, our courts have explained the disfavor as follows:
>
> > 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.

Lewis, 400 S.C at 365, 734 S.E.2d at 327-28 (quoting *Scott v. Scott*, 354 S.C. 118, 125-26, 579 S.E.2d 620, 624 (2003)).

In *Spreeuw*, this court found:

> [T]he exceptional nature of this case demands that we affirm the family court's award of joint physical custody. In this case, a seven[-]year delay occurred between the issuance of the family court's final order . . . and oral argument before this panel . . . . The reasons for the delay in this case range from the acceptable—Father's bankruptcy proceeding—to the unacceptable—the rash of motions filed by both parties. Since the family court's final order, the children have grown from the ages of five and twelve to the ages of twelve and nineteen. Undoubtedly, many things have changed in the children's lives since 2002. However, the custodial arrangement has remained constant. At this point, we are reluctant to order a change in the custody arrangement based on a record which most certainly has become cold. Accordingly, we affirm the family court's decision to award both parties joint physical custody of the children.

385 S.C. at 61-62, 682 S.E.2d at 851.

Likewise, we affirm the family court's custody award in the present case. Wife argues the record contains no evidence she engaged in conduct to alienate Child from Husband. However, Husband testified that during the marriage, due to Wife's influence, Child could not tell him she loved him and told him she could only give him one hug. He provided he "stopped [the] marriage because [he] wanted [Child] to be able to freely love who she wanted to love." Husband testified Child was acclimated to the current custody arrangement and knew when it was time for the exchange between Wife and Husband. He believed Child needed both her parents in order to become a well-adjusted child and adult and neither parent had a greater

position in her life than the other. Wife testified she wanted Husband and Child to have a strong bond. She also provided Husband loves Child and is a good father.

While joint custody is generally disfavored, this arrangement worked well for Child for the fourteen months before the final hearing.[4] This custody arrangement has now continued from the time of the hearing (May 2015) until present, which is an additional twenty-nine months, amounting to a total of forty-three months or about three and a half years—close to half of Child's life. The teachers, parents, GAL, and therapist all testified about how well Child was doing. Many witnesses commented on how happy and well-adjusted she was at the time of the final hearing. We find the passage of time and the good reports on Child's welfare and mental adjustment to the situation comprise exceptional circumstances warranting joint custody. While disfavored, no evidence has been presented to allow the family court or this court to rule differently. Accordingly, we affirm the family court's joint custody award.

II. Settlement Agreement

Wife maintains the family court erred when it issued an order granting Husband's motion to reconsider the parties' settlement agreement equitably allocating the marital estate. We disagree.

"[P]arties may enter into contracts resolving issues of alimony and equitable distribution and . . . the family court has jurisdiction over those contracts." *Swentor v. Swentor*, 336 S.C. 472, 479, 520 S.E.2d 330, 334 (Ct. App. 1999). "The family court has exclusive jurisdiction: . . . (25) to modify or vacate any order issued by the court." S.C. Code Ann. § 63-3-530(A) (2010). "However, 'the law in South Carolina is exceedingly clear that the family court does not have the authority to modify court ordered property divisions.'" *Simpson v. Simpson*, 404 S.C. 563, 571, 746 S.E.2d 54, 58-59 (Ct. App. 2013) (quoting *Green v. Green*, 327 S.C. 577, 581, 491 S.E.2d 260, 262 (Ct. App. 1997)); *see* S.C. Code Ann. § 20-3-620(C) (2014) ("The court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal."); *Swentor*, 336 S.C. at 480 n.2, 520 S.E.2d at 334 n.2 ("[A]n agreement

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[4] Child was about four and a half years old when her parents starting living apart and began sharing custody, was about five and a half years old at the time of the final hearing, and is now over eight years old.

regarding equitable apportionment claims is final and may not be modified by the parties or the court . . . .").

In *Green*, during a divorce proceeding, the parties reached a property settlement agreement, which was approved by the family court. 327 S.C. at 578, 491 S.E.2d at 261. Later, the wife moved to adjust the agreement to decrease the value of an office building allocated to her in the settlement, contending "the husband and his expert 'fraudulently concealed and withheld evidence of the true condition of the building and the fact that there was structural as well as other damage to the building which would have a cost of approximately $36,500 to repair.'" *Id.* at 578-79, 491 S.E.2d at 261. "The wife conceded that neither she nor the husband really knew the extent of the damage to the building at the time they entered into the agreement." *Id.* at 579, 491 S.E.2d at 261. The family court concluded "it was within the 'equitable powers' of the court to reopen and modify the parties' agreement." *Id.* at 581, 491 S.E.2d at 262. However, this court found "the law in South Carolina is exceedingly clear that the family court does not have the authority to modify court ordered property divisions." *Id.*

Rule 60(a), SCRCP, permits trial courts to correct clerical errors at any time: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Nevertheless,

> The family court's correction of clerical errors may not extend to "chang[ing] the scope of the judgment." *Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986). "Except for those matters over which a court retains continuing jurisdiction, terms of a final property settlement agreement, once approved, are binding on the parties and the court." *Price v. Price*, 325 S.C. 379, 382, 480 S.E.2d 92, 93 (Ct. App. 1996); *accord Doran v. Doran*, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986) ("A trial judge loses jurisdiction to modify an order after the term at which it is issued, except for the correction of clerical [errors]. Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action.").

Brown v. Brown, 392 S.C. 615, 622, 709 S.E.2d 679, 683 (Ct. App. 2011) (alterations by court).

The situation here is unlike that in *Green*. Wife does not allege she and Husband owned more than one trailer. The order included the trailer in two different places, thus accounting for it twice. Changing the order to only include the trailer once was not a change in the scope of judgment but was merely a correction of a clerical error. Accordingly, the family court was allowed to correct this. The fact that the parties reached the settlement on the division of marital property after being sent out in the hall for an hour to negotiate at the beginning of the final hearing likely contributed to the parties submitting forms that had been hastily prepared or had not been double checked. Therefore, the family court did not err in correcting the order to only account for the twelve-foot trailer one time instead of two.

CONCLUSION

The family court did not err in awarding joint custody as this case presented exceptional circumstances. Further, the family court did not err in granting Husband's motion to modify the marital division due to the erroneous inclusion of the trailer twice. Accordingly, the family court's decision is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter Kucera, Respondent,

v.

Ashley Moss, Appellant.

Appellate Case No. 2015-001665

Appeal From Greenville County
Alex Kinlaw, Jr., Family Court Judge

Unpublished Opinion No. 2018-UP-140
Submitted February 9, 2018 – Filed April 4, 2018

REVERSED IN PART, AFFIRMED IN PART, and REMANDED

Gwendolynn Wamble Barrett, of Barret Mackenzie, LLC, of Greenville, for Appellant.

Peter Kucera, of Greenville, pro se.

PER CURIAM: Ashley Moss appeals the ruling of the family court awarding her and Peter Kucera joint custody of their minor child. Moss argues there was not a substantial change in circumstances warranting a change in custody. Additionally, Moss argues joint custody and the family court's award of expanded visitation to

Kucera are not in their child's best interests.[1] We reverse in part, affirm in part, and remand.

FACTS/PROCEDURAL HISTORY

Moss and Kucera met in Colorado and were involved in a romantic relationship resulting in the birth of a daughter (Child) in January 2005. Moss and Kucera never married. The relationship ended, Moss relocated to Greenville, South Carolina, and Kucera soon followed.

In December 2006, Moss filed a complaint seeking full custody of Child with Kucera having standard visitation. The court entered a Final Custody Order in November 2008 granting, *inter alia*, Moss full custody and requiring Kucera to pay child support. In addition, Kucera was given the following visitation schedule: every other weekend, from Friday at 4:00 p.m. to until 6:00 p.m. Sunday; an overnight on alternating Thursdays; three weeks during the summer months; alternate holidays; and Father's Day.

Subsequently, Moss became romantically involved with Mark Ritchie. Moss became pregnant, and she and Ritchie got engaged. Moss, Ritchie, and Child moved in together in January 2011, and Moss and Ritchie were married in May of that year. Moss and Ritchie's son was born in June 2011.

The parties operated under the 2008 Final Custody Order until April 2011, when Kucera filed a complaint seeking full custody based on a substantial change in circumstances. The court issued a temporary order in November 2011, maintaining the custody and visitation arrangement in the 2008 Final Custody Order. Additionally, Kucera's child support obligation was recalculated based on his unemployment, a Guardian ad Litem was appointed to represent Child, and each party was ordered to undergo a psychological evaluation.

The trial commenced June 25, 2013, and continued through June 28. On October 10, 2013, the court declared a mistrial because the parties were unable to finish in the time allotted. However, in November 2013, the court *sua sponte* reconsidered its decision to order a mistrial and ordered a continuance requiring the parties to meet certain obligations, by no specific date, before the final hearing would recommence. Without any action having been taken by the parties, the court held a status conference in April 2014. The following month, the court found Moss had

[1] Kucera did not file a brief in response to Moss's appeal.

met her obligations as set forth in the November 2013 Continuance Order but Kucera had not. The court ordered Kucera to meet his obligations or be declared in contempt. The trial finally concluded in November 2014.

The court issued its Final Custody Order in March 2015, granting Moss and Kucera joint custody of Child and expanding Kucera's visitation by an extra overnight visit each week—Kucera was to return Child to school on Monday mornings following his weekend visitation rather than return Child to Moss on Sunday. In addition, the court recalculated child support, held Kucera in contempt for various violations of the 2008 Final Custody Order, and awarded Moss attorney's fees relating to her meritorious contempt actions. The order left the remaining provisions of the 2008 Final Custody Order in place. Moss filed a motion to reconsider alleging, among other things, the court erred in granting joint custody and in failing to order supervised and restricted visitation for Kucera. The court denied the motion to reconsider and this appeal followed.

ISSUES ON APPEAL

1. Was there a substantial change in circumstances warranting a change in custody?

2. Is joint custody and Kucera's expanded visitation in Child's best interests?

STANDARD OF REVIEW

"[T]he proper standard of review in family court matters is de novo . . . ." *Stoney v. Stoney*, 421 S.C. 528, 531, 809 S.E.2d 59, 60 (2017); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017).

LAW/ANALYSIS

I. Change in Circumstances

Moss had full custody of Child under the 2008 Final Custody Order. The 2015 Final Custody Order awarded Moss and Kucera joint custody of Child, with Moss having primary placement. Moss argues there has not been a substantial change in circumstances warranting a change in custody. We agree.

"To warrant a change of custody, the party seeking the change bears the burden of establishing 'a material change of circumstances substantially affecting the child's welfare.'" *Housand v. Housand*, 333 S.C. 397, 400, 509 S.E.2d 827, 829 (Ct. App. 1998) (quoting *Allison v. Eudy*, 330 S.C. 427, 429, 499 S.E.2d 227, 228 (Ct. App. 1998)). "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." *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004) (quoting *Stutz v. Funderburk*, 272 S.C. 273, 278, 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.

Id. "When determining whether a change of circumstance[s] has been established in a custody case, the issue is whether the evidence, *viewed as a whole*, establishes that the circumstances of the parties have changed enough that the best interests of the children will be served by changing custody." *Housand*, 333 S.C. at 405 n.5, 509 S.E.2d at 832 n.5; *see also Hollar v. Hollar*, 342 S.C. 463, 473, 536 S.E.2d 883, 888 (Ct. App. 2000) ("[T]he totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision [to award a change in custody] can be weighed." (quoting *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975))).

