THE DUEL BETWEEN REVERSIBLE ERROR AND PRESERVATION: FLORIDA SUPREME COURT TO HAVE LAST WORD ON FAMILY LAW CASES WITH INADEQUATE STATUTORILY-REQUIRED FINDINGS

Larry R. Fleurantin, Esq.[*]

INTRODUCTION 213

I. THE FOURTH DISTRICT'S EN BANC DECISION IN *FOX* 215

II. DISCUSSION AND ANALYSIS 220
   A. *The Prior Panel Precedent Rule:* Farghali*'s Analysis Was Inconsistent with Then-Binding Fourth District Precedent* 220
   B. *The* Fox *Decision Rests on a Sound Analytical Framework* 221
   C. *The Florida Supreme Court Should Approve the Rule Established by* Fox *to Stabilize the Judicial System and Promote Uniformity of Law in Florida*...224

CONCLUSION...224

INTRODUCTION

This Article revisits the issue of whether a family law case litigant must file a motion for rehearing to bring to the trial court's attention the lack of factual findings in its judgment in order to preserve the issue for appeal. In 2001, the Third District Court of Appeal in *Broadfoot v. Broadfoot*[1] established the rule that in family law cases, a litigant may not complain about a trial court's failure to make factual findings unless the matter was brought to the trial court's attention in a motion for rehearing to provide the trial court with an opportunity to correct its own errors.[2] In

---

* Larry R. Fleurantin is a member of the Appellate Practice Section of The Florida Bar and holds a B.A. summa cum laude (2000), Florida International University Honors College; J.D. cum laude (2003), University of Florida Levin College of Law. Mr. Fleurantin is the managing partner of Fleurantin, Francois & Antonin, P.A. in North Miami Beach, Florida. The firm concentrates its practice in civil and appellate litigation, with a particular focus on personal injury, car accidents, marital and family law, real estate, foreclosure, and immigration. The author would like to express his gratitude to attorney Parnel D. Auguste for his comments and suggestions. Special thanks to his wife Marie-Michelle Rousseau-Fleurantin for her unwavering support. This Article is dedicated to UF law professor Kenneth B. Nunn who introduced the author to scholarly research and writing.

1. 791 So. 2d 584 (Fla. 3d DCA 2001).
2. *Id.* at 585.

2004, the Fifth District applied the *Broadfoot* rule in *Mathieu v. Mathieu*[3] with one caveat commonly known as the *Mathieu* exception: "[I]f the court determines on its own that its review is hampered, we may, at our discretion, send the case back for findings."[4] Back in 2005 the Fourth District decided *Dorsett v. Dorsett*,[5] which reached a contrary result and expressed disagreement with both *Broadfoot* and *Mathieu*.[6]

By 2012, all Florida district courts except the Fourth District had explicitly or implicitly followed the *Broadfoot* rule or the *Mathieu* exception.[7] Since the state of the law regarding this preservation issue was unclear, in a widely circulated 2012 Florida Bar Journal article, this author argued that the Fourth District should revisit *Dorsett* and follow *Broadfoot* and *Mathieu* so that all the district courts can speak with one voice.[8] But recently, the Fourth District decided *Fox v. Fox*,[9] which re-affirmed its earlier decisions that a party may raise the issue of lack of statutorily-required findings in alimony, equitable distribution and child support cases without the need to file a motion for rehearing.[10] The *Fox*

` 3. 877 So. 2d 740 (Fla. 5th DCA 2004) (per curiam).

4. *Id,* at 741 n.1.

5. 902 So. 2d 947 (Fla. 4th DCA 2005).

6. *Id.* at 950 n.3.

