

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Kenneth M. Shufelt

Respondent,

v.

Janet R. Shufelt,

Petitioner,

RETURN TO PETITIONER'S
WRIT FOR CERTIORARI

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NOV 08 2018

S.C. SUPREME COURT

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in remanding the issue of equitable division of property for a new trial in violation of prior ruling of the Supreme Court?
2. Did the Court of Appeals err in remanding the issues of alimony and attorney's fees for a new trial in violation of prior ruling by the Supreme Court?
3. Did the Court of Appeals violate prior ruling of the Supreme Court in finding the matter had to be remanded to the family court to have it memorialize its unavailing reconciliation attempt, in the family court's "new order"?

COUNTER STATEMENT OF THE CASE

Respondent brought this in February 2013 in the Lexington County Family Court seeking, *inter alia*, a divorce from Petitioner, Janet R. Shufelt ("Wife"). App. pp. 22-25. Wife filed an answer and counterclaim, and the contested issues were equitable distribution of property, alimony, and attorney's fees. App. pp. 26 - 30.

The trial of this case occurred 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. 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 by either party prior to the date proposed Orders were to be submitted to Judge Nuessle by March 23, 2015. App. p. 153-154. The Court signed the order drafted by Wife's trial attorney. App. pp. IC-6, 216-31. That order filed April 27, 2015, set forth that it granted a divorce to Husband and decided the issues of property division, alimony, and attorney's fees. App. pp. 1 C-6. Although the Husband's uncontradicted testimony established that Franklin Templeton accounts were nonmarital (App. pp. 43, 45) and despite such being uncontradicted, the family

court included the entirety of the husband's Franklin Templeton disputed retirement 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 \$13,790.00 in attorney's fees. App. pp. 1-C - 6

Husband filed Motion to Reconsider, Alter or Amend Final Order or to Grant a New Trial pursuant to SCRCR Rule 59(e), of the South Carolina Rules of Civil Procedure and pursuant to SCFCR 26(e) of the South Carolina Family Court Rules. Respondent, alleging, *inter alia*, the Court did not make findings of fact and conclusions of law to support its Rulings as to equitable division of property and did not consider the relevant factors in § 20-3-620 of the South Carolina Code (2014), did not make findings and conclusion to support its ruling as to alimony and did not follow the requirements of § 20-3-130 of the South Carolina Code (2014), and did not make findings and conclusion as to support attorney's fees as required by the law of this state. Husband also submitted that the lower Court's order was void as the Order did not comply with § 20-3-90 of the South Carolina Code (2014) which requires that the unsuccessful attempt at reconciliation must be in the Order (memorialized) to grant a divorce and other relief. App. pp. 8-17

The Petitioner filed a return which contended that an unsuccessful attempt at reconciliation is not required to be in an Order granting a divorce and other relief, and that the family court Order contained findings sufficient to support the divorce, property division, alimony and attorney's fees. App. pp. 18-21. Judge Nuessle denied Husband's Motion by summary Order filed October 26, 2015. App. p. 7.

Husband appealed, challenging the equitable division of property for lack of findings and conclusions required by Rule 26 of the South Carolina Family Court Rules to support a 50/50 division (App. p. 241) and the failure to comply with § 20-3-620(B) of the South Carolina Code (2014) in making equitable division. App. p 245

The Court of Appeals found error in the family court's equitable division of property in failing to properly determine what was marital and nonmarital property as established by Husband's testimony and documents that the \$61,500.00 Franklin Templeton account was nonmarital, and ruled that such was nonmarital citing section § 20-3-630 of the South Carolina code of Laws (2014).

The Court of Appeals did state that because we are remanding equitable division for failure in making proper findings and conclusions concerning same and for the family court failed to properly consider the factors set forth in § 20-3-620(B) of the South Carolina Code (2014) and remanded so that such for a new trial which would consider same. App. pp. 298-300.

The Court of Appeals also stated, "Considering our remand of the equitable division, we also remand the issue of alimony and direct the family court to consider all of the relevant statutory factors under section 20-3-130(C) of the South Carolina Code (2104)" App. p. 300

The Court of Appeals further stated, "We also remand the issue of attorney's fees. *Crossland v. Crossland*, 408 S.C. 443, 460, 759 S.E.2d 419, 428 (2014) ("Where beneficial results in a divorce action are reversed on appeal, the case should be remanded for reconsideration of the attorney's fee awarded.") On remand, the family court should consider the factors set forth in *E.D.M. v. T.A.M.*, 307 S.C. 471, 471, 467-77, 415 S.E. 812, 816 (1992)" App. p. 300

