

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Zane Allen Powell, Respondent,

v.

Renee Anne Dolin, Appellant.

Appellate Case No. 2019-001308

Appeal From Charleston County
Michael S. Holt, Family Court Judge

Opinion No. 5940
Heard June 22, 2022 – Filed August 24, 2022

REVERSED AND REMANDED

Anthony B. O'Neill, Sr. and Elonda Fair O'Neill, of
O'Neill & Fair, of Charleston, for Appellant.

Roger Scott Dixon, of Dixon Law Firm, of Charleston,
for Respondent.

MCDONALD, J.: In this appeal from family court, Renee Dolin argues the family court erred in: (1) finding a common law marriage; (2) declaring Dolin's recently sold real property was marital; (3) reducing Zane Powell's child support despite his failure to document his income; and (4) declining to award her requested attorney's fees and costs. We reverse and remand.

Facts and Procedural History

Dolin and Powell met at a coffee shop in 1998 or 1999 but did not begin dating for a year or two. In 2001, Dolin moved in with Powell at 58A Rutledge Avenue, where they lived together for approximately two years. During this time, Dolin worked as a counselor at the Department of Mental Health, and Powell owned and operated Powell Waterproofing and Roofing.

In 2001 or early 2002, Powell began looking at residential properties for investment purposes. Shortly thereafter, he and Dolin decided to purchase and renovate a duplex at 696 King Street in downtown Charleston. Although both Dolin and Powell testified Dolin obtained a loan from BB&T to purchase the property, they gave different accounts regarding the down payment. Powell explained that because his roofing company was involved in an ongoing lawsuit, he believed it would be in his best interest to purchase the property in Dolin's name. He testified that in order to get the loan, he put \$30,000 from a workers' compensation settlement into a joint account with Dolin at BB&T. Dolin denied any such joint account existed. Powell was unable to document the \$30,000 he claimed he contributed to the purchase of 696 King Street.

By contrast, Dolin claimed she solely purchased the property on May 10, 2002 for \$105,000; she made a \$10,000 down payment using money given to her by a former boyfriend—kept in a certificate of deposit at BB&T—and borrowed the remaining \$95,000. Like Powell, Dolin was unable to obtain records from BB&T verifying these transactions.¹ However, Dolin's homeowner's insurance policy noted "Mortgage from Renee Ann Dolin to Branch Banking and Trust Company of South Carolina, dated 5/10/02, in the original principal amount of \$95,000, recorded on May 15, 2002, at 10:56 AM in Mortgage Book H406 at Page 071 Charleston County Records." Additionally, it is undisputed that the loan obtained to purchase 696 King Street, the loan obtained to renovate the property, and the subsequent mortgages obtained for the purpose of refinancing the original loans were all undertaken by Dolin solely in her name.²

Upon Dolin's purchase of 696 King Street, Powell immediately began working to rebuild and renovate the property; Dolin does not contest that Powell worked on

¹ Both parties testified as to their inability to obtain BB&T records due to the age of the referenced accounts.

² None of these documents suggest Powell held an ownership interest in the King Street property.

the renovation and property improvements; however, she contends he was paid for his work and also lived with her rent-free. Powell's friend and witness, Robert Mallard, described Powell as the "owner, supervisor, lead man on the job" and general contractor; Powell called himself the project manager. Mallard further testified that he pulled one of the two building permits for the renovation of the duplex, assisted Powell with finding sub-contractors, and otherwise confirmed proper inspections were being done, while Dolin, as the owner of record, pulled the other permit. Mallard attested to Powell's significant work on the property and identified a series of photographs showing the renovation. Similarly, Powell identified the photographs, which he took, and testified extensively as to his work on the renovation project, which took the better part of a year.

Powell maintains the labor and materials he contributed, including the demolition of the walls, porches, and fireplaces; the foundation repair; the installation of a new copper roof; concrete work; painting; and carpentry, were paid for through Powell Waterproofing and Roofing—not with loans Dolin obtained—and the new roof alone cost thirty to forty thousand dollars. When questioned about whether she paid Powell for his work or the materials he furnished, Dolin noted a second loan from Spartanburg Mortgage was used solely to pay for the renovation. Dolin acquired this \$47,750 loan approximately one year after her initial purchase of the property.

