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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY

Robert E. Guess, Family Court Judge

Case No. 2011DR4601905
Opinion No. 5450, filed November 2, 2016

Tzvetelina Miteva, Petitioner,

versus

Nicholas Robinson Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I Does the Petition for Writ of Certiorari raise legal arguments compelling issuance of a Writ of Certiorari?

II Was the testimony of the Wife and her witnesses credible?

III Denial of Divorce on Ground of Habitual Drunkenness.

IV Identification of the Marital Estate.
A. The Mobile Homes.
B. Ferguson Meadow and Montibello Drive.

V Apportionment of the Marital Estate.

VI Payment of a Portion of Husband's Attorney's Fees

Arguments

I Does the Petition for Writ of Certiorari raise legal arguments compelling issuance of a Writ of Certiorari?

While Rule 242, SCACR, neither limits the Supreme Court's power to grant review nor limits its discretion, it provides helpful criteria indicting the character of reason for granting certiorari and is a good starting point.

1. Is there a novel question of law? Petitioner raises issues regarding the denial of her claim for a divorce on the ground of habitual drunkenness, the equitable apportionment of property, and the award of attorney's fees. Not only are these questions not novel questions of law, the Petitioner challenges the factual findings of the family court and court of appeals rather than the conclusions of law.

2. Was there a dissent in the court of appeals? The court of appeals' decision is unanimous with neither concurring nor dissenting opinions.

3. Does the opinion of the court of appeals conflict with a prior decision of the Supreme Court? The Petition cites four cases of the Supreme Court: *Epperly,*[1] *Lee,*[2] *and Rooney*[3] regarding habitual drunkenness and *McDavid*[4] regarding economic misconduct. Petitioner does not argue the court of appeals opinion conflicts with these prior cases of the Supreme Court. She argues the trial court and the court of appeals findings of fact conflict with her view of the evidence.

4. Are substantial constitution issues involved? The Petition cites neither the South Carolina nor United States Constitutions. Familiar constitutional phrases, such as due process and equal protection are absent from the Petition.

5. Is there a federal question in which the court of appeals opinion conflicts with a decision of the United States Supreme Court? The Petition contains no reference to a federal question, federal authority, or any opinion of the United States Supreme Court.

Certiorari "goes to an inferior tribunal to keep it within the scope of its powers, if not to correct error of law, but certainly not to correct error of fact." [5] "The writ of certiorari is a common-law remedy, to correct errors in law of inferior jurisdiction. The writ will not lie to review errors or mistakes in matters of discretion, where the court has acted within its jurisdiction, and where there has been no disregard by the court of the procedure prescribed by law."[6] [internal citation omitted]

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[1]*Epperly v. Epperly*, 312 S.C. 411, 440 S.E.2d 884 (1994).

[2]*Lee v. Lee*, 282 S.C. 76, 316 S.E.2d 435 (Ct. App. 1984).

[3]*Rooney v. Rooney*, 242 S.C. 503, 131 S.E.2d 618 (1963).

[4]*McDavid v. McDavid*, 333 S.C. 490, 511 S.E.2d 365 (1999).

[5]*Ex parte Schmidt*, 24 S.C. 363, 364 (1886).

[6]*Wyse v. Wolfe*, 129 S.C. 499, 123 S.E. 818, 820 (1924), citing with approval *State v. Senft*, 2 Hill 369, 20 S.C.L 367 (1834).

While the Court may grant certiorari for any reason satisfactory to it, there is no apparent reason to depart from the guidance of Rule 242, SCACR.

II Was the testimony of the Wife and her witnesses credible?

The issues presented by the Wife are factual issues, not legal issues. Factual issues turn on the reliability, credibility, and believability of the witnesses and the evidence.

The testimony of the parties was contradictory. The findings of the trial court and the Court of Appeals imply a finding of the husband's credibility and the wife's lack of credibility. Incredible testimony is irrelevant testimony. Where the wife's testimony is not credible, that testimony is not evidence of any fact. This applies to each argument in the wife's Petition for Writ of Certiorari.

III Denial of Divorce on Ground of Habitual Drunkenness.

A party may raise an issue of habitual drunkenness for many purposes, such as a ground for divorce, alimony, or equitable apportionment of property. Once the trial court grants a divorce on one ground, the court need not consider alternate grounds.[7] Here Judge Guess considered the testimony regarding habitual drunkenness and found the testimony of the wife and her mother inconsistent,[8] uncorroborated,[9] and incredible.[10] He then granted the divorce on the alternate ground of the separation of the parties without cohabitation for a period of one year.