7. The First District embraced *Broadfoot* and *Mathieu* in *Owens* v. *Owens*, 973 So. 2d 1169, 1170 (Fla. 1st DCA 2007). The Second District acknowledged the Fourth District's disagreement with *Broadfooot* and *Mathieu* in *Esaw* v. *Esaw*, 965 So. 2d 1261, 1263 & 1267 n.1 (Fla. 2d DCA 2008) where the Second District affirmed the lower court even though the judgment below lacked the required factual findings. However, on July 3, 2019, the Second District decided *Engle v. Engle* wherein the Second District joined the Fourth District's decision in *Fox*, which held that "the failure to comply with the statute's requirement of factual findings is reversible error regardless of whether a motion for rehearing is filed." Engle v. Engle, 277 So. 3d 697, 699 (Fla. 2d DCA 2019) (citing Fox v. Fox, 262 So. 3d 789, 791 (Fla. 4th DCA 2018)). In reaching its conclusion, the Second District reviewed the line of cases from the First, Third, and Fifth Districts that followed *Ascontec Consulting, Inc.* v. *Young*, 714 So. 2d 585, 587 (Fla. 3d DCA 1998) and *Reis v. Reis*, 739 So. 2d 704, 705 (Fla. 3d DCA 1999), which do not stand for the proposition that a motion for rehearing is required to preserve the failure to make factual findings. Engle, 277 So. 3d at 699–700. Rather, *Reis* and *Ascontec* dealt with "claims that the trial court waited too long after an evidentiary hearing to issue its written order" and thus necessitating a new trial since the passage of time put into question whether the trial court can correctly recall the details of the hearing. Engle v. Engle, 277 So. 3d at 699–700. Moreover, in *Allen v. Juul*, the Second District followed its own decision in *Engle* and certified conflict with the First District's opinion in *Owens*, the Fifth District's opinion in *Mathieu*, the Third District's opinion in *Broadfoot*, and "the cases of those districts that rely on those opinions." Allen v. Juul, 278 So. 3d 783, 785 & 786 (Fla. 2d DCA 2019).

8. Larry R. Fleurantin, *The Debate Continues on Whether to Remand Family Law Cases with Inadequate Findings*, 86 FLA. BAR J. 27, 27 (2012). For further discussion of the preservation issue, *see generally* Daniel A. Bushell, *When Is a Motion for Rehearing Necessary to Preserve for Review a Trial Court's Error in Failing to Make Factual Findings?*, 93 FLA. BAR J. 46, 46 (2019).

9. 262 So. 3d 789 (Fla. 4th DCA 2018).

10. *Id.* at793.

decision is remarkable because it is an en banc decision that established a clear precedent in the Fourth District.[11] Subsequent to the Fourth District's decision in *Fox*, the Second District decided *Engle v. Engle* wherein the Second District joined *Fox* and certified conflict with the other three district court opinions.[12] *Fox* and *Engle* unequivocally raised the tension between the Fourth District and Second District on one hand and the other Florida district court opinions on the other hand. Now, it is up to the Florida Supreme Court to resolve the conflict certified by *Fox* and *Engle* and settle the law on this issue that is likely to reoccur.

This Article carefully examines the decision in *Fox* that receded from *Farghali v. Farghali*,[13] where a three-judge panel departed from the Fourth District's precedent that "the failure to make the [required] statutory findings constitutes reversible error."[14] In particular, the author uses the Fourth District's decision in *Fox* to illustrate why the prior panel precedent rule must be adhered to even if a subsequent panel is convinced that a case was wrongly decided.[15] One of the original panel members of the *Farghali* court changed his position and filed a concurring opinion in *Fox* explaining why the majority's position is more persuasive from the position expressed in *Farghali* and *Kuchera*.[16] *Fox* provides a careful and well-reasoned analysis that considers reversible error versus preservation.[17] The author is convinced that the legal system will be better served if Florida follows the rule established by *Fox*.[18] Therefore, this Article urges the Florida Supreme Court to approve *Fox* in order to stabilize the judicial system and establish a binding precedent to promote uniformity of law in Florida.

I. THE FOURTH DISTRICT'S EN BANC DECISION IN *FOX*

In *Fox*, the former husband argued that the trial court's failure to make statutorily-required findings in an award of alimony is reversible error whereas the former wife argued that the former husband did not preserve the issue for appeal because he did not file a motion for rehearing to bring the matter to the trial court's attention.[19] The Fourth District took the issue en banc to resolve a conflict within the district.[20] The conflict stems from the *Farghali*'s panel that departed from the Fourth District's

11. *See id.* at 791.
12. *Engle*, 277 So. 3d at 699 n.2 & 704.
13. *Farghali v. Farghali*, 187 So. 3d 338, 339 (Fla. 4th DCA 2016).
14. *Fox*, 262 So. 3d at 791.
15. *See infra* Part II.
16. Fox, 262 So. 3d at 795–96 (Conner, J., concurring) (citing *Farghali*, 187 So. 3d at 338; also citing *Kuchera v. Kuchera*, 230 So. 3d 135 (Fla. 4th DCA 2017)).
17. *Id.* at 794 (majority opinion).
18. *See id.* at 791.
19. *Id.*
20. *Id.*

precedent.[21] The *Farghali* court expressly adopted a First District's rule that "a party is not entitled to complain that a judgment in a marital and family law case fails to contain sufficient findings unless that party raised the omission before the trial court in a motion for rehearing."[22]

