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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Family Court
Peter R. Nuessle, Family Court Judge

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Case No. 2013-DR-32-352
Appellate Case No. 2015-002426

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Kenneth M. Shufelt,

Respondent,

v.

Janet R. Shufelt,

Petitioner

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# PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, counsel for Petitioner certifies that a petition for rehearing was made by Petitioner and finally ruled on by the Court of Appeals.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in remanding the issue of equitable division of property for a new trial and in thereby granting Husband a third "bite at the apple" of proving what he claimed to be the nonmarital portion of certain accounts owned on the date of filing of this action, and should this Court affirm, or affirm as modified, the family court's division of property?

2. Did the Court of Appeals err in remanding the issues of alimony and attorney's fees for a new trial, and should this Court affirm the family court's resolution of those issues?

3. Did the Court of Appeals err in its direction to the family court to memorialize its unavailing reconciliation attempt, and in not making its own finding that reconciliation was not possible, based on the family court's clear attempt at reconciliation and clear finding, on the record, that reconciliation was not possible?

## STATEMENT OF THE CASE

Respondent, Kenneth M. Shufelt ("Husband"), brought this action in February 2013 in the Lexington County Family Court, seeking an order of separate support and maintenance or, alternatively, a divorce from Petitioner, Janet R. Shufelt ("Wife"). App.

pp. 22-25. Wife filed an answer and counterclaim, seeking a divorce based on Husband's adultery, equitable distribution of property, alimony, and attorney's fees. App. pp. 26-30.

The trial of this case occurred more than three and one-half years ago, on March 12, 2015, before Family Court Judge Peter R. Nuessle. App. p. 31. At the time of trial, Wife was 65 years of age and Husband was 67. App. pp. 61-62, 125. The disputed issue in the equitable division of property pertained to certain accounts in Husband's name, portions of which he claimed to be nonmarital. At the close of the evidence, the family court judge noted the lack of evidence with respect to these accounts and left the record open for submission of further evidence. App. pp. 151-53. However, no further evidence was submitted.

The court requested proposed orders from both parties, and the court signed the order drafted by Wife's trial attorney. App. pp. 1C-6, 216-31. That order, dated April 22, 2015, and filed April 27, 2015, granted a divorce and decided the issues of property division, alimony, and attorney's fees. App. pp. 1C-6. The court included the entirety of the disputed accounts in the marital estate, effected a 50/50 division of the marital property, awarded Wife $500 per month in permanent periodic alimony, and awarded Wife attorney's fees.

Husband filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to which Wife filed a return. App. pp. 8-21. Judge Nuessle denied Husband's motion by order dated October 21, 2015, filed October 26, 2015. App. p. 7.

Husband appealed, challenging the equitable division of property and the alimony and attorney fee awards. He also challenged the failure of the family court's order to contain a written finding memorializing its attempt at reconciliation and its determination

that reconciliation was not possible, which occurred at the start of trial and were recorded in the transcript. App. pp. 32-33. The Court of Appeals found error in the family court's equitable division of property and remanded for a new trial. App. pp. 298-300. Because of its remand of this issue, the Court also remanded the issues of alimony and attorney's fees. App. pp. 300-01. The Court further directed the family court to memorialize its previous unavailing attempt at reconciliation in its new order. App. p. 301.

Petitioner is seeking certiorari review because the decision of the Court of Appeals misapplied the burden of proof and misapprehended the consequences of the failure of proof in this case, based on established precedents.

## CONSIDERATIONS GOVERNING CERTIORARI REVIEW

A writ of certiorari should be granted where there are special and important reasons. *See* Rule 242(b), SCACR. One of the enumerated considerations governing certiorari review applies here. The decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court. *See* Rule 242(b)(3), SCACR.

## ARGUMENT AND AUTHORITIES

The details of the parties' relationship and marital history are fully set out in Petitioner's Final Brief of Respondent filed in the Court of Appeals, App. pp. 252-82, incorporated herein by reference. They had begun living together in 1994 and married in 2005. Husband moved out of the marital residence in December 2012 and filed this action in February 2013. Wife learned of two affairs he had engaged in, and he admitted to Wife that he had been seeing both women at the same time. As of the trial in 2015, he was living with his paramour in Rhode Island.

