

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

APPEAL FROM RICHLAND COUNTY
In the Family Court

George M. McFaddin, Jr., Family Court Judge

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MAR 21 2019

Civil Action No. 2014-DR-40-3574

S.C. SUPREME COURT

Ivery M. Chestnut Appellant,

v.

Mashell Chestnut, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE FAMILY COURT ERR IN REQUIRING APPELLANT/HUSBAND TO PAY \$750.00 PER MONTH IN SPOUSAL SUPPORT?
- II. DID THE FAMILY COURT ERR IN FINDING HUSBAND'S PREMARITAL PERSONAL PROPERTY HAD BEEN TRANSMUTED INTO MARITAL PROPERTY?
- III. DID THE FAMILY COURT ERR IN AWARDING WIFE ONE HALF THE EQUITY IN A MARITAL HOME HUSBAND PURCHASED PRIOR TO THE PARTIES' MARRIAGE?
- IV. DID THE FAMILY COURT ERR IN ITS AWARD OF ATTORNEY'S FEES TO WIFE?

STATEMENT OF THE CASE

Husband filed this divorce action on September 10, 2014. R. 13-14; Complaint. Wife filed an Answer and Counterclaim on October 9, 2014. R. 15-21; Answer and Counterclaim. Husband filed his reply on October 21, 2014. R. 22-26; Reply to Answer and Counterclaim.

Trial was held January 11, 2016 and resulted in a March 14, 2016 Final Order of Divorce. R. 1-6; Final Order of Divorce. Husband served a Motion to Reconsider on March 23, 2016. R. 38-39; Plaintiff's Motion to Reconsider. The family court partially granted this motion. R. 7-11; June 27, 2016. Reconsideration Order. That order directed Husband's attorney to draft a supplemental order addressing some of the relief granted. That supplemental order was filed on July 25, 2016. R. 12; Supplemental Order from Plaintiff's Motion to Reconsider. This appeal followed.

ARGUMENT

1. The family court erred in awarding Wife \$750.00 per month in permanent periodic alimony. The parties married on August 27, 2005. R. 50; TT, p. 16, lines 10-16. No children were born during the marriage. R. 40; TT, p. 5, lines 1-3. Husband has three children who were born prior to the marriage. At the time of trial their ages were 23, 22 and 21. Husband has substantial expenses for these children. The oldest child has autism and schizophrenia. As a result, that child has special needs, including adult care and primary care assistance. This care costs Husband \$15,000 to \$20,000 per year. R. 40-41; TT, p. 5, line 8-p. 6, line 15. Husband also had a son in college at Coastal Carolina at the time of trial. Husband paid \$15,000 to \$16,000 the previous year for that son's college expenses. Husband works as an IT specialist earning about \$72,000 per year. R. 42-43; TT, p. 7, line 12-p. 8, line 11. Wife also brought four children of her own into the marriage. R. 88; TT, p. 120, lines 14-17. Wife acknowledges that Husband was good to her four children during the marriage, paying as much attention to her children's homework as he paid to his own children's homework. R. 88-89; TT, p. 120, line 19-p. 121, line 6.

The parties separated in June 2013. R. 47; TT, p. 12, lines 14-16. They separated because Wife was no longer happy in the marriage. R. 44; TT, p. 9, line 9-17. During this time, Husband suggested and attempted marriage counseling. R. 46-47; TT, p. 11, line 5-p. 12, line 9.

Wife is in good health and employed at FedEx. R. 49; TT, p. 14, lines 18-22. She makes \$11.00 per hour, however the paycheck attached to her financial declaration showed 40.07 hours of work for a two-week period. R. 32-37; Mashell Chestnut January 11, 2016 financial declaration with attached December 24, 2015 pay stub. Husband encouraged Wife to seek full-time employment during the marriage. R. 62-63; TT, p. 37, line 22-p. 38, line 17.

Wife's financial declarations listed monthly wage income of \$1,330.00 per month and withholding from her paycheck of \$317.00 per month. R. 32; Mashell Chestnut January 11, 2016 financial declaration, p. 1. She listed expenses of \$2,176 per month. R. 33; Mashell Chestnut January 11, 2016 financial declaration, p. 2. However \$246.00 of these monthly expenses are for \$2,016.00

in credit card debt that she should be able to pay off within a year (or pay off via her equitable distribution award). After paying off this credit card debt, her ongoing expenses would be \$1,930.00 per month.

In setting Husband's alimony obligation the family court failed to properly consider important alimony factors. S.C. Code Ann. § 20-3-130(C)(12) makes "the existence and extent of any support obligation from a prior marriage or for any other reason of either party" an alimony factor. Between a child with special needs and a child in college, Husband has over \$30,000 per year in obligations to children who predated this marriage.

Further, the family court did not give proper weight to S.C. Code § 20-3-130(C)(4 & 6), "the employment history and earning potential of each spouse" and "the current and reasonably anticipated earnings of both spouses."

At trial Wife presented no credible explanation why she could not obtain full-time employment. She claims she sought full-time employment during the marriage. R. 74-75; TT, p. 82, line 24-p. 83, line 3. She claimed to be seeking full-time employment at the time of trial. R. 85; TT, p. 112, lines 12-19. She did not explain how or why she was unable to find full-time employment.

"Alimony should not serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support." *Myers v. Myers*, 391 S.C. 308, 705 S.E.2d 86, 89 (Ct.App. 2011). Here, if Wife obtained 40 hour per week employment for \$11.00 per hour, she could earn \$1,906.67 per month. If she paid off her \$2,016 in credit card debt she still might need alimony, but she would not need \$750.00 per month in alimony. Meanwhile, Husband should not be required to pay such significant alimony when he has to take care of a special needs child and pay tuition for another child.

It is noteworthy that the family court made a specific finding on the alimony issue that Wife did not seek full-time employment during the marriage at Husband's request in order to help take care of Husband's special needs child. R. 3; Final order, p. 3, ¶7(e). Now that Husband is solely responsible for taking care of this child, the court should have used this factor to lower, not increase,

the amount of alimony it awarded Wife. Wife now has no reason no to seek, and obtain, full-time employment. Meanwhile Husband has the sole financial and emotional burden of caring for this son.

The family court's alimony award creates a disincentive for Wife to seek full-time employment and places a financial burden on Husband, who must continue provide substantial assistance to his adult children. This was not a long-term marriage or a marriage that produced children. Given these facts, it was an error for the family court to award Wife \$750.00 per month in permanent periodic alimony.

2. The family court erred in finding Husband's premarital personal property had been transmuted into marital property

The family court valued the parties' personal property at \$5,600.00 based on the schedule provided in Husband's August 4, 2015 bankruptcy filing. R. 112; Defendant's Exhibit 3; R. 3; Final Order, p. 3, ¶10. The family court took into account that much of this property was furniture Husband purchased prior to the marriage with funds he received from an insurance claim. R. 3; Final Order, p. 3, ¶10. Wife acknowledged that the furniture Husband purchased prior to the marriage from the proceeds of the house fire were paid for by Husband. R. 87-88; TT, p. 119, line 11-p. 120, line 13. However the family court found that "there has been co-mingling of personal property," and found the personal property had been transmuted. R. 3; Final Order, p. 3, ¶10.

It should not have done so. Of the \$5,600.00 in personal property, \$4,400.00 was for a "Living room and dining room furniture bedroom furniture for one adult and one child." R. 112; Defendant's Exhibit 3, p. 4. Further Husband noted that this property was "the same furniture we had at Fort Stewart." R. 64; TT, p. 47, lines 4-13. Such property was premarital. Clearly the furniture of Husband's adult child had not been transmuted into marital property. Further, Wife's mere use of Husband's household furnishings is insufficient to support a finding of transmutation.

Property that is nonmarital when acquired may be transmuted into marital property in three ways: (1) "it becomes so commingled with marital property that it is no longer traceable," (2) it "is titled jointly," or (3) it "is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384,

743 S.E.2d 734, 740 (2013). “The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation.” *Taylor-Cracraft v. Cracraft*, 417 S.C. 570, 576, 790 S.E.2d 423, 426 (Ct.App. 2016).

Here the property is traceable. It is not titled jointly. Husband indicated no intent to make this property marital. Wife’s mere use of that property was insufficient to make it marital and the family court erred in finding this property transmuted.

3. The family court erred in awarding Wife one half the equity in a marital home Husband purchased prior to the parties’ marriage

Husband purchased the home at issue prior to the marriage, obtaining a VA loan to finance it. R. 48; TT, p. 13, lines 11-15. He never conveyed an interest in this home to Wife. R. 48; TT, p. 13, lines 16-21. Shortly before the marriage the house was completely destroyed in a fire and insurance Husband had on the property enabled him to rebuild it. R. 48-49; TT, p. 13, line 22-p. 14, line 10, R. 61; p. 34, line 25-p. 36, line 9. Wife did not contribute funds to rebuilding the house. R. 49; TT, p. 14, line 11-14. She acknowledges making no direct financial contributions to the house. R. 87; TT, p. 119, line 4-13. She also acknowledges she had no ability to contribute financially other than “basically gas money, any little odds and ends, personal stuff, anything that kids needed.” R. 90-91; TT, p. 123, lines 8-p. 124, line 13. Nowhere in the record does Wife indicate she made direct contributions to the mortgage.