The court found that *Farghali* conflicts with the Fourth District's earlier decisions that did not require a motion for hearing to preserve the issue of sufficient findings.[23] In resolving the intra-district conflict, the court adhered to its prior decisions and held that "the failure to comply with the statute's requirement of factual findings is reversible error regardless of whether a motion for rehearing is filed."[24] The court therefore receded from *Farghali* and certified conflict with the other district courts.[25]

The en banc court noted that in *Dorsett* the Fourth District held that the failure to make sufficient findings in an equitable distribution award constitutes reversible error.[26] The *Dorsett* court acknowledged that both *Broadfoot* and *Mathieu* as having reached the opposite conclusion.[27] Next reviewed was the Third District's decision in *Broadfoot* that affirmed an alimony award even though the judgment did not contain the statutorily-required findings on the ground that "the award was clear and supported by the record."[28] In *Mathieu*, the Fifth District followed *Broadfoot* and affirmed a dissolution judgment despite the lack of statutorily-required findings because the husband failed to raise the issue in a motion for

---

21. Fox v. Fox, 262 So. 3d 789, 791 (Fla. 4th DCA 2018).

22. The *Farghali* panel departed from Fourth District precedent when the court followed the rule established by *Simmons v. Simmons*, 979 So. 2d 1063, 1064 (Fla. 1st DCA 2008). *See* Fox, 262 So. 3d at 792.

23. These earlier decisions held that the failure to make the statutorily-required findings constitutes reversible error. *See, e.g.*, Badgley v. Sanchez, 165 So. 3d 742, 744 (Fla. 4th DCA 2015); Rentel v. Rentel, 124 So. 3d 993, 994 (Fla. 4th DCA 2013); Mondello v. Torres, 47 So. 3d 389, 395 (Fla. 4th DCA 2010); Aguirre v. Aguirre, 985 So. 2d 1203, 1207 (Fla. 4th DCA 2008); and Dorsett v. Dorsett, 902 So. 2d 947, 950 n.3 (Fla. 4th DCA 2005).

24. *Fox*, 262 So. 3d at 791 (relying on Phila. Fin. Mgmt. of S.F., LLC. v. DJSP Enters., Inc., 227 So. 3d 612, 617 (Fla. 4th DCA 2017); and then relying on *In re* Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982) ("[A] panel of our court has no authority to overrule or recede from our precedent on the same legal issue").

25. *Id.* at 791 n.1 (noting that because Kuchera v. Kuchera, 230 So. 3d 135, 139 (Fla. 4th DCA 2017), followed *Farghali*, the court also receded from *Kuchera*).

26. *Id.* at 793.

27. *Id.* (citing Dorsett, 902 So. 2d at 950). Unlike *Farghali* and *Kuchera* that departed from binding precedent, all subsequent panels followed *Dorsett* as binding precedent. For example, in 2010, in *Mondello*, the Fourth District again expressed disagreement with *Mathieu*. *Mondello*, 47 So. 3d at 400 n.3. In *Rentel*, the Fourth District reversed and remanded an alimony award for failure to make statutorily-required findings. *Rentel*, 124 So. 3d at 994. The Fourth District in *Badgley* reiterated that the failure to make the statutorily-required findings warrants reversal, citing *Mathieu* again as contrary authority. *Badgley*, 165 So. 3d at 744.

28. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).

rehearing.[29] Both *Broadfoot* and *Mathieu* adopted an exception to the rule that when the court's review is hampered, they may remand the case for sufficient findings.[30]

The en banc court further considered *Owens* where the First District adopted *Broadfoot* and *Mathieu* and held that because the appellant failed to raise the lack of findings in a motion for rehearing, the issue is not preserved for appellate review.[31] The court also reviewed the Second District's decision in *Esaw* that affirmed the lower court based on a failure to show harmful error or provide a transcript, noting the lack of findings did not make the error fundamental.[32] In reaching its result, the *Esaw* court acknowledged that the Fourth District has disagreed with *Broadfoot* and *Mathieu*.[33]

The en banc court stated that:

> [d]espite the other districts' decisions requiring a party to file a motion for rehearing to preserve the issue of a trial court's failure to make statutorily-required findings in alimony, equitable distribution, and child support, we adhere to our

29. *Id.*

30. *Id.*

31. *Id.* (reviewing Owens v. Owens, 973 So. 2d 1169, 1169 (Fla. 1st DCA 2007).

