REL: December 20, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180283

Jonathan B. Wikle

v.

Hilary Boyd

Appeal from Dale Circuit Court
(DR-11-636.01)

EDWARDS, Judge.

Jonathan B. Wikle ("the former husband") and Hilary Boyd ("the former wife") were divorced by a 2011 judgment ("the 2011 divorce judgment") of the Dale Circuit Court ("the trial court"), which incorporated an agreement of the parties ("the

divorce agreement") relating to the division of their assets. The divorce agreement reads, in pertinent part, as follows:

> "(l) SUPPORT:
>
> > "(A) That no periodic or rehabilitative spousal support shall be paid by the [former] husband to the [former] wife.
>
> "(2) DIVISION OF ASSETS and PROPERTY SETTLEMENT:
>
> "(A) The parties shall have all right, title and interest in, and to any personal property, they now have in their possession, and that each of the parties now has, in their possession, the personal property they want and desire[,] and they hereby ratify that division of personal property.
>
> "(B) Specified Property Settlement; Specialized Monetary Obligations Provisions:
>
> > "(i) Hereby deemed as a <u>property settlement</u> by the parties, the [former] husband agrees to be responsible for, maintain and thus pay for the [former] wife's current future household bills and other typical/traditional living expenses for the next seven (7) years beginning on November 1st, 2011, and continuing for a period for seven (7) total years. Said bills shall be payable from the [former] husband's military base pay as detailed on his 'LES', and any supplementary payments/bonus/stipends received from the United States Military. If the [former] husband is discharged, honorably or dishonorably from his employer, he shall not be relinquished from any said responsibilities detailed below. The [former] wife's bills and/or living

expenses include but are not limited to her:

"(A) Household bills/utilities:

"1) Rent/Mortgage payments (approximately $840.00),

"2) Power (Pea River Electric -- approximately $250.00),

"3) Water (Culligan -- approximately $60.00),

"4) Gas (SouthEast AL Gas -- approximately $25.00),

"5) Cable & Internet (Cobridge Communications approximately $85.00),

"6) Home Phone (Century Tel -- approximately $110.00),

"7) Trash (Ozark Utilities Board -- approximately $60.00),

"8) Pest Control (Orkin -- approximately $36.00),

"9) ADT Security (approximately $28.99),

"10) Lawn Care (True Green -- approximately $65.00), and

"(B) Other:

"1) Cell Phone payments (AT&T -- approximately $272.00),

"2) 'Petsmart' health insurance for the parties' animals,

"3) 'Banfield' wellness plan (approximately -- $31.95),

"4) Gym Membership (Synergy -- approximately $37.79).

"(ii) If the [former] wife relocates her principle [sic] place of residence, prior to the cessation of the seven (7) year period, the [former] husband shall still be responsible for all the new and reasonable household and other bills as set out in paragraph 'i' above. The [former] husband shall additionally be responsible for said debts; notwithstanding increased rates due to inflation and/or geographical location of the [former] wife's proposed residence or due to the standards of living in the community she so chooses to reside.

"(iii) This agreement was made based on a culmination in [sic] the totality of circumstances of the parties' current standard of living demonstrating that:

> > "1) the [former] husband ... has a clear ability to pay both his and the [former wife's] household and other bills/debt for the outlined time period;
> >
> > "2) the [former] wife's need for said bills to be paid based on her status as a college student;
> >
> > "3) the obvious great disparity in [in]come between the parties; and
> >
> > "4) Based upon the fact that the [former] husband has been the primary financial provider for the [former] wife since 1999.
>
> "(iv) This specific provision of paragraph (2)(B), and all subsections, is entered into by the parties because it shall maintain the 'status quo' for each the [former] husband and [the former] wife upon ratification and incorporation of this agreement into a final decree. Moreover, the parties have specifically taken into account the:
>
> > "1) standard of living during the course of the marriage;
> >
> > "2) future prospects, potential for maintaining their standard of living after their divorce;
> >
> > "3) age and gender of each;
> >
> > "4) health of each party;

"5) length of marriage;

"6) source or sources of their common property.

"(v) The [former] husband is active military, and barring unforeseen circumstances, he shall so be employed in the same or higher ranking [sic], position for the next seven (7) years with the United States Military; and therefore, the [former] husband hereby agrees to subtract the total of bills due, as listed in this on behalf of the [former] wife, from the total amount received pursuant to his current 'LES.' (Including all supplemental pay - BAH, BAS, BAQ, Combat pay, etc...). The remaining balance shall be equally split amongst the parties. The agreement to pay debts/bills on behalf of the [former] wife shall be deemed a property settlement and is a voluntary, knowing, and an intelligent agreement between the parties. Both parties herein acknowledge and fully understand to [sic] these provisions, and further believe it is in the best interest and welfare of both the [former] husband and [the former] wife to agree to said provisions.

"(vi) The [former] husband shall be responsible for timely payment(s) of all the [former] wife's bills/debts listed in 'i' above. If applicable, the [former] wife shall provide the [former] husband with a legible copy of all bills/receipts receive[d] in regard to the aforementioned household and other bills within fourteen (14) days of receipt. Thereafter, the [former] husband shall make full payment thereof within fourteen (14) days of receipt of said bills. However, if the

> [former] husband directly receives said bills from the debtor [sic], he shall directly make such payments to the company and/or person to whom the debt is owed and immediately provide the [former] wife with a legible copy of the bill and proof of payment of the aforementioned bill(s). Additionally, the [former] husband shall provide the [former] wife with a copy of his military pay stub (i.e., 'LES' each month), along with a list of total monthly bills paid [o]n her behalf directly or indirectly thereby demonstrating the remaining finances which the parties have agreed to split equally. The [former] husband shall pay to the [former] wife 50% of the remaining balance of his income as demonstrated on his LES by the end of the first week of each month. This shall continue for a period of seven (7) years, and shall not be modifiable unless specifically mutually agreed upon by the parties.
>
> "(vii) This monetary obligation shall not be deemed as either periodic or rehabilitative spousal support; and thus, may not be terminable if the [former] wife remarries or co-habitats [sic] with a member of the opposite sex as defined under Alabama law."