Throughout the marriage, Husband's earnings were significantly greater than Wife's. The financial declarations submitted at trial reflected Husband had monthly income of $5,500, while Wife's monthly income was $3,326.22. App. pp. 155, 160. Husband testified his base monthly income of $5,500 was guaranteed, but he actually earned more through overtime. App. pp. 41-42. Because of overtime, he had earned more than $80,000 the year prior to trial. App. pp. 42, 80. During the pendency of this action, Husband had been giving Wife, on average, $750 per month to apply to her household expenses. App. p. 80. However, he sought to have the court deny any alimony to Wife going forward, and he challenged on appeal the court's award to her of permanent periodic alimony in the amount of $500 per month.

The marital residence in South Carolina was owned by both parties. App. p. 72. Wife continued to live in the marital residence after Husband left in 2012, and she sought to be awarded the residence in the equitable distribution. App. pp. 113, 118, 123, 126. During the course of the marriage, Husband was away, on average, three and one-half weeks of every month due to work-related travel, and during those absences it was Wife who cared for the home and the parties' pets. App. pp. 65, 76-77. Husband had been gone from the residence for over two years and was living with his paramour out of state as of the 2015 trial. App. pp. 62-63. The court awarded the equity in the marital residence to Wife. Although title to that property has not yet been transferred to her, she has resided there throughout this appeal, and she has paid the mortgage, taxes, and maintenance costs related to this marital asset.

As of the date of filing, the parties had a number of financial accounts in the name of one or the other or both. The marital character of some of their accounts was not in

dispute: Wife's 401(k), a Lincoln account in the names of both parties, a joint BB&T IRA account, and Husband's savings account. The accounts in dispute were Husband's account with T. Rowe Price (which Husband referred to in this appeal as his Intelligrated retirement) and two Franklin Templeton accounts. In this appeal, Husband challenged the court's rulings with respect to the marital character of the T. Rowe Price and Franklin Templeton accounts. He also challenged, for the first time, the court's 50/50 division of the marital estate.

In its decision, the Court of Appeals addressed only Husband's claims that the family court erred by including the entire T. Rowe Price and Franklin Templeton accounts in the marital estate. The Court of Appeals was clearly disturbed at the absence of proof as to what were the nonmarital portions, and the Court of Appeals declined to make its own findings on the record created in the family court. Instead, the Court remanded for a new trial on the equitable division of property. App. pp. 298-300. Due to this remand, it remanded the remaining issues as well. App. pp. 300-01.

In its decision, the Court of Appeals misplaced the burden of proof and the consequences of the absence of evidence as to the value, if any, of the nonmarital portion of the disputed accounts. The Court of Appeals noted the lack of testimonial and documentary evidence about the accounts at issue. The family court had similarly noted the lack of evidence, even holding the record open to allow submission of what Husband had not obtained prior to trial. Having failed to submit the required proof of the value of any claimed nonmarital portions of the accounts and having failed to provide a sufficient record on which the appellate court could make findings, Husband should not have been heard to complain of error in the family court's treatment of the accounts as entirely

marital. *See Lewis v. Lewis*, 392 S.C. 381, 393, 709 S.E.2d 650, 656 (2011); *Pittman v. Pittman*, 395 S.C. 209, 220, 717 S.E.2d 88, 93-94 (Ct.App. 2011); *Chanko v. Chanko*, 327 S.C. 636, 643, 490 S.E.2d 630, 634 (Ct.App. 1997). Husband should not be given another "bite at the apple" through remand. *Lewis*, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n. 11; *Pittman*, 395 S.C. at 220, 717 S.E.2d at 94.

In numerous contexts, our Supreme Court has repeatedly endorsed the concept of providing a litigant a single "bite at the apple" in presenting his case in the trial court. *See Lewis*, 392 S.C. at 393-94 & n.11, 709 S.E.2d at 656 & n.11; *Therrell v. Jerry's Inc.*, 370 S.C. 22, 30, 633 S.E.2d 893, 897 (2006); *Spruill v. Richland County Sch. Dist. 2*, 363 S.C. 61, 65, 609 S.E.2d 524, 527 (2005); *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 28, 609 S.E.2d 506, 511 (2005); *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004); *see also Milliken & Co. v. South Carolina Dep't of Labor*, 275 S.C. 264, 266-68, 269 S.E.2d 763, 764-65 (1980). This concept is grounded in the principle of fundamental fairness. *See Lewis*, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n.11; *Milliken*, 275 S.C. at 267, 269 S.E.2d at 764. Our appellate courts also recognize that an appellant has the burden of providing a sufficient record upon which the appellate court can make a decision. *See Pittman*, 395 S.C. at 220, 717 S.E.2d at 93-94, *citing Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996). Where the necessary proof has not been provided and the requisite record has not been made, our appellate courts have disapproved of granting a "second bite at the apple" through remand for presentation of further evidence not presented at the initial opportunity. *Lewis*, 392 S.C. at 393 n.11, 709