32. *Id.* (citing Esaw v. Esaw, 965 So. 2d 1261, 1265 (Fla. 2d DCA 2007)).

33. *Id.* (reviewing *Esaw*, 965 So. 2d at 1265 n.1). The conflict was also noted in the concurring opinion. *See Esaw*, 965 So. 2d at 1268 (Silberman, J., concurring). But as previously noted, the Second District in *Engle* followed *Fox*'s reasoning and rejected the rationale offered. by the other district courts. *See* Engle v. Engle, 277 So. 3d 697, 702 (Fla. 2d DCA 2019). The *Engle* court noted that *Fox* interpreted *Esaw* to have implicitly approved the preservation rule established by *Broadfoot* and its progeny; however, the *Engle* court made it clear that was not the case as evidenced by Judge Silberman's concurrence encouraging litigants to raise the issue in a motion for rehearing since the Second District has not explicitly addressed the preservation issue. *See id*. at 699 n.2. The *Engle* court found *Fox*'s reasoning persuasive on several key points. First, the court noted that allowing trial courts to fail to make the required findings "will create future difficulty in subsequent modification proceedings" where the trial court has to determine whether "there has been a material change in circumstances." *Id*. at 702 (citing *Fox*, 262 So. 3d at 793–94). Second, remanding for the required findings is appropriate in these cases because the rules were not designed to allow trial judges to ignore statutory requirements, as family law trial judges should be aware of the findings that they are required to include in a family law judgment. *See id*. at 703 (citing *Fox*, 262 So. 3d at 794). Third, because these cases involve families and children, "foreclosing a litigant from raising" the issue on appeal for failure to raise the preservation issue in a motion for rehearing not only "creates a procedural bar to achieving equity" but also "allows trial courts to ignore specific legislative directives." *Id*. at 704 (citing *Fox*, 262 So. 3d at 794). Fourth, the *Engle* court acknowledges that family law cases involve a large number of litigants who appear before the trial court and the appellate courts pro se and therefore "this judicially created rule may create a trap that not only has the potential to affect all family law litigants but in practice could unduly affect pro se litigants." *Id*. (citing *Fox*, 262 So. 3d at 794). Hence, the Second District, like in *Fox*, urged the Family Law Rules Committee to review and address the issue. *Id.* (citing *Fox*, 262 So. 3d at 795).

> precedent that a party may raise the issue without having previously filed a motion for rehearing.[34]

The court reasoned that "the rules do not require the filing of a motion, many dissolution appeals are pro se, and a family court judge should be aware of the statutory requirements in rendering a decision on alimony, equitable distribution, and child support."[35]

The court noted the distinction between dissolution of marriage cases and other civil litigation.[36] Unlike in civil litigation where the final judgment is the end of the litigation process, a final judgment of dissolution "establishes ground zero for the purpose of petitions for enforcement, modification, and contempt proceedings."[37] Without the statutorily-required factual findings, "it is difficult, if not impossible," to enforce a judgment or to justify a modification based on a material change in circumstances.[38] The court reasoned that the refusal to review a trial court's failure to make the required findings "frustrate[d] the very purpose [of] those findings."[39] Because children and families are the focus, a rule requiring a motion for rehearing "is too restrictive and imprecise to operate fairly."[40] This is especially true where many family court cases are handled pro se."[41]

The majority addressed the dissent's suggestion that judicial economy should prevail over children and family and that requiring a motion for rehearing was just a preservation issue.[42] The majority disagreed, noting that "[t]he failure to make required factual findings is not the type of error that preservation rules were designed to avoid."[43] Likewise, "the preservation rules were not designed to allow a trial court to ignore statutory requirements of which it should be aware."[44]

The court noted that while the failure to make the statutorily-required findings may not be fundamental error, it is reversible error.[45] The en banc court, therefore, adhered to its prior precedent, approved the rule

---

34. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 793–94.

39. *Id.* at 794.

40. Fox v. Fox, 262 So. 3d 789, 794 (Fla. 4th DCA 2018).

41. *Id.* at 794.

42. *Id.*

43. *Id.*

44. *Id.* (stating that while a lawyer or a party should encourage the trial court to comply with statutory requirements, it should not be a rule to require a party to bring the statutory requirements to the trial court's attention in order to preserve the issue for appeal).