Without question the husband drank, but there was no credible evidence his drinking caused the breakdown of the marriage nor is there evidence his drinking

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

[8]Record, page 10.

[9]Record, page 11-12.

[10]Record, page 13.

affected the house flipping. The trial judge got it right and the Court of Appeals got it right, but even if both are wrong, the wife shows no prejudice.

IV Identification of the Marital Estate.

A. The Mobile Homes.

The wife asserts, "[T]he Court overlooked the evidence. Wife did, in fact, present evidence on this point."[11] In a strict technical sense, the wife is right because she presented evidence on this point. The Court of Appeals omitted the key word credible. The wife's evidence was not credible. The claim the wife makes--her payment of the husband's debts--if true, should easily be proven by a paper trail. The wife neither introduced supporting documentary evidence nor explained the absence of documentary evidence. Wife had the opportunity to prove her point but failed. The trial court and the Court of Appeals make findings based on credible evidence, not speculation, conjecture, or incredible evidence. Neither court erred.

The wife correctly states, "Husband admitted the *only* property he listed on his financial declaration as non-marital was the Messina Road property."[12] The marital or nonmarital character of property is a question of law for the court. The wife showed Ferguson Meadow as marital property on her financial declaration[13] and listed one mobile home as nonmarital property,[14] but the husband made no issue of these because it is a question of law for the court.

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[11]Petition, p. 4.

[12]Petition, p. 5.

[13]Record, 346, Financial Declaration of Wife.

[14]Record, 345, Financial Declaration of Wife.

B. Ferguson Meadow and Montibello Drive.

Regarding Ferguson Meadows, Wife asserts, "Both Wife and Mr. Brice explained why that was done." Mr. Brice admitted his "understanding about the purpose of these properties [was] based solely on the information from Ms. Miteva."[15] Nothing in his testimony refers to setting up a trust for the daughter or the wife seeking, or him giving, advice on the subject. The wife does not testify to a trust or that she sought Mr. Brice's advice about creating a trust. Absent credible evidence of her intent to invest in properties for her daughter, the court properly found that the parties bought and sold the properties for marital gain. The Wife failed to prove her claim.

The Wife concedes the settlement statement lists the husband as the buyer and he was the landlord on the residential lease for the property.[16] These concessions, alone, establish the wife's intent to use Ferguson Meadow for marital gain. This justifies the Court's finding of transmutation.[17] The agreement to purchase the property supports the finding of transmutation.[18] Judge Guess found Ferguson Meadow transmuted, not just because of the settlement statement, but because of the totality of facts showing the parties purchased it intending a joint enterprise.[19]

Regarding Montibello Road, Judge Guess found, "This property was purchased with marital funds generated as a result of a number of purchases and sales of real estate by both Plaintiff and Defendant and included in the purchase price was $208,000.00 in marital funds generated from a home equity loan taken out against

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[15]Record, 143, lines 19-21.

[16]Petition, p. 6.

[17]*Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013).

[18] Defendant's Exhibit #8, Agreement to Buy and Sell Real Estate, Record 116, lines 9-14.

[19]Record, 16-17, Decree of Divorce, ¶ 1.

3722 Messina Road."[20] The wife concedes the $200,000 from the home equity loan went to the wife and then into Montibello Road.[21]

The "smoking gun" on Montibello is the wife's e-mail message to the husband. On June 16, 17, and 21, 2011, he asked for an account of the funds from his home equity loan. She responded, "Nick, the 200K are in Montibella (sic)"[22] This fits nicely with the $208,000 check.[23] Because he wife failed to assert or prove the HELOC money was hers in June 2011, her claims to that money are not credible.

V Apportionment of the Marital Estate.

Aggrieved Party. The wife complains of the 50-50 apportionment of the marital estate,[24] the identical apportionment she requested at trial. In response to Judge Guess' request for proposed orders,[25] the wife's proposed order included as a finding, "I find that each party is entitled to a fifty percent division of the marital estate."[26] The wife is not an "aggrieved party."[27]

The Court of Appeals explained, "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. (Citations omitted) The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden

[20]Record, 212, lines 14-16.

[21]Petition, p. 7.

[22]Record, 111-112, lines 17-2.

[23]Record, page 200, line 17 through page 201, line 10.

[24]Petition, p. 8, §3.

[25]Record, 289, lines 21-25.

[26]Record, 360, proposed Decree of Divorce.

[27]Rule 201(b), SCACR.

or obligation."[28] The wife asked for a 50-50 split of the marital estate, and the family court granted her request. Because the trial judge granted the relief she sought, the wife is not an aggrieved party. She suffered no real or imagined wrong nor was she treated unfairly (grievance). The trial judge did not refuse to give or grant her request (denial or right), and no burden was forced upon her (imposition).