S.E.2d at 656 n.11; *Pittman*, 395 S.C. at 220, 717 S.E.2d at 94. The comments of this Court in Lewis are particularly applicable here:

> The court of appeals understood that [Husband's] cursory evidence precluded it from definitively finding a value for the home that was below the appraiser's recommendation. The court of appeals admitted it was "sympathetic to Husband's concerns." The court of appeals' remand instructions invited the family court to "accept additional evidence ... or order supplemental information on its own motion." Given [Husband's] incomplete presentation at trial, it would be fundamentally unfair to [Wife] to give [Husband] a second bite at the apple.

*See Lewis*, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n.11.

In this case, it is undisputed the accounts at issue were either entirely or in part marital assets. Once the evidence established the marital character of some or all of an account, it became Husband's burden to produce the requisite evidence to establish the value of any nonmarital portion. *See Wilburn v. Wilburn*, 403 S.C. 372, 382, 743 S.E.2d 734, 740 (2013); *Simcox-Adams v. Adams*, 408 S.C. 252, 265, 758 S.E.2d 206, 213 (Ct.App. 2014). He failed to meet that burden. Troubled by the lack of such evidence at trial, the family court left the record open for submission of additional evidence as to value. App. pp. 151-55. Upon Husband's failure to avail himself of this second opportunity to prove his claim, the family court properly included the entirety of the disputed accounts in the marital estate. Husband failed to make a record on which the family court and the Court of Appeals could make findings of fact as to the value of any nonmarital portion. The Court of Appeals erred in giving him a ***third*** bite at the apple through remand for further proceedings.

As both the Court of Appeals and this Court recognize, the failure of proof at trial defeats the claim of an appellant seeking to overturn the family court's findings:

> A litigant who fails to offer proof on an issue may not be heard to complain about the court's resolution of that issue.

*See Chanko*, 327 S.C. at 643, 490 S.E.2d at 634 (citations omitted).

> We have stated before, and we reiterate here, that a party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings.

*See Lewis*, 392 S.C. at 393, 709 S.E.2d at 656 (quotation marks and citations omitted).

The effect of the Court of Appeals' failure to adhere to these precedential decisions concerning the consequences of a failure of proof will be devastating to Wife. She is now in her late 60s and has been engaged in this divorce proceeding for almost six years. During the pendency of the appeal, she has maintained the marital residence on limited resources, paying the expenses related thereto, without benefit of the division of marital funds controlled by Husband, even those that were not in dispute in this appeal. The Court of Appeals' remand returns her to "square one" in reaching a final outcome of this divorce, which was thrust upon her late in life when Husband left her for another woman.

The unfairness contemplated by this Court in *Lewis* is even more pronounced here. Faced with an inadequate record, the family court left the record open, giving Husband a second opportunity to procure and submit evidence to establish any nonmarital share of the disputed accounts. Notwithstanding this opportunity, Husband failed to produce evidence on which such findings could be made. The effect of the Court of Appeals' remand is to give Husband a ***third*** opportunity to establish his claims. This Court should recognize the unfairness of the Court of Appeals' disposition and affirm, or affirm as modified, the family court's order based on the findings that can be made on the evidence presented at trial, without remand for further evidentiary

proceedings. Such an outcome is in the interests of fundamental fairness, judicial economy, and finality.

1. Equitable Division of Property.

In the third and fourth arguments of his brief in the Court of Appeals, Husband challenged the equitable apportionment of property. His third argument challenged the inclusion of the Franklin Templeton accounts of $237,761.31 and $3,487.39 in the marital estate. His fourth argument challenged the inclusion in the marital estate of the entire value of the T. Rowe Price account (his Intelligrated retirement), rather than a lesser amount he contended was the value of the marital portion of that account.[1] The fourth argument also challenged the court's 50/50 division of the marital estate.[2] The family court's rulings were appropriate, and this Court should affirm the equitable division of property in its entirety.