The Court of Appeals found the family court's Order failed to comply with the mandatory requirements of § 20-3-90 of the South Carolina Code (2014) which requires mandatory certification of the judge's unsuccessful attempt to reconcile the parties, yet it did not reverse and remand on this issue as per *Miller v. Miller* 280 S.C. 314, 316, 313 S.E.2d 288, 290 (1984). The Court of Appeals stated, "Because this case is already being reversed and remanded for reconsideration of several other issues, we decline to reverse the Decree on this ground. Rather on remand, we direct the family court to memorialize its previous unavailing reconsideration attempt **in its new order.**" App. p. 301 (Emphasis

added) The Court of Appeals also cited the case of “*Brown v. Brown*, 243 S.C. 383, 387, 134 S.E.2d 222, 224 (1963)” in support of its position.

Husband made a like challenge of failure to make findings and conclusion as to alimony and failure to comply with § 20-3-130 of the South Carolina Code (2002) in awarding alimony, App. p. 241, and challenged the lack of findings and conclusion as to attorney fees. See *E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E. 812 (1992).

Husband also challenged the failure of the family court's order to contain a written finding memorializing its unsuccessful attempt at reconciliation in its Order even though the court made a determination that reconciliation was not possible occurred at the start of the trial, App. pp. 32-33. The Husband's challenge was that this unsuccessful attempt at reconciliation was not included in the Order and thus the Order could not grant a divorce and could not grant the other relief requested. App. p. 9

The Court of Appeals found the family court's Order failed to comply with the mandatory requirements of § 20-3-90 of the South Carolina Code (2014) which requires written certification of the judge's unsuccessful attempt to reconcile the parties in a family court order, yet it did not reverse and remand on this issue as per *Miller v. Miller* 280 S.C. 314, 316, 313 S.E.2d 288, 290 (1984). The Court of Appeals stated, “Because this case is already being reversed and remanded for reconsideration of several other issues, we decline to reverse the Decree on this ground. Rather on remand, we direct the family court to memorialize its previous unavailing reconsideration attempt **in its new order.**”

CONSIDERATIONS GOVERNING CERTIORARI REVIEW

Petitioner contends that, “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.

COUNTER ARGUMENTS AND AUTHORITIES

1. Did the Court of Appeals err in remanding the issue of equitable division of property for a new trial?

In this appeal, Petitioner claims Husband first challenged the court's ruling 50/50 division of the marital estate on appeal, the error being that such is clearly contained in Husband's Motion before Judge Nuessle. App . pp. 8-17.

While the Court of Appeals was clearly concerned at the absence of proof as to what were the nonmarital and marital, the Court of Appeals declined to make its own findings on the record created in the family court and remanded for a new trial on the equitable division of property to give both the Husband and the Wife an opportunity to present evidence to prove what was marital and non-marital. App. pp. 298-300.

The Court of Appeals likens this matter to, “the same class of error we deemed reversible in *Chanko v, Chanko*, when the family court included the husband's entire retirement account in the marital estate despite uncontradicted evidence he owned the account seven years before the marriage. 317 S.C. 636, 641-42, 490 S.E.2d 630, 633 (Ct. App, 1997). App. p. 299.

The Court of appeals continued, “As in *Chanko*, we recognize Husband's testimony about the T. Rowe Price 401K was “vague and that expert testimony or documentary evidence on the pre-marital value of the retirement plans would have been preferable” Id. At 643, 490 S.E.2d at 663; see also *McMillan*, 417 S.C. at 596-98, 790 S.E.2d at 223-24. Unlike *Chanko* and *McMillan*, however, here the Husband did not testify as to even an approximate premarital value, so we must remand to the family court to complete this task.” App. p. 300

Additionally, the Court of Appeals found that the, “Wife presented no credible evidence to contradict Husband's testimony regarding the nonmarital portions (of his retirement accounts)” App. p. 299

While the family court judge did, “leave the record open, so we can come back if we need to have another hearing. I hope you don't because I'm not on the

schedule any more period, that I know of.” (App. p. 153)d,” App. p. 153. The Court also wanted proposed Orders by March 23, 2015, (App. p. 154) which left little time to obtain any evidence and have a hearing prior thereto.

The Court of Appeals, as did the family court, faulted both parties for lack of evidence, and it provided in its order the opportunity for both parties to provide additional evidence upon which the family court could properly decide what was marital and nonmarital App. p. 300, even though the only testimony as to what was marital and nonmarital was provided by the husband. App pp. 298-300

The Court of Appeals thus Ordered, “We reverse the equitable division and remand this case to the family court to identify, value and divide the marital property consistent with this opinion and the relevant factors of Section 20-3-620(B).” App. p. 300.