In March or April 2017, the former husband stopped paying the former wife amounts that she claimed he owed her under the terms of the 2011 divorce judgment, and the former wife filed in the trial court a complaint seeking to have the former husband held in contempt and seeking enforcement of several

provisions of the 2011 divorce judgment. The former husband answered the former wife's complaint, contending, among other things, that the former wife had concealed certain facts at the time of the execution of the divorce agreement. The former husband also sought a modification of the 2011 divorce judgment, based upon the former wife's remarriage in 2013, to terminate the payments due to her under paragraph (2)(B) of the divorce agreement, which he characterized as support and maintenance payments.

At trial, the former husband contended that the trial court could "relieve a fraud in the formation of a divorce," asserting, essentially, that a part of his answer to the former wife's complaint had been a "defensive" Rule 60(b), Ala. R. Civ. P., motion requesting an order setting aside the 2011 divorce judgment based on the former wife's alleged misrepresentation about her relationship with another man at the time of the execution of the divorce agreement and the entry of the 2011 divorce judgment. Because the former husband contended that he had discovered the former wife's alleged fraud in early 2017, he argued that he had two years from that date to seek to set aside the divorce judgment. <u>See</u>

Spindlow v. Spindlow, 512 So. 2d 918, 920 (Ala. Civ. App. 1987) (explaining that Ala. Code 1975, § 6-2-3, applies to permit the extension of the three-year limitations period for bringing an independent action under Rule 60(b) on the ground of fraud for up to two years after the discovery of the fraud). In addition, the former husband, who had only recently retired from active duty in the United States Army at the time of the trial, asserted that 50 U.S.C. § 3936(a), a part of the Servicemembers' Civil Relief Act, codified at 50 U.S.C. § 3901 et seq., tolled any limitations period under Rule 60(b) until he was no longer an active-duty servicemember, thus permitting him to bring his Rule 60(b) claim regardless of the expiration of any limitations period.

After the conclusion of the trial, the trial court entered a judgment that, among other things, found the former husband in contempt of certain provisions of the 2011 divorce judgment and ordered him to pay certain sums to the former wife. The trial court also denied the former husband's request to set aside the 2011 divorce judgment on the ground of fraud. The trial court specifically found that the former husband had not filed a Rule 60(b) motion and that, if the

statement regarding fraud in his answer could be construed as a Rule 60(b) motion, the motion was untimely. In addition, the trial court rejected the application of § 3936(a), stating that the former husband had not been deployed at all times during the years between the entry of the 2011 divorce judgment and the commencement of the former wife's 2017 contempt action. The judgment further concluded that paragraph (2)(B) of the divorce agreement incorporated into the 2011 divorce judgment was a property settlement and not an award of periodic alimony and therefore that the former husband's obligations under that paragraph could not be terminated based on the former wife's remarriage. After his postjudgment motion on those issues was denied, the former husband timely appealed the judgment.[1]

On appeal, the former husband asserts two main arguments. He first contends that the monetary obligations set out in paragraph (2)(B) of the divorce agreement are, in fact, periodic alimony and not a property settlement or alimony in

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[1]The trial court granted the former husband's postjudgment motion in part, correcting the amount the former husband was required to pay toward the debt on the former wife's automobile. That amendment to the judgment is not relevant to the issues in this appeal.

gross. He next argues that the trial court erred in concluding both that his Rule 60(b) claim was untimely and that § 3936(a) did not prevent the running of the limitations period for the filing of a Rule 60(b) motion.

We first address contention in the dissenting opinion that the divorce agreement was an integrated bargain. The former wife never asserted in the trial court that the divorce agreement was an integrated bargain, and the divorce agreement, which favors the former wife, does not contain language indicating that "the amount of alimony to be paid for support and maintenance has been established by the parties by taking into account the property settlement features of the agreement," DuValle v. DuValle, 348 So. 2d 1067, 1069 (Ala. Civ. App. 1977), or that the parties were effecting a final, "'full and complete,'" or "'permanent'" settling of their claims against each other, DuValle, 348 So. 2d at 1070 (quoting other cases). The parties had little in the way of property, and they divided that which they did have almost equally. In DuValle, we stated that, before a court could determine, as a matter of law, that a settlement agreement was an integrated bargain, "a ... pronounced intent to settle all

claims of property rights and rights of maintenance and support is required" and must appear in the language of the agreement. DuValle, 348 So. 2d at 1070. When it is not entirely clear from the language of the agreement that it is an integrated bargain, and if the agreement is ambiguous, parol evidence regarding the parties' intent in negotiating the agreement is required in order to determine if the agreement is an integrated bargain. See DuValle, 348 So. 2d at 1071.

However, because neither party raised the issue whether the divorce agreement was an integrated bargain in the trial court, the testimony concerning the negotiation of the divorce agreement is quite limited. As the dissent notes, the former wife testified that the former husband had agreed to pay her over time; however, she further testified that the parties had no assets significant enough to permit the former husband to pay her "a lump sum compensory [sic] to the amount of time [the parties] had been married." The testimony of the former wife regarding her desiring a lump sum of money as part of the divorce agreement and the former husband's inability to pay it other than over time is not evidence supporting a conclusion

that the parties negotiated an integrated bargain; if it were, all settlement agreements would be integrated bargains, and that is not the law. See Gignilliat v. Gignilliat, 723 So. 2d 90, 92 (Ala. Civ. App. 1998) (noting that "[m]erely because the amount of alimony was established at the same time the division of property and debts was agreed upon does not, in itself, show that the parties related alimony to the property division" and recognizing that "'severable combination' agreements also establish alimony and property rights"). Nothing in the record supports the conclusion that "the amount of alimony to be paid for support and maintenance has been established by the parties by taking into account the property settlement features of the agreement." DuValle, 348 So. 2d at 1069. Thus, we cannot, as does the dissent, conclude that the divorce agreement was, in fact, an integrated bargain, and we will consider the arguments raised by the former husband.