A. T. Rowe Price Account.

The Court of Appeals' opinion misapprehended the legal principles applicable to the failure of Husband to establish the value of the portion of the T. Rowe Price retirement account that he claimed was nonmarital. The T. Rowe Price account was attributable to Husband's employment with Intelligrated, which began before the marriage but continued after the marriage and through the time of trial. It was undisputed that this retirement account was at least in part marital.

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[1] Although the heading of his third argument mentioned the court's valuations, Husband's arguments of both the third and fourth issues did not raise any challenge to the court's valuations of the various items of property.

[2] The 50/50 division was challenged for the first time on appeal, as is addressed in greater detail *infra* at 17-18.

The Court of Appeals' opinion found the family court improperly shifted the burden to Husband before Wife presented evidence that the account was marital. This finding was inaccurate, as it overlooked the evidence presented by Wife concerning the marital nature of the account. Wife's attorney elicited testimony from Husband that established this account was acquired, at least in part, through contributions made during the marriage from marital earnings. App. pp. 85-88, 93. Wife elicited Husband's admission the account was in part marital. App. pp. 86, 93. This testimony met the burden of establishing the marital character of the account. Based on this evidence, the burden shifted to Husband to establish what portion was nonmarital. *See Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740; *Simcox-Adams*, 408 S.C. at 265, 758 S.E.2d at 213. Husband offered no evidence whatsoever to establish the value of the nonmarital portion of the account. He provided no evidentiary basis on which the family court or the appellate court could place a value on the nonmarital portion of this account.

The ability to obtain the date of marriage and date of filing values of this account was uniquely Husband's. Throughout this litigation, he was employed at Intelligrated, where this retirement account was established. Notwithstanding that the case had been pending since February 2013, Husband testified he had not begun to seek the information that could establish the pre-marital value until just over a week before the trial, held in March 2015. App. pp. 51-52, 58. He stated the person who could provide the information was out and would not be back until the Monday following trial. App. p. 52. The family court expressed its concern that, though the case had been pending more than two years, no effort was made until two weeks before trial to obtain the valuation evidence. App. p. 151, lines 17-23. Because of the lack of sufficient evidence to make

findings as to value, the family court judge left the record open for submission of further evidence on the valuation issue. App. pp. 151-53. Despite Husband's testimony that the necessary person would be available to provide this information the following Monday, Husband did not avail himself of the opportunity afforded by the court to submit documentation of the value of the nonmarital portion of the retirement account. Upon this failure of proof, the family court properly included the entire account, which Husband admitted was in part a marital asset, in the marital estate for division.

Husband's testimony and his financial declaration were evasive, confusing, and contradictory with respect to this account. He listed the account in three separate places on his financial declaration, placing three different values on it: $234,161, $304,161, and $270,000. App. pp. 85-87, 157. In his trial testimony, he testified the true value was the highest of those figures, $304,161. App. p. 87. A statement offered into evidence by Wife showed this account had a balance of $260,161.15 as of January 3, 2014, and $270,965.38 as of March 31, 2014. App. p. 187. Based on this evidence, the court's order found the account had a date-of-filing value of $260,161.15. App. p. 4, ¶ 12.

The Court of Appeals noted the family court based its valuation on the balance in the account almost a year after the date of filing. The statement reflecting that balance was the only documentation of a value for this account introduced into evidence, and the family court correctly adopted the lower value from the date that was closest in time to the date of filing. Husband's appeal did not challenge the valuation of the retirement account at this amount. Rather, he challenged only the determination that the entire account should be included in the marital estate.

Husband claimed the court should have found the marital value of this account to be $115,615.12, based on a formula. He had worked for Intelligrated for 18 years and eight of those years were during the marriage. He proposed dividing the total value by 18 and multiplying that figure by the number of years of marriage, eight, to arrive at a value of the marital portion of $115,615.62, and he argued on appeal that only this amount should have been included in the marital estate. Where the evidence established that the account was acquired, in part, during the marriage and owned as of the date of filing, the burden shifted to Husband to establish, with proof, the value of the nonmarital portion of this asset. *See Simcox-Adams*, 408 S.C. at 265, 758 S.E.2d at 213. His suggested formula does not establish the actual value attributable to the years of the marriage, and it was his burden to produce evidence of that actual value.