45. *See id.* (citing Walden v. Adekola, 773 So. 2d 1218, 1219 (Fla. 3d DCA 2000) (which "revers[ed] a sanctions order for failing to contain a willfulness finding, which can be raised for the first time on appeal")).

applied in *Badgley*, *Rentel*, *Mondello*, *Aguirre*, and *Dorsett* and receded from *Farghali* and *Kuchera* to the extent they departed from the Fourth District's established precedent.[46] After addressing the merits of the former husband's second issue—the trial court's refusal to allow him to discover and present evidence on the former wife's employability—the court reversed and remanded the cause for further proceedings.[47]

Judge Conner issued a concurrent opinion noting, "After participating in the panel decisions issued in *Farghali* and *Kuchera* and considering the various positions argued during the en banc consideration of this case, I have come to the conclusion that the majority's position is more persuasive."[48] Accordingly, he changed his position from that expressed in *Farghali* and *Kuchera*.[49]

Judge Kuntz also issued an opinion, concurring in part and dissenting part. Unlike the majority that held that the failure to make the written findings constitutes fundamental error, Judge Kuntz noted that "there is no general rule that the lack of statutorily required findings constitutes fundamental error."[50] Hence, the dissent would require parties to preserve the issue for appellate review, as required in all other instances absent fundamental error.[51]

In the case at bar, the dissent found the former husband waived his challenge to the court's alimony award, noting that the *Farghali* court reached the correct conclusion when it adopted the rule used by the First District in *Simmons*.[52] The *Simmons* rule tracked the rule applied by the other districts in *Esaw*, *Owens*, *Mathieu* and *Broadfoot*.[53] The dissent reviewed those decisions and found them to be persuasive, noting that the rule adopted in *Farghali* stands for the proposition that the appellate court's review is limited to issues raised before and ruled upon by the trial court.[54] As a result, issues raised for the first time on appeal will not be considered. "The requirement that a party preserve an issue is based on

---

46. Fox v. Fox, 262 So. 3d 789, 794–95 (Fla. 4th DCA 2018).

47. *Id.* at 791.

48. *Id.* at 796 (Conner, J., concurring) (citations omitted).

49. *Id.*

50. *Id.* at 799 (citing Esaw v. Esaw, 965 So. 2d 1261, 1265 (Fla. 2d DCA 2007)) (brackets omitted) (Kuntz, J., concurring in part and dissenting in part).

51. *Id.* at 796.

52. Fox v. Fox, 262 So. 3d 789, 797 (Fla. 4th DCA 2018) (Kuntz, J., concurring in part and dissenting in part).

53. *Id.* (citing Simmons v. Simmons, 979 So. 2d 1061, 1064 (Fla. 1st DCA 2008); *Esaw*, 965 So. 2d at 1261; Owens v. Owens, 973 So. 2d 1169 (Fla. 1st DCA 2007); Mathieu v. Mathieu, 877 So. 2d 740 (Fla. 5th DCA 2004) (per curiam); Broadfoot v. Broadfoot, 791 So. 2d 584 (Fla. 3d DCA 2001)).

54. *Id.* at 798 (citing State v. Barber, 301 So. 2d 7, 9 (Fla. 1974)).

fairness to the litigants, the court, and the judicial system."[55] It is to allow the judge and the opposing party an opportunity to correct the error.[56]

The dissent took issue with the majority's statements that dissolution cases are unlike civil cases and that "'it is equally, if not more, important' that a court make findings in a dissolution case."[57] The dissent pointed out that "an exception to the preservation requirement exists for fundamental error, not error this Court decides in a particular case to be important."[58] Because the former husband failed to preserve the issue of adequate findings in a motion for rehearing or by other means authorized by the rules, the dissent would affirm on this issue and recede from the Fourth District's earlier decisions requiring a contrary result.[59]

II. Discussion and Analysis

A. *The Prior Panel Precedent Rule:* Farghali*'s Analysis Was Inconsistent with Then-Binding Fourth District Precedent*

In *Farghali*, a three-judge panel followed the First District's decision in *Simmons*, but disregarded the Fourth District's binding precedent.[60] In effect, the *Farghali* panel receded from *Dorsett* and its progeny that held "the failure to make the [required] statutory findings constitutes reversible error."[61] That was a violation of the prior panel precedent rule under Fla. R. App. P. 9.331.[62] If the *Farghali* panel had looked to Florida case law and Rule 9.331, it would have found that, as a subsequent panel, the *Farghali* court was bound to follow *Dorsett*, which dictates a contrary result from the one reached in *Farghali*.[63]

---

55. *Id.* (citing City of Orlando v. Birmingham, 539 So. 2d 1133, 1134 (Fla. 1989)).