We have often been tasked with determining whether an award to a spouse is periodic alimony or alimony in gross. See, e.g., Hood v. Hood, 76 So. 3d 824, 831 (Ala. Civ. App. 2011); Daniel v. Daniel, 841 So. 2d 1246, 1250 (Ala. Civ. App. 2002); Singleton v. Harp, 689 So. 2d 880, 882 (Ala. Civ. App.

1996); Laminack v. Laminack, 675 So. 2d 481, 482 (Ala. Civ. App. 1996); and Boley v. Boley, 589 So. 2d 1297, 1299 (Ala. Civ. App. 1991). Although the label placed on an award may be considered in determining what type of alimony has been awarded, see, e.g., Boley, 589 So. 2d at 1299, "[t]he substance of the award takes precedence over its label." Cheek v. Cheek, 500 So. 2d 17, 19 (Ala. Civ. App. 1986). Furthermore, "[t]he source of payment and its purpose are of prime importance." Lacey v. Ward, 634 So. 2d 1013, 1015 (Ala. Civ. App. 1994). Thus, an appellate court considering the type of alimony awarded in a divorce agreement or judgment must examine the substance of the award under the principles governing both types of alimony.

> "Our supreme court has explained the difference between periodic alimony and alimony in gross. Hager v. Hager, 293 Ala. 47, 299 So. 2d 743 (1974). Alimony in gross is considered 'compensation for the [recipient spouse's] inchoate marital rights [and] ... may also represent a division of the fruits of the marriage where liquidation of a couple's jointly owned assets is not practicable.' Hager v. Hager, 293 Ala. at 54, 299 So. 2d at 749. An alimony-in-gross award 'must satisfy two requirements, (1) the time of payment and the amount must be certain, and (2) the right to alimony must be vested.' Cheek v. Cheek, 500 So. 2d 17, 18 (Ala. Civ. App. 1986). It must also be payable out of the present estate of the paying spouse as that estate exists at the time of the divorce. Hager v. Hager,

> 293 Ala. at 55, 299 So. 2d at 750. In other words, alimony in gross is a form of property settlement. Hager v. Hager, 293 Ala. at 54, 299 So. 2d at 749. An alimony-in-gross award is generally not modifiable. Id.
>
> "Periodic alimony, on the other hand, 'is an allowance for the future support of the [recipient spouse] payable from the current earnings of the [paying spouse].' Hager v. Hager, 293 Ala. at 55, 299 So. 2d at 750. Its purpose ... 'is to support the former dependent spouse and to enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until the spouse is self-supporting or maintaining a status similar to the one enjoyed during the marriage.' O'Neal v. O'Neal, 678 So. 2d 161, 165 (Ala. Civ. App. 1996) (emphasis added). Periodic alimony is modifiable based upon changes in the parties' financial conditions or needs, such as an increase in the need of the recipient spouse, a decrease in the income of the paying spouse, or an increase in the income of the recipient spouse. See Tibbetts v. Tibbetts, 762 So. 2d 856, 858 (Ala. Civ. App. 1999). The paying spouse's duty to pay periodic alimony may be terminated by petition and proof that the recipient spouse has remarried or is cohabiting with a member of the opposite sex. Ala. Code 1975, § 30-2-55."

Daniel v. Daniel, 841 So. 2d 1246, 1250 (Ala. Civ. App. 2002).

The divorce agreement clearly characterizes the monthly payments of the former wife's expenses and the award to her of 50% of the former husband's remaining military pay as a "property settlement" and specifically states that the former husband's obligations under paragraph (2)(B) are not to be

considered to be periodic or rehabilitative alimony. In addition, the divorce agreement plainly states that the former wife's cohabitation or remarriage would not affect the former wife's right to receive the payments required under paragraph (2)(B). The divorce agreement further states that the former husband will not pay periodic or rehabilitative alimony to the former wife. Although those pronouncements in the divorce agreement are a clear indication of the parties' intent that the award be considered alimony in gross or a property settlement, they are not sufficient to end our inquiry. See Hood, 76 So. 3d at 831 (explaining that the parties' purported waiver of "alimony" did not serve to prevent an award to the wife of a monthly sum that was to increase upon certain circumstances from being periodic alimony). Instead, we must consider the substance of the monetary obligations created by paragraph (2)(B).

Despite its label, which is "not controlling on the question of the true nature of the obligation," Anderson v. Anderson, 686 So. 2d 320, 324 (Ala. Civ. App. 1996), paragraph (2)(B) creates monetary obligations that appear to be in the nature of periodic alimony. The divorce agreement contains

nothing indicating that the purpose of the award was to compensate the former wife for inchoate marital rights or to award the former wife a portion of the fruits of the marriage in lieu of a division of the parties' property. The divorce agreement requires the sale of the marital residence and an equal division of the proceeds of that sale, awards each party an automobile, awards the former wife a portion of the former husband's military retirement, and recites that the parties have divided all other personal property owned by them, indicating that the parties owned no other significant assets. Moreover, nothing in the divorce agreement or in the testimony supports the conclusion that the monetary obligations created by paragraph (2)(B) were payable out of the former husband's estate at the time of the divorce. Both parties testified at trial that, at the time of the divorce, the former husband owned no assets from which he could have paid the former wife a lump sum. Specifically, the former wife testified that, at the time of the divorce, the parties did not own sufficient assets "for [me] to get a lump sum compensory [sic] to the amount of time we had been married." The former wife also admitted that the source of the former husband's monetary

obligations under paragraph (2)(B) was intended to be the former husband's future earnings. However, "an award of alimony in gross must be made based on the value of the marital estate and the parties' separate estates and not on the anticipated future earnings of the payor." Ex parte Dickson, 29 So. 3d 159, 162 (Ala. 2009).

