THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Case No. 2013-DR-32-352
Appellate Case No. 2018-001651

Kenneth M. Shufelt,

Respondent,

v.

Janet R. Shufelt,

Petitioner

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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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?

ARGUMENT IN REPLY

Petitioner, Janet R. Shufelt ("Wife"), seeks certiorari review of the decision of the Court of Appeals to remand this divorce litigation to the family court for a new trial, based on insufficient evidence on which to make findings of fact as to the portions of certain accounts that were marital and nonmarital. A central premise of her request for review is that the Court of Appeals misplaced the burden of proof, once the evidence established the marital character of all or a portion of the disputed accounts, and misunderstood the consequences of the failure of Respondent, Kenneth M. Shufelt ("Husband"), to present evidence as to the value, if any, of what he claimed to be the nonmarital portion of those accounts. *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). Another premise of her request for review is that the Court of Appeals also misunderstood the consequences of Husband's failure, as the appellant, to create an evidentiary record upon which the appellate court can make a decision. *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). Wife contends that affirmance of the family court order was required, rather than a remand that will provide Husband another "bite at the apple" and opportunity to make the evidentiary showing he twice failed to make in the court below. *See Lewis*, 392 S.C. at 393 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); *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). Husband's return does not challenge these assertions as to the burden of proof or these authorities that establish, in the interests of fundamental fairness, that remand for a new trial is not the proper disposition based on an appellant's failure to offer sufficient evidence to support his cliams.

As more fully detailed in Wife's Petition, under the circumstances of this case and in the interests of fundamental fairness, judicial economy, and finality, this Court should

grant a writ of certiorari, affirm the equitable division of property, reach the remaining issues not addressed by the Court of Appeals, and affirm the family court's decision on alimony and attorney's fees, and it should affirm, or affirm as modified, the court's unavailing attempt at reconciliation.

1. Equitable Division of Property.

Husband appealed the 50/50 division of the marital estate, claiming the family court should have awarded 60 percent of the marital estate to him and 40 percent to Wife. He now concedes that this aspect of his appeal is not preserved and should not have been raised. *See* Return to Petitioner's Writ for Certiorari, p. 10, fourth full paragraph.

A. T. Rowe Price Account.

Wife adheres to her argument with respect to the T. Rowe Price account set out in the Petition for Writ of Certiorari, pages 9-13, and it is not repeated here. This reply addresses points made by Husband in his return.

Husband invokes the decision in *Chanko v. Chanko*, 327 S.C. 636, 490 S.E.2d 630 (Ct.App. 1997), as did the Court of Appeals, but *Chanko* was decided on the basis of some valuation evidence, not a complete absence of evidence. There, the family court awarded 50 percent of a husband's retirement account, some of which was earned prior to the marriage, to the wife. While the husband did not offer expert valuation evidence as to the pre-marital portion, he testified to a value of $75,000 to $80,000 based on statements he had from the second quarter of the year in which the parties were married. The Court of Appeals found, under these circumstances, it was error to award fifty percent of the entire account to the wife, and it modified the family court's order by deducting the sum of $75,000 from the value of the account before the 50/50 division was made. *See id.*,

327 S.C. at 641-42, 490 S.E.2d at 633. Similar circumstances are not presented in this case. Unlike *Chanko*, Husband presented no evidence as to the pre-marital value of his retirement account, which the Court of Appeals noted in its opinion. He did not provide even an estimate of the pre-marital value on which the family court or Court of Appeals could make a determination.

Elsewhere in the *Chanko* decision, the Court of Appeals set out the proper result that should be reached where an appellant has failed to provide evidence of the nonmarital portion of an asset that is before the court for equitable division:

> 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 id., 327 S.C. at 643, 490 S.E.2d at 634 (citations omitted). Under the clear authority of *Chanko* and the other authorities addressing the appellant's burden, the Court of Appeals should have affirmed the family court's treatment of the T. Rowe Price account, because of Husband's complete failure of proof as to the value of the nonmarital portion.

As is set out in detail in Wife's Petition, pages 10-11, Husband had the opportunity to present this evidence at trial and again following trial, when the judge left the record open, but no additional valuation evidence was presented. In his return, he claims he made numerous attempts to obtain the records and that Wife has focused only on the attempt made about a week before trial. Wife focuses on that time-line because it is clear from his testimony, both on direct and on cross, that was when he made his attempt. App. p. 51, lines 3-7; p. 58, lines 8-17. He testified the person who could furnish the information was out but would be back on Monday. App. p. 52, lines 3-6. However, no further information was forthcoming following the trial, despite the court's leaving the record open. This situation falls squarely within the ambit of the holdings of

Chanko, *Lewis*, and the other authorities cited above, *supra* at 2. The remedy for his failure of proof was not to remand to give him another chance to offer evidence. Because he failed to produce the evidence at the appropriate time or again at the second opportunity provided by the trial judge, the Court of Appeals should not have heard his complaint about the family court's resolution of this issue. He should not receive a third bite at the apple to establish his claim. Such a result is contrary to fundamental fairness. *See Lewis*, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n. 11. This Court should grant certiorari and affirm the family court's treatment of the T. Rowe Price account.