On October 5, 2003, the couple's first child (CAP) was born. Dolin rented the upstairs and downstairs units at 696 King Street to third parties from 2003 through 2006. Powell testified the parties had tenants at the King Street property for approximately two and a half years while continuing to live in his Rutledge Avenue apartment, with the intention of flipping the King Street building rather than using it as their personal residence. However, Dolin, Powell, and CAP moved into the downstairs unit at 696 King Street around 2006, and Dolin continued to rent out the top unit, using the rent proceeds to pay the mortgage.

In 2005 or 2006, Dolin and Powell leased a space at 708 King Street, adjacent to Powell's roofing business, which they renovated and opened as Zappos Pizza. Dolin handled the business transactions: she opened the business bank account, researched and created the menu, programmed the cash register, obtained the business license, and handled advertising. Initially, Powell did not work at Zappos. However, he closed his roofing company in 2007, and began working at Zappos full-time making pizzas. After the birth of the couple's second child (SBP) on March 22, 2007, Powell took over the operation of Zappos, and Dolin assisted at Zappos from time to time.

Following a 2011 domestic incident, law enforcement interviewed Powell at Zappos but neither arrested nor charged him with any crime related to criminal domestic violence. The morning after this incident, January 5, 2011, Dolin sought an order of protection against Powell, alleging he was violent and abusive, she feared for her safety, and he was using drugs. The family court granted Dolin an order of protection restraining Powell from entering her residence at 696 King Street or the business at 708 King Street. The order restrained Powell from all contact with Dolin or the couple's minor children, including emailing, calling, texting, or coming within 100 feet of the three.

On May 31, 2011, Powell filed an action in family court seeking to vacate the order of protection; he also sought custody, visitation, child support, and his own restraining order. In his verified complaint, Powell alleged, "Plaintiff and Defendant have resided together since 2002 but Plaintiff does not consider Defendant to be his Wife nor does Plaintiff believe that Defendant considers him to be her Husband. No formal wedding ceremony has been held nor does Plaintiff believe that a common law marriage exists." Additionally, Powell alleged he was the "owner and operator" of Zappos Pizza but not of 696 King Street, which he referred to as "the home where he was living." Finally, Powell's affidavit in the 2011 litigation states, "Mother, the Defendant, Renee Ann Dolin and I never married but lived together and co-parented our children since the day they were born."

In her answer to Powell's 2011 complaint, Dolin stated, "Plaintiff and Defendant have resided together since 2002 but Defendant does not consider Plaintiff to be her husband nor does Defendant believe that Plaintiff considers himself to be Defendant's husband. No marriage ceremony has been held nor does Defendant believe herself to be in a common law marriage." On November 21, 2011, the parties filed a custodial and support settlement agreement giving Dolin primary custody with final decision-making authority for the minor children. The parties never sought court approval of this agreement, and the case was administratively dismissed in July 2012.³

³ Powell testified the parties reconciled following Dolin's October and December 2011 hospitalizations for mental health treatment. Although Dolin acknowledged these hospitalizations, her complete testimony was not included in the record.

Dolin testified the parties continued to live separately with Powell returning to 696 King Street only to visit and care for the children when Dolin was out. Both parties dated other people from 2011 through the March 18, 2019 final hearing. Powell claims he lived at the residence from late 2011 or early 2012 until 2015 but would often sleep at Zappos. However, the record reflects Powell lived with two different women around 2015–16, and eviction records suggest he had two apartments during this time period. Powell admitted that after Zappos closed in 2014, he rented a residence for approximately three months before returning to 696 King Street.

On June 29, 2018, Dolin listed 696 King Street for sale.⁴ Three days later, Powell filed this action claiming a common law marriage due to the years he and Dolin lived together and held themselves out to the public as husband and wife.⁵ In support of his claim, Powell alleged the parties: (1) had the mutual intent to enter a marriage contract and agreed to be married; (2) represented and held themselves out to the community that they were married and that they were husband and wife; (3) cohabitated and lived together for an extended period time; (4) were not married to other persons at the time; and (5) established a valid common law marriage in January 2002. Additionally, Powell sought a divorce based on habitual drunkenness, equitable division of the marital property, certain mutual restraints, and attorney's fees and costs. Regarding custody, visitation, and child support, Powell stated the parties already had an order in place and modification of that order was not necessary.

On August 8, 2018, Dolin filed an answer and counterclaim, in which she admitted the parties had two minor children in common but denied all other essential allegations of Powell's complaint. In her counterclaim, Dolin requested: (1) sole custody of the parties' minor children; (2) that Powell's visitation with the children

⁴ 696 King Street sold for \$675,000 on August 17, 2018. After paying off her mortgage, Dolin netted \$385,776.90.