Furthermore, the divorce agreement also indicates that the monetary obligations imposed on the former husband are, in fact, for purposes of maintenance and support. First, the divorce agreement requires the former husband to be responsible for the former wife's household bills, including rent, utilities, and her gym membership. Second, the divorce agreement notes that one consideration for the imposition of the monetary obligations on the former husband is the fact that he had been the primary financial provider for the former wife. We have long explained that periodic alimony serves as a source of support for a former dependent spouse. See O'Neal, 678 So. 2d at 165. Third, a stated purpose of the obligations is to maintain the status quo of the parties, i.e., to maintain their standard of living, another purpose of periodic alimony. See Shewbart v. Shewbart, 64 So. 3d 1080,

1087 (Ala. Civ. App. 2010) (explaining that "periodic alimony consists of regular installment payments made from one spouse to another to enable the recipient spouse, to the extent possible, to maintain his or her standard of living as it existed during the marriage, i.e., the 'economic status quo'" (quoting Orr v. Orr, 374 So. 2d 895, 897 (Ala. Civ. App. 1979)).

Finally, the monetary obligations created by paragraph (2)(B) do not possess all the requisite characteristics of alimony in gross. Alimony in gross must meet two requirements: "(1) the amount and time of payment must be certain; and (2) the right to the payment must be vested and not subject to modification." Segers v. Segers, 655 So. 2d 1014, 1016 (Ala. Civ. App. 1995). Although the length of time of payment, which is limited in the divorce agreement to seven years, is certain, the amount of the award to the former wife is not. The documentary evidence established and both parties testified that the former wife's expenses fluctuated monthly, and the divorce agreement itself recognized that the former wife's expenses could increase or decrease based on where the former wife might choose to live or because of inflation.

Thus, the amount awarded to the former wife is not a sum certain. See Hood, 76 So. 3d at 830 (noting that the fact that the sum awarded in the judgment might increase upon the happening of a future event prevented the award from being certain). Furthermore, the divorce agreement specifically permitted the parties to modify the monetary obligations by mutual agreement, preventing the award from being vested. See Segers, 655 So. 2d at 1016.

Because the monetary obligations imposed on the former husband in paragraph (2)(B) are not a sum certain and the right of the former wife to receive those funds is, by the express terms of the divorce agreement, modifiable and therefore not vested, the monetary obligations imposed by paragraph (2)(B) cannot be alimony in gross. Other characteristics of those obligations, including the fact that they are payable out of the former husband's earnings and are intended to maintain the status quo of the parties' standard of living, support the conclusion that those obligations amount to periodic alimony. The trial court erred in determining that the monetary obligations imposed by paragraph

(2)(B) are alimony in gross and that the monetary obligations are not modifiable or terminable.

We note that the former wife points out that paragraph (2)(B) of the divorce agreement specifically states that the former husband's monetary obligations would not terminate upon the former wife's remarriage or cohabitation. However, we have concluded that paragraph (2)(B) requires the former husband to pay the former wife periodic alimony, which, by law, is terminable upon the remarriage of the recipient spouse. See Ala. Code 1975, § 30-2-55. Because the divorce agreement was incorporated into the 2011 divorce judgment, the trial court must "follow the mandates of § 30-3-55," regardless of the terms of the divorce agreement. Ex parte Murphy, 886 So. 2d 90, 94 (Ala. 2003) (explaining that, once it is merged into a divorce judgment, an agreement "los[es] its contractual nature and [becomes] subject to the equity power of the court"). The judgment of the trial court, insofar as it concluded that the monetary obligations created by paragraph (2)(B) were alimony in gross and were not modifiable upon the remarriage of the former wife, is therefore reversed.

We turn now to the former husband's argument that the trial court erred by not allowing him to present evidence relating to alleged fraud in the procurement of the divorce agreement on the ground that his attempt to do so was untimely. As noted previously, the former husband referred to alleged misrepresentation and concealment by the former wife in his answer to her complaint. Specifically, the former husband averred in his answer that

> "the [divorce] agreement was procured by knowing concealment and misrepresentation on the part of the [former wife] in that she was intimately involved with a member of the opposite sex[,] which she concealed[,] and the very purpose of the agreement[,] to wit[,] to provide for the support and maintenance of the [former wife] and funds for her as a student[,] was part of a massive scheme to misrepresent the facts to the [former husband]."

At trial, the trial court denied the former husband's request that he be permitted to present evidence to attack the 2011 divorce judgment based on the former wife's alleged misrepresentations or concealment of facts in the procurement of the divorce agreement. The trial court pointed out in its judgment that the former husband had not filed a Rule 60(b) motion seeking to set aside the 2011 divorce judgment and concluded that, even if the above-quoted averment in the

former husband's answer was sufficient as a Rule 60(b) motion, that motion was untimely.

Although the procedural posture of this case is unusual, we cannot agree that the former husband did not assert as a counterclaim in his answer an attack on the 2011 divorce judgment under Rule 60(b). See, e.g., Thurman v. Thurman, 74 So. 3d 440, 442 (Ala. Civ. App. 2011) (indicating that an allegation in a petition to modify was properly construed as a request for relief from an earlier judgment under Rule 60(b) and considering the appeal from the denial of that request). A party may present an attack on a judgment by way of a motion or an independent action, see Rule 60, and the use of one when the other is appropriate "is not fatal to the party attacking the judgment." Committee Comments on 1973 Adoption of Rule 60; Warren v. Riggins, 484 So. 2d 412, 414 (Ala. 1986) (noting that "an incorrect choice between [a motion or an independent action] will not be fatal to a party's claim for relief from the judgment"). The former husband's allegation of fraud on the part of the former wife, although not explicitly labeled as a Rule 60(b) motion or an independent action under Rule 60(b), was sufficient to give notice that he challenged the

2011 divorce judgment on the ground of fraud. Thus, we consider the former husband's attack on the judgment to have been sufficiently presented.

