

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 08 2019

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Family Court

George M. McFaddin, Jr., Family Court Judge

Civil Action No. 2014-DR-40-3574

Ivery M. Chestnut, Petitioner,

v.

Mashell Chestnut, Respondent.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

Daniel K. Felker, Esquire
Attorney for Respondent
Hucks & Felker, LLC
9610 Two Notch Rd., Suite 5
Columbia, SC 29223
(803) 865-6370
(803) 865-6332 (fax)
dan@hucksandfelker.com

Other Counsel of Record:
Gregory S. Forman, Esquire
Attorney for Petitioner
171 Chestnut St., Suite 160
Charleston, SC 29401
(843) 720-3749
(843) 614-5086 (fax)
attorney@gregoryforman.com

Index

Questions Presented.....3
Argument.....3
Conclusion..... 12

Questions Presented

1. Did the Court of Appeals make numerous factual findings in support of alimony that actually should not be a basis to award Respondent (Wife) alimony?
2. Did the Court of Appeals err in finding the transmutation of Petitioner's (Husband) pre-marital personal property that the parties stipulated was valued at \$5,600.00?
3. Did the Court of Appeals err in finding the transmutation of Petitioner's (Husband) home purchased prior to the marriage?
4. Did the Court of Appeals err in not remanding the equitable distribution of the home's equity to the Family Court?
5. Did the Court of Appeals err in affirming the Family Court' award of attorney's fees to Wife?

Argument

- I. Did the Court of Appeals make numerous factual findings in support of alimony that actually should not be a basis to award Respondent (Wife) alimony?

“[T]he proper standard of review in family court matters is de novo” and which “allows an appellate court to make its own findings of fact[.]” [T]his standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge. *Stoney v. Stoney*, 422 S.C. 593,594, 813 S.E.2d 486, 487 (2018). See also *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

The Court of Appeals properly addressed the statutory factors for alimony required to be considered by Family Courts. S.C. Code Ann. §20-3-130(C). While no one factor is dispositive, both the Court of Appeals and the Family Court found that considering the thirteen factors the award of alimony to the Wife was warranted. They are: (1) the duration of the marriage (ten

years); standard of living established during the marriage (comfortable, primarily based on husband's income); (6) current and reasonably anticipated earnings of the parties (Husband- \$8,961.00 per month and Wife- \$1,580.00 per month); (7) current and reasonably anticipated expenses of the parties (Husband- \$6,737.00 per month and Wife- \$2,176.00 per month); (8) marital and non-marital properties of the parties (\$5,600.00 of personal property divided evenly); (9) custody of children (no children of this marriage, but each party had three children from previous relationships); (10) marital misconduct or fault (none); (11) tax consequences (alimony was deductible for Husband and taxable to Wife). R, 2-3, Final Order, pp. 2-3, ¶ 7; Reconsideration Order, pp. 7-8; Appendix, pp. 2-4.

The Court of Appeals found additional grounds under statutory factor (13) "any other factors the court considers relevant." The Court made note of the Wife's contributions as a homemaker and caregiver as well as the contribution of ninety percent of her income to household expenses. The Court additionally found her income was stagnant and significantly lower than Husband's, which had increased. Appendix, p. 4.

While there is inconsistency between Husband's testimony and his Financial Declaration as to the expenses of care for his disabled son, he now argues that he has to expend \$15,000-\$20,000 per year for services he could not provide as a single father after the marriage. R. 30, Financial Declaration of Ivery Chestnut, p. 30; R. 41, TT, p. 6, ll. 1-14. Wife submits that the \$15,000- \$20,000 is an implicit estimation by Husband of the value of the services Wife provided the marriage partnership, in just this one area of caregiving.

The Petitioner argues that the Court of Appeals did not address his prior support obligations related to his own children, citing his testimony of \$15,000- \$20,000 per year for his disabled son and college expenses of \$15,000.00 for another son. R. 41-41, TT, p.6, l. 16- p.7, l.