Equal Division. It matters not whether the Court of Appeals agreed with the trial judge as to each of the equitable apportionment elements. The Court of Appeals "looks to the overall fairness of the apportionment ...."[29] The Court concludes, "Therefore, we find the fifty-fifty division as a whole was fair."[30]

The wife complains about the Court's finding of economic misconduct regarding her incredible claim of a $115,000 investment in a solar energy company and the finding of her superior financial condition. While the Court's findings are correct, it is irrelevant because she agreed to the equal apportionment of the martial estate.

Panhorst[31] and McDavid.[32] The wife cites two cases to support her contention the Court of Appeals "overlooked or misapprehended several points."[33] *Panhorst* differs because the transactions in *Panhorst* were spread over 20 years and did not "involve fraudulent transfers or dissipation of marital assets in contemplation of the

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[28]*Beaufort Realty Co., Inc. V. Beaufort County*, 346 S.C. at 301, 551 S.E.2d at 589.

[29]*Miteva v. Robinson*, 418 S.C. 447, 460, 792 S.E.2d 920, 927 (S.C. Ct. App. 2016), citing *Doe v. Doe*, 370 S.C. 206, 213–14, 634 S.E.2d 51, 55 (Ct. App. 2006).

[30]*Miteva v. Robinson*, 418 S.C. 447, 463, 792 S.E.2d 920, 928 (S.C. Ct. App. 2016).

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

[32]*McDavid v. McDavid*, 333 S.C. 490, 493, 511 S.E.2d 365, 367 (1999).

[33]Petition, p. 8, §III.

breakdown of the marriage."[34] In *McDavid* the Supreme Court affirmed the Court of Appeals' finding "Husband's use of these funds, even if imprudent, did not constitute 'misconduct' warranting a downward adjustment from his share of the marital assets."[35] Here, the question is not whether the Wife made an imprudent investment. Both the trial judge and the Court of Appeals questioned, "[W]hether Wife invested $115,000--almost the exact amount invested to acquire Caldwell Rush--in a solar panel company owned by the same person who worked for her flipping properties." *Panhorst* and *McDavid* support the Court of Appeals' opinion, while undermining the wife's argument.

VI Payment of a Portion of Husband's Attorney's Fees

The Husband disagrees with the Court of Appeals reduction of the attorney's fees awarded by Judge Guess, losing $12,561.29, but no valid argument exists to support a claim the Court of Appeals "overlooked or misapprehended" any fact or authority relating to attorney's fees. To his credit, wife's counsel acknowledges he raises this point only if the opinion is further modified or reversed.[36] Likewise, husband concedes a modification or reversal of other issues may justify a modification of attorney's fees.[37]

Conclusion

The Petition presents no traditional ground for granting a Writ of Certiorari. Even if the Court, in exercising its sound discretion, grants a Writ of Certiorari, the

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

[35] *McDavid v. McDavid*, 333 S.C. 490, 493, 511 S.E.2d 365, 367 (1999)

[36] Petition, p. 10, § IV.

[37] *Sexton v. Sexton*, 310 S.C. 501, 504, 427 S.E.2d 665, 666 (1993).

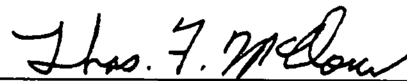
record and the arguments support no modification or reversal of the court of appeals' opinion.

The wife based her Petition for Rehearing upon her assertion "the Court overlooked or misapprehended ... in affirming the family court's order as modified."[38] The Court of Appeals addressed each argument briefed by the wife, often restating the wife's argument, and then found her arguments lacking in evidence, not compelling, or less compelling than the husband's arguments. The Court of Appeals overlooked nothing and apprehended everything.

The wife's testimony and evidence was not credible. No credible evidence supported the finding of habitual drunkenness the wife sought. The trial judge correctly identified and apportioned the marital estate. The *de novo* review and equities require wife to contribute $15,000 toward the husband's attorney's fees.

Respectfully submitted,

McDow & Urquhart, LLC
Jennifer M. Creech



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March 28, 2017

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[38]Petition for Rehearing, p. 1.

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ORIGINAL

Tzvetelina Miteva, Petitioner,

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PROOF OF SERVICE

I certify that I served the return to petition for writ of certiorari by depositing one copy of it in the United States Mail, postage prepaid, on March 28, 2017, addressed as follows:

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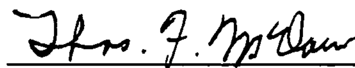

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