The trial court further determined that, if the former husband had advanced an attack on the 2011 divorce judgment, it was untimely. Indeed, a Rule 60(b)(3) motion seeking to set aside a judgment on the ground of fraud is required to be filed within four months, and an independent action under Rule 60(b) must be filed within three years of the entry of the judgment. Rule 60(b); Taylor v. Newman, 93 So. 3d 108, 114 n.4 (Ala. Civ. App. 2011). The former husband's attack on the 2011 divorce judgment was filed in June 2017, well over the three-year limit. The former husband argues both that the limitations period was tolled under Ala. Code 1975, § 6-2-3, because, the former husband says, he did not discover the former wife's fraud until 2017, see Taylor, 93 So. 3d at 114; Spindlow, 512 So. 2d at 920, and that § 3936(a) prevented the limitations period under Rule 60(b) from running because he was an active-duty servicemember until the time of trial. Because we find the former husband's argument regarding the application of § 3936(a) dispositive, we pretermit discussion

of the tolling of the limitations period under § 6-2-3. See McGee v. Bevill, 111 So. 3d 132, 135 (Ala. Civ. App. 2012) (pretermitting discussion of one issue based on the dispositive nature of another).

The former husband contends that 50 U.S.C. § 3936(a) prevented the running of any limitations period because he was an active-duty servicemember between the entry of the 2011 divorce judgment and the time he filed his answer to the former wife's complaint in 2017. The former wife, relying on Crouch v. United Technologies Corp., 533 So. 2d 220 (Ala. 1988), first argues that, in order to rely on the protections of § 3936(a), the former husband was required to establish that his military service prevented him from timely seeking to set aside the 2011 divorce judgment. The former wife also argues that the language in § 3936(a) differs from the similar provision of the former Soldiers' and Sailors' Civil Relief Act of 1940, formerly codified at 50 U.S.C. App. § 525, because it contains the term "may not" instead of the term "shall not"; the former wife contends that the change in the language of § 3936(a) provides trial courts discretion in the application of the statute.

In order to address the issue, a reading of the text of both § 3936(a) and former § 525 is required. Section 3936(a) reads as follows:

> "The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators or assigns."

The provision at issue in Crouch, former § 525, read, in pertinent part, as follows:

> "'The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns ....'"

533 So. 2d at 221-22.

As the former wife contends, Crouch addressed whether former § 525 tolled the statute of limitations on a tort action brought by a career servicemember. Crouch, 533 So. 2d at 221. After discussing the holdings of cases from other jurisdictions, our supreme court concluded that "the granting of relief under the [Soldiers' and Sailors' Civil Relief Act]

is discretionary, based on the Court's finding that the applicant's defense of the suit is materially affected by his military service, whether he be career or not." Id. at 223. As a result of that conclusion, our supreme court declined to find that the statute of limitations had been tolled on the tort action brought by the servicemember. Id.

However, we cannot follow the holding set out in Crouch. Almost five years after Crouch was decided, the United States Supreme Court addressed the same issue -- whether former § 525 tolled the statute of limitations until the conclusion of a servicemember's military service -- in Conroy v. Aniskoff, 507 U.S. 511 (1993). The United States Supreme Court concluded, contrary to the holding in Crouch, that former § 525 applied to toll the statute of limitations until the conclusion of an active-duty servicemember's military service without the need for proof that the servicemember's military service impaired his or her ability to bring suit. Conroy, 507 U.S. at 516. In part, the Supreme Court relied upon the fact that "Congress included a prejudice requirement" in other sections of the act, indicating that it had deliberately chosen not to impose that requirement on the protections afforded by former § 525.

Id. Based on Conroy, we must conclude that the holding in Crouch is no longer viable, and we must conclude that the provisions of § 3936(a) apply without proof of prejudice to, or proof of an inability to bring suit on the part of, the active-duty servicemember. See Little v. Consolidated Publ'g. Co., 83 So. 3d 517, 525 (Ala. Civ. App. 2011) (declining to follow a holding of an opinion of the Alabama Supreme Court because it conflicted with a holding on the same issue in an opinion of the United States Supreme Court and noting that "this court is bound to follow the opinion of the United States Supreme Court").

We next consider whether, as the former wife suggests, the amendment of former § 525 in 2003 into what has become its current form in § 3936(a), which changed the wording from "[t]he period of military service shall not be included" to "[t]he period of ... military service may not be included," should result in a determination that Congress intended to make the application of § 3936(a) discretionary with the trial court. Although the United States Supreme Court has not yet spoken on the issue, we are not without guidance in this endeavor. In Brandt v. Weyant (In re Brandt), 437 B.R. 294

(Bankr. M.D. Tenn. 2010), the United States Bankruptcy Court for the Middle District of Tennessee addressed the meaning of the term "may not" in what is now § 3936(a).[2]

> "When used in conjunction with 'not,' however, 'may' is not deemed to connote discretion[;] rather 'may not' most often is construed as if it were 'shall not.' As the bankruptcy court in Richardson v. Wells Fargo Home Mortgage, Inc. (In re Brandt), 421 B.R. 426, 430 (Bankr. W.D. Mich. 2009), explained 'while there may be some ambiguity when a legislature uses the term "may" to authorize some action (as opposed to the term "shall"), there is no grammatical ambiguity created when the legislature provides that something "may not" be done. In a statute, the phrase "may not" has exactly the same meaning as "shall not."' See Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 448 (Ky. 2002) ('"[W]here other words are used in connection with 'shall' 'must,' 'may' or 'might,' which clearly indicate mandatory or directory construction, as the case may be, we have never ignored the force of the descriptive or qualifying language." ... Courts that have construed "may not" have consistently held that the phrase is mandatory and not permissive or discretionary.') (quoting Clark v. Riehl, 313 Ky. 142, 230 S.W.2d 626, 627 (1950)); In re Denial of Application for Issuance of One Original (New) On-Premises Consumption Beer/Wine License, 267 Mont. 298, 883 P.2d 833 (1994) (the phrase 'may not consider' precludes consideration); Washington v. Gettman, 56 Wash. App. 51, 782 P.2d 216, 218 (1989) (Construing a statute that contained both 'shall' and 'may not,' the court observed: 'When a provision contains both the words "shall" and "may" the presumption is the Legislature intended to

[2]At the time Brandt was decided, the pertinent language was codified at 50 U.S.C. App. § 526(a).