9. This is simply not the case. Both the Family Court and the Court of Appeals cited the Husband's Financial Declaration in weighing the parties' expenses. Considering the daycare and college expenses he listed in his financial declaration, both the Family Court and Court of Appeals found that the Husband had the ability to pay alimony as awarded. As noted above, Husband's own testimony and his Financial Declaration are significantly different in the amounts he claims. To further call into question his own credibility, the Husband used a third set of figures related to college expenses and adult daycare costs on his bankruptcy schedules. R. 135, Defendant's Exhibit 3, p. 25, ll. 19 and 21.

It is noteworthy that despite Husband's denial on cross-examination, he was in a better financial condition at the time of trial than he had been during the marriage, since he had been relieved of \$69,008.00 of unsecured debt in his personal Chapter 7 Bankruptcy. R. 66, TT. p. 53, ll. 2-20. The bankruptcy was filed in August 2015, approximately five months prior to the divorce. R. 109, Defendant's Exhibit No. 3, p. 1.

On the issue of the Wife's reasonable earning potential, Petitioner argues that the Wife gave no reasonable explanation as to why she was only able to work part time and that the Court of Appeals therefore did not properly address this factor. Once again, this is simply not the case. The Court of Appeals noted that the Family Court found that "even if the Wife's income was doubled, it would leave a great disparity in income between the parties" and "her expenses to maintain a separate household [took] on a greater proportion of her income." Appendix, p.3.

The Petitioner places great emphasis on his insistence that the Wife should have found full-time work, yet the one time that both parties testified Wife was able to obtain a full-time position, Husband discouraged her from doing so. R. 63, TT., p. 38, ll. 12-24; p. 77, l. 13- p. 78, l. 4.

The purpose of Alimony is to “place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage.” *Hinson v. Hinson*, 341 S.C. 574, 577, 535 S.E.2d 143, 144 (Ct. App. 2000). Petitioner’s arguments suggest rather that the Wife should be left in the same position she enjoyed prior to the marriage. It is consistent that both the Court of Appeals and the Family Court noted the Husband’s actions at the time of separation in not allowing the Wife to take anything from the home or even use one of the three vehicles to leave. R. 80-82, TT p. 100, l. 8- p. 102, l. 4. While this related to the equitable distribution portion of those orders, it is applicable here in that it indicates Husband’s misapprehension that this marriage was not an economic partnership in which the parties afforded a comfortable standard of living due to both of their contributions. Husband’s substantial financial contributions combined with Wife’s minimal financial, but significant non-financial contributions as a homemaker and caregiver to the combined household of six children, including the Husband’s disabled child are significant to the dissolution of this marriage partnership and the awarding of alimony.

The Family Court and Court of Appeals properly considered the statutory factors in awarding alimony to the Wife and committed no error in factual findings consistent with the award of alimony.

II. Did the Court of Appeals err in finding the transmutation of Petitioner’s (Husband) pre-marital personal property that the parties stipulated was valued at \$5,600.00?

It is undisputed that when the parties first combined their households of three children each prior to marriage, the Petitioner had a house full of furniture. R. 71, TT. p. 78, ll. 4-7. Yet the Wife brought some furniture with her, the parties disposing of the rest. *Ibid.* ll. 9-16. When the marital home was built, the parties disposed of all household furniture, purchasing new

furniture for the new house. *Ibid.* ll. 17-25. Approximately one year later, the home burned, was then rebuilt, and all the contents replaced with insurance proceeds. R. 72, TT. p.80, ll. 8-24. Sometime after the separation, the Husband allowed the Wife to take her clothing, some dishes and towels. R. 83, TT. p. 109, ll. 7-25. There was no evidence that Husband thereafter disposed of any additional personal property as of the time of the trial. The parties stipulated at trial that the value of the personal property was \$5,600.00 as listed on the Husband's bankruptcy schedules. R. 3, Final Order, ¶ 9.

Petitioner argues that the Court of Appeals improperly found that Husband's pre-marital personal property had been transmuted, because it was actually the property of his and his adult disabled son. This is based presumably on the description that Husband made of the property in his bankruptcy schedule as "Living room and dining room furniture and bedroom furniture for one adult and one child" valued at \$4,400.00. R. 112, Defendant's Exhibit 3, p.4. This assertion plainly contradicts the undisputed testimony of both parties that the combined household had two adults and six children who lived comfortably prior to the marital separation in a fully furnished home. R. 65, TT. p. 52, ll. 5-9.