The family court awarded a change in custody—granting joint custody, with Moss having primary placement. However, the family court's order does not state what factual findings support its conclusion to award a change in custody. The only reasoning the court gave was that there was nothing in the record indicating Kucera

did not love Child or that Kucera was a danger to Child. We find the family court's reasoning does not support a finding that the circumstances of the parties have changed. In fact, the family court never addressed the issues Kucera alleged constituted a change in circumstances. Therefore, we find the family court erred in awarding a change in custody.

Regardless, we will address the merits of Kucera's original allegations because the record is well developed, and the issue affects the rights of a minor. *See Thomson v. Thomson*, 377 S.C. 613, 623, 661 S.E.2d 130, 135 (Ct. App. 2008) ("When an order from the family court fails to make specific findings of fact in support of the court's decision, the appellate court may remand the matter to the family court or, '[when] the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" (quoting *Badeaux v. Davis*, 337 S.C. 195, 203, 522 S.E.2d 835, 839 (Ct. App. 1999))); *see also Galloway v. Galloway*, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967) ("The duty to protect the rights of minors has precedence over procedural rules otherwise limiting the scope of review[,] and matters affecting the rights of minors can be considered by this court [e]x mero motu."); *see, e.g.*, *Tillman v. Oakes*, 398 S.C. 245, 250–52, 728 S.E.2d 45, 48–49 (Ct. App. 2012) (discerning and addressing the "factual findings to support the [family] court's decision" to change custody when the family court's reasoning was unclear).

Kucera's complaint alleged the following changes in circumstances were substantial and warranted a change in custody: (1) Moss was living with her boyfriend and expecting a child; (2) Moss took Child to a psychologist without informing Kucera; (3) Moss and Child stayed in Atlanta overnight without informing Kucera; and (4) Moss is adamant about strict compliance with the 2008 Final Custody Order. We address each allegation in turn.

A. Living Arrangement

The 2008 Final Custody Order prevented any party from having Child overnight in the presence of an adult party of the opposite sex to whom they were not related to by blood or marriage. Moss and Ritchie lived together with Child from January 2011 to May 2011 while engaged. The couple married in May 2011. Even though this was a violation of the 2008 Final Custody Order, it does not constitute a substantial change in circumstances warranting a change in custody. The record is devoid of any evidence showing how this living arrangement negatively impacted Child's welfare. *See Latimer*, 360 S.C. at 381, 602 S.E.2d at 35 ("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."); *Routh v. Routh*, 328 S.C. 512, 520–21, 492 S.E.2d 415, 420 (Ct. App. 1997) (stating a parent's immorality is relevant only when it impacts the child's welfare). In addition, Moss is no longer violating the restriction—Moss and Ritchie are married and have a son together. Furthermore, Moss's remarriage is relevant to show her circumstances have improved. *Cf. Routh*, 328 S.C. at 520, 492 S.E.2d at 419 ("[R]emarriage is normally relevant to show improved circumstances on the part of a remarried parent seeking to obtain custody, not to show the deterioration of the circumstances of the custodial parent.").

B. Psychologist Visit

Kucera alleged Moss violated the 2008 Final Custody order when Moss took Child to a psychologist. Kucera argued Moss's actions violated the order's requirement that both parties be given equal access to Child's medical providers. First, we find this is not a violation of the 2008 Final Custody Order because the order does not require the custodial parent to inform the non-custodial parent of a medical non-emergency within any specific time of its occurrence. Regardless, we fail to see how this isolated event has affected the welfare of Child or reflects poorly on Moss's fitness as a parent. *See generally Pinckney v. Hudson*, 294 S.C. 332, 333, 364 S.E.2d 462, 462 (1998) (finding a mother's violations of custody arrangements were not "a sufficient change of circumstances" warranting a change of custody because the violations were not constant, there wasn't a sufficient showing a custody change would be in the best interest of the child, and the violations had no bearing on the mother's fitness as a parent).

C. Atlanta Visit

The 2008 Final Custody Order required any party traveling overnight and out of the state with Child to notify the other party one week prior to the travel taking place. Moss traveled to Atlanta overnight with Child without notifying Kucera. Although this failure to notify constituted a violation of the order, there is no evidence showing this violation affected Child's welfare or reflects poorly on Moss's fitness as a parent. *See generally Pinckney*, 294 S.C. at 333, 364 S.E.2d at 462 (finding a mother's violations of custody arrangements were not "a sufficient change of circumstances" warranting a change of custody because the violations were not constant, there wasn't a sufficient showing a custody change would be in the best interest of the child, and the violations had no bearing on the mother's fitness as a parent).

D. Strict Adherence to Custody Order

Kucera also argues that, on one occasion, Moss's strict adherence to the custody arrangement placed Child in danger—when road conditions were unsafe due to snow and ice, Moss refused to allow Child to stay overnight with Kucera after his visitation period had ended. However, one isolated instance of Moss's inflexibility is not sufficient to support a claim alleging a substantial change in circumstances. *See Housand*, 333 S.C. at 405 n.5, 509 S.E.2d at 832 n.5 ("When determining whether a change of circumstance[s] has been established in a custody case, the issue is whether the evidence, *viewed as a whole*, establishes that the circumstances of the parties have changed enough that the best interests of the children will be served by changing custody."). Further, "custody is not to be used to penalize or reward a parent for his or her conduct." *Hollar*, 342 S.C. at 477, 536 S.E.2d at 890 (quoting *Clear v. Clear*, 331 S.C. 186, 191, 500 S.E.2d 790, 792 (Ct. App. 1998)); *see Smith v. Smith*, 261 S.C. 81, 85, 198 S.E.2d 271, 273 (1973) ("The court may not award or change custody to punish a parent for acting in violation of the orders of the court.").

Under the totality of the circumstances, we find Kucera has failed to show a substantial change in circumstances affecting the welfare of Child. *Hollar*, 342 S.C. at 473, 536 S.E.2d at 888 ("[T]he totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision [to award a change in custody] can be weighed." (quoting *Davenport*, 265 S.C. at 527, 220 S.E.2d at 230)). Further, Kucera has not carried his burden of showing a change in custody would be in the overall best interests of Child. *See Latimer*, 360 S.C. at 381, 602 S.E.2d at 35 ("[T]he 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."); *Hollar*, 342 S.C. at 477, 536 S.E.2d at 890 (finding the record did not establish either a change of circumstances justifying a change of custody or that a change of custody would be in the child's best interest). Therefore, we reverse the family court's decision to change custody.

II. Changed Visitation

Kucera's complaint requested sole custody of Child but never requested expanded visitation as an alternative remedy. Moss counterclaimed, requesting restricted visitation based upon changed circumstances. The family court awarded expanded visitation to include an extra overnight visit with Child—instead of returning Child to Moss on the Sunday ending his weekend visitation, Kucera could keep Child overnight and take her to school on Monday. Moss argues the family

court erred in awarding expanded visitation and in not awarding restricted and supervised visitation. We agree the family court should not have expanded visitation, but we are hesitant to restrict Kucera's visitation as Moss suggests.

When a court has previously established a visitation schedule, "the moving party must show a change of circumstances to warrant a change of visitation." *Ingold v. Ingold*, 304 S.C. 316, 320, 404 S.E.2d 35, 37 (Ct. App. 1991); *see King v. Gardner*, 274 S.C. 493, 495, 265 S.E.2d 260, 262 (1980) ("[A] judicial award of the custody of a child and the fixing of visitation rights is not final and changed circumstances may authorize the change of custody or visitation rights in the future." (quoting *McGregor v. McGregor*, 255 S.C. 179, 183, 177 S.E.2d 599, 600–01 (1970))). Similar to changes of custody, modification of visitation must be in the best interests of the child. *Smith v. Smith*, 386 S.C. 251, 272, 687 S.E.2d 720, 731 (Ct. App. 2009) ("The welfare and best interests of the child are the primary considerations in determining visitation."). A change in circumstances justifying a change in visitation must adversely affect the welfare of the child. *See Ingold*, 304 S.C. at 320, 404 S.E.2d at 37 (finding an insufficient change of circumstances to justify reducing father's visitation because the mother had not shown how the visitation adversely affected their child's welfare); *Duck v. Jenkins*, 297 S.C. 136, 139, 375 S.E.2d 178, 179 (Ct. App. 1988) (stating visitation privileges can be denied when "their exercise would injure the child emotionally").

It is not in a child's best interest to grant expanded visitation to a non-custodial parent when the child's parents lack cooperation and communication. *See Lewis v. Lewis*, 400 S.C. 354, 367, 734 S.E.2d 322, 329 (Ct. App. 2012) ("Our review of the preponderance of the evidence convinces us that, given the lack of cooperation and communication between the parties, allowing [the father] more extensive visitation would not be in [the child's] best interest."). Additionally, expanded visitation is not warranted when there has not been a showing the current visitation negatively affects the relationship between the non-custodial parent and the child. *See id.* at 368, 734 S.E.2d at 329. Furthermore, supervised or limited visitation is warranted when based upon a psychiatrist's and Guardian ad Litem's recommendations. *See Nash v. Byrd*, 298 S.C. 530, 536–37, 381 S.E.2d 913, 917 (Ct. App. 1989) (noting a psychiatrist and Guardian ad Litem each recommended supervised or restricted visitation).

Here, the court expanded Kucera's visitation based merely upon his love for Child. As noted above, we find the family court erred in expanding visitation because the court did not set forth the factual findings to support its order. *See* Rule 26(a), SCRFC (requiring orders from the family court to "set forth the specific findings of fact and conclusions of law to support the court's decision"); *cf. Tillman*,

398 S.C. at 252, 728 S.E.2d at 49 (finding the family court's order violated Rule 26(a) when it failed to set forth all of the specific findings of fact supporting its decision to change custody). Furthermore, Kucera never requested a change in visitation. Even if we were to address Kucera's alleged changes in circumstances in the context of a change in visitation, we find he has failed to show how those changes have affected Child's welfare warranting an expansion in his visitation. In addition, given the lack of cooperation between Moss and Kucera and their inability to communicate cordially, it would not be in Child's best interests to expand Kucera's visitation. Therefore, we find the family court erred in expanding Kucera's visitation.

Moss argues a change in circumstances has occurred warranting the reduction or supervision of Kucera's visitation. To show a change in circumstances, Moss provides numerous examples of Kucera's behavior that show his overbearing personality and his general uncooperativeness. Kucera is rude to Child's teachers, has used profanity in front of Child, has physically taken Child away from Moss when it is his time for visitation, and has verbally harassed Moss. Moss has also provided examples of when Kucera violated the visitation schedule—ranging from Kucera returning Child to Moss half an hour after his visitation had ended to keeping Child overnight after his visitation had ended.

We share a similar sentiment to the family court in refusing to restrict Kucera's visitation. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 652 (noting the family court is in the best position to make credibility determinations). The Guardian ad Litem did not recommend visitation restrictions. Furthermore, even though Dr. Watson—the psychologist who performed evaluations of Kucera and Moss—recommended Kucera's contact with Child be reduced or supervised, this recommendation was conditioned upon a future showing that Kucera could not move beyond his rejection by Moss. The record does not show there has been such a showing. *See Nash*, 298 S.C. at 536–37, 381 S.E.2d at 917 (finding the family court's "determination that court ordered visitation is not in the best interest of the child" was proper considering a psychiatrist's and Guardian ad Litem's recommendations that visitation should be limited and supervised).