⁵ In addition to Powell's 2011 complaint alleging he and Dolin were *not* married, Powell's pleadings and testimony contain numerous inconsistencies regarding the marriage issue. For example, Powell claimed the parties have been in a common law marriage since January 2002; Powell claimed he can prove he and Dolin have been in a common law marriage since August 2002; Powell explained he did not know when the common law marriage commenced; Powell considered himself married to Dolin when she moved her grandmother's ring from her right hand to her left hand; and Powell told his former lawyer he and Dolin were not married.

be supervised; (3) appointment of a guardian ad litem should custody be contested; (4) child support; (5) certain restraining orders; (6) an order determining Powell's common law marriage claim was frivolous in light of Powell's 2011 action claiming the parties did not consider themselves married; (7) sanctions; and (8) attorney's fees.

Dolin subsequently sought temporary relief, and on September 24, 2018, the parties entered a temporary order by consent. The parties agreed Dolin would have sole custody of the minor children and that upon providing documentation that he had a working refrigerator and beds for the children, Powell would have visitation every other weekend and midweek. The parties further agreed Powell would pay biweekly child support to Dolin based on Powell's annual income of \$70,000 and Dolin's annual income of \$18,216. Exchanges of financial declarations with income documentation within three days and mediation within sixty days were to follow. Finally, the parties agreed to mutual restraining orders and certain parental guidelines. A supplemental consent child support order awarded Dolin monthly child support payments of \$1,031.

Prior to the call of the case on March 18, 2019, Dolin moved to dismiss Powell's action for common law marriage on judicial estoppel grounds. The family court reserved its ruling until the issuance of the final order and proceeded with the final hearing. In its final order, the family court denied Dolin's motion to dismiss; declared Powell and Dolin had a common law marriage; denied Powell's claim for divorce on the ground of habitual drunkenness; declared 696 King Street was marital property and awarded Powell half of the proceeds from the sale; ordered Powell to pay attorney's fees of \$10,000 to Dolin's counsel; maintained the custody and visitation schedule to which the parties agreed in the temporary order; and reduced Powell's monthly child support obligation from \$1,031 to \$942. After the family court denied Dolin's motion to alter and amend, Dolin timely appealed.

Standard of Review

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018) (noting an abuse of discretion standard is to be used for reviewing a family court's evidentiary or procedural rulings).

Law and Analysis

I. Common Law Marriage

Dolin argues the family court erred in finding a common law marriage existed based on the preponderance of the evidence. South Carolina's landmark case on common law marriage, *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (2019), was released after the family court's final order in this case. In *Stone*, our supreme court abolished common law marriage prospectively and refined how South Carolina courts are to determine whether a common law marriage exists, stating:

We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it. Therefore, from this date forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license. Consistent with our findings regarding the modern applicability of common-law marriage rationales, we also take this opportunity to refine the test courts are to employ henceforth.

Id. at 82, 833 S.E.2d at 267.

Citing *Callen v. Callen*, 365 S.C. 618, 620 S.E.2d 59 (2005), the court explained:

A common-law marriage is formed when the parties contract to be married, either expressly or impliedly by circumstance. The key element in discerning whether parties are common-law married is mutual assent: each party must intend to be married to the other and understand the other's intent. Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts.

Id. at 87–88, 833 S.E.2d at 270.

Consistent with our supreme court's "discussion regarding the sanctity of a marital relationship and our reticence to impose one on those who did not fully intend it," the court found "a heightened burden of proof is warranted" and held "the 'clear

and convincing evidence' standard utilized in probate matters should also apply to living litigants." *Id.* at 89, 833 S.E.2d at 271. The court clarified that "a party is not required to show his opponent had legal knowledge of common-law marriage; ignorance of the law remains no excuse." *Id.* The party claiming common law marriage "must demonstrate that both he and his partner mutually intended to be married to one another, regardless of whether they knew their resident state recognized common-law marriage or what was required to constitute one." *Id.* The court concluded by restating that "in the cases litigated hereafter, a party asserting a common-law marriage is required to demonstrate mutual assent to be married by clear and convincing evidence." *Id.* "Courts may continue to weigh the same circumstantial factors traditionally considered, but they may not indulge in presumptions based on cohabitation, no matter how apparently matrimonial." *Id.* Although the court "set forth the law to be applied in future litigation," it applied "the principles in effect at the time this action was filed to the case at hand." *Id.*

The following language was in effect when Powell filed this case:

Appellate courts have previously recognized two lines of cases regarding common-law marriage. The first holds that a party proves a common-law marriage by a preponderance of the evidence. The second relies on "a strong presumption in favor of marriage by cohabitation, apparently matrimonial, coupled with social acceptance over a long period of time." This presumption—like common-law marriage itself—is based on a conception of morality and favors marriage over concubinage and legitimacy over bastardy. It can only be overcome by "strong, cogent, satisfactory or conclusive evidence" showing the parties are not married. This Court has held that once a common-law marriage becomes complete, "no act or disavowal" can invalidate it.