Petitioner's main argument however is that transmutation could not have occurred because the furniture at separation was purchased solely by him using insurance proceeds belonging solely to him. Yet, both the Court of Appeals and Family Court noted that Husband offered no testimony by which the respective courts could determine when the replacement furniture was purchased and that the property had been so comingled as to not being traceable and therefore transmuted into marital property. *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013).

The Family Court and the Court of Appeals properly considered the trial evidence in finding the transmutation of the \$5,600.00 in personal property and the Petitioner is unable to show that the preponderance of the evidence is against the finding of the Family Court.

III. Did the Court of Appeals err in finding the transmutation of Petitioner's (Husband) home purchased prior to the marriage?

It is undisputed that the original home was purchased by the Husband approximately a year prior to the marriage by the Husband for \$115,900.00 for which he alone granted a VA mortgage for \$119,311.00. R. 92, Defendant's Exhibit No. 1, p. 2; and R. 95, Defendant's Exhibit No. 2, p. 1 (¶E) The home was destroyed in a fire and the parties moved into the home rebuilt with Husband's insurance proceeds approximately one month prior to the marriage. R. 72-73, TT. p. 80, l. 25- p. 81, l. 8.

Petitioner argues that the Family Court and Court of Appeals erred in finding that the home was transmuted into marital property. The Petitioner cites *Pittman v. Pittman*, 407 S.C. 141, 151, 754 S.E.2d 501, 506 (2014) that reliance on pre-marital contributions to determine transmutation is error. The Court of Appeals acknowledged that the Family Court improperly relied in part on pre-marital contributions of the Wife, however as in *Pittman*, the Court of Appeals went on to find that there was additional evidence in the record demonstrating that the parties regarded the residence as the common property of the marriage. *Moghaddassi v. Moghaddassi*, 364 S.C. 182, 190, 612 S.E. 2d 707, 711 (Ct. App. 2005). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 292, 372 S.E.2d 107, 110 (Ct. App. 1988). These were not the only contributions that the Family Court considered however.

The Court of Appeals and the Family Court noted that the wife had testified and that the Husband admitted on cross-examination that the house was referred to as “our home” and the Husband admitted that “our home” included the wife. R. 84- 85, TT. p. 110, l. 12- 24; R. 60, TT. p. 32, ll. 5-14. Petitioner references in his brief only a portion of the Husband’s testimony regarding “our home” where his testimony changes after earlier candidly admitting the intent that the home was marital property. *Ibid.* p. 32, 112-14. In light of inconsistent or conflicting testimony the courts have “recognize[d] the superior position of the family court judge in making credibility determinations” and “an appellant is not relieved of his burden to demonstrate error in the family court’s findings of fact.” *Lewis at 655.*

Furthermore the Court of Appeals noted “that wife testified that a large portion of her income was given to Husband to contribute to the family’s household expenses” and that “one of those expenses included the mortgage for the residence at issue.” Appendix 7-8. Clearly Wife’s marital income was then used to pay the mortgage contributed to the equity in the home and which subsequently been transmuted into marital property subject to equitable division. See *Hamiter v. Hamiter*, 290 S.C. 508, 509, 351 S.E.2d 581, 582. See also *Taylor-Cracraft v. Cracraft*, 417 S.C. 570, 576, 790 S.E.2d 423, 426 (Ct. App 2016).

Petitioner seeks to minimize the amount or value of Wife’s financial contribution to the marital estate by suggesting that the Court of Appeals having determined that Wife makes so little money and needing Husband’s support, she could have made no real financial contribution sufficient enough to support even her own children, as if this were the key factor in finding transmutation. This is a patent misstatement of the facts. In awarding alimony, both the Family Court and Court of Appeals considered the great disparity between the incomes of the parties and that the Wife’s expenses took on a greater proportion of her income in maintaining a separate

household. R. 3, Final Order, ¶e; Appendix, 4. This is not the same as suggesting that Wife's financial contributions were insubstantial or inconsequential to the marital estate. Contributions are not limited to direct financial contributions. See *Doe v. Doe*, 370 S.C. 206, 215, 634 S.E.2d 51, 56 (Ct. App. 2006).

The Family Court and the Court of Appeals properly considered the trial evidence in finding the transmutation of the home and the Petitioner is unable to show that the preponderance of the evidence is against the finding of the Family Court and the Court of Appeals in making its own findings.