Additionally, Child is now thirteen years old and in the second year of middle school. The actions Moss argues support the change in visitation occurred when Child was in pre-school, kindergarten, and elementary school. Although Kucera's interactions with persons other than Child cause us some concern, the evidence does not show his actions have affected the welfare of Child in such a way that restricted and supervised visitation is warranted. Furthermore, the behavior Moss argues

should support a change in circumstance is addressed by the 2015 Final Custody Order, which prohibits parties from speaking negatively about each other or each other's family in front of Child and restricts them from harassing or annoying one another.

In sum, we find the family court erred in awarding Kucera expanded visitation because there was no showing of a change in circumstances warranting the change in visitation. Therefore, we reverse the family court's expansion of Kucera's visitation. We also find the record does not support restricting Kucera's visitation or requiring his visitation be supervised.

In conclusion, we reverse the family court's award of joint custody and expansion of Kucera's visitation. We remand for an order consistent with this opinion.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.[2]

HUFF, GEATHERS, and MCDONALD, JJ., concur.

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

682 S.E.2d 843
385 S.C. 45
Diana SPREEUW,
Respondent/Appellant,
v.
Douglas BARKER,
Appellant/Respondent.
No. 4602.
Court of Appeals of South Carolina.
Heard March 5, 2009.
Decided July 29, 2009.

[682 S.E.2d 846]

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

Russell S. Stemke, of Isle of Palms, for Respondent/Appellant.

HEARN, C.J.:

This is a protracted custody suit where an order issued in 2002 is only just now being reviewed on appeal.

FACTS

During their ten-year marriage, Diana Spreeuw (Mother) and Douglas Barker (Father) lived in Charleston and had two children: Daryn, born January 1, 1990, and Dylan, born March 20, 1997. Mother, the family's primary breadwinner, worked in the field of health-care finance, while Father worked as an attorney. After the birth of the parties' second child, their marriage began deteriorating. To further complicate matters, Mother learned her employer, the last remaining health-care provider with financial operations in the area, would soon leave Charleston for Nashville. Mother immediately began searching for comparable employment in the area; however, her efforts were unsuccessful.[1] Soon thereafter, on June 25, 1999, Father commenced a divorce action.

Prior to the divorce hearing, Mother and Father reached an agreement regarding custody and child support. With her oldest child expressing a desire to finish elementary school in Charleston and no employment opportunities in the area, Mother agreed to give Father primary custody of the children, while sharing joint legal custody with him. In addition, Mother agreed to pay Father $1,000 in child support per month. Meanwhile, Mother accepted the closest employment opportunity available in Nashville. The parties were divorced and the agreement was approved by order of the family court dated December 17, 2001.

Following the divorce, Mother moved to Nashville to begin her job. While there, she routinely sent letters to the children and called them daily. Approximately two months later, Father married Daphne Burns. Thereafter, Daphne began living with Father and the children in Charleston. Daphne described her time in the house as filled with "tension, anger, and ugliness." Six months after moving in, Daphne moved out of the house. Over the next year, Daphne moved back into the house on two occasions only to permanently move out of the house in the spring of 2001.[2] Jo Marie Hartman, a neighbor of Father, telephoned Mother and informed her of Daphne's permanent departure from the home. Mother called Father and expressed concern about the impact the move would have on the children.

A few months later, the children arrived at Mother's house for summer visitation. While there, her oldest child begged Mother to return to Charleston. In June 2001, Mother decided to return to Charleston and called

[682 S.E.2d 847]

Father to inform him of her decision. Shortly thereafter, Mother placed her home in Nashville on the market and began searching for employment. In contemplation of her return, Father scheduled a mediation session to revisit the existing visitation schedule. For some unknown reason, the mediation never

took place, and the current visitation schedule remained in effect.

By September, Mother still had not sold her house and had failed to find comparable employment in the Charleston area. Nevertheless, Mother, believing her children needed her, took the first job she could find and moved into a friend's house on Daniel Island.[3] Mother, who earned $74,000 a year in Nashville, was then working in a fabric store earning $6.50 an hour. Mother supplemented her income by substitute teaching at local schools for $50 a day. All the while, Mother continued her search for a financial management position in the area She solicited the service of head-hunting agencies, sent out numerous job applications, looked through employment advertisements in the newspaper, and networked with friends in search of employment. Eventually, Mother accepted a position as an accounts receivable clerk with RoHoHo Incorporated, a franchisee of Papa John's Pizza, earning $26,000 per year.

A month after Mother's return to Charleston, Father still refused to amend the existing visitation schedule.[4] On October 31, 2001, Mother filed a complaint against Father seeking a change in custody and modification of child support. At the temporary hearing, Father alleged his monthly income was $3,600 per month, while Mother indicated her monthly income was $903.59. The Honorable F.P. Segars-Andrews issued a temporary order granting Mother overnight visitation with the children every Wednesday night and on alternating weekends. In addition, Mother's child support payments were reduced from $1,000 to $500 per month.

In October of 2001, Father commenced a romantic relationship with Jennifer Helm. As the relationship progressed, Jennifer began spending more and more time at Father's home with the children present. On some occasions, Father acknowledged Jennifer stayed past the children's bedtime. According to the testimony of Mother and the Guardian ad Litem ("Guardian"), the parties' oldest child did not like Jennifer and felt uncomfortable with her in the house. By contrast, Father testified that his children loved Jennifer.

The parties' lives remained virtually unchanged until August 6, 2002 when Father, pursuant to the parties' prior understanding, picked up the children from Mother's house at 9:00 A.M. to take their oldest child to register for school. By the time Father arrived at Mother's residence, she had already departed for work, and the children, ages twelve and five, were alone. However, the children were provided with a list of names and telephone numbers of nearby neighbors they could contact in case of an emergency. After arriving at Mother's house, Father immediately called Mother and informed her he was keeping the children for the remainder of the day. Father also attempted to contact the Guardian, who was unable to take his phone call at the time. Thereafter, Father visited his attorney's office and instructed him to prepare a motion for an ex parte order. In his motion, he alleged "the children were to be left alone all day while [Mother] was at work."[5] On that same day, Judge Segars-Andrews issued an emergency ex parte order preventing the children from being left home alone.

A mere five days before the parties' September 10, 2002 trial date, Father, on his

[682 S.E.2d 848]

own initiative and without prior notice or approval, took the children to the office of Dr. Barton Saylor, a forensic psychologist, to be assessed and interviewed. From his interview with the children, Dr. Saylor concluded that the children were well-adjusted and did not display any significant emotional problems. At trial, Dr. Saylor made it clear that he did not conduct a custody evaluation or make a comparison of the parents.

Prior to trial, the Guardian submitted her written report to both parties. The Guardian's written report was the culmination of a five-month investigation of the family, consisting of numerous interviews, observations, and in-home visits.[6] The Guardian did not submit a recommendation regarding custody of the children in her report. Instead, the Guardian, through her attorney, informed the court she wished to reserve the right to make a custody recommendation at the conclusion of the testimony. At that time, the Guardian orally recommended that primary custody of the children be awarded to Mother. The Guardian based her recommendation on numerous factors including: the oldest child's stated preference to live with Mother; Father's refusal to allow Mother to share in parental decisionmaking; Father's testimony that Mother should not have more time with the children beyond the existing visitation schedule; the children's disposition while in the care of both parties; and her concerns about the impact Father's relationship with Jennifer had on the children.

At the end of trial, the family court issued an order modifying custody and child support. The court's order awarded the parties joint physical custody, designated Mother as the primary physical custodian, and granted her final decision-making authority. In addressing the child support issue, the family court declined to impute income to Mother, finding she was not voluntarily underemployed due to her leaving a high-paying job in Nashville to return to Charleston. Next, the court determined the amount of money Father withdrew from his law firm in 2001 represented only 80% of his total income for that year as reported in his income tax return.[7] Therefore, when Father alleged he withdrew $6,000 per month in 2002, the family court, operating under the assumption that this amount represented only 80% of his gross income, concluded Father's income for 2002 equaled $7,500 per month (80% of $7,500 = $6,000). Then, the family court determined Father improperly included $1,474.47 of items as expenses that should have been reported as part of his gross monthly income in his financial declaration. As a result, the family court concluded Father earned $8,974.47 per month for child support purposes and required him to pay $804 per month in child-support to Mother. Lastly, the family court ordered Father to pay Mother $43,675 in attorney's fees and costs in light of the vigorous defense asserted by him and the beneficial results obtained by Mother.

Thereafter, both parties filed motions to alter or amend the judgment. Before the court could rule on the motions, Father also filed a motion for relief from judgment based on newly discovered evidence. The family court denied both parties' motions to alter or amend the judgment on February 28, 2002. Father filed a notice of appeal on March 13, while Mother filed a notice of appeal on March 27. On April 7, the family court denied Father's motion for relief from judgment based on newly discovered evidence. Subsequently, Father filed a second notice of appeal on April 11. On May 8, Court of Appeals Judge Cureton issued an order consolidating Father's two appeals.

After trial, this case encountered many delays during its almost seven year journey to our docket. Immediately following the family court's order, Father sought a determination from the United States Bankruptcy Court as to whether the family court's award of attorney's fees should be designated as a priority debt. This case was stayed until 2005 during the pendency of the bankruptcy proceedings. From there, the parties and

[682 S.E.2d 849]

their counsel managed to delay resolution of this case even further by filing more than twenty-five motions with this court.

STANDARD OF REVIEW

In an appeal from the family court, this court may correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Semken v. Semken,* 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct.App.2008). 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. *Marquez v. Caudill,* 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). In particular, an appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the family court. *Woodall v. Woodall,* 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. TIMELINESS OF MOTHERS APPEAL

Father argues Mother did not timely file her motion to alter or amend the final order pursuant to Rules 52 and 59(e), SCRCP. Assuming the motion was timely filed, Father contends Mother failed to timely file a notice of appeal. We disagree.

Father's arguments are wholly without merit and warrant little discussion. First, Mother timely made her Rule 59(e) motion by serving Father ten days after receiving notice of the judgment. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be *served* not later than 10 days after receipt of written notice of the entry of the order.") (emphasis added). Second, because Mother timely made a motion pursuant to Rule 59(e), the time to serve her notice of appeal did not run until she received written notice of the order granting or denying that motion. *See* Rule 203(b)(1), SCACR (noting if a party makes a timely Rule 59 motion, the time for appeal is stayed and does not begin to run until the receipt of written notice of the order granting or denying such motion). Therefore, Mother had thirty days to file a notice of appeal after receiving written notice of the order denying her Rule 59(e) motion. *Id.* Because she served her notice of appeal within the thirty day time period, her notice of appeal was timely.

II. CUSTODY

A. *Final Decision-Making Authority*

Father asserts the family court erred in awarding final decision-making authority to Mother. According to Father, the family court misconstrued the previous order as silent on the issue of final decision-making authority. Father claims the previous order implicitly granted him final decision-making authority when it granted him primary custody.