B. Franklin Templeton accounts.

Wife adheres to her argument with respect to the Franklin Templeton accounts set out in the Petition for Writ of Certiorari, pages 13-17, and it is not repeated here. This reply addresses points made by Husband in his return.

Husband continues to assert, as he did in the Court of Appeals, that the entirety of the Franklin Templeton accounts is nonmarital. This assertion is contrary to his position at trial, when he testified only $61,500 of the Franklin Templeton funds was pre-marital. App. p. 51, lines 8-10; p. 108, line 20 – p. 109, line 9. His position is not supported by the record and, because it is contrary to the position he asserted in the court below, it is not preserved and cannot be maintained in this appeal.

The Court of Appeals made a finding that $61,000 of the Franklin Templeton funds was nonmarital. Husband did not file a petition for rehearing with respect to that finding, and he has not sought certiorari review of that finding. His claim that all the Franklin Templeton funds are nonmarital is contrary to the Court of Appeals' determination, and he cannot continue to assert this position under these circumstances.

Husband challenges Wife's claim that the Franklin Templeton funds held on the date of filing of this action were acquired during the marriage and are therefore marital property. He asserts his testimony about these funds is "uncontradicted." In fact, the documentary evidence contradicts his testimony. The year-end asset summary from 2005, the year of the marriage, shows the accounts owned on date of filing were not in existence in 2005. App. pp. 166, 184-85. 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 Court of Appeals' conclusion to the contrary is erroneous, based on the documentary evidence and the clear mandate of Section 20-3-630(A). This Court should grant certiorari and find, based on the evidence and the statute, that the Franklin Templeton accounts owned on date of filing were entirely marital.

C. 50/50 Division.

As noted above, *supra* at 3, Husband now concedes that his argument for a 60/40 division of the marital estate is not preserved and should not have been raised on appeal. The 50/50 division should be affirmed.

D. Valuations.

As noted at page 9, footnote 1, of the Petition for Writ of Certiorari, 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.

2. Alimony and Attorney's Fees.

The Court of Appeals did not decide the merits of Husband's challenge to the alimony and attorney's fee awards, remanding those matters to the family court to be re-determined in light of the remand of the equitable distribution aspect of the case. Those issues have been fully briefed by the parties in the Court of Appeals, and their briefs are in the Appendix before this Court. If this Court finds the Court of Appeals erred in ordering remand as to equitable distribution, in the interests of judicial economy and finality, it should address the merits of the alimony and attorney's fee determinations made by the family court and affirm. Because the issues are fully briefed, the Court may even dispense with further briefing to do so.

3. Attempt at Reconciliation and Written Finding.

The record is clear, and Husband concedes, that an unsuccessful attempt at reconciliation was made by the family court. In his return, however, he argues the absence of a written finding in the court's order to that effect mandates remand of the entire case for a new trial, even if the Court agrees with Wife's position on the other issues argued above. As Wife has argued throughout this appeal, no such remand is necessary. The Court can affirm, finding that the family court's reconciliation attempt at trial and its finding on the record that reconciliation was not possible substantially complied with the requirements of S.C. Code Ann. § 20-3-90. Alternatively, this Court can make its own finding to that effect and modify the family court's order to include such a finding.

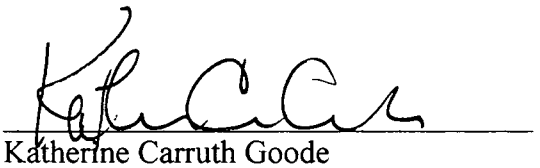
In his brief in the Court of Appeals, Husband expressly acknowledged that reconciliation was attempted. App. p. 240. Moreover, he twice conceded that the

reviewing court has the "right to make such findings as it desires." *Id.* In his reply brief, he further stated, "If the Court desires to so find that an attempt at reconciliation [sic], then Appellant will accept same." App. p. 287. Under *de novo* review, this Court can make its own finding, based on the clear attempt made by the family court judge and the judge's determination that reconciliation was not possible.

CONCLUSION

For all these reasons and the additional reasons set out in the Final Brief of Respondent, incorporated herein by reference, and the Petition for Writ of Certiorari, 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 its entirety. 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 finding as to the reconciliation attempt to be statutorily required, it should make its own finding that the family court attempted reconciliation and reconciliation was not possible.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of the Reply to Return to Petition for Writ of Certiorari has been served upon respondent's counsel, John E. Cheatham, 102 Harmon Street, Lexington, South Carolina 29072, on November 16, 2018.

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