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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180486

Jennifer Kelley Morgan

v.

John Jason Morgan

Appeal from Colbert Circuit Court
(DR-16-900226)

EDWARDS, Judge.

Jennifer Kelley Morgan ("the wife") and John Jason Morgan ("the husband") were married in May 2008. They have two children, who were born in 2010 and 2014. In October 2016, the husband filed a complaint in the Colbert Circuit Court

("the trial court") seeking a divorce from the wife. The wife later filed a motion seeking the recusal of the trial-court judge based solely on the trial judge's "long-standing relationship" with the husband's grandfather.

The trial in this action spanned five separate days between September 2017 and September 2019. The trial court appointed Bethany Malone as the guardian ad litem for the children.[1] However, because the husband's relatives had approached Malone's law partner on two occasions in apparent attempts to influence Malone's report, the trial court, in March 2018, appointed Jenna Smith as the replacement guardian ad litem. After the conclusion of the trial, the trial court asked Smith if she desired to submit a guardian ad litem's report and recommendation ("the guardian ad litem's report"), to which she replied that she would do so. Although Smith apparently submitted the guardian ad litem's report to the trial court, the record does not contain the guardian ad litem's report, and the State Judicial Information System

[1]On June 12, 2018, the trial court ordered the wife to pay Malone $6,202.50 of her $13,583.50 fee.

case-action-summary sheet does not reflect that Smith filed a report.

On December 4, 2018, the trial court entered a judgment divorcing the parties, the details of which will be discussed below. In that judgment, the trial court invited Smith to file a motion seeking an award of a fee "and demonstrat[e] to the court ... the reasonable fees necessarily incurred for her services to the minor children"; Smith filed a motion on December 14, 2018, in which she requested a fee of $10,035. The wife filed a postjudgment motion directed to the divorce judgment, in which she requested a hearing. The trial court denied the wife's motion by an order entered on March 1, 2019, after which the wife filed a timely notice of appeal.

On appeal, the wife raises several issues. She complains that the trial judge erred by failing to recuse herself from the divorce action upon the wife's motion. She also argues that the trial court erred by considering the guardian ad litem's report regarding custody of the children despite the fact that the guardian ad litem's report was not provided to the parties and the parties had been given no opportunity to contest Smith's findings or recommendations or to cross-

examine Smith; the wife further contends that the trial court should not have required her to pay certain amounts of the fees awarded to both Malone and Smith. In addition, the wife challenges the trial court's division of the parties' property, including its decision not to include in the marital estate certain property gifted to the husband by members of his family. She further contends that the trial court erred by awarding the husband sole physical custody of the children. Finally, the wife contends that the trial court erred by failing to hold a hearing on her postjudgment motion, in which she raised all these issues.

Before discussing the facts revealed in the record, we will first consider the argument that the trial-court judge should have recused herself from the divorce action based on the wife's allegation that the judge had a "long-standing relationship" with the husband's grandfather. In her postjudgment motion, the wife again raised the issue of recusal. The trial judge responded to the wife's recusal request in the postjudgment order by stating that, although she knew the husband's grandfather, her relationship with the husband's grandfather was not significant enough to cause a

conflict requiring her recusal and by noting that the husband's grandfather had neither testified nor been involved in the divorce action.

First, we note that, in contrast to the assertion by the husband in his brief on appeal that the issue of recusal must be appropriately considered by a petition for the writ of mandamus, a party may seek review of the disposition of a motion to recuse on appeal from a final judgment. Ex parte Crawford, 686 So. 2d 196, 198 (Ala. 1996).[2]

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[2]Our supreme court explained:

> "However, we believe that to allow the recusal issue to be raised either on appeal, after having been properly preserved at trial, or in a petition for a writ of mandamus, will best serve the interests of justice. This ruling will allow us to avoid the situation where every case in which a judge's impartiality is questioned receives a piecemeal appellate review, i.e., a review of one question by mandamus petition, followed by a later appeal. As this Court has often stated, the writ of mandamus is an extraordinary writ. If a party, in its discretion, believes that the interests of justice will be best served by petitioning for a writ of mandamus immediately after the trial judge denies a motion to recuse, then the appellate court may consider that petition. However, if the party chooses to preserve the alleged error by properly objecting to the denial of the motion and then proceeds to trial, then an appellate court may review the propriety of the ruling denying a recusal, if the recusal issue is properly raised.

> "'The burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice.' Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196, 198 (Ala. 1996), citing Otwell v. Bryant, 497 So. 2d 111, 119 (Ala. 1986). '[A] mere accusation of bias that is unsupported by substantial fact does not require the disqualification of a judge.' Ex parte Melof, 553 So. 2d at 557 (emphasis omitted). Prejudice on the part of a judge is not presumed. Hartman v. Board of Trs. of the Univ. of Alabama, 436 So. 2d 837, 841 (Ala. 1983); Duncan v. Sherrill, 341 So. 2d 946, 947 (Ala. 1977); and Ex parte Rives, 511 So. 2d 514, 517 (Ala. Civ. App. 1986). '"[T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea."' Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987) (quoting Fulton v. Longshore, 156 Ala. 611, 613, 46 So. 989, 990 (1908))."

Baldwin v. Baldwin, 160 So. 3d 34, 37 (Ala. Civ. App. 2014). We have also explained that "[a]dverse rulings by themselves are not sufficient to establish bias or prejudice." Tackett v. Jones, 575 So. 2d 1123, 1124 (Ala. Civ. App. 1990). Furthermore, a legal error by a judge is not sufficient to demonstrate a need for recusal. See Jadick v. Nationwide Prop. & Cas. Ins. Co., 98 So. 3d 5, 10 (Ala. Civ. App. 2011)

> