

**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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S.C. SUPREME COURT

Civil Action No. 2014-DR-40-3574

Ivery M. Chestnut, Appellant,
v.
Mashell Chestnut, Respondent.

FINAL BRIEF OF RESPONDENT

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ARGUMENT

This court described the standard of review in family court matters in *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213 (Ct. App. 2012), where the court stated,

“The family court is a court of equity.” *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). [***5] “De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court’s findings.” *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55.

When addressing the findings of fact by the trial court in light of de novo review, this court went on to say,

“However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of demonstrating error in the family court’s findings of fact. *Id.* at 387-88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55.

(at 216)

I. THE FAMILY COURT DID NOT ERR IN REQUIRING APPELLANT/HUSBAND TO PAY \$750.00 PER MONTH IN SPOUSAL SUPPORT.

In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) equitable apportionment; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) such other factors the court deems relevant. S.C. Code Ann. §20-3-130(C). No one factor is dispositive. *Jenkins v. Jenkins*, 359 S.C. 384, 597 S.E.2d 840 (Ct. App. 2004). Alimony is awarded as a substitute for support normally incident to a marital relationship and should place the supported spouse, as nearly as possible, in the same position she enjoyed during the marriage. *Jenkins v. Jenkins*, 359 S.C. 384, 597 S.E.2d 840 (Ct. App. 2004), *Allen v. Allen*, 347 S.C. 177, 554 S.E.2d 421, (Ct. App., 2001).

In the present case, the family court discussed the weighing of the relevant factors in making its decision to award the Wife \$750.00 per month in alimony. R. pp. 2-3; Final Order, pp. 2-3. It found the parties to be roughly the same age (48 and 49) in a marriage of ten years duration, who had combined their families (a total of six children) as early as 2002 for residence and financial purposes. The family court also noted the great disparity of monthly income of the parties (\$8,961 v. \$1,580); the relevant purpose of the wife maintaining part-time employment during the course of the marriage in order to provide for the care of the children, in particular, the Husband's oldest child who has special needs; the Husband's encouragement of the Wife to remain part-time employed and discouragement to take on more lucrative employment, as well as the Wife's then

current inability to obtain full-time employment. It specifically noted that even doubling Wife's income would not adequately compensate for the disparity in incomes. The Final Order of Divorce noted the comfortable standard of living enjoyed by the parties during the marriage based primarily on the Husband's income which continued to increase, while she Wife's remained essentially the same. R. p. 3; Final Order, p. 3.

The conscious decision of substantial benefit to both parties for the wife to maintain part-time employment in order to care for their combined families and household during the course of the marriage affected her earning potential as she relied on the Husband to maintain the standard of living she had become accustomed to during the marriage.

The family court further addressed arguments of the Husband in the Reconsideration Order, where the Husband there only sought a reduction in the alimony awarded. R. p. 7; Reconsideration Order, p. 1. The first argument was based on new allegations that the Wife was then working fulltime. The family court denied that as a basis for relief on a Motion for Reconsideration as it was more appropriately addressed on a Motion for Modification. Secondly the family court was not persuaded by the Husband's arguments related to his expenses for his 21-year-old college-age son and 23-year-old special needs child, as argued in this appeal. Even if these alleged expenses should have been given further consideration in determining the alimony award, the Husband's contradictory testimony and the evidence presented have created a credibility issue as to what those expenses actually were, if any. For instance, the Husband testified that the extraordinary expenses for his 23-year-old special needs child were \$15,000 to \$20,000 per year, (R. p. 41; TT, p. 6, lines 1-13) yet his Financial Declaration on the day of trial lists only \$400.00 per month in work related daycare expenses, with no other extraordinary costs listed. R. p. 30; Ivery Chestnut Financial Declaration, p. 2. Furthermore, on the Husband's Bankruptcy Court schedules filed in August

2015, he listed \$1,906.00 per month for “adult daycare expenses for disabled son.” R. p. 135; Defendant’s Exhibit #3, p. 25. What could a fact finder reasonably believe or take into further consideration in the face of three extremely inconsistent sworn statements of a party?

Similarly, the Husband testified at the trial that he paid \$15,000 to \$16,000 in college expenses for his 21-year-old son. R. p. 42; TT, p. 7, lines 7-8. In contradiction, on his Financial Declaration, the Husband lists \$500.00 per month on a line item titled “College for son” (R. p. 30; Ivery Chestnut Financial Declaration, p. 2.) and on his Bankruptcy Court Schedule, three items totaling \$830.00 per month for the son’s rent, college tuition, parking and gas. R. p. 135; Defendant’s Exhibit #3, p. 25.

Another significant factor in evaluating the Husband’s financial condition is that as a result of his Chapter 7 Bankruptcy, he was relieved of \$69,008.00 in debt, including debts for educational expenses and attorney representation in this matter. R. p. 65; TT line 18- p. 66, line 20, R. pp. 122-126; Defendant’s Exhibit #3, pp. 14-18.

Further evidence of discrepancies reported by the Husband are details regarding his income. His sworn Financial Declaration reports his monthly gross income as \$8,961.00/month, while Page 2 of the Bankruptcy Schedule lists his current monthly income as \$9,460.68/month. On his Financial Declaration, the Husband indicated his “Principal Earnings from Employment” as \$5,560.00/month, while on Page 21 of the Bankruptcy Schedule, his “Monthly gross wages, salary, and commissions”, is listed as \$6,058.00/month, and he testified that his annual salary from his job was about \$72,000.00 (equating to \$6,000/month). R. p. 29; Ivery Chestnut Financial Declaration, p. 1, R. pp. 110 and 131; Defendant’s Exhibit #3, pp. 2 & 21, R. p. 43 TT p. 8, lines 8-12. The Husband testified that the monthly income noted on his Bankruptcy Schedule of \$9,460/month had not changed since he had filed bankruptcy. R. p. 67; TT p. 54, lines 14-25.

An additional notable discrepancy was shown in the Husband's claims related to his tithes to Agape Church. In his Financial Declaration, he lists his "Tithes & Offerings" as \$500.00/month. R. p. 30; Ivery Chestnut Financial Declaration, p. 2. In contrast, he claims his Gift to Agape Church as \$20.00/week. R. p. 140; Defendant's Exhibit #3, p. 30.

The Husband's testimony and what scant evidence he submitted on his or the parties' financial matters were contradictory and not credible.

II. THE FAMILY COURT WAS PROPER IN FINDING HUSBAND'S PRE-MARITAL PERSONAL PROPERTY HAD BEEN TRANSMUTED INTO MARITAL PROPERTY.

The only evidence the Husband provided to the family court as to the purported value of personal property was his Financial Declaration, listing "Dining Room Furniture acquired June 17, 2005, \$1,000; Bedroom Furniture acquired May 30, 2005, \$1,000; and Living Room Furniture acquired June 8, 2005, \$500," all of which the Husband retained in his possession from the time the parties separated. R. p. 31; Ivery Chestnut Financial Declaration, p. 3. The parties were engaged on February 14, 2003, and married August 27, 2005. R. p. 56- 57; TT p. 27, line 21- p. 28, line 3; R. p. 69- 70; TT p. 74, line 7- p. 75, line 12. By his admissions in his Financial Declaration, the Husband indicates that this personal property was purchased after the parties were engaged to be married, very shortly prior to the marriage after they had already been residing with one another for several years, and was intended to furnish their marital residence and be utilized by their combined family.

On cross examination, the Husband contradicted his Financial Declaration by acknowledging his Bankruptcy Schedule from August 2015 valuing household goods and furnishings at \$5,600.00 listed as "living room and dining room furniture bedroom furniture for

one adult and one child (\$4,400.00) [and] desktop computer (\$200.00); 55" TV (\$500.00); Bose stereo (\$500.00)." R. p. 112; Defendant's Exhibit #3, p.4. The Husband testified that when the parties first moved in together, he had household furniture for a total of eight people, (R. p. 62; TT p. 37, lines 15-21) whereas the Wife testified that when the parties moved in together, they got rid of most of both of their individual family's things, purchased new bedroom furniture, and moved into an otherwise crowded three bedroom house with the Husband and his children on Crestview Avenue. R. p. 71; TT p. 78, lines 17-25. This furniture would have followed them into the marital home and been replaced after the house fire and was intended for the entire family. Yet further confusing his own position, the Husband later asserts that he had not disposed of anything, that the household property in his possession at the time of trial was the same property they had at the time of the family moving back to Columbia from Ft. Stewart, which would have taken place in 2011, over 6 years after the parties were married. R. 64; TT p. 47, 1-10, R. p. 87; TT p. 119, lines 4-6. Husband's arguments now that somehow the property is traceable is wishful thinking and does not contour to the testimony and evidence provided to the family court.

The Husband confirmed the parties began living together in October of 2002. R. p. 54; TT p. 22, lines 21-25. The Wife testified that when the parties moved in together, they got rid of most of both of their individual family's things, purchased new bedroom furniture, and moved into an otherwise crowded three bedroom house with the Husband and his children on Crestview Avenue. R. p. 71; TT p. 78, lines 17-25. It was apparent that the parties required a larger house to accommodate their combined family and 200 Stafford Road was purchased. R. p. 59; TT p. 31 lines 3-11. They both testified that following the fire of 200 Stafford Road, all of the home's contents were replaced. R., p. 62; TT p. 37 lines 1-14, R. p. 72; TT p. 80, lines 17-24

The Wife's claims as to her interest in the personal property is not based on the mere use

of it. The decisions to dispose of and replace household furnishings was jointly made based upon the needs of the entire family. Curiously, despite Husband's arguments now that he had no intent to make this property marital, the Wife testified that he began treating everything as his own only after he told her to leave the marital residence. He would not even allow her the use of a suitcase purchased for their honeymoon. R. p. 80; TT p. 100, lines 8-14. Husband further refused to allow her the use of one of their vehicles, or the truck jointly titled at the time of their separation, despite there being three vehicles at the residence. R. pp. 80-81; TT p. 100, line 22- p. 101, line 4.

The family court addressed the issue of the personal property in both the Final Order of Divorce and the Reconsideration Order by holding that the parties had co-mingled their personal property (R. p. 3; Final Order, p. 3), and that its destruction and replacement after the fire making them "marital in character" combined with no testimony "as to what furnishings were bought after the fire and before the marriage that can be easily culled from marital property." R. p. 8; Reconsideration Order, p. 2.

Clearly the requirements of *Wilburn v. Wilburn*, 403 S.C. 372, 743 S.E.2d 734 (2013) were met in finding that the property was so co-mingled as to be untraceable. Furthermore the only credible testimony was by the Wife as to the Husband's judicially motivated denial of intent to recognize it as marital property used in support of the marriage.

III. THE FAMILY COURT WAS PROPER IN AWARDING WIFE ONE-HALF OF THE EQUITY IN THE MARITAL HOME HUSBAND PURCHASED PRIOR TO THE PARTIES' DATE OF MARRIAGE.

In his arguments, the Husband misquoted the testimony of the Wife as it regards her financial contributions to the household and marriage by conveniently only referencing specific parts of the quotes which benefit his argument, such as that which is highlighted below in bold.

The Husband misquotes in the Final Brief of Appellant, (p. 6) “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.”

The testimony of the Wife, taken from the R. p. 90; TT p. 123, lines 8-19, was actually:

Q How much of your income did you contribute to this household?

A Between 12 or \$1500.00 a month.

Q All right. And what percentage of that was of your income?

A Pretty much 90 percent of it.

Q Okay. Did that leave you any additional?

A **Just basically gas money, any little odds and ends, personal stuff, anything that kids needed. And we didn't -- I was just like -- if we were going to the store or something I would get it, or groceries or something like that. But nothing --**

The Wife's actual testimony was that she contributed 90% of her income to her husband to be used, along with his contributions, to pay household expenses which would have included the mortgage and any and all other expenses to maintain the household and property, and that she retained only so much as was necessary to pay for other household expenses such as gas, groceries, and things the kids needed.