Wife acknowledged that Husband “pretty much paid for everything.” R. 73; TT, p. 81, line 16. Husband was the sole signature to the home mortgage. R. 60; TT, p. 32, lines 15-17. The deed was solely in his name. R. 92-94; Defendant’s Exhibit 1. He never conveyed an interest in the property to her. R. 48; TT, p. 13, line 16-21. The mortgage was solely in his name. R. 95-108; Defendant’s Exhibit 2. When he went into Chapter 13 bankruptcy, Wife did not join him. R. 109-171; Defendant’s Exhibit 3.

The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage. Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property,

using marital funds to build equity in the property, or exchanging the property for marital property. However, the mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation.

McMillan v. McMillan, 417 S.C. 583, 591-92, 790 S.E.2d 216, 220 (Ct.App. 2016) (citations omitted).

Four of the six factual findings the court made to find transmutation were for facts that predated the parties' marriage. R, 3-4; Final order, pp. 3-4, ¶11(a-d). Those factual findings were:

- a. The parties began searching for a house soon after they moved in together and became a combined household of 8 people in a rental house with only 3 bedrooms. They became engaged to marry on February 14, 2003.
- b. The parties took a year to find the right house for their family and both of them were instrumental in making the choice.
- c. The purchase was financed using Plaintiff's VA eligibility, which required the title to be in Plaintiff's name since they were unmarried.
- d. When the house burned in March 2005, and rebuilt the month before the parties' actual marriage, the Defendant was instrumental in reworking the floor plan to add a bedroom and other changes to convenience the combined family.

None of these factual findings can be used to support transmutation because they pre-date the marriage. In *Pittman v. Pittman*, 407 S.C. 141, 754 S.E.2d 501, 506 (2014), the Supreme Court stated, "[t]o be clear, the family court committed an error of law in relying on Wife's premarital contributions to the Business in support of its transmutation finding." Any premarital contributions by Wife to this home cannot be used to support a transmutation finding.

Another of the factual findings the court made to support a finding of transmutation is not accurate. Finding 11(f) reads in part, "The Defendant testified, and the Plaintiff admitted on cross-examination, that during their marriage they referred to it as 'our home.'" R. 4; Final order, p. 4, ¶11(f). However that was not Husband's final testimony during cross-examination on that issue. His cross-examination testimony on that issue concluded:

Q. Even though, this was just purchased in your name, this was always our home, isn't that right?

A. I don't remember saying that. But, I remembered it being my home. Because, I was

the only one sitting at the table, when we close the deal.

R. 60; TT, p. 32, line 10-14.

Finally the family court found transmutation because Wife's income went, in part, to pay household bills, "which would have included the mortgage." R. 4; Final order, p. 4, ¶11(e). However there is no evidence she ever paid towards the mortgage. Further the court's full factual finding would indicate she could not have contributed to the mortgage:

Defendant used her part-time income to purchase gas for her car, groceries and other necessary items for the household, and contributed the remainder to the Plaintiff for the payment of household bills which would have included the mortgage.

R. 4; Final order, p. 4, ¶11(e).

Wife had four dependant children that were not Husband's to support. Her part time income was used to support those children and purchase "gas for her car, groceries and other necessary items for the household, and contributed the remainder to the Plaintiff for the payment of household bills." She never provided support for his children's college or special needs expenses. R. 44-45; TT, p. 9, line 23-p. 10, line 5. There is no evidence Wife paid towards the mortgage and no evidence that should would have had funds available after paying these items to contribute towards the mortgage.

There is simply insufficient evidence in the record to support a finding of transmutation of Husband's premarital home. Many of the family court's factual findings on this issue are in error as a matter of law.

Even if the family court correctly found the marital home was transmuted, it erred in awarding Wife 50% of the equity, in that it failed to consider Husband's premarital contribution. *Fredrickson v. Schulze*, 416 S.C. 141, 785 S.E.2d 392, 397 (Ct.App. 2016) (wife's premarital down payment to marital home was proper factor to consider in equitable distribution).

The family court's factual findings, and the record, do not support the court's finding that the marital home was transmuted. Four of the six factual findings cannot be used to support transmutation, one factual finding is inaccurate, and one factual finding is implausible speculation that has no actual support in the record. Even if the marital home was transmuted the family court

failed to properly consider and weigh Husband's premarital contributions.

IV. The family court erred in its award of attorney's fees to Wife


If this court reverses the lower court's decision, Wife's attorney fee award should be reversed *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

The family court erred in awarding Wife \$750.00 per month in permanent periodic alimony when she worked part time but was capable of full-time employment, especially when Husband had significant expenses for his adult children. The family court erred in finding household furnishings Husband owned prior to the marriage were transmuted. It erred in finding Husband's premarital home was transmuted and further erred in awarding Wife half the equity in that home. If the family court erred in any of these areas, its award of attorney's fees to Wife should be reversed or remanded.

Respectfully submitted,

April 24, 2017



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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April 24, 2017