Unless otherwise stated by agreement of the parties or order of the family court, the power to make final decisions for children is necessarily vested in the custodial parent. Thus, Father correctly points out that the previous order implicitly granted him final decision-making authority by virtue of granting him primary legal custody. Accordingly, the family court misconstrued the previous order when it stated that it was silent as to final decision-making authority. Nevertheless, the family court awarded Mother primary legal custody based on a finding of a substantial change in circumstances. Therefore, the fact that the family court misconstrued the previous order makes no difference on appeal because the change in primary legal custody, and with it the grant of final decision-making authority, was predicated on a finding of a substantial change in circumstances, not on an interpretation of the previous order. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter."). Accordingly, the family court did not err in awarding final decision-making authority to Mother.

B. *Primary Legal Custody*

Father argues the family court erred in awarding primary legal custody of the children to Mother, asserting the family court failed to consider or improperly considered

[682 S.E.2d 850]

a number of factors in the best interests of the child analysis. Specifically, Father contends the court erred by: determining he excluded Mother from the decision-making process when he held final decision-making authority; failing to take into account Mother left the children alone at home; relying on the report and recommendation of the Guardian; and considering the preference of the oldest child.[8] Lastly, Father alleges his decision-making for the children was proper, and they were doing very well in his care. We disagree.

The paramount and controlling consideration in a custody dispute is the best interests of the child. *Cole v. Cole,* 274 S.C. 449, 453, 265 S.E.2d 669, 671 (1980). The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they affect the child. *Hollar v. Hollar,* 342 S.C. 463, 472-73, 536 S.E.2d 883, 888 (Ct.App.2000). 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, 99, 413 S.E.2d 860, 863 (Ct.App.1992). In sum, the totality of circumstances unique to each particular case constitutes the only scale upon which the ultimate decision can be weighed. *Paparella v. Paparella,* 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct.App.2000).

In order for a court to grant a change in custody, the moving party must demonstrate changed circumstances occurring subsequent to the entry of the order in question. *Kisling v. Allison,* 343 S.C. 674, 679, 541 S.E.2d 273, 275 (Ct.App.2001). 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. *Shirley v. Shirley,* 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct.App.2000). "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." *Latimer v. Farmer,* 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004).

The family court awarded primary legal custody of the children to Mother based on a finding of a substantial change in circumstances. In making this finding, the family court determined the best interests of the children would be served by awarding primary legal custody to Mother. For the reasons set forth below, we believe the family court properly considered the best interests of the children in awarding primary legal custody to Mother.

Initially, even though the previous order granted Father final decisionmaking authority, this power did not excuse him from the responsibility of co-parenting with Mother. Therefore, this was a relevant inquiry in the court's analysis. Contrary to Father's assertions, the family court recounted the episode where the children were left alone while in Mother's care in great detail. We decline to assign additional weight to this incident on appeal as the record merely indicates the children were left alone for a short period of time while they waited for their Father to pick them up. Next, the family court properly considered the oldest child's stated preference to live with Mother in performing the best interests analysis. *See Brown v. Brown,* 362 S.C. 85, 93, 606 S.E.2d 785, 789 (Ct.App.2004) ("In determining the best interests of the child, the court must consider the child's reasonable preference for custody."). At the time of trial, the parties' oldest child was nearly thirteen years-old and by all accounts very mature for her age. Accordingly, the family court properly attached significance to her wishes in awarding custody to Mother. *See Smith v. Smith,* 261 S.C. 81, 85, 198 S.E.2d 271, 274

(1973) ("The significance to be attached to the wishes of the child in a custody dispute depends upon the age of the child and the attendant circumstances.").

Lastly, Father alleges his decision-making for the children was proper, and they were doing very well in his care. However, the record reveals Father made many decisions

[682 S.E.2d 851]

to advance his own interests without regard to how they affected the children. For example, Father continually allowed his girlfriend, Jennifer, to come to his home while the children were there even though this disturbed the oldest child. In addition, he allowed Jennifer to stay at his house past the children's bedtime. Thus, while the children were doing well in school and healthy while in Father's care, we find that the family court properly considered their best interests in awarding primary legal custody to Mother.

C. *Physical Custody*

On cross-appeal, Mother argues the family court erred in awarding both parties joint physical custody of the children without making a finding of extraordinary circumstances. Mother contends it would be in the best interests of the children for sole physical custody to be awarded to her. We disagree.

The family court, although awarding both parties joint physical custody, failed to make a finding of exceptional circumstances to support its decision. *See Patel v. Patel,* 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004) (noting joint custody should only be ordered under exceptional circumstances); *Courie v. Courie,* 288 S.C. 163, 168, 341 S.E.2d 646, 649 (Ct.App.1986) ("Divided custody is avoided if at all possible, and will be approved only under exceptional circumstances."). Absent exceptional circumstances, the law regards joint custody as typically harmful to the children and not in their best interests. *Scott v. Scott,* 354 S.C. 118, 125, 579 S.E.2d 620, 624 (2003).

We believe the exceptional nature of this case demands that we affirm the family court's award of joint physical custody. In this case, a seven year delay occurred between the issuance of the family court's final order, dated December 19, 2002, and oral argument before this panel on March 5, 2009. The reasons for the delay in this case range from the acceptable—Father's bankruptcy proceeding—to the unacceptable—the rash of motions filed by both parties. Since the family court's final order, the children have grown from the ages of five and twelve to the ages of twelve and nineteen. Undoubtedly, many things have changed in the children's lives since 2002. However, the custodial arrangement has remained constant. At this point, we are reluctant to order a change in the custody arrangement based on a record which most certainly has become cold. Accordingly, we affirm the family court's decision to award both parties joint physical custody of the children.

III. SUPPORT

A. *Imputing Income to Mother*

Father argues Mother voluntarily left a job earning $74,000 in Nashville for a low-paying job in Charleston. As a result, Father contends the family court erred in refusing to impute income to Mother. If the court refuses to impute income to Mother based on a finding of voluntary underemployment, Father alleges Mother's income should be increased to reflect the raise she received from her employer, RoHoHo, Inc. We disagree.

"If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent." S.C.Code Ann. Regs. 114-4720(A)(5)

(Supp.2008). A parent seeking to impute income to the other parent need not establish a bad faith motivation to prove underemployment. *Arnal v. Arnal,* 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006). However, the motivation behind any purported reduction in income or earning capacity should be considered in determining whether a parent is voluntarily underemployed. *Id.* "[T]he 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." *Kelley v. Kelley,* 324 S.C. 481, 489, 477 S.E.2d 727, 731 (Ct.App. 1996).

A trial court may relieve a party from a final judgment, order, or proceeding based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). Rule 60(b)(2), SCRCP. The

[682 S.E.2d 852]

motion must be made within a reasonable time and not more than one year after the judgment was entered. Rule 60(b), SCRCP. To obtain relief based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier,* 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2004).

The trial court did not err in refusing to impute income to Mother. The overwhelming evidence reveals the motivating factor prompting Mother's resignation from her job in Nashville was the wishes of the parties' oldest child. *See Kelley,* 324 S.C. at 489, 477 S.E.2d at 731 (noting courts should consider the parties' good-faith and reasonable explanation for the decreased income in determining whether to impute income to the party). Immediately prior to summer visitation with Mother, the children endured a traumatic episode when Father's third wife, Daphne Burns, permanently moved out of Father's residence. Thereafter, upon arriving in Nashville, the parties' oldest child begged Mother to return to Charleston, and Mother did so. Once she returned to Charleston, Mother found her employment opportunities in the field of health-care finance remained non-existent in the Charleston area. Because of this, Mother earns significantly less in Charleston than she earned in Nashville. Nonetheless, before arriving in Charleston and up to the time of trial, Mother searched and continued searching for a financial management position in the area by soliciting the service of head-hunting agencies, sending out numerous job applications, looking through employment advertisements in the newspaper, and networking with friends. Based on these facts, we conclude that Mother was not voluntarily underemployed. Consequently, we do not believe the family court erred in refusing to impute income to Mother.

In addition, we do not believe the family court erred in denying Father's motion to increase Mother's income from $26,000 to $31,200 based on newly discovered evidence. We believe Father could have, through the exercise of due diligence, discovered Mother's raise in time to move for relief pursuant to Rule 59. *See* Rule 60(b)(2), SCRCP (stating a party cannot obtain relief from a final judgment based on newly discovered evidence if the evidence could have been discovered through the exercise of due diligence in time to move for a new trial under Rule 59(b)); *Lanier,* 364 S.C. at 220, 612 S.E.2d at 460 (defining due diligence as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."). In this case, the trial ended on September 22, 2002. In November 2002, Mother received a raise from her employer. On December 19, 2002, the

family court issued its amended final order. Thus, the evidence of Mother's raise was in existence during the time period in which Father could have sought relief pursuant to Rule 59. *See* Rule 59(b), SCRCP (noting in non-jury actions, a party has ten days after the receipt of written notice of the entry of judgment to serve a motion for a new trial). On appeal, Father fails to offer any reason why Mother's raise could not have been discovered during this time. In fact, on January 17, 2003, Father ultimately discovered Mother's raise by subpoena of loan documents prepared by Mother in November 2002. Therefore, the family court properly denied Father's motion for relief from judgment based on newly discovered evidence.[9] *See State v. Mercer,* 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (noting our jurisprudence recognizes the gatekeeping role of the trial court in determining the credibility of post-trial motions); *State v. Pierce,* 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) ("The credibility of newly-discovered evidence offered in support of a motion for new trial is a matter for determination by the circuit judge to whom it is offered.").

[682 S.E.2d 853]

B. *Imputing Income to Father*

The family court concluded Father earned $7,500 per month in gross income, exclusive of additions for in-kind benefits received by Father. Father asserts the family court committed several errors in arriving at this figure. First, because his income varies from month to month, Father alleges the family court erred by using his highest-ever eight month income, the $6,000 a month he withdrew from his law practice in 2002, as a base-line figure for its child support calculations. Instead, Father asserts his income should have been averaged over a longer period of time. Additionally, Father claims the family court erred in determining the $6,000 per month he withdrew from his law firm in 2002 represented only 80% of his gross income for that year. According to Father, this error caused the family court to conclude his gross income equaled $7,500 per month (80% of $7,500 = $6,000).

"Child support awards are within the sound discretion of the trial judge and, absent an abuse of discretion, will not be disturbed on appeal." *Mitchell v. Mitchell,* 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). An abuse of discretion occurs when the court's decision is controlled by some error of law or where the order, based upon the findings of fact, is without evidentiary support. *Kelley,* 324 S.C. at 485, 477 S.E.2d at 729. Ordinarily, the family court determines income based upon the financial declarations submitted by the parties. S.C.Code Ann. Regs. 114-4720(A)(6) (Supp.2008). However, where the amounts reflected on the financial declaration are at issue, the court may rely on suitable documentation to verify income, such as pay stubs, receipts, or expenses covering at least one month. *Id.* The Child Support Guidelines specifically address how to determine income from someone who is self-employed:

> For income from self-employment . . . gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. . . . However, the court should exclude from those expenses amounts allowed by the Internal Revenue Service for accelerated depreciation of investment tax credits for purposes of the guidelines and add those amounts back in to determine gross income. In general, the court should carefully review income and expenses from self-employment . . . to determine actual levels of gross income available to the parent to satisfy a child support obligation. As may be apparent, this amount may differ from the

> determination of business income for tax purposes.

S.C.Code Ann. Regs. 114-4720(A)(4) (Supp. 2008).