56. *Id.* (citing Castor v. State, 365 So. 2d 701, 704 (Fla. 1978)). The dissent cited to several Florida Supreme Court decisions that determined the failure to make required findings does not constitute fundamental error. *See* State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994); Hopkins v. State, 632 So. 2d 1372 (Fla. 1994); Seifert v. State, 616 So. 2d 1044 (Fla. 2d DCA), *approved in relevant part*, 626 So. 2d 207 (Fla. 1993).

57. Fox v. Fox, 262 So. 3d 789, 799 (Fla. 4th DCA 2018) (Kuntz, J., concurring in part and dissenting in part).

58. *Id.*

59. *Id.*

60. *See id.* at 791 & 792 (majority opinion).

61. *Id.*

62. Fla. R. App. P. 9.311 (2019).

63. *See Fox*, 262 So. 3d at 792 (citing *In re* Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982)). There are proper ways a district court's precedent may be overruled or receded from, but the way the *Farghali* panel receded from *Dorsett* was not one of them. First, a Florida district court's precedent may be overruled by an intervening U.S. Supreme Court or Florida Supreme Court decision. *See generally* Raoul G. Cantero, III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 75 Fla. Bar J. 40, 40 (May 2002). When an intervening decision from the U.S. Supreme Court or Florida Supreme Court implicitly overrules prior cases from the district courts of appeal, courts often certify the issue to the Florida Supreme Court for clarification. *Id.* The second way to overrule or recede from a precedent is by following the prior panel precedent

This author previously laid down the procedure to overrule or recede from *Dorsett* if a subsequent panel is convinced that *Dorsett* was wrongly decided: "[While] subsequent panels from the Fourth District must follow *Dorsett*, which has the force of binding precedent, a future panel may faithfully apply *Dorsett*'s holding and recommend en banc review."[64] That is the procedure, but the *Farghali* panel did not follow it.[65] Instead, the *Farghali* panel took it upon itself by receding from *Dorsett* and its progeny in violation of Rule 9.331.[66]

B. *The* Fox *Decision Rests on a Sound Analytical Framework*

In December 2018, the Fourth District decided *Fox*, which demonstrates that *Dorsett* was rightly decided and should be followed in cases like *Fox*.[67] *Fox* is a well-reasoned decision that considered the Fourth District's earlier decisions[68] and the other district courts' decisions,[69] with which *Dorsett* disagreed. A close review of the decision shows that *Fox* rests on a sound analytical framework.

In affirming the validity of *Dorsett*'s holding, *Fox* made three important points, explaining that appellate courts should not require family law litigants to file a motion for rehearing to preserve for appeal the lack of statutorily-required findings.[70] First, the rules do not require family law litigants to file a motion for rehearing in order to preserve the issue for appeal.[71] Although the Fourth District is not willing to impose such a requirement, it will apply such a rule if it is adopted. Hence, the en banc court stated that the Florida Bar Family Rules Committee may address this issue, because of judicial economy, by adopting the rule championed by the other district courts requiring a motion for rehearing to preserve the issue of the lack of statutorily-required findings for appeal.[72] "Absent such a rule, however, [the court] will not require a motion for rehearing to 'preserve' the issue."[73] Second, as the *Fox* court

---

rule under Rule 9.331, which authorizes en banc review in order to maintain uniformity in decisions when a subsequent panel disagrees with a prior panel. As an alternative to the suggestion of en banc hearing, a subsequent panel could certify the issue to the Florida Supreme Court for resolution. *See* State v. Johnson, 516 So. 2d 1015, 1021 (Fla. 5th DCA 1987).

64. *See* Fleurantin, *supra* note 2, at 30 (citing O'Brien v. State, 478 So. 2d 497 (Fla. 5th DCA 1985)).

65. Fox v. Fox, 262 So. 3d 789, 792 (Fla. 4th DCA 2018).

66. *See In re* Rule 9.331, 416 So. 2d at 1128.

67. *Fox*, 262 So. 3d at 794.

68. *Id.* at 792.

69. *Id.* at 793–94.

70. *Id.* at 793,794–95.

71. *Id.* at 793.

72. *Id.* at 795.