The evidence presented at trial tended to establish that the actual value of the marital portion would have been substantially greater than the $115,615.12 value resulting from the formula Husband proposed. He was contributing $2,126 per month into this account at the time of trial, and he acknowledged he had been contributing at least $2,100 per month. App. pp. 94, 155. He acknowledged that throughout his employment he had made large monthly contributions into this account. App. pp. 94-95. He acknowledged his employer also matched a portion of his contributions. App. p. 94. Based on a $2,100 monthly contribution alone, over the course of the eight years of marriage, the marital portion would have exceeded $200,000, without considering the additional employer match and the interest earned on the account throughout the marriage. The family court's finding of a $260,161.15 value is consistent with this evidence and clearly a more accurate valuation of the marital portion than that claimed

under Husband's proposed formula, even considering only eight years of contributions and growth. It would be purely speculative to use the formula he proposed to value the marital portion, where the formula has no correlation to the true value and growth of this account over the years of the marriage, based on the actual individual and employer contributions and the interest earnings accruing throughout the marriage.

It was Husband's burden to produce the requisite evidence to establish the value of the nonmarital portion of this account, and he failed to meet that burden. Troubled by the lack of such evidence at trial, the family court left the record open for submission of additional evidence as to value. Upon Husband's failure to avail himself of this second opportunity to prove his claim, the court properly included the entire account in the marital estate. The Court of Appeals erred in not affirming the family court's conclusion and in giving Husband a third opportunity to present evidence he twice failed to produce at trial.

B. Franklin Templeton accounts.

The Court of Appeals reversed the family court's finding that the Franklin Templeton accounts owned on the date of filing were entirely marital and held that $61,000 of those accounts was nonmarital.[3] In so holding, the Court relied on evidence

[3] In his brief in the Court of Appeals, Husband claimed the entire Franklin Templeton funds were nonmarital. This claim was contrary to his position at trial, when he claimed only $61,500 of the Franklin Templeton funds was premarital. App. pp. 108-09, 157. It was also contrary to the express finding he proposed in the order drafted by his attorney, which stated Husband "had a premarital retirement account of $61,500.00 with Franklin Templeton," which acknowledged that a portion of the Franklin Templeton accounts "had marital funds," and which included in the marital estate to be apportioned between the parties the amount Husband contended was the marital portion. App. p. 227, ¶ 12. Having conceded that a portion was marital, Husband could not assert on appeal that the entirety of the Franklin Templeton accounts owned as of the date of filing was nonmarital. Moreover, the Court of Appeals held only $61,000 of the Franklin

with respect to a ***different*** account presented by Husband, an account that was not before the family court in the equitable distribution analysis.

The only documentation Husband submitted pertaining to Franklin Templeton funds was a year-end summary from 2005, the year the parties were married, showing he had a Franklin Templeton account, account number 110-10185395048, with a value of $61,583.82 as of December 31, 2005. App. p. 166. All additional funds in any accounts with Franklin Templeton were acquired thereafter, during the marriage.

Wife testified she and her attorney attempted to obtain information about Husband's accounts, without success. App. p. 140. Wife did produce evidence showing that in 2013, shortly before the date of filing of this action, there were two accounts with Franklin Templeton, account number 109-90231159927 with a balance of $225,226.65, and account number 109-90227240493 with a balance of $3,303.55. App. pp. 184, 185. Wife claimed these accounts were marital and sought to have them included in the marital estate for apportionment. App. pp. 137-38, 162.

Husband testified he separated out on his financial declaration what he claimed to be premarital, claiming only $61,500 of the Franklin Templeton funds to be nonmarital. App. pp. 51, 108-09, 157. As to the remainder of the Franklin Templeton funds, his financial declaration stated the date of acquisition was "Accumulated" and the source of funds was "Income." App. p. 157. Wife elicited testimony from Husband that the larger of the two Franklin Templeton accounts was used for marital purposes, having been used to make improvements to the marital residence. App. p. 90. This evidence established a

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Templeton accounts was nonmarital. App. p. 298. Husband did not seek rehearing to challenge this ruling. Any further claim that more than $61,000 of these funds is nonmarital is not preserved.

prima facie case that the Franklin Templeton funds owned on the date of filing, accumulated during the marriage and used for the benefit of the marriage, were marital. *See* S.C. Code Ann. § 20-3-630(A) (property acquired during marriage and owned as of date of filing is marital); *Wilburn*, 403 S.C. at 380, 743 S.E.2d at 738 (property that is nonmarital when acquired may be transmuted into marital property); *Simcox-Adams*, 408 S.C. at 265, 758 S.E.2d at 213 (same). Based on this showing, the burden rested on Husband to establish what, if any, portion of the Franklin Templeton funds owned on the date of filing (accounts 109-90231159927 and 109-90227240493), was acquired prior to the marriage. *See Simcox-Adams*, 408 S.C. at 265, 758 S.E.2d at 213.