Based on the evidence submitted at trial, the family court did not abuse its discretion in determining Father's gross income. The evidence presented at trial and Father's own testimony revealed his 2001 financial declaration did not accurately reflect his gross income for that year. In his 2001 financial declaration, Father reported withdrawing an average of $3,600 per month from his law firm from January 1 through October 31. While this amount was accurate for the ten-month period, Father withdrew $17,000 from his law firm during the remaining two months of 2001. Thus, his total withdrawals from his law firm equaled $53,000 for 2001. His corporate income tax return revealed his law firm earned $66,372 for that same year. During cross-examination, Father admitted "the best documentation of my income for the year 2001 would be the preliminary tax returns that were prepared for the year 2001." For 2002, Father produced only a financial declaration as evidence of his gross income for that year. In that document, Father claimed to withdraw an average of $6,000 a month from his law firm from January 1 through August 31.

By the end of trial, a few things were apparent. First, by virtue of his testimony and the evidence presented at trial, Father vastly understated his gross income in his 2001 financial declaration. This fact necessarily called into question the veracity of his 2002 financial declaration. Second, the amount of money Father withdrew from his law firm in 2001, $53,000, represented about 80% of what he claimed to be his true gross income for that year, $66,372, as evidenced by his 2001 corporate income tax return.

[682 S.E.2d 854]

Third, Father's 2001 corporate income tax return served as the only credible evidence to demonstrate his gross income. Still, the family court was faced with the difficult task of determining Father's current gross income, and the only evidence depicting his gross income for the current year was his 2002 financial declaration. To determine Father's current gross income, the family court relied on the historical relationship between Father's 2001 withdrawals and his 2001 corporate income tax return. From this evidence, the family court determined Father's withdrawals amounted to only 80% of his actual gross income for that year (80% of $66,372 = $53,097.60). Thus, when Father claimed to withdraw an average of $6,000 a month from his law firm from January 1, 2002 through August 31, 2002, the family court, operating under the assumption that this amount equaled only 80% of his income, concluded Father's gross income totaled $7,500 per month (80% of $6,000 = $7,500).

The family court relied on the lone piece of credible evidence, Father's 2001 financial declaration, in determining Fathers income for child-support purposes. We cannot conclude the family court abused its discretion in making this determination. *See Kelley,* 324 S.C. at 485, 477 S.E.2d at 729 (stating an abuse of discretion occurs when the court's decision is controlled by some error of law or where the factual findings are without evidentiary support). In addition, Father only provided the court with a financial declaration to evidence his current income for 2002. Father's testimony and the evidence presented at trial demonstrated his 2001 financial declaration understated his income for that year. Thus, the veracity of his 2002 financial declaration was also called into question.[10] As a result, Father's refusal to provide the family court with a meaningful representation of his current income precludes him from complaining of the family court's ruling on appeal. *See Patrick v. Britt,* 364 S.C. 508, 513, 613 S.E.2d 541, 544 (Ct.App.2005) (affirming the family court's determination of Father's income where he

refused to provide the court with any meaningful representation of his current income). Lastly, even if the family court erred in determining Father's gross income, such error was caused by Father's failure to provide the court with accurate financial information. *See Cox v. Cox,* 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct.App. 1986) ("A party cannot complain of an error which his own conduct has induced."). Accordingly, we affirm the family court's decision to impute income to Father.

C. *Father's Expenses*

Father argues the family court improperly added ordinary business expenses to his gross income. Specifically, Father claims the court erred in adding $7,884.37 worth of automobile expenses, $1,960 in parking expenses, and $2,400 in annual debt repayment from Daphne Burns to his gross income.

The court should count as income expense reimbursements or in-kind payments received by a parent from self-employment if they are significant and reduce personal living expenses, such as a company car, free housing, or reimbursed meals. S.C.Code Ann. Regs. 114-4720(A)(3)(c) (Supp.2008).

The family court correctly determined Father's vehicle expenses for 2001 totaled $7,884.37. Initially, Father contends he reported his vehicle expenses of $2,462.95 as gross income in his 2001 corporate income tax return; therefore, he asserts the family court erred in adding this amount back to his gross income. Father fails to cite to a specific page in his corporate income tax return to support his argument. Moreover, after reviewing the record, we have been unable to find where Father listed this amount as income on his tax return. Accordingly, we conclude this evidence does not appear in the record and cannot be considered on appeal. *See* Rule 210(h), SCACR (stating an appellate court may not consider a fact which does not appear in the record).

[682 S.E.2d 855]

Next, Father argues his 2001 lease payments equaled $4,428, and his total vehicle expenses amounted to $7,037, not $7,884.37 as set forth by the family court. No evidence in the record shows the amount of lease payments paid by Father. Instead, Father has "automobile expenses" itemized as an expense in the amount of $7,884.37. Assuming Father is correct, automobile expenses, not just lease payments, paid by his law firm on his behalf would still qualify as in-kind income and would be subject to imputation as gross income. If the family court erred by using the term "lease payments" in lieu of the term "automobile expenses," the error is without consequence. *See McCall,* 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter."). While Father's Form 2106-EZ indicates his total vehicle expenses for 2001 were $7,037, Father, in another piece of evidence, acknowledges his vehicle expenses for the same year totaled $7,884.37. In light of the contradictory evidence submitted by Father to the family court, we cannot conclude the family court erred in determining his vehicle expenses for 2001 equaled $7,884.37. Moreover, Father's Form 2106-EZ appears only as an attachment to his Rule 59(e) motion. Accordingly, it cannot be considered on appeal. *See Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Therefore, the family court properly added $7,884.37 to Father's gross income.

However, the family court erred in adding Father's parking charges to his gross income. The record reveals Father's law firm spent $1,960 annually so he could park his car downtown near his office. Unlike an automobile, a parking space for work qualifies as an ordinary and necessary business expense and is properly deductible from the gross receipts of Father's business. *See* S.C.Code Ann. Regs. 114-4720(A)(4) (noting a self-

employed parent's gross income for child support purposes equals gross receipts minus ordinary and necessary expenses required for business operation). Additionally, the family court erred in counting the $2,400 Father received from his former wife, Daphne Burns, as income. Father's amended financial declaration specifically notes this money was for repayment of a debt. We do not believe payment received in satisfaction of a debt qualifies as gross income under the child-support guidelines. On remand, these expenses should be deducted from Father's gross income, and the family court should recalculate child support pursuant to this order.

D. *Reimbursement of Child Support Paid By Mother*

On cross-appeal, Mother argues Father understated his income at the temporary hearing before Judge Segars-Andrews in 2001. As a result, Mother claims Father should reimburse the $6,000 she paid in child support pursuant to the temporary order. We disagree.

Mother never raised a claim for retroactive reimbursement of child support at trial and presented this argument to the court for the first time during her post-trial motions pursuant to Rule 59 and Rule 60. Accordingly, Mother's arguments are not preserved for appellate review. *See Hickman,* 301 S.C. at 456, 392 S.E.2d at 482 ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not").

IV. FEES

A. *Guardian ad Litem Fees*

Father argues the family court erred in relying on the Guardian's report and recommendation. Father contends the Guardian conducted her investigation in a biased manner. In addition, Father claims the Guardian's report was incomplete because it failed to include a custody recommendation. Because her report was flawed, Father contends the issue of Guardian's fees should be remanded to the family court. We disagree.

In *Patel v. Patel,* the Supreme Court of South Carolina set forth base-line standards a Guardian should follow in developing a recommendation to the family court. 347 S.C. 281, 288-89, 555 S.E.2d 386, 390 (2001). Pursuant to *Patel,* the Guardian shall:

[682 S.E.2d 856]

> (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; 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.[11]

Id.

Father's arguments are not preserved for appeal. While Father complained of the Guardian's bias during his testimony, he never made a motion to relieve the Guardian of her duties based on bias.[12] *See Pye v. Estate of Fox,* 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (stating issues not raised and ruled upon in the trial court will not be considered on appeal). In addition, Father never asserted the Guardian's report was incomplete or otherwise objected to her report because it lacked a recommendation. *See Webb v. CSX Transp., Inc.,* 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (noting a contemporaneous objection is required to preserve issues for appellate review). Accordingly, these arguments are not preserved for appellate review. Therefore, we affirm the family court's award of fees to the Guardian.

B. *Attorney's Fees*

Father argues the family court erred in awarding attorney's fees to Mother. In the alternative, Father asserts that the amount of attorney's fees awarded were excessive. We disagree.

"The award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion." *Upchurch v. Upchurch,* 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006). In awarding 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 fee on each party's standard of living. *E.D.M. v. T.A.M.,* 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorney's fees to award, the court should consider the: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. *Glasscock v. Glasscock,* 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court did not err in awarding $43,675 in attorney's fees to Mother. Contrary to Father's assertions, Mother obtained beneficial results both at the temporary hearing and at trial. At the temporary hearing, Judge Segars-Andrews reduced Mother's child support payments by 50% and awarded her overnight visitation with the children one day a week and on every other weekend. Before the temporary hearing, the visitation schedule in effect was established based on Mother's residence in Nashville. Consequently, the visitation schedule did not allow Mother to see the children on a weekly basis. At trial, Mother received additional beneficial results in gaining joint physical custody of the children, primary legal custody of the children, and child support from Father.[13] Accordingly, Mother obtained beneficial

[682 S.E.2d 857]

results at trial.[14]

Next, Father contends the amount of attorney's fees awarded were excessive in light of his income. Typically, we would be very concerned by an award of attorney's fees representing approximately 40% of Father's annual income. *See Rogers v. Rogers,* 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) (reversing the family court's award of attorney's fees where the award represented 16% of Mother's annual income, and some of the beneficial results obtained by Mother in the litigation were reversed on appeal). However, in this case, the family court based its award of attorney's fees, not only on the factors set forth in *Glasscock,* but also on Father's uncooperative conduct in discovery and his evasiveness in answering questions with respect to his financial situation. A review of the record reveals that Father's

uncooperative conduct greatly contributed to the litigation costs associated with this action. During discovery, Father failed to respond to basic requests for production of documents on two occasions. In both instances, Father's obstructionist tactics caused Mother to incur the unnecessary expense of drafting motions and attending court proceedings. To compound matters, Father gave evasive answers to questions about his finances. At one point during cross-examination, Father answered that he could not remember how much money he withdrew from his law firm in 2001. Taking into account that Father's uncooperative conduct greatly increased the cost of litigation, we affirm the family court's award of $43,675 in attorney's fees to Mother. *See Donahue v. Donahue,* 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (holding husband's lack of cooperation serves as an additional basis for the award of attorney's fees); *Anderson v. Tolbert,* 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct.App.1996) (noting an uncooperative party who does much to prolong and hamper a final resolution of the issues in a domestic case should not be rewarded for such conduct).

V. RELIEF FROM DISCOVERY/EX PARTE ORDERS

Mother asks us to vacate discovery orders from seven years ago, and an ex parte order, which Father and the judge who issued it, acknowledge is moot. We decline to do so because such an order from this court would have no practical legal effect. *See Byrd v. Irmo High Sch.,* 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (noting an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy). Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

PIEPER, J., and LOCKEMY, J., concur.

Notes:

1. The specialization required in her field of health-care finance did not translate to other finance positions.

2. Despite Daphne's transient living arrangement, the children maintained a "very close" relationship with her.

3. Mother bought her own home approximately a month later.

4. Under the 1999 order, visitation consisted of monthly weekend visitations and longer periods of visitation during the summer and on school vacations. The 1999 order did not include a normal weekly sharing of custody between the parties due to the distance between their residences.