2. Did the Court of Appeals err in remanding the issues of alimony and attorney's fees for a new trial in violation of prior ruling by the Supreme Court?

Attorney’s fees: The Petitioner states in her Petition for Certiorari concerning attorney’s fees that she incorporates her Final Brief App. pp. 270 281, Petitioner concludes, “Husband has not demonstrated that it was an abuse of discretion.” App. p. 240

In that the Petitioner’s argument states the wrong standard for reviewing attorney’s fees, and in that the Court made no findings and conclusions as required by Rule 26(a) App. p. 241-42, 250-51, this issue should not be addressed by the Supreme Court, and further the Petitioner did not set forth any prior ruling by the Supreme Court that the Court of Appeals did not follow. App. pp. 279-281, 309.

Alimony: In that the Petitioner simply refers to its Final Brief on this issue, it fails to explain how the Court of Appeals did not follow a prior ruling of the Supreme Court.

3. Did the Court of Appeals violate prior ruling of the Supreme Court in finding the matter had to be remanded to the family court to have it memorialize its unavailing reconciliation attempt, in the family court's "new order"?

Included in Petitioner's argument is that the Supreme Court should find the lower Court "[s]ubstantially complied with the requirements of Section 20-3-90" App. p. 265 and Petition for Certiorari p. 22.

The Petitioner appears to be requesting that the Supreme Court reverse its prior rulings cited by the Court of Appeals that such a memorialization of an unsuccessful attempt at reconciliation is necessary for an Order of divorce to exist. App p. 301 See: *Miller v. Miller* 280 S.C. 314, 313 S.E.2d 288 (1984); *Brown v. Brown*, 243 S.C. 383, 134 S.E.2d 222 (1963).

The requirement by the family court is mandatory according to § 20-3-90 of the South Carolina Code (2014), and Respondent contends that such failure requires that the matter be remanded for a new trial. *Miller v. Miller* 280 S.C. 314, 316, 313 S.E.2d 288, 290 (1984).

The Court of Appeals found the family court's Order failed comply with the mandatory requirements of § 20-3-90 of the South Carolina Code (2014) which requires written certification of the judge's unsuccessful attempt to reconcile the parties in a family court order, yet it did not reverse and remand on this issue as per *Miller v. Miller* 280 S.C. 314, 316, 313 S.E.2d 288, 290 (1984).

The Court of Appeals stated, "Because this case is already being reversed and remanded for reconsideration of several other issues, we decline to reverse the Decree on this ground. Rather on remand, we direct the family court to memorialize its previous unavailing reconsideration attempt **in its new order.**" App. p. 301 (Emphasis added) The Court of Appeals also cited the case of "*Brown v. Brown*, 243 S.C. 383, 387, 134 S.E.2d 222, 224 (1963);" in support of its position.

The Court of Appeals thus ruled that a finding that an unsuccessful attempt at reconciliation by the family court and certification of such by the family court

judge is necessary to issue an Order of divorce *Miller v. Miller, supra*, and *Brown v. Brown, supra*. Respondent submits the Court of Appeals at least inferred that such prior unsuccessful attempt at reconciliation must be memorialized the family court's "new order" as such is mandatory to issuing an order of divorce.

Respondent submits that even if the Petitioner is successful on the other issues raised, the matter would still have to be reversed and remanded for further consideration of all issues as the family court Order (App. p. 1-C – 6) which did not contain the mandatory requirements of § 20-3-90 of the South Carolina Code (2014). Further, such was raised in Respondent's post trial Motion (App. pp. 8-17) which resulted in the Family Court's Order filed October 26, 2015, which did not address this unsuccessful attempt at reconciliation issue.

COUNTER TO PETITIONER'S ARGUMENT AND AUTHORITIES

Petitioner makes numerous statements and arguments under this heading, which seems to not be limited to violation of the Court of Appeals of prior rulings of the Supreme Court.

The Petitioner seeks to infer that producing a year end statement on Franklin Templeton account ending 5048 in 2005, establishes that the Franklin Templeton accounts ending 9927 and 0493 did not exist in 2005 and thus are marital property.

Such disregards the Husband's uncontradicted testimony that all Franklin Templeton accounts were before he went to work at Intelligrated, where he worked for 10 years prior to his 8 year marriage. App. pp. 43, 45, 89. There is no evidence otherwise as determined by the Court of Appeals, "Wife presented no credible evidence to contradict Husband's testimony regarding the nonmarital portions (of his retirement accounts)" App. p. 299

Thus, the Wife never proved when the accounts came into existence, as found by the Court of Appeals, Wife offered no evidence as to "[w]hen the funds in any of them (retirement accounts) were acquired. App. p. 299.