73. Fox v. Fox, 262 So. 3d 789, 795 (Fla. 4th DCA 2018).

says, "many dissolution appeals are [handled] pro se;"[74] therefore, it does not serve the end of justice to refuse to hear the issue on appeal just because a litigant either forgot or failed to file a motion for rehearing. In fact, the court reasoned that the failure to review the issue on appeal "frustrates the very purpose for those findings."[75] Third, it is not a burden to require family law judges to comply with statutory mandates since family law judges should be aware that Chapter 61 requires them to make statutory findings in rendering decisions in cases involving alimony, equitable distribution, and child support.[76] There is no question that *Fox* rests on a sound analytical framework, as it explains its position and reaches its result after careful consideration of the other district courts' opinions and the dissent's position.[77]

Another persuasive point made by the majority is the distinction between dissolution of marriage cases and other civil litigation.[78] After the conclusion of an appeal at the district court level, a final judgment may not be modified, altered, or amended except as provided by rules or statutes.[79] "There is one [limited] exception to this absolute finality"—that is Rule 1.540(b), "which gives the court jurisdiction to relieve a party from the act of finality in a narrow range of circumstances."[80] Generally, after one year, a civil litigant may not avail itself to Rule 1.540(b) to attack a judgment.[81] That means civil ligation ends after the appellate process runs its course.[82]

Contrast that to final judgments in family law cases. The en banc court recognized that after the final judgment, a family law litigant tends to file petitions for enforcement, modification, and contempt proceedings.[83] The court is concerned that the lack of statutorily-required findings will hamper review.[84] The court's concern is justified because it will be difficult if not impossible to discern from the judgment the basis for enforcement, modification, or contempt if the initial judgment lacks the statutorily-required findings.[85]

In the duel between reversible error and preservation, the majority's position in *Fox* is more persuasive because it rests on firmer statutory

---

74. *Id.* at 793.
75. *See id.* at 794.
76. FLA. STAT. § 61 (2019).
77. *Fox*, 262 So. 3d at 793–94.
78. *See id.* at 793.
79. De La Osa v. Wells Fargo Bank, N.A., 218 So. 3d 914, 917 (Fla. 3d DCA 2016). *See also, e.g.*, FLA. STAT. § 61.14.
80. Miller v. Fortune Ins. Co., 484 So. 2d 1221, 1223 (Fla. 1986).
81. *See* FLA. R. APP. P. 1.540(b)(1) (2019).
82. *See id.*
83. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).
84. *Id.* at 793–94.
85. *Id.*

grounds than the dissent's position. The lack of required findings "is not the type of error that preservation rules were designed to avoid."[86] While the court will not review unpreserved issues, it will not require a motion for rehearing based on the preservation rules, which were not designed to allow a trial judge to ignore statutory mandates.[87] The majority's position is consistent with the court's responsibility with respect to the application of alimony, equitable distribution, and child support statutes, which mandate a trial court to make factual findings in family law cases.[88]

According to the *Fox* majority, while the failure to make statutorily-required findings may not be fundamental error, it is reversible error.[89] The majority is concerned that the refusal to review a trial court's failure to make the required findings frustrates the very purpose of those findings, which are designed to protect children and families.[90]

Because the majority admits that the lack of findings is not fundamental error, the dissent takes the position that the preservation rule should prevail when it comes to the failure to make factual findings.[91] Both *Broadfoot* and *Mathieu* provided an exception that the appellate court may at its discretion send the case back for findings if its review is hampered.[92] According to the *Fox* dissent, the exception to the preservation requirement addresses the majority's concern.[93] Because the majority concedes that the lack of factual findings is not fundamental error, the dissent would affirm on this issue and recede from the Fourth District's earlier decisions requiring a contrary result.[94]

In reaching its conclusion, the dissent relied on several supreme court cases that determined the failure to make sufficient findings does not constitute fundamental error.[95] The dissent cited to *State v. Townsend*, but *Townsend* was not a case involving failure to make statutorily-required findings in a family law case.[96] Rather, *Townsend* involved a criminal defendant's failure to timely make contemporaneous objections under

---

86. *Id.* at 794.

87. *Id.*

88. For a thoughtful discussion on how the *Fox* decision meets the Fourth District's responsibility respecting consequence, consistency, and coherence, see generally Larry R. Fleurantin, *Exhaustion of Administrative Remedies in Immigration Cases: Finding Jurisdiction to Review Unexhausted Claims the Board of Immigration Appeals Considers Sua Sponte on the Merits*, 34 AM. J. TRIAL ADVOC. 301, 302 (2010).

89. Fox v. Fox, 262 So. 3d 789, 794 (Fla. 4th DCA 2018).

90. *Id.*

91. *Id.* at 799 (Kuntz, J., concurring in part and dissenting in part).