> distinguish them —- "shall" being construed as mandatory and "may" as discretionary or permissive. However, in the instant case, "may not" is clearly not permissive in nature. Had the Legislature intended such, it could have simply omitted the word "not." ... [E]mploying a plain reading of the statute, "may not" is mandatory and none of the language is superfluous.'); In re Meekins, 554 P.2d 872, 875 (Okla. Ct. App. 1976) ('may not be modified' prohibits modification); Ryan v. Montgomery, 396 Mich. 213, 240 N.W.2d 236 (1976) ('may not be recounted' means 'shall not be recounted'); De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225, 153 P.2d 983 (1944) (the words 'may not' are mandatory)."

Brandt, 437 B.R. at 298.

In addition, one of our sister states has rejected the argument that the change from "shall not" to "may not" affected the meaning of what is now § 3936(a). See Walters v. Nadell, 481 Mich. 377, 751 N.W.2d 431 (2008).[3] In Walters, the Supreme Court of Michigan explained:

> "The United States Supreme Court interpreted former 50 USC Appendix 525 of the Soldiers' and Sailors' Civil Relief Act and held that it was 'unambiguous, unequivocal, and unlimited.' We do not believe that the 2003 amendments inserted any ambiguity into the meaning of the tolling provision, and we similarly hold that current 50 USC Appendix 526 is 'unambiguous, unequivocal, and unlimited.'

[3]At the time Walters was decided, the pertinent language was codified at 50 U.S.C. App. § 526(a).

> "The [Michigan] Court of Appeals opined that the change from 'shall not' to 'may not' rendered the tolling discretionary. Although the term 'shall' is clearly mandatory, and the term 'may' is typically permissive, 'may not,' in the context of 50 USC Appendix 526(a), is not permissive. 'May not,' as it is used in 50 USC Appendix 526(a), has the same meaning and import as 'cannot' or its predecessor, 'shall not.' The provision clearly provides that the time that a servicemember is in military service is excluded from any period of limitations."

481 Mich. at 383, 751 N.W.2d at 434-35 (footnotes omitted).

Like both the Tennessee bankruptcy court and the Supreme Court of Michigan, we perceive no difference between the use of the term "may not" in § 3936(a) and the use of the term "shall not" in former § 525. In our opinion, as used in § 3936(a), "may not" is equivalent to "is not permitted to." See Bryan A. Garner, Garner's Dictionary of Legal Usage 954 (3d ed. 2011) ("Words of Authority," subpart F).[4] Thus, the import of § 3936(a) is clear: the period during which a servicemember is in military service is to be excluded from the computation of a limitations period.

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[4]Garner points out that, generally, the use of the term "may not" might lead to ambiguity. Garner, Garner's Dictionary of Legal Usage 568-69. However, he notes that "may not does not cause interpretive difficulties in statutes ...." Id. at 569.

To the extent that the former wife contends that the former husband's counterclaim attacking the 2011 divorce judgment is not the bringing of an "action," we note that the former husband appears to be bringing an independent action to set aside the 2011 divorce judgment, and, even if he is instead filing a motion, he is instituting a proceeding to achieve that end. Nothing in § 3936(a) lends itself to an interpretation that a servicemember is not protected from the running of a limitations period merely because he or she is asserting a counterclaim or filing a motion to institute a proceeding to set aside a judgment under Rule 60(b) instead of filing a new or separate action. Furthermore, the former wife's reliance on Richardson v. First National Bank of Columbus, 46 Ala. App. 366, 242 So. 2d 676 (Civ. App. 1970), is unavailing. The section of the Soldiers' and Sailors' Civil Relief Act of 1940 at issue in Richardson was the provision allowing for a stay of a pending action involving a servicemember. This present appeal involves instead the provision tolling the statute of limitations of actions or proceedings that might be instituted by or against a servicemember. Accordingly, we conclude that the trial court

erred in failing to apply § 3936(a) to toll the limitations period under Rule 60(b).

We have concluded that the monetary obligations created by paragraph (2)(B) of the divorce agreement incorporated into the 2011 divorce judgment amount to periodic alimony and that the trial court therefore erred in concluding that those obligations were alimony in gross and not terminable upon the former wife's remarriage. We have also concluded that the trial court erred in failing to apply § 3936(a) to toll the limitations period for the former husband to seek to set aside the 2011 divorce judgment on the ground of fraud under Rule 60(b). The trial court's judgment is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., dissents, with writing.

THOMPSON, Presiding Judge, dissenting.

I disagree with the main opinion's reversal of the trial court's determination that the parties' agreement, incorporated into the divorce judgment, was unambiguous and due to be enforced.

> "Whether an agreement is ambiguous is a question of law for the trial court. Terry Cove North v. Baldwin County Sewer Authority, Inc., 480 So. 2d 1171 (Ala. 1985). When the agreement is reasonably susceptible to more than one meaning, an ambiguity exists. The instrument is unambiguous if only one reasonable meaning clearly emerges. Blue Cross & Blue Shield of Alabama v. Beck, 523 So. 2d 121 (Ala. Civ. App. 1988). The words of an agreement are to be given their ordinary meaning, and the intention of the parties is to be derived from the provisions of the contract. Smith v. Citicorp Person-to-Person Financial Centers, Inc., 477 So. 2d 308 (Ala. 1985). When the provisions are certain and clear, it is the duty of the trial court to analyze and determine the meaning of the provisions. Pate v. Merchants National Bank of Mobile, 428 So. 2d 37 (Ala. 1983). Where an ambiguity exists, the trial court may admit parol evidence to explain or clarify the ambiguity. Mass Appraisal Services, Inc. v. Carmichael, 404 So. 2d 666 (Ala. 1981)."

Vainrib v. Downey, 565 So. 2d 647, 648 (Ala. Civ. App. 1990).