Although the Husband's uncontradicted testimony established that Franklin Templeton accounts were nonmarital (App. pp. 43, 45), the family court included

the entirety of the husband's Franklin Templeton disputed retirement accounts in the marital estate

Petitioner also ignores the fact that Respondent made numerous attempts to obtain the records on his retirements (App. p. 51-52) and only focuses on his last attempt made about a week before the hearing. App. p. 58

The Petitioner refers to other items that should have been treated differently, which seem to be raised for the first time on appeal should have been in a Motion to Reconsider if she believed the family court misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

The Court of Appeals thus Ordered, "We reverse the equitable division and remand this case to the family court to identify, value and divide the marital property consistent with this opinion and the relevant factors of Section 20-3-620(B)." App. p. 300.

Since the Court of Appeals remanded the matter to the lower court upon the above terms, it left open the issue of the remaining property and thus Respondent is not bound by the footnote on page 14 of Petitioner's Petition for Certiorari. Further, both parties are being given another opportunity to present clarifying evidence and the Petitioner seems to disregard the Court of Appeals finding against the Petitioner which is uncontested, that, "Wife presented no credible evidence to contradict Husband's testimony regarding the nonmarital portions (of his retirement accounts)" App. p. 299

Petitioner includes in her argument details that were not brought before the Court as they occurred while the matter was on appeal, thus with no basis in fact she submits items that Respondent believes he should not have to respond to.

The family court made no findings and simply stated conclusions and the Trial Court did not indicate what weight or consideration it gave to the statutory

elements as to equitable division of property, alimony, or attorney's fees as required by the family court Rule 26(A) of the South Carolina Family Court Rules.

Findings and rulings made by a Judge for the record are only what a Judge indicates he is going to find and rule and are not binding upon the Judge as the Judge is free to change such until his order containing findings, conclusions and rulings is filed with the Clerk of Court as upon filing the Judge loses control over the matter and the Judge's Order is then binding upon the Judge and the parties.

The Family Court Order did not address the issue of reconciliation and the Judge's comments at the hearing are not binding on the Judge or the parties, as the Judge is free to change his mind until his Order concerning the matter is filed with the Clerk of Court, and his findings, conclusions, and rulings are then binding on the Judge and the parties. The Petitioner took the position before the lower Court that a finding as to reconciliation being memorialized in the Order is not required to grant a divorce pursuant to, S. C. Code Ann. § 20-3-90 (1976 as amended)

Petitioner also request that the Supreme Court speculate about the value of a retirement account, simply because the Respondent admitted he was making a \$2,100.00 donation as per his financial declaration, yet the Court of Appeals found there was no testimony as to what his donations had be made over the years, and that the testimony concerning such, "was so vague as to be inconsequential." App. p. 299

Respondent acknowledges that the 60 percent and 40 percent division should not have been raised and is not preserved for appeal, and apologizes to the Court.

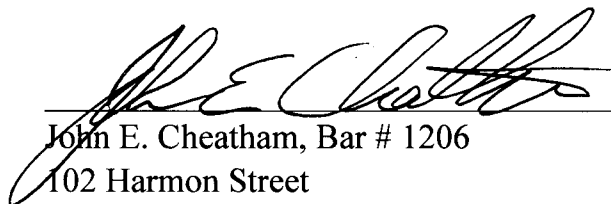
The remaining items seem to deal with Petitioner's desired equitable division of real and personal property, but do not cite any specific Court of Appeals ruling that directly violates any prior Supreme Court case that the Court of Appeals did not follow in making its ruling.

CONCLUSION

Respondent submits that Petitioner's Petition for Certiorari should be denied, and that the matter should be remanded and reconsidered as provided in the Order of the Court of Appeals filed June 13, 2018.

Respectfully submitted,

November 6, 2018



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S.C. SUPREME COURT

**PROOF OF SERVICE OF A RETURN
TO PETITION FOR CERTIORARI**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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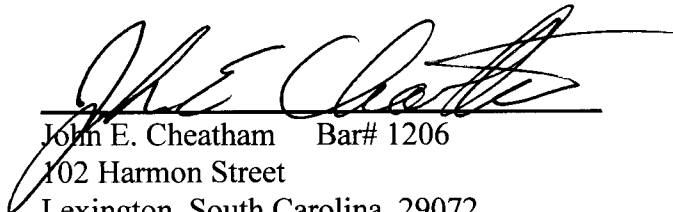
Janet R. Shufelt,

Petitioner.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Certiorari upon Petitioner by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2018, addressed to her attorney of record, Katherine Carruth Goode, Post Office Box 1175, Winnsboro, South Carolina 29180.

November 6, 2018


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