IV. Did the Court of Appeals err in not remanding the equitable distribution of the home's equity to the Family Court?

Despite that the Court of Appeals made its own findings in arriving at the same conclusion as the Family Court that the home was transmuted, the Petitioner argues that the Court of Appeals should have remanded the matter of equitable distribution to the Family Court. The Court of Appeals acknowledged that the Family Court erred in considering pre-marital contributions of the wife in transmutation. The Petitioner's concern is based on a presumption that the Family Court's error may have affected its finding of a 50% equitable distribution to the Wife. This flies in the face of the Court of Appeals own findings, as it as an appellate court reviewing an equity case is able to do. See *Stoney* and *Lewis*. Not all of the Family Court's considerations were pre-marital and numerically most of them were of a non-economic nature, i.e., searching for a larger home; making the choice; reworking the floorplan after the house burned.

The Court of Appeals carefully considered in its findings, the factors found in S.C. Code Ann. §20-3-620(B) based upon the adequate record. Appendix 8-9. The Court of Appeals specifically excluded any reference to pre-marital contributions of the Wife in its findings.

In addition, the Court acknowledged that the Husband obtained a VA mortgage to purchase the home approximately eighteen months before the marriage, however this was a marriage of ten years during which the Wife contributed homemaker duties that benefitted and their home, citing *Doe v. Doe*, 370 S.C. 206, 215, 634 S.E.2d 51, 56 (Ct. App. 2006) regarding the unfairness of only considering direct financial contributions as to a spouse who took on homemaker duties. As in *Doe*, the Wife here provided caretaker duties for the couple's combined six children, including the extraordinary care required for the Husband's disabled child. S.C. Code Ann. §20-3-620(B) (such other relevant factors).

The Court of Appeals went on to find that 50/50 division of the marital property valued at \$56,926.00, between the parties with disparate incomes and earning potentials was fair and equitable based on a preponderance of the evidence. Appendix, 10.

The Court of Appeal's findings are consistent with its ability to make its own findings based on an adequate record. See, *Stoney*. The Petitioner is unable to show that the record is lacking or that the Court of Appeals abused its discretion in making its own findings in awarding the Wife a 50% equitable distribution of the marital home.

V. Did the Court of Appeals err in affirming the Family Court' award of attorney's fees to Wife?

Petitioner's final argument rests solely on the assumption that if the Court of Appeals should be reversed or remanded that the award of attorney's fees should be remanded. For all

the reasons stated above, the Court of Appeals decision should be affirmed and the award of Attorney's fees upheld.

Conclusion

Applying the appropriate "de novo" standard of review, the Court of Appeals reviewed the findings of the Family Court as well as the record, making its own findings of fact, applying the appropriate and settled law, and disregarding any erroneous findings of the Family Court, arrived at the decision that its finding of facts applied to the law and which justice required.

For all the foregoing reasons, this Court should deny Petitioner a Writ of Certiorari.

Respectfully Submitted,



Daniel K. Felker
Attorney for Respondent
Hucks & Felker, LLC
9610 Two Notch Rd., Suite 5
Columbia, SC 29223
(803) 865-6370
(803) 865-6332 (fax)
dan@hucksandfelker.com

May 8, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 08 2019

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Family Court

George M. McFaddin, Jr., Family Court Judge

Civil Action No. 2014-DR-40-3574

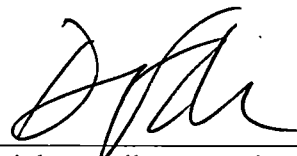
Ivery M. Chestnut, Petitioner,

v.

Mashell Chestnut, Respondent.

PROOF OF SERVICE

I hereby certify that on May 8, 2019, I served the Respondent's Return to Petition for a Writ of Certiorari on Petitioner by depositing a copy in the United States mail, postage prepaid, addressed to his attorney of record, Gregory S. Forman, 171 Church Street, Suite 160, Charleston, SC 29401.



Daniel K. Felker, Esquire
Attorney for Respondent
Hucks & Felker, LLC
9610 Two Notch Rd., Suite 5
Columbia, SC 29223
(803) 865-6370
(803) 865-6332 (fax)
dan@hucksandfelker.com