In this case, the trial court explained in its judgment that

> "the core of the dispute between the parties involves provisions (2)(B)(i)-(vii), which provide for [the husband's] payment of certain 'new and reasonable household expenses and other bills' of

> the [wife] over a seven-year period. Such sections state, in three different areas, that such payments are deemed 'property settlement' and 'shall not be deemed as either periodic or rehabilitative spousal support; and thus, may not be terminable if the wife re-marries or co-habits with a member of the opposite sex as defined under Alabama law.' Further, the Agreement specifies, 'This [the payment of such expenses] shall continue for a period of seven (7) years, and shall not be modifiable unless specifically mutually agreed upon by the parties.'"

In its judgment in this matter, the trial court concluded that "[t]he payment provisions set forth in the settlement agreement, which was subsumed by the final divorce judgment, were clearly and unequivocally expressed to constitute a property settlement, not periodic alimony, and, as such, this court no longer retains jurisdiction to modify [the divorce judgment]." Much of the remainder of the trial court's judgment addresses the enforcement of the divorce judgment and the trial court's determination that, with regard to some provisions, the parties had mutually agreed to modify the divorce judgment (as was explicitly provided for in the agreement).

The policy of this state is to encourage extrajudicial agreements and settlements rather than litigation. Harris v. M & S Toyota, Inc., 575 So. 2d 74, 80 (Ala. 1991); Wells v.

Mobile Cty. Bd. of Realtors, Inc., 387 So. 2d 140, 144 (Ala. 1980); Allstate Ins. Co. v. Amerisure Ins. Cos., 603 So. 2d 961, 965 (Ala. 1992) ("[I]t is the policy of the law to encourage settlements."). The parties entered into a settlement agreement concerning the manner in which they elected to resolve the equities of their situation at the time of the divorce. A settlement agreement reached by parties to a divorce loses its contractual nature when it is incorporated into a divorce judgment. Flomer v. Farthing, 64 So. 3d 36, 41 (Ala. Civ. App. 2010). In such a case, the settlement agreement is subsumed within the judgment, and it may be enforced in the same manner as any other judgment. Warren v. Warren, 94 So. 3d 392, 396 n.6 (Ala. Civ. App. 2012).

Under the facts of this case, it is clear that the parties, in fashioning their settlement agreement, entered into an integrated bargain.

> "In explaining the distinction between modifiable periodic-alimony awards and nonmodifiable integrated bargains providing for the payment of periodic alimony, this court has stated:
>
> > "'Agreements by which both property rights and rights of support and maintenance are settled consist of two categories. In the "severable combination", although both types of rights are fixed,

the provisions as to each are severable and distinct so that the amount of alimony initially agreed upon by the parties may thereafter be modified by the trial court.

"'In the "integrated bargain" category of agreement, the amount of alimony to be paid for support and maintenance has been established by the parties by taking into account the property settlement features of the agreement. In other words, "'integrated bargain' agreements [provide] for both support and division of property, but with the entire provision for one spouse being in consideration for the entire provision for the other, so that the support and property terms are inseparable." [John J. Michalik, Annotation, Divorce: Power of a Court to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of the Parties,] 61 A.L.R.3d 520, 529 [(1975)]. Alimony payments thus established may not thereafter be modified by the court without the consent of both parties.

"'The rationale for the latter principle is clear. The parties have agreed that the support payments and the provisions relating to the division of property are reciprocal consideration. To modify the alimony provision might drastically alter the entire character of the property settlement agreement to the detriment of one of the parties. Hence, the trial court may not modify the alimony provision of the "integrated bargain" without the consent of both parties. See Plumer v. Plumer, 48 Cal. 2d 820, 313 P.2d 549 (1957); Fox v. Fox, 42 Cal. 2d 49, 265 P.2d 881 (1954); Movius v. Movius, 163 Mont. 463, 517 P.2d 884 (1974).'

> "DuValle v. DuValle, 348 So. 2d [1067,] 1069 [(Ala. Civ. App. 1977)]."

Holmes v. Holmes, 17 So. 3d 666, 670 (Ala. Civ. App. 2009).

In this case, each party gave up certain rights or claims to reach their settlement agreement. The parties' agreement clearly sets forth that they were agreeing to a property division that was not modifiable upon the remarriage of the wife. That settlement agreement constituted an integrated bargain. Holmes v. Holmes, supra. I believe that the main opinion errs in reversing the trial court's determination that the agreement incorporated into the divorce judgment was unambiguous and set forth the parties' clear intentions to enter into a property division or an award of alimony in gross. The effect of the main opinion is to allow one party to obtain the benefit of the agreement and to negate the rights of the other party despite the clear language characterizing the parties' agreement. See Latham v. Latham, 570 So. 2d 694, 697 (Ala. Civ. App. 1990) ("Support payments thus established [in an integrated bargain] may not be modified by the court without the consent of both parties; otherwise, modification of the agreement would drastically

alter the entire character of the agreement to the detriment of one of the parties. Duvalle.").

For the reasons set forth above, I dissent from the main opinion's determination that the parties' settlement agreement incorporated into the divorce judgment provided for an award of periodic alimony. I agree with the trial court that the provision at issue was unambiguous, that the settlement agreement constituted an integrated bargain between the parties, and that the provision at issue in this appeal was a nonmodifiable award of alimony in gross.[5]

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[5]The main opinion contends that the wife did not raise the issue of an integrated bargain before the trial court, and it relies on that failure, together with what it contends is limited evidence on the issue, to conclude that the trial court could not have determined that the parties' settlement agreement constituted an integrated bargain. First, I note that this court does not presume error on the part of the trial court. Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010). Rather, we must affirm a judgment if it is supportable on any legal ground. Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983). "'An appellate court does not presume error.' Greer v. Greer, 624 So. 2d 1076, 1077 (Ala. Civ. App. 1993). 'We presume that trial court judges know and follow the law.' Ex parte Atchley, 936 So. 2d 513, 516 (Ala. 2006)." Anderson v. Anderson, 199 So. 3d 66, 69 (Ala. Civ. App. 2015). See also Brewer v. Hatcher Limousine Serv., Inc., 708 So. 2d 163, 166 (Ala. Civ. App. 1997) ("When an issue is presented to the trial court, ... the trial court is presumed to know and apply the law with respect to that issue."). The wife testified, among other things, that, "instead of getting like a lump sum right after the