The evidence Husband presented did not meet this burden. His only documentation, the summary from 2005, pertained to a ***different*** account owned on December 31, 2005, not the accounts in existence as of the date of filing. Upon Husband's failure to make any evidentiary showing as to the actual accounts before the court for division, accounts 109-90231159927 and 109-90227240493, the family court properly included the entire value of those accounts in the marital estate.

The Court of Appeals held the family court should have treated $61,000 of the Franklin Templeton accounts as nonmarital. App. p. 298. This determination misapprehended the evidence and overlooked what the documents in evidence revealed about the accounts that were before the court for division. Those accounts were marital, because they were acquired after the parties were married and owned as of the date of filing of the marital litigation. *See.*S.C. Code Ann. § 20-3-630(A). The evidence was clear that only two Franklin Templeton accounts were owned on February 13, 2013, the date of filing: account no. 109-90231159927 and account no. 109-90227240493. App.

pp. 184-85. The evidence Husband produced pertained to a different Franklin Templeton account he claimed was owned prior to the date of marriage, February 15, 2005. App. p. 166. This account did not exist on the date of filing and was not before the court for division. The Franklin Templeton accounts before the family court, account no. 109-90231159927 and account no. 109-90227240493, were not in existence in 2005, as evidenced by the 2005 year-end asset summary offered by Husband. App. p. 166. Husband produced no evidence purporting to establish that account no. 109-90231159927 and account no. 109-90227240493 predated the marriage or to establish what their date of marriage value would have been. Rather, the document he produced ***refuted*** the existence of these accounts on the date of the marriage, because they were not reflected on the 2005 Franklin Templeton asset summary at all – not as being in existence on January 1, 2005, and not as being in existence on December 31, 2005. App. p. 166.

The Court of Appeals placed undue reliance on Husband's testimony, to the exclusion of what the documents actually established. App. p. 301. These accounts, which came into being after the date of marriage and were owned as of the date of filing, were by definition marital. *See* S.C. Code Ann. § 20-3-630(A). Wife claimed they were marital, both on her sworn financial declaration and in her testimony. App. p. 139, lines 1-2, 17-18; p. 162. The 2005 and 2013 statements introduced into evidence established the accounts came into existence during the marriage and were owned on date of filing, consistent with her testimony that they were marital. App. pp. 166, 184-85. Upon this evidence, the burden shifted to Husband to establish, with proof, the nonmarital character of any portion of accounts 109-90231159927 and 109-90227240493, and the value of the nonmarital portion, if any. *See Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740; *Simcox-*

*Adams*, 408 S.C. at 265, 758 S.E.2d at 213. Upon Husband's failure to provide such proof, the family court correctly found the Franklin Templeton accounts to be entirely marital. The Court of Appeals erred in relying on his testimony concerning a different account to find $61,000 of the Franklin Templeton accounts owned on the date of filing were nonmarital. This Court should affirm the family court's inclusion in the marital estate of the entire Franklin Templeton funds held as of the date of filing.

If, contrary to Wife's contention, this Court agrees with the Court of Appeals that Husband's testimony and the 2005 statement established a portion of the Franklin Templeton funds owned as of date of filing were nonmarital, remand is not necessary. The Court may confirm the Court of Appeals' finding and modify the family court's order so as to deduct $61,000 from the total marital estate to be divided.

This Court should grant a writ of certiorari and affirm, or affirm as modified, the order of the family court with respect to the Franklin Templeton funds.

C. 50/50 Division.

On appeal, Husband challenged the court's 50/50 division of the marital estate, arguing he should receive 60 percent and Wife should receive only 40 percent. The Court of Appeals did not address this aspect of Husband's argument, instead remanding for a new trial on the equitable division of property. Because remand was an inappropriate disposition based on the failure of proof, both at trial and after the record was left open for additional evidence, this Court should also address and affirm the 50/50 division made by the family court.