5. Father had not discussed with Mother what plans she had for the children after school registration. Therefore, his statement that they were to be left alone "all day" is speculative. However, it is accurate to say the children were left alone for about an hour from the time Mother left for work until Father picked up the children.

6. Although the Guardian requested that both parties provide her with a written list of witnesses to interview, neither party did so.

7. At trial, Father admitted withdrawing $53,000 from his law firm in 2001. By contrast, his 2001 corporate income tax return reported his income for the year equaled $66,372.

8. We note that Father's argument concerning the family court's reliance on the Guardian's report and recommendation is not preserved for appellate review. This issue is addressed directly under the "Fees" section of this opinion.

9. In his Rule 60(b)(2) motion, Father also sought relief from judgment because Mother

moved from her residence and continued to leave the children alone at home. We believe the family court acted within its discretion in refusing to grant Father relief on these grounds.

10. This is not the first time Father has failed to provide candid financial information to the family court. During a hearing before the office of disciplinary counsel, Father acknowledged he did not make full financial disclosure when initially seeking a divorce from Mother. *See In re Barker,* 352 S.C. 71, 74, 572 S.E.2d 460, 461 (2002) (suspending Father from the practice of law for six months).

11. We note the statutory Guardian ad Litem guidelines only apply to guardians appointed on or after January 15, 2003. *Nasser-Moghaddassi v. Moghaddassi,* 364 S.C. 182, 193-94, 612 S.E.2d 707, 713 (Ct.App.2005). The Guardian in this case was appointed on November 13, 2001. Consequently, *Patel* and its progeny control.

12. Father's lone motion to relieve the Guardian was on the basis of her move to Washington.

13. On appeal, Father claims Mother failed to obtain beneficial results at trial because she received no more than Father offered in settlement negotiations—joint physical custody of the children. While we disagree with Father's argument, we also note that statements made during settlement negotiations are inadmissible. *See* Rule 408, SCRE ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible.").

14. In addition, we note that this controversy between Mother and Father developed into a highly contentious litigation. In the end, the trial lasted for five full days. During this time, twenty-one witnesses were called, and sixty-four exhibits were presented to the court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frederick Charles Tranfield, Appellant,

v.

Lilly Sophia Tranfield, Respondent.

Appellate Case No. 2015-002357

Appeal From Charleston County
Jack A. Landis, Family Court Judge
Daniel E. Martin, Jr., Family Court Judge

Unpublished Opinion No. 2018-UP-348
Heard June 6, 2018 – Filed August 1, 2018

AFFIRMED AS MODIFIED

Chris Paton, of Chris Paton LLC, of Mount Pleasant, and Courtney Wall Kerce, of Payne Law Firm, LLC, of Daniel Island, for Appellant.

Gregory Samuel Forman, of Gregory S. Forman, PC, of Charleston, for Respondent.

PER CURIAM: Frederick Tranfield (Father) appeals the ruling of the family court awarding custody of his two minor children to their Mother, Lilly Tranfield. Father argues the family court erred in: (1) awarding sole custody of the children to Mother

and restricting his visitation; (2) delegating authority to his therapist to determine visitation restrictions; (3) ordering he undergo a psychosexual evaluation; (4) awarding alimony; (5) incorrectly apportioning the parties' debts and assets; (6) awarding Mother attorney's fees; (7) restraining his speech; and (8) ordering support to be paid through income withholding. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Father and Mother met in California and married in May 2002 in Hawaii. They have two children—a girl (Daughter) born in August 2003 and a boy (Son) born in May 2005. The children were born in Japan and the parties adopted many Japanese cultural practices that they continued to abide by once they returned to the United States, including communal bathing and sleeping in the same room. The family moved to Charleston, South Carolina, in 2008. Once in Charleston, Father became the breadwinner, and Mother stayed at home and taught both children. Father worked as a freelance web designer, eventually working for Blue Acorn.[1]

In September 2012, Father peered over Mother's shoulder and noticed Mother emailing a friend about her "crush" on Daughter's ballet teacher.[2] The crush did not develop into anything further. Father confronted Mother about the email, and the two attended counseling in an attempt to save the marriage. But counseling failed to mend the growing chasm dividing the family due, in large part, to Father's bizarre behavior. As an example, Father brought the family's outdoor security camera indoors to film Mother over fears of "covert behavior" in October 2012, for a period of three to four months.[3] Mother eventually expressed displeasure being filmed and asked Father to stop. Father complied but resumed filming one week later. He stopped filming when a friend indicated the behavior was "creepy." Later, in December 2012, an altercation occurred between Mother and Father, terminating when Father forcefully grabbed Mother's arm and stated they were going to get a divorce. Mother fled and hid in the bathroom, while the children cried. In an effort

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[1] Father was terminated from Blue Acorn in June 2016. Father has since found similar employment.

[2] Many have described Daughter as a ballet prodigy, having skills far exceeding others her age.

[3] Previously, in 2010, Father had used the outdoor camera indoors to film Mother home schooling the children. Father compiled a list of "healthy requests" for Mother's parenting and intended to review the videos with Mother. However, after Mother refused to review the videos, Father placed the camera outdoors again.

to resolve the dispute, Father required the family to hold hands in a circle and told the children Mother was mentally ill.

Mother eventually asked Father for a divorce in January 2013. In early 2013, based on the advice of counsel and a therapist, the family ceased communal bathing and sleeping as well as using the bathroom with the door open. The couple continued to live together, in separate rooms, because Mother did not have money to find another place to live. After Mother asked for a divorce, Father's relationship with Son remained mostly normal, but his relationship with Daughter became strained—she became rigid and angry towards him. In March 2013, while attempting to ease Daughter's tantrum, Father pinned her to her bed and would not let her up until she calmed down. Mother was present and filmed the event on her phone. Around the same time, Father emailed the family's therapist, admitting making many parenting mistakes. In the email, Father indicated he had told the children the following inappropriate information: Mother had a mental sickness, Mother's father went to jail for beating Mother's sister, Mother's father abused Father, and Mother's sister killed herself. Father also stated he had suggested taking away Daughter's dance classes as a consequence of her acting out towards him.

The parties finally separated in June 2013 and have lived in separate households since. In July 2013, shortly after Mother moved out, Father filed a complaint against Mother seeking, among other things, temporary relief, sole custody of Daughter and Son, child support, equitable division, and attorney's fees. Mother answered Father's suit and counterclaimed, also seeking sole custody of the children, child support, alimony, equitable division, and attorney's fees.

In lieu of a hearing on Father's motion for temporary relief, the parties submitted an agreement resolving the temporary issues, which the family court adopted on September 16, 2013. The parties temporarily agreed to share joint custody of the children, with Mother having primary physical and legal custody. Although Mother retained ultimate decision-making authority, Mother agreed to consult Father regarding major decisions affecting the children. Father had custody of Son on alternating weeks, whereas Father had custody of Daughter only every other weekend. The children were also scheduled to attend public school so Mother could seek employment. Additionally, the parties agreed Father would pay Mother $2,600 in unallocated support every month beginning in August 2013 until the family court could determine alimony and child support after a final hearing.

The agreement also set a schedule the parties were to adhere to prior to reaching any final agreement regarding custody and visitation—providing dates for

the appointment of a Guardian ad Litem and mandatory mediation. While the parties attempted to resolve their disputes, Father's bizarre behavior continued. In October 2013, in response to Daughter's behavior towards him, Father told her he was concerned she would grow up to cut herself, as in self-mutilation. Father's visitation with Daughter was suspended for three months as a result. Another incident occurred after visitation was reinstated. While disciplining Daughter, Father forcefully grabbed her arm and pulled her up the stairs. When Daughter told Father he was hurting her, Father called Daughter a liar. As a result, a no-contact order was issued, restraining the parties from physically disciplining the children.

Mother and Father were unable to resolve their disputes. After failed mediation, multiple increases in Guardian ad Litem fees, a Rule to Show Cause, and other incidents of Father's bizarre behavior, the family court conducted a five-day final hearing in December 2014. In its order, the family court equitably divided the parties' assets and debts, granted Mother spousal support, and gave Mother sole custody of the children. The family court granted Father supervised visitation and required him to pay child support, undergo a psychosexual evaluation, and pay Mother's attorney's fees. A divorce was granted on the ground of separation for one year. Father filed a motion for reconsideration, which the family court denied. Subsequently, upon motion by Mother, the clerk of court issued an income withholding order to garnish Father's wages to pay his support obligations. Father appealed both the final divorce order and income withholding order, and the appeals were consolidated.

ISSUES ON APPEAL

1. Did the family court err in awarding custody to Mother, with Father having only limited and supervised visitation?

2. Did the family court err in delegating its authority concerning visitation to Father's therapist?

3. Did the family court err in ordering Father to undergo a psychosexual evaluation after issuance of the final order?

4. Did the family court err in awarding permanent periodic alimony?

5. Did the family court err in apportioning the parties' marital assets and debts?

6. Did the family court err in requiring Father to pay a $50,000 fee award?

7. Did the family court err in restraining Father's speech?

8. Did the family court err in ordering support be paid through income withholding?

STANDARD OF REVIEW

"[T]he proper standard of review in family court matters is de novo . . . ." *Stoney v. Stoney*, Op. No. 27758 (S.C. Sup. Ct. filed April 18, 2018) (Shearouse Adv. Sh. No. 16 at 11); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). When the "evidence is disputed, the appellate court may adhere to the findings of the [family court, which] saw and heard the witnesses." *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). "On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion." *Urban v. Kerscher*, Op. No. 5560 (S.C. Ct. App. filed May 23, 2018) (Shearouse Adv. Sh. No. 21 at 90).

LAW/ANALYSIS

I. Child Custody and Visitation

The family court awarded sole custody of the children to Mother, granting Father supervised visitation. Father argues the legislature's amendment of the Children's Code—specifically, section 63-15-230 of the South Carolina Code (2012)—eliminated the "exceptional circumstances" requirement for awarding joint custody. In the alternative, Father argues he has met the standard of exceptional circumstances, warranting an award of joint custody. We disagree.

The polestar in all child custody determinations is the best interests of the child. *Lewis v. Lewis*, 400 S.C. 354, 364, 734 S.E.2d 322, 327 (Ct. App. 2012). Although the family court has authority to order, and must consider, joint custody when requested, joint custody should be awarded only when exceptional circumstances show the arrangement is in a child's best interest. *Clark v. Clark*, Op.

No. 5558 (S.C. Ct. App. filed May 2, 2018); *see* S.C. Code Ann. § 63-3-530(A)(42) (2010) (stating the family court has jurisdiction to order joint custody when "the court finds it is in the best interests of the child"); S.C. Code Ann. § 63-15-230(C) (Supp. 2017) ("If custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody, and, in its final order, the court shall state its determination as to custody and shall state its reasoning for that decision."). "[O]ur courts are particularly reluctant to award joint custody between estranged and quarrelsome parents." *Lewis*, 400 S.C. at 367, 734 S.E.2d at 328–29. Exceptional circumstances are present and may warrant an award of joint custody when there is "the potential for the custodial parent to effectively alienate [the child] from the non-custodial parent" in a sole custody arrangement. *Scott v. Scott*, 354 S.C. 118, 126, 579 S.E.2d 620, 624 (2003).