With regard to the issue whether the husband asserted a claim of fraud that could be resolved in the trial court, I also dissent. In his "response to [the] petition for contempt and petition for modification," the husband, in addition to asserting several defenses, alleged in pertinent part:

> "3. The [husband] shows unto the Court that the agreement is in fact modifiable according to its terms and contemplated the payment of sums as support and maintenance, notwithstanding how they were characterized and the [wife] has remarried and all sums due pursuant to the [divorce judgment] should be terminated.
>
> "4. The agreement was procured by knowing concealment and misrepresentation on the part of the [wife] in that she was intimately involved with a member of the opposite sex which she concealed and the very purpose of the agreement to wit to provide for the support and maintenance of the [wife] and funds for her as a student was part of a massive scheme to misrepresent the facts to the [husband].
>
> "5. The funds that are being sought by the [wife] are being used to assist in the support and maintenance of her present spouse and the agreement as written is unconscionable.
>
> "6. The agreement by its very terms is modifiable and the express provision for modification of the agreement renders it an agreement for support and maintenance rather than a

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divorce, [the husband] offered to pay out over the course of the next 7 years." The evidence in the record on appeal, together with the presumption of the trial court's knowledge of the law, supports a determination that the trial court properly reached its judgment in this matter.

> property settlement. There have occurred significant and material changes of circumstances since the [divorce judgment]. Those circumstances warrant a termination of payments required pursuant to the [divorce judgment].
>
> "7. The [wife] has previously agreed to a modification of the obligations arising pursuant to the [divorce judgment].
>
> "8. The parties have agreed on a prior occasion to terminate payments and the [husband] is not indebted to the [wife].
>
> "....
>
> "WHEREFORE, the [husband] prays that all sums due and payable pursuant to the [divorce judgment] be terminated with the exception of 30% of his military-retire[ment] pay."

The substance of a claim or motion governs the manner in which it is interpreted by the courts. R.W.S. v. C.B.D., 244 So. 3d 987, 990 (Ala. Civ. App. 2017). At most, the husband's responsive pleading set forth a claim seeking a modification of a nonmodifiable alimony-in-gross award made pursuant to the integrated bargain incorporated into the parties' 2011 divorce judgment. The pleading sets forth that the husband was seeking a modification, and it seeks the "termination" of his obligations under the 2011 divorce judgment. In seeking to modify his obligations under the 2011 divorce judgment, the husband made allegations concerning other modifications to

which the parties had agreed.[6] Nothing in that filing seeks relief from the 2011 divorce judgment. Given the substance of the husband's answer and counterclaim filed in this action, I conclude that the husband sought to modify the alimony-in-gross provision of the divorce judgment.[7]

In his postjudgment motion, the husband argued, in relevant part, that his claim was one alleging breach of contract, specifically, the parties' settlement agreement that was incorporated into the divorce judgment. The husband did not argue before the trial court, and he does not contend before this court, that his modification claim should be interpreted as one made pursuant to Rule 60(b), Ala. R. Civ. P.[8] Rather, the husband asserts arguments concerning the two-

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[6]The divorce judgment provided that the parties could modify provisions of the alimony-in-gross award if they mutually agreed to do so.

[7]An award of a property division or alimony in gross is not modifiable more than 30 days after the judgment making that award. Singleton v. Harp, 689 So. 2d 880, 882 (Ala. Civ. App. 1996); Lacey v. Lacey, 126 So. 3d 1029, 1035 (Ala. Civ. App. 2013) ("An award of alimony in gross is in the nature of a property division, and such an award is not subject to modification."); Daniel v. Daniel, 841 So. 2d 1246, 1250 (Ala. Civ. App. 2002) ("An alimony-in-gross award is generally not modifiable.").

[8]I disagree with the main opinion's determination that the husband sought relief pursuant to Rule 60(b). During the

year statute of limitations to bring a fraud action. The husband has not, in fact, set forth any claim alleging fraud and seeking any relief based on such an allegation.

To the extent the husband and the main opinion rely on the Servicemembers' Civil Relief Act ("the Act"), 50 U.S.C. § 3901 et seq., which operates to extend or toll statutes of limitations for servicemembers "bringing of any action or proceeding in a court," 50 U.S.C. § 3936(a), I note first that the husband has not brought or asserted any action or claim, other than to seek, under a counterclaim, to modify

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hearing, in discussing the husband's attempt to present evidence regarding the husband's allegation of fraud, the husband's attorney stated, in pertinent part:

> "[O]n the summary judgment motion that you ruled against us on, Your Honor, you will note that we specifically exempted the question of the fraud from the summary judgment motion. They did not counter with a summary judgment motion on the fraud. And we have the ability independent, and <u>we're asserting it as a defense to our requirement to pay</u>. And a Court of equity has authority to relieve a fraud in the formation of a divorce."

(Emphasis added.) The parties and the trial court then went off the record. When the hearing resumed, the trial court summarized the husband's arguments by stating that the husband had argued issues concerning a two-year statute of limitations for a fraud claim and when that statute of limitations would begin to run.

nonmodifiable provisions of the parties' 2011 divorce judgment. Moreover, the Act speaks in terms of initiating a new action; the Act does not, however, suspend or toll the time for the husband to have filed a postjudgment motion seeking to alter the 2011 divorce judgment imposing an alimony-in-gross obligation. See, e.g. Shivers v. Shivers, 272 So. 3d 193, 200 (Ala. Civ. App. 2018) (noting that a party may not seek to modify an alimony-in-gross award more than 30 days after the entry of the divorce judgment but that such an award is modifiable when a timely postjudgment motion is filed in the divorce action); see also Weaver v. Weaver, 4 So. 3d 1171, 1174 (Ala. Civ. App. 2008) ("In the absence of a postjudgment motion, a trial court loses jurisdiction to modify a property division after 30 days from the entry of the divorce judgment.").

For the foregoing reasons, I dissent from the main opinion.