Id. at 88, 833 S.E.2d at 270–71 (internal citations omitted).

Powell's testimony focused on the parties' lengthy periods of cohabitation; the raising of their two children together; their alleged partnership in acquiring, renovating, and renting 696 King Street; and their partnership in owning and operating Zappos Pizza. Powell did not submit any evidence that the parties were jointly titled on 696 King Street, mortgages, or bank accounts or that they ever filed joint tax returns. Instead, Powell submitted Dolin's stepfather's 2004

obituary—which Dolin testified she did not write—listing Dolin as the decedent's daughter and Powell as her husband; an administrative law court order referring to Powell as Dolin's husband in its findings of fact regarding a beer and wine permit sought for Zappos; and a 2003 mechanic's lien referring to Powell as Dolin's husband and stating Dolin owns 696 King Street.

Powell also offered testimony from Mallard, Deena Frooman, and John Cathcart to support his common law marriage claim. All three witnesses testified Powell held himself out to be married to Dolin but only Frooman and Cathcart said the same was true for Dolin regarding Powell. Frooman indicated Powell purchased 696 King Street "to support his, essentially, wife and family"⁶ but believed Dolin and Powell did not begin holding themselves out as husband and wife until 2013–14. However, Frooman also acknowledged that she knew Dolin was dating other people during this time period and that she did not know whether Powell gave Dolin the ring she wore on her left ring finger.⁷ Frooman equivocated when asked about the 2011 affidavit she helped Powell prepare but eventually admitted this "definitely was before they were holding out they were married." Cathcart testified he believed Dolin and Powell began holding themselves out as husband and wife in 2009; however, he believed Powell to be married during 2004–07, which he described as the "early years" he knew Powell.⁸

Powell testified that Dolin first introduced him as her husband after CAP was born in 2003 but he corrected her, stating he was her boyfriend. Powell admitted he never proposed to or was engaged to Dolin and that he does not know when they became husband and wife.

⁶ Dolin purchased 696 King Street in 2002; the couple had their first child in 2003.

⁷ Dolin testified the ring she wears on her left ring finger belonged to her grandmother and was given to her after her grandmother's death around 1994, which predated her meeting Powell. Despite Powell's testimony that he believed the parties to be married when Dolin began wearing the ring on her left hand, Dolin explained that wearing her grandmother's ring never indicated she held herself out as married to Powell.

⁸ This testimony, from Powell's own witnesses, offers no support for the family court's finding that Powell established a common law marriage as of October 5, 2003.

As for Dolin, she testified she never intended to marry Powell. Dolin presented her tax returns from 2007–16, which indicated "head of household" rather than married; the deed to 696 King Street and mortgage documents listing only her name; her petition for an order of protection on which she checked the box "parties have children in common" rather than "husband and wife"; and her answer to Powell's 2011 complaint in which she stated, "Plaintiff and Defendant have resided together since 2002 but Defendant does not consider Plaintiff to be her husband nor does Defendant believe that Plaintiff considers himself to be Defendant's husband. No marriage ceremony has been held nor does Defendant believe herself to be in a common law marriage."⁹ Additionally, Dolin noted the couple's minor children received Medicaid because she was a single mother.¹⁰

Our de novo review of the record suggests Powell called himself married when it was convenient and financially beneficial for him but considered himself single when marriage was inconvenient or financially detrimental. Assuming arguendo that Powell intended to be married to Dolin throughout this time—which the evidence presented does not support—a critical inquiry is whether Dolin so intended. *See Stone*, 428 at 87, 833 S.E.2d at 270 ("The key element in discerning whether parties are common-law married is mutual assent: each party must intend to be married to the other and understand the other's intent."). The parties lived together (for various periods of time), raised two children together, and ran Zappos Pizza together. Although some witnesses testified the two introduced each other as husband and wife, others testified they never heard Dolin do so, and still others testified they heard neither Powell nor Dolin do so.