In addition, the Wife made other indirect contributions to the household by providing the care for both parties' children, restricting her work to part-time so that she could do so while her Husband worked full-time and was on the occasional deployment. R. p. 85; TT p. 112 lines 3-15; R. pp. 76-78; TT p. 86 line 21- p. 88, line 4. This was necessary even to the extent of the extraordinary care needed for the Husband's oldest child who was autistic, such as going to his school to shower him when he soiled himself. R. pp. 78-79; TT p. 88, line 21- p. 89, line 3. The Wife's care of the Husband's oldest son was instrumental in the parties' first meeting and ongoing relationship development leading to the marriage.

As discussed above in relation to the transmutation of the household personal belongings,

the Husband only began insisting all of the property was his after the parties separated. R. pp. 83-84; TT p. 109, line 17- p.110, line 24. On cross examination and in a moment of candor, the Husband admitted but then changed his testimony, saying he did not remember saying that he had always previously referred to the house as “their house” until the marital litigation. R. p. 60; TT p. 32, lines 5-14. His reasoning was that he alone financed it, but also to conveniently ignore the Wife’s contributions, direct and indirect to the same pool of funds, his salary and hers, that funded the house, the cars, the six kids and their good lifestyle.

While the court may not have considered the contributions of the Wife for the fifteen (15) months prior to the marriage, the fact is they continued thereafter for the duration of the ten year marriage. Wife is unaware of any legal principal that financial contributions after a marriage are discounted merely because they began before the marriage. Husband would be hard pressed to suggest that he had even appreciated any value in the real estate before the marriage without the Wife’s financial contributions since he borrowed more on the mortgage he gave (\$119,000.00) than he paid for the house (\$115,000.00). R. p. 58; TT p. 30, lines 5-8.

By testimony of both parties, it was clear that the intent of the parties in purchasing the real property at 200 Stafford Road, was to provide a home for the marriage and combination of the parties’ children and personal property. The Husband admits that he was merely renting when the parties moved in together (R. p.51; TT p. 19, lines 3-8), and thereafter the parties sought to purchase a larger house for their combined family (R. p. 57; TT p. 28, lines 4-14, R. pp. 59-60; TT p. 31, line 3- p. 32, line 4.) After the initial house at 200 Stafford Road was destroyed by a house fire, it was remodeled and rebuilt to better accommodate the large family. The Wife assisted in the floor plans to remodel the home, and the parties were married less than thirty (30) days after moving into the rebuilt home. R. p. 73; TT p. 81, lines 1-8.

The Wife contributed financially towards the marital property by providing 90% of her income to her Husband to put towards the household bills. This amount was not attributable to any specific bill(s), and therefore was generally attributable across the board, which would have included towards the improvement, maintenance, and finding of the marital property. R. p. 90; TT p. 123, lines 8-19.

It is abundantly clear through the actions of the parties, that by purchasing a large home to accommodate their combined families following a lengthy engagement, by the parties working together to re-decorate and furnish their home both following purchase and following being rebuilt after destruction, and by the parties both contributing toward the household, that it was the intent that the real property be transmuted into marital property of the parties. All of the above is ample evidence of more factors than simply "mere use" by the Wife.

IV. THE FAMILY COURT WAS PROPER IN ITS AWARD OF ATTORNEY' S FEES TO WIFE.

Appellant's arguments on this point are contingent upon the ultimate ruling in this case. The family court adjusted its award of attorney's fees in the Reconsideration Order as a result of the relief granted to the Husband relating to the taxes due by the parties. R. 10; Reconsideration Order, p. 4. Respondent does not believe that further relief is due the Appellant.

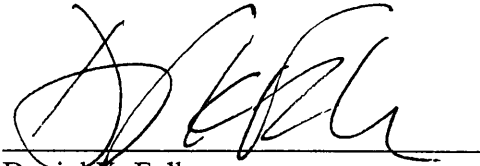
CONCLUSION

The family court properly reviewed the statutorily required elements in awarding alimony and arrived at a well-reasoned and fair and equitable award of alimony in light of the trial testimony. As is to be expected in a case such as this, the facts are in dispute, however as has been

demonstrated, the Husbands testimony on financial matters was inconsistent and unreliable. For these reasons the family court order should be upheld.

Respectfully Submitted,

May 30, 2017

A handwritten signature in black ink, appearing to read 'D. Felker', written over a horizontal line.

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