Here, pursuant to our de novo review, we find exceptional circumstances are not present and, thus, the family court properly awarded Mother sole custody of the children. The record is replete with instances of Father's bizarre behavior negatively affecting the children; more so Daughter—driving a wedge in their relationship and resulting in Daughter's recalcitrance towards Father. Additionally, Father told the children inappropriate information and repeatedly asserted Mother had a mental illness. Although Father's relationship with Son is not as strained as his relationship with Daughter, the Guardian ad Litem expressed concerns about Son witnessing conflicts between Daughter and Father, and Dr. Kay McNeill—the family's psychologist—testified that Son felt Father was being mean to Daughter.

Regarding parental alienation, there is no evidence that Mother, as the custodial parent, will endeavor to alienate Father from either of the children. As the family court noted, Father has maintained a position that Mother alienated Daughter from him and that is why his relationship with Daughter degraded. Dr. Davis Henderson, the children's previous psychologist, told Father that Mother was not alienating Daughter from him. Yet Father wrote Daughter's ballet teachers telling them parental alienation had been confirmed by a psychologist. Father continued with his assertion and even retained an expert on parental alienation during litigation in an effort to prove his theory. However, Father chose not to have that expert testify at the final hearing.

Father's behavior and the particularly quarrelsome nature of the parties' divorce leads us to conclude that awarding joint custody would not be in the children's best interests. Therefore, we affirm the award of sole custody.

Regarding visitation, Father argues the family court should not have *sua sponte* required his visitation with the children to be supervised, i.e., requiring a supervising party to be within sight and sound of Father and the children at all times during visitation. We disagree.

First, the family court has authority to grant relief not requested when issues are tried by implied consent. *See McComb v. Conard*, 394 S.C. 416, 426, 715 S.E.2d 662, 667 (Ct. App. 2011) (finding the family court had authority to restrain the parents from having their child "overnight in the presence of an adult of the opposite sex who was not related by blood or marriage," even though no party requested the restraint, because concerns were raised during trial regarding the child being in the presence of opposite-sex adults not related by blood or marriage). Second, the family court may impose restrictions and conditions on a non-custodial parent's visitation privileges the court believes are proper. *Frye v. Frye*, 323 S.C. 72, 76, 448 S.E.2d 586, 588 (Ct. App. 1994). Similar to custody determinations, the welfare of the child is paramount when determining visitation rights. *Nash v. Byrd*, 298 S.C. 530, 536, 381 S.E.2d 913, 916 (Ct. App. 1989). "The privilege of visitation must yield to the best interests of the children and may be denied or limited if the best interests of the children will be served thereby." *Frye*, 323 S.C. at 76, 448 S.E.2d at 588.

Here, despite neither party requesting supervised visitation, concerns were raised during the final hearing regarding Father's bizarre behavior and how that behavior has impacted the children. For example, in October 2013, in response to Daughter's behavior toward Father, Father told Daughter he was concerned she would grow up to cut herself—as in self-mutilation—and visitation was suspended for three months as a result. After visitation was reinstated, Father grabbed Daughter's arm and pulled her up the stairs in an attempt to discipline her. Father's recollection was that he guided Daughter up the stairs but Daughter had a different view—she repeatedly told Father he was hurting her arm, and Father called her a liar. Although Father's relationship with Son was not as strained as his relationship with Daughter, there were concerns of Son being forced to act as a peacemaker during visits with Father and Daughter.

Given the concerns raised at the final hearing over Father's bizarre behavior towards Daughter and the effect of that behavior on Son, we find the family court did not err in *sua sponte* placing sight and sound restrictions on Father's visitation. Additionally, although Father's behavior towards Son was not as troubling, treating the children equally would be in their best interests. Disparate application of the

sight and sound restrictions could further strain the relationship between Daughter and Father.

II. Delegating Visitation

After granting Father supervised visitation, the family court found that the supervision restriction could be lifted in either of two ways after Father received the results of the psychosexual evaluation—(1) either party could request a modification, or (2) Father's therapist and Daughter's therapist could agree that supervision was no longer needed. Father argues the family court erred in delegating authority regarding visitation to the two therapists.

Family courts should not delegate authority regarding custody or visitation decisions. *Hardy v. Gunter*, 353 S.C. 128, 138, 577 S.E.2d 231, 236 (Ct. App. 2003); *Stefan v. Stefan*, 320 S.C. 419, 422, 465 S.E.2d 734, 736 (Ct. App. 1995). "[I]t is the family court [that] is charged with the authority and responsibility for protecting the interest of minors involved in litigation, not the guardian or any other person whom the court may appoint to assist it." *Hardy*, 353 S.C. at 138, 577 S.E.2d at 236 (quoting *Stefan*, 320 S.C. at 422, 465 S.E.2d at 736); *id.* ("We caution family court judges ***NOT*** to delegate *any* responsibility to a guardian in regard to visitation of children with parents." (emphasis in original)).

We find the family court improperly delegated its authority to the two therapists because the language in the order indicates the supervision restriction can be lifted by the therapists without any action by the family court. Thus, the family court has delegated *some* responsibility to determine visitation. As a remedy, we modify the order's language to clarify that the two therapists can recommend to the family court the supervision restriction be lifted but the family court, as protector of the children's interests, has sole authority to determine whether circumstances warrant lifting the restriction.

III. Father's Psychosexual Evaluation

Father argues the family court erred in ordering him to undergo a psychosexual evaluation. We disagree.

A family court has jurisdiction "to order either before, during, or after a hearing a mental, physical[, or] psychiatric examination as circumstances warrant." S.C. Code Ann. § 63-3-530(A)(26) (2010); *see Nash*, 298 S.C. at 536–37, 381 S.E.2d at 917 (finding the family court did not err in suspending a father's visitation

privileges until he underwent counseling because, among other things, the father refused to work to resolve visitation conflicts). Additionally, a family court has "wide latitude to take whatever actions it deems necessary in the best interest of [a] child." *Watson v. Poole*, 329 S.C. 232, 240, 495 S.E.2d 236, 240 (Ct. App. 1997). In *Watson*, a mother contended the family court erred in requiring exclusive use of her child's prior therapist and prohibiting further therapy by additional therapists. *Id.* This court affirmed, agreeing with the family court's limitations because the child's mother had shuttled the child to multiple doctors and therapists for sexual abuse evaluations—in an attempt to prove unfounded sexual abuse allegations against the father—having devastating effects on the child. *Id.* at 240, 495 S.E.2d at 240–41.

We find the family court did not err by requiring Father to obtain a psychosexual evaluation. The family court was especially cognizant of the best interests of the children. At the hearing on Father's motion for reconsideration, the family court explained it was alarmed at Father's insistence on engaging in behavior that made Daughter uncomfortable. Expert testimony established that Daughter had become uncomfortable with communal bathing. The family court was also concerned with an incident at a dance exhibition—Father wanted access to the general dressing room with Daughter but was denied because multiple young girls were using it, and Father created a scene when he was denied. The family court stated it had "to err on the side of caution when it [came] to the well[-]being of the children" and thought the evaluation was a reasonable requirement. We find the family court was within its authority to order Father to submit to the evaluation.

IV. Alimony Award

The family court awarded wife the following permanent periodic alimony: beginning January 1, 2015, $1,250 every month for the following twelve months and, beginning January 1, 2016, $750 every month. Father argues the alimony award is excessive and should be reduced. Specifically, Father contends the court erred in failing to consider "the overall financial situation of the parties [and] the ability of the supporting spouse to pay."

"In proceedings for divorce . . . the court may grant alimony . . . in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just . . . ." S.C. Code Ann. § 20-3-130(A) (2014). "Alimony is a substitute for the support [that] is normally incident to the marital relationship." *Johnson v. Johnson*, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "If a claim for alimony is well founded, the law favors the award of permanent, periodic alimony." *Id.* at 301, 372 S.E.2d at 114.

The family court must consider and give as much weight as it finds appropriate to the thirteen factors in section 20-3-130(C) of the South Carolina Code (2014). The family court is not required to specifically evaluate each and every factor, just the relevant factors. *King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009). The three most "important factors in awarding periodic alimony are (1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other." *Id.* at 141, 681 S.E.2d at 613 (quoting *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004)).

Here, Father's first financial declaration, filed in December 2014, showed he had $5,130 in gross monthly income, $3,626.28 after deductions, and monthly expenses of $6,278.11. Father's third financial declaration, filed after the divorce in May 2015, showed $6,446.68 in gross monthly income, $4,650.46 after deductions, and $4,415.67 in monthly expenses. Mother's financial declaration, filed December 2014, showed $500 in gross monthly income and $5,691 in expenses. However, the parties acknowledged Mother had an annual earning capacity of $30,000, which would equate to $2,500 in gross monthly income.

We find the family court did not err in the amount it awarded Mother in permanent, periodic alimony. In its order denying Father's motion for reconsideration, the family court noted that Father earns twice what Mother is capable of earning and that Mother had not been working for an extended period of time because she cared for and taught the children. Additionally, in making his excessive-alimony argument to the family court, Father failed to consider that he can deduct alimony from his taxes while Mother must pay taxes on the alimony. Further, Father's financial declaration listed two voluntary contributions and failed to account for a reduction in his financial responsibilities as a result of the divorce—including no longer being responsible for Mother's car insurance, health insurance, and expenses related to the children. The reduction of expenses is apparent when comparing Father's first and third financial declarations—his monthly expenses reduced from $6,278.11 to $4,415.67. Essentially, Father and Mother have similar monthly expenses yet Father makes more than twice as much as Mother. To balance this disparity and give Mother time to achieve her $30,000 earning capacity, the family court awarded Mother alimony of $1,250 per month for the first year and $750 per month thereafter. Therefore, we find Father has not carried his burden of establishing that the preponderance of the evidence shows the family court's award of alimony is excessive.

Furthermore, we find the cases cited by Father—*Dickert v. Dickert*, 387 S.C. 1, 691 S.E.2d 448 (2010) and *Wannamaker v. Wannamaker*, 395 S.C. 592, 719 S.E.2d 261 (Ct. App. 2011)—are distinguishable. The standard of living established in *Dickert* far exceeded the standard of living established in this case and no children were born of the marriage in *Wannamaker*.

V. Equitable Apportionment

In apportioning the couple's assets and debts, the family court relied on the Marital Asset Addendum filed by Mother, finding it was "the clearest evaluation of the marital assets and debts that was presented at trial." Father asserts the family court erred in equitably distributing the parties' property. Father takes issue with the court's valuation of the following assets and debts: (1) Toyota Sienna, (2) 2013 tax debt, and (3) Schwab account. We will address each asset and debt below.

Toyota Sienna

The Addendum listed the value of the Toyota Sienna at $10,000. Father argues the vehicle was subject to a loan of $3,300, which was not factored into the vehicle's value. In his reply brief, Father argues "the value of the vehicle should have been reduced by around [$3,000]." Therefore, Mother shares $1,500 of the debt. Mother agrees that the vehicle was subject to a loan and its value should be reduced, but argues the valuation by the family court was within the family court's discretion. Because our standard of review is de novo and both parties agree the Toyota Sienna was subject to a loan, we find the loan should be accounted for to reduce the value of the marital estate. Further, we find the value should be reduced by the amount suggested by Father in his reply brief, $3,000. Therefore, the value of the marital estate, as listed in the Addendum, should be reduced from $19,833.15 to $16,833.15.