Although the evidence regarding introductions is mixed, the remaining factors appellate courts consider in determining intent are decidedly against a finding of common law marriage. *See id.* at 88, 833 S.E.2d at 270 ("Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts."). Dolin filed her taxes as "head of household" during the entirety of her

⁹ Likewise, in his May 31, 2011 affidavit for that round of litigation, Powell stated, "Their Mother, the Defendant Renee Anne Dolin and I are not married but lived together and co-parented our children since they were born." At trial before the family court in this action, Powell testified that when he filed the 2011 action, he claimed he was not married in order "to protect himself."

¹⁰ Powell never listed Dolin as his wife with the Veterans Administration where he received healthcare benefits for himself.

relationship with Powell. Additionally, both she and Powell filed documents under penalty of perjury claiming they were not married. The parties signed some contracts jointly, but many more were in Dolin's name only. Finally, the parties produced no evidence of shared mortgages, checking accounts, or savings accounts.

Accordingly, we find the parties' conduct does not demonstrate they each intended to be married or knew the other intended the same. Notably, the benefits Powell received in claiming he and Dolin were not married were contrary to any finding that he believed himself to be married or that he conducted himself as a married man. Powell was not subject to paying spousal support, providing Dolin or their children health insurance, sharing assets, or any other financial obligations a spouse might incur. Moreover, Powell was aware Dolin was involved in relationships with other men, and he provided care for the parties' children when Dolin went out on dates. All of this, when considered alongside the verified complaint and sworn affidavit from Powell's 2011 family court litigation, convinces us the family court erred in finding a common law marriage existed.

II. Nonmarital Property

Dolin argues the family court erred in determining the property located at 696 King Street was marital property and awarding Powell half of the proceeds from the property's sale. We find no common law marriage existed between the parties, and the family court lacked jurisdiction to equitably apportion Dolin's nonmarital property. *See* S.C. Code Ann. § 20-3-630(B) (2014) ("The court does not have jurisdiction or authority to apportion nonmarital property.").

III. Child Support

Dolin argues the family court erred in reducing Powell's child support obligation without the income documentation necessary to do so. The temporary consent order required documentation of the parties' respective incomes, and Dolin provided a pay statement with her financial declaration. She also testified as to her employment status. However, Powell admitted at trial that he did not provide any documentation regarding his income and testified he could earn up to \$250,000 yearly. Because the family court accepted Powell's financial declaration on its face without requiring any evidentiary support, in light of Powell's own testimony, we reverse and remand this issue to the family court with instructions that both parties must submit documentation of their respective incomes—as they agreed to do in the temporary consent order. The family court should consider such supporting

documentation in conjunction with the testimony in the record, applicable statutory authority, and child support guidelines in making its child support determination.

IV. Attorney's Fees and Costs

Dolin argues the family court erred in awarding her only \$10,000 of the \$18,623 in attorney's fees and costs she incurred in defending this action. We agree.

In order to award attorneys' fees, a court should consider several factors including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) the effect a fee award will have on the 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 attorneys' fees, the family court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Here, the family court stated,

With regard to the issue of attorney fees, the Plaintiff submitted a fee statement with attorney's fees in the amount of \$9,470.50. Defendant objected to the fee affidavit because it was not itemized and there were dates that predated this action. The Court overruled the objection and entered the affidavit and fee statement into evidence. The Court accepted a copy of an itemized billing statement at the conclusion of the trial and entered [it] into evidence without testimony and without objection from Defendant. Defendant submitted a fee affidavit with attorney's fees in the amount of \$18,623.00 excluding previously ordered fees. The Court considered all of the factors when awarding fees and finds and concludes that Plaintiff shall pay to Defendant's attorney \$10,000 within 7 days of the disbursement as provided for herein. Let it be noted that the Court finds that Plaintiff frustrated the discovery process, which [led] to the Defendant incurring additional fees and also engaged in other behavior which frustrated this litigation.

We reverse and remand the analysis of attorney's fees. On remand, the family court should make specific findings of fact as to the parties' respective incomes and abilities to pay once the financial documentation required by the temporary order is produced. In considering the remaining pertinent fee factors, we instruct the family court to consider the beneficial results Dolin has obtained on appeal.¹¹

Conclusion

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

REVERSED AND REMANDED.

THOMAS and HEWITT, JJ., concur.

¹¹ We decline to address whether the family court erred in considering the issue of judicial estoppel Dolin raised in her pretrial motion to dismiss. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues where a prior issue was dispositive).