As a procedural matter, Husband's argument for a 60/40 division of the marital estate, made for the first time on appeal, is not preserved. At trial, Husband did not ask

the court to make a 60/40 apportionment of the marital estate, he did not provide for a 60/40 division in his proposed order, and he did not ask for a 60/40 division in his Rule 59(e) motion.[4] Error preservation principles do not allow his assertion of this claim for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Easterling v. Burger King Corp.*, 416 S.C. 437, 453, 786 S.E.2d 443, 451 (Ct.App. 2016); *Doe v. Roe*, 369 S.C. 351, 375-76, 631 S.E.2d 317, 330 (Ct.App. 2006).

On the merits, the court's 50/50 division of the marital estate was fair and equitable. On appeal, the reviewing court must look to the overall fairness of the apportionment made by the family court. *Pruitt v. Pruitt*, 389 S.C. 250, 259, 697 S.E.2d 702, 707 (Ct.App. 2010); *see also Wilburn*, 403 S.C. at 390, 743 S.E.2d at 744. If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant. *Pruitt*, 289 S.C. at 259, 697 S.E.2d at 707. "Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is fair." *See Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 55 (Ct.App. 2006).

Under the statutory factors of S.C. Code Ann. § 20-3-620(B), the court's 50/50 division was appropriate. Section 20-3-620(B) provides the statutory factors that control equitable apportionment, and those factors support the court's award.

Factors one, two, and five – the duration of the marriage together with the ages of the parties, marital misconduct and fault, and health of the parties -- support the court's award. *See* S.C. Code Ann. § 20-3-620(B)(1), (2), (5). Although the marriage was one

[4] In his Rule 59(e) motion, Husband's only claims of error in the 50/50 division were that it was not supported by specific findings and conclusions and consideration of statutory factors. App. pp. 8-17, ¶¶ 13-14, 31, 45-52. He did not ask for a 60/40 division.

of only eight years, the parties had been together 19 years, and Husband walked out on the marriage after they were advanced in age. At trial, Wife was 65 years of age and would soon be retiring. She had health issues and needed a surgery that she had been forced to postpone because of the divorce proceedings. App. pp. 125-26. Husband was engaged in an inappropriate relationship before he moved out in December 2012, and he admitted having committed adultery shortly after meeting his paramour. App. pp. 35-36, 71, 118, 125-26. His adulterous relationship with his paramour was the direct cause of the breakup of the marriage.

Factor three – the value of the marital property and the contribution of each party to the acquisition and preservation of the marital property, including the contribution of a spouse as a homemaker – also supports the court's award. *See* S.C. Code Ann. § 20-3-620(B)(3). Here, though Husband claims he brought nonmarital assets into the marriage, those claims have not been established with ***proof***, as is more fully discussed previously in this petition. Both parties contributed financially through their earnings during the marriage. Although Husband's earnings and direct contributions were higher than Wife's, Wife made far greater indirect contributions to the preservation of the marital estate, because she maintained the parties' property and cared for their home and pets during Husband's long absences due to his work, absences that lasted, on average, three and one-half weeks of every month. Under these circumstances, Wife's indirect contributions weigh more heavily in favor of the 50/50 division than in the typical case where both spouses are constantly present and contributing equally to the care and maintenance of their property.

Factors four and seven – the income, earning potential, and opportunity for future acquisition of capital assets, and the nonmarital property of each spouse – both weigh in favor of the 50/50 division. *See* S.C. Code Ann. § 20-3-620(B)(4), (7). Wife's income was modest, she was about to retire, and her future earning ability and opportunity for future acquisition of assets was practically non-existent. She had only one nonmarital asset, a small account containing inherited funds, to assist with her expenses in retirement and her future needs due to advancing age. App. p. 162.

Factor nine – whether alimony was awarded – also supports the division. *See* S.C. Code Ann. § 20-3-620(B)(9). The alimony award was small, only $500 per month. It was less than the $750 per month Husband contributed to Wife's expenses during the pendency of this action. It was exactly enough to cover the difference between Wife's current net income and monthly expenses, and it did not provide anything more to supplement her income upon retirement or to provide for her future medical needs due to advancing age or unexpected and non-routine expenses that might arise. The court's equitable distribution award appropriately provided for such future needs.