92. Mathieu v. Mathieu, 877 So. 2d 740, 741 n.1 (Fla. 5th DCA 2004); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001).

93. *Fox*, 262 So. 3d at 799 (Kuntz, J., concurring in part and dissenting in part).

94. *See id.* at 799.

95. *See id.*; *supra* note 27 and accompanying text.

96. *See Fox*, 262 So. 3d at 799 (citing State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994)).

§ 90.803(23) of the Florida Statutes to the trial judge's failure to make factual findings regarding reliability of child's statements.[97] The dissent also cited *Hopkins v. State*, but likewise, that case did not involve failure to make statutorily-required findings in a family law case.[98] *Townsend* and the other cited cases were criminal cases where the defendants were most likely represented by counsel whereas many dissolution appeals are handled pro se.[99] Because *Townsend* and the cited cases did not involve facts similar to *Fox*, reliance on those cases is misplaced.

C. *The Florida Supreme Court Should Approve the Rule Established by* Fox *to Stabilize the Judicial System and Promote Uniformity of Law in Florida*

The Florida Supreme Court should approve *Fox* to promote uniformity of law in Florida. *Fox* provided a well-reasoned analysis in approving the rule applied in *Dorsett* and its progeny. While the author acknowledges that an exception to the preservation requirement exists for fundamental error, the way the exception is carved is not sufficient to alleviate the majority concern.[100] The most salient impediment to the exception adopted in *Broadfoot* and *Mathieu* is that it is up to the discretion of appellate judges to send the case back for findings if the court's review is hampered.[101] According to Judge Conner, the caveat "can sometimes lead to speculation about what a trial judge was thinking. Discerning the unspoken thoughts of a trial judge can be problematic, when a trial judge's thinking is often dependent upon determining the credibility of witnesses."[102] Different panels will reach drastically different conclusions if it is up to an individual's judge discretion to send cases back for findings. Hence, it is a valid concern that the caveat will not be applied fairly and consistently.

CONCLUSION

This Article revisits the preservation issue in family law judgments that lack statutorily-required findings. The en banc decision in *Fox* and the Second District's decision in *Engle* unambiguously raised the tension

97. *Townsend*, 635 So. 2d at 951.

98. *See Fox*, 262 So. 3d at 799 (Kuntz, J., concurring in part and dissenting in part) (citing Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994)).

99. *Id.* (citing *Townsend*, 635 So. 2d at 959 ("[T]he failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." (citing *Hopkins*, 632 So. 2d 1372; *Seifert v. State*, 616 So. 2d 1044 (Fla. 2d DCA), *approved in relevant part*, 626 So. 2d 207 (Fla. 1993); *Jones v. State*, 610 So. 2d 105 (Fla. 3d DCA 1992))).

100. *Id.* at 799.

101. *See* Mathieu v. Mathieu, 877 So. 2d 740, 741 n.1 (Fla. 5th DCA 2004); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001).

102. *See Fox*, 262 So. 3d at 796 (Conner, J., concurring).

between the Fourth District and the Second District on one hand and the other Florida district court opinions on the other hand. Because all Florida district courts are unable to speak with one voice on this issue, the Florida Supreme Court should resolve the conflict certified by *Fox* and *Engle* and settle the law once and for all. [103]

The Florida Supreme Court should approve the Fourth District's decision in *Fox* and the Second District's decision in *Engle* because there are no rules requiring family law litigants to file a motion for rehearing to preserve for appeal the lack of statutorily-required findings in a trial court's judgment. While we recognize all the district courts except the Fourth District and the Second District adopted an exception to the preservation requirement when it comes to fundamental errors, we cannot leave it up to the discretion of a panel of appellate judges to send a case back for findings if the lack of findings frustrates the court's appellate review. Leaving it up to individual judges' discretion will lead to speculation about what the trial judge was thinking and thus the exception will not be applied fairly and consistently. Consequently, the Florida Supreme Court should approve the rule established by *Fox* in order to stabilize the judicial system and promote uniformity of law.

[103] To date, the conflict certified by Fox and Engle has not been resolved. In fact, the Fourth District recently applied the holding of Fox in *Aponte v. Wood*, 308 So 3d 1043 (Fla. 4th DCA 2020). Therefore, the Florida Supreme Court has the last word either to accept jurisdiction to resolve the conflict or recommend the Family Law Rules Committee to review the issue and submit an amendment to the Family Law Rules of Civil Procedure for the supreme court's consideration and approval in order to promote uniformity of law in Florida.