2013 Taxes

The family court recognized the parties would file taxes separately for 2013 and required each party to be responsible for their own 2013 tax debt. The family court also required Father to pay all of 2012's tax debt. Father argues half of the 2013 tax debt, $3,000, is marital because the divorce action was filed in July 2013 and, therefore, Mother is responsible for $1,500 of 2013's tax debt.

We find this argument is not preserved because the family court did not rule on the marital character of 2013's tax debt and Father did not request a ruling on the

marital character of 2013's tax debt in his Rule 59(e), SCRCP, motion. *See Bodkin v. Bodkin*, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010) (finding a husband's argument that the family court did not consider the tax consequences to him when dividing the marital property was not preserved because the family court did not rule on the issue and the husband failed to raise it in a Rule 59(e) motion).

Schwab Account

The Addendum listed the Schwab account's value at $20,151.49. The Addendum acknowledged that the account balance as of the date of filing was $8,321.59, but reasoned the higher amount was subject to equitable division because, right before filing for divorce, Father paid fees for which he was solely responsible—legal fees, psychological evaluation fees, and mediation fees. Father argues the relevant date of valuation is the date of filing and, because the value on the date of filing was $8,321.59, then the court should have apportioned that amount. Should he be responsible for the pre-filing payments to his attorney, mediation fees, and psychological evaluation fees, Father argues those amounts add up to $8,330, and adding that value back to the value of the Schwab account on the date of filing would be $16,651.59, not the higher amount the family court valued. Mother argues similarly to Father's reply argument.

"Marital Property" is defined as "all real and personal property [that] has been acquired by the parties during the marriage and [that] is owned as of the date of filing or commencement of marital litigation." S.C. Code Ann. 20-3-630(A) (2014). "By requiring the estate to be identified as of the date marital litigation is filed, the [l]egislature has elected to foreclose the spouses from litigating every expenditure or transfer of property during the marriage." *Panhorst v. Panhorst*, 301 S.C. 100, 105, 390 S.E.2d 376, 379 (Ct. App. 1990). "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." *Id.*

However, when parties are separated before commencing marital litigation, a valuation date other than the commencement of marital litigation may be used to avoid inequitable results. *See Wannamaker*, 305 S.C. at 41 406 S.E.2d at 183. Additionally, this court in *Dixon* cited, with approval, the family court's finding that when "one spouse has dissipated marital assets, the court will value the assets as of some date before the dissipation and treat the dissipated assets as part of the dissipating spouse's share of the marital estate." *Dixon v. Dixon*, 334 S.C. 222, 232, 512 S.E.2d 539, 544 (Ct. App. 1999).

Here, Mother told Father she wanted a divorce in January 2013. Father filed for divorce in July 2013. Father conceded at the final hearing that one or two months prior to filing for divorce, he paid $1,350 for mediation fees, $5,000 to his mother (allegedly as a reimbursement for legal fees), and $1,980 to Dr. Bart Saylor, all out of the Schwab account.

Given our de novo standard of review, we find the specifically identified payments made by Father should be credited to the Schwab account's value as it was on the date of filing, $8,321.59. Crediting those payments would make the Schwab account's value $16,651.59 ($8,330 + $8,321.59) for the purpose of equitable apportionment. This would result in a reduction in the value of the marital estate of $3,500.

After all debts and assets were considered, the family court valued the marital estate at $19,833.15. However, we find the family court overvalued the marital estate by $6,500—the actual value of the marital estate is $13,333.15. One-thousand dollars of that is attributable to Mother while the rest is attributable to Father—$12,333.15. In order to equitably distribute the marital estate, Father would have to pay Mother $5,666.57, leaving each party with $6,666.57 in value from the marital estate and effecting a 50-50 equitable distribution. We modify the family court's order to reflect these adjustments.

VI. Attorney's Fees

Father argues the family court erred in awarding Wife $50,000 in attorney's fees because he does not have the ability to pay.

A family court's award or denial of attorney's fees is reviewed de novo. *See Stoney*, Op. No. 27758 (finding the court of appeals erred and, pursuant to *Lewis v. Lewis*, should have reviewed a family court's denial of attorney's fees de novo). In deciding whether or not to *award* attorney's fees, the family court must consider: "(1) the party's ability to pay [his or her] own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). In determining whether the *amount* of an attorney's fee is reasonable, the court should consider:

> (1) the nature, extent, and difficulty of the case;
>
> (2) the time necessarily devoted to the case;

(3) professional standing of counsel;

(4) contingency of compensation;

(5) beneficial results obtained; [and]

(6) customary legal fees for similar services.

Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

"A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living." *Srivastava v. Srivastava*, 411 S.C. 481, 489, 769 S.E.2d 442, 447 (Ct. App. 2015) (quoting *Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001)). An attorney's fee award is excessive when it represents a substantial portion of the paying spouse's gross annual income. *See id.* at 490, 769 S.E.2d at 447 (finding an attorney's fee award representing 90% of the paying spouse's gross annual income was excessive); *Rogers*, 343 S.C. at 334, 540 S.E.2d at 842 (finding an attorney's fee award representing 16% of the paying spouse's annual income was excessive).

Although the ability to pay is an essential factor, it is not the only factor to consider—particularly when the spouse against whom fees are awarded has hindered, or been uncooperative during, litigation. *See Blackwell v. Fulgum*, 375 S.C. 337, 346, 652 S.E.2d 427, 431 (Ct. App. 2007) ("Generally, we would be inclined to determine an award of attorney's fees in accordance with the factors outlined in the case of *E.D.M. v. T.A.M.* However, if the case before us presents an added dimension of an uncooperative spouse who hampers a final resolution of the issues in dispute, we will not reward an adversary spouse for such conduct." (footnote omitted)). A court is apt to award attorney's fees against an uncooperative spouse even when the award represents a substantial portion of the paying spouse's gross annual income. *See Spreeuw v. Baker*, 385 S.C. 45, 72–73, 682 S.E.2d 843, 857 (Ct. App. 2009) (affirming an attorney's fee award of $43,675 to a mother despite expressing concern the fee award represented 40% of the father's annual income because "a review of the record reveal[ed] that [the father's] uncooperative conduct greatly contributed to the litigation costs associated" with the case).

Reasoning an adversarial spouse should not be rewarded for his or her behavior, courts can require that spouse to be responsible for the attorney's fees of

the non-paying spouse that are attributable to the adversarial spouse's conduct. *Anderson v. Tolbert*, 322 S.C. 543, 549–50, 473 S.E.2d 456, 459 (Ct. App. 1996). Examples of conduct prolonging litigation include requiring one spouse to seek orders protecting his or her children or to obtain sanctions for violating court orders. *Id.* at 550, 473 S.E.2d at 459; *see Lewin v. Lewin*, 396 S.C. 349, 360, 721 S.E.2d 1, 7 (Ct. App. 2011) (finding an award of attorney's fees to a mother was appropriate based, in part, on the three-year length of the case and the father's uncooperative conduct in failing to timely respond to the mother's requests).

Here, the family court awarded Mother $50,000 in attorney's fees. The family court considered the factors from *E.D.M* and *Glasscock* and found (1) Father was in a better position to pay attorney's fees than Mother; (2) Mother's attorney achieved beneficial results; and (3) if Mother had to pay all her attorney's fees it would negatively impact her ability to support herself and the children. The court also acknowledged that Father's unreasonableness and inflexibility prolonged litigation. Mother's proposed settlements offering to resolve many issues before the court were more favorable to Father than what the court eventually awarded.

The court expanded further on its finding that Father's actions prolonged litigation in its order denying Father's motion for reconsideration. The court noted, for example, Father maintained he should be awarded sole custody and that Mother was alienating the children from him; he even retained an expert on parental alienation. Yet, at the final hearing, he abandoned both positions—requesting a continuation of joint custody and choosing not to have his expert testify. The family court considered Father's financial situation but determined he should nevertheless bear the burden of his actions, rather than Mother, because she was forced to incur the costs associated with defending against Father's positions.

Father has not shown by a preponderance of the evidence that the family court's award of attorney's fees is excessive. Although the award represents a substantial portion of Father's income, his inflexibility and the unreasonableness of his positions increased the cost of litigation. *See Blackwell*, 375 S.C. at 346, 652 S.E.2d at 431 ("Generally, we would be inclined to determine an award of attorney's fees in accordance with the factors outlined in the case of *E.D.M. v. T.A.M.* However, if the case before us presents an added dimension of an uncooperative spouse who hampers a final resolution of the issues in dispute, we will not reward an adversary spouse for such conduct." (footnote omitted)). The family court noted that Mother's proposed settlements offered to resolve the issues in a manner more favorable to Father than the court ultimately determined. By maintaining his positions on custody and alienation, Father forced Mother to incur substantial

attorney's fees.[4] We believe Father should bear the costs Mother incurred in defending against his actions. *See Anderson*, 322 S.C. at 549–50, 473 S.E.2d at 459 (finding courts can require an adversarial spouse to be responsible for the portion of attorney's fees incurred by the other spouse that are attributable to the adversarial spouse's conduct).

Furthermore, requiring Mother to pay the entirety of her attorney's fees with her income would drastically reduce her standard of living. *See E.D.M*, 307 S.C. at 477, 415 S.E.2d at 816 (listing the "effect of the attorney's fee on each party's standard of living" as a factor to consider when determining whether to award attorney's fees); *see also* Roy T. Stuckey, Marital Litigation in South Carolina 716 (4th ed. 2010) ("An award of fees and costs is based on the duty of a spouse to provide necessary spousal and child support, and it reflects the reality that legal services are as necessary as food and lodging when a spouse becomes involved in litigation." (citing *Anderson*, 322 S.C. at 545–46, 473 S.E.2d at 457)). Therefore, we affirm the family court's award of attorney's fees.

VII. Prior Restraint

Father argues the family court erred in restraining his speech by imposing the following injunction: "Father shall be restrained from making 'diagnoses' about the children or the Mother. Father shall be restrained from 'diagnostic name calling' with regard to children or Mother (i.e. using diagnostic labels, to or about them, such as 'passive aggressive'), and/or from calling the children 'liars.'" Father asserts the restraint violates his freedom of speech because it is not narrowly tailored.

We find this issue is not preserved. To preserve an issue, it must be raised to and ruled upon by the family court. *Bodkin*, 388 S.C. at 219, 694 S.E.2d at 239. Constitutional arguments are also subject to rules of issue preservation. *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) (finding a husband's due process claim was not preserved because it was raised for the first time on appeal). Father presents his prior-restraint argument for the first time on appeal. Therefore, it is not preserved.

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[4] Mother's attorney accrued over $110,000 in fees representing Mother. Mother notes that, between the time she offered to settle and the conclusion of trial, she incurred $51,000 in attorney's fees and costs. Mother sent a proposed settlement on September 17, 2014. Between that date and the end of trial, Mother incurred an additional $51,473.91 in attorney's fees.

VIII. Income Withholding

Father argues the family court erred in ordering support to be paid through income withholding. Specifically, Father argues the court failed to serve him with a notice of delinquency before serving the withholding order on his employer—Blue Acorn—thereby depriving him of his right to petition the court to stay service of the withholding order. Father requests this court to reverse the family court's order upholding the withholding of support payments from his income from Blue Acorn.

We find this issue is moot because Father no longer works for Blue Acorn. *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing [c]ourt to grant effectual relief."). Therefore, we decline to address the merits.

AFFIRMED AS MODIFIED.

HUFF, GEATHERS, and MCDONALD, JJ., concur.

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