Factor thirteen – liens on the property – also supports the award. *See* S.C. Code Ann. § 20-3-620(B)(13). Wife was awarded the marital residence, but she also was required to pay the mortgage and other expenses pertaining to that property, and she is expected to refinance it within one year after it is conveyed to her in order to release Husband of any obligation on this indebtedness. The equitable distribution award facilitated her ability to take full responsibility for the house expense and to pay off the mortgage and thereby effect a release of Husband's liability, even if she could not qualify

for a refinance of the mortgage because of her age and diminished income due to retirement.

Based on all the applicable factors[5] of Section 20-3-620(B), the court's award was equitable and fair and should be affirmed.

If this Court modifies the family court's disposition as to the Franklin Templeton accounts, reducing the marital estate by the claimed $61,000 nonmarital portion of those accounts, the effect of such modification will be to reduce the amount Wife will receive from the 50/50 division ordered by the family court. If that occurs, the 50/50 division should not be altered so as to give Wife an even smaller percentage of the marital estate.

In his brief in the Court of Appeals, Husband did not demonstrate that the court's 50/50 division was against the preponderance of the evidence, and he did not demonstrate that the apportionment was not equitable. This Court should affirm the 50/50 division made by the family court.

D. Valuations.

As noted in footnote 1, *supra* at 9, Husband did not challenge any of the valuations of the various marital assets, except his argument that the court should have valued and apportioned only what he claimed to be the marital share of the accounts, not their entire value. All of the family court's valuations were supported by evidence presented at trial as to the values of the accounts at or near the date of filing, and all of the valuations should be affirmed.

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[5] Factors six, eight, ten, eleven, twelve, and fourteen are not applicable to the parties' circumstances and do not factor into the equitable distribution analysis.

2. Alimony and Attorney's Fees.

Because the Court of Appeals remanded the equitable distribution issue to the lower court, it also remanded the issues of alimony and attorney's fees for retrial in light of the controlling factors and the new equitable division. If this Court finds the Court of Appeals erred in ordering remand, it should address the merits of the alimony and attorney's fee determinations and affirm the family court's findings on those issues, for the reasons outlined in the Final Brief of Respondent, App. pp. 277-81, incorporated herein by reference.

3. Attempt at Reconciliation and Written Finding.

The family court made the required attempt at reconciliation and made a finding on the record that reconciliation was not possible. App. pp. 32-33. However, this finding was omitted from the divorce decree. The Court of Appeals acknowledged the family court made an unsuccessful attempt to reconcile the parties, and it acknowledged neither party disputes that such attempt was made. App. p. 301. The family court also made an express finding, on the record, that reconciliation was not possible. App. p. 33, lines 17-18. Husband raised an issue on appeal as to the omission of this finding from the written order.

For the reasons set out in the Final Brief of Respondent, App. pp. 263-66, incorporated herein by reference, the Court of Appeals should have found the family court substantially complied with the requirements of S.C. Code Ann. § 20-3-90 or, alternatively, made its own finding that the family court attempted reconciliation and that reconciliation was not possible. If this Court determines that remand is not appropriate on the other issues in this case, no remand is necessary with regard to the reconciliation

attempt. If, like the Court of Appeals, this Court believes a written finding is necessary, it should simply modify the family court order and make a finding in its own order that reconciliation was attempted but was not possible, as the family court clearly held.

## CONCLUSION

For all these reasons and the additional reasons set out in the Final Brief of Respondent, incorporated herein by reference, this Court should grant a writ of certiorari, reverse the decision of the Court of Appeals, and affirm the decision of the family court. In the alternative, on the issue of division of property, if the Court agrees with the Court of Appeals' view of the Franklin Templeton accounts, it should reduce the marital estate by the $61,000 the Court of Appeals found to be nonmarital and give effect to the division previously ordered by the family court with that modification. Also in the alternative, if the Court deems a written reconciliation attempt finding to be statutorily required, it should makes its own finding that the family court attempted reconciliation and reconciliation was not possible.

Respectfully submitted,

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APPEAL FROM RICHLAND COUNTY
Family Court
Peter R. Nuessle, Family Court Judge

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Case No. 2013-DR-32-352
Appellate Case No. 2015-002426

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Kenneth M. Shufelt,

Respondent,

v.

Janet R. Shufelt,

Petitioner

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PROOF OF SERVICE

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I certify that a copy of the Petition for Writ of Certiorari in the above-referenced case has been filed in the South Carolina Court of Appeals, and that a copy of said Petition and the Appendix have been served upon respondent's counsel, John E. Cheatham, 102 Harmon Street, Lexington, South Carolina 29072, on September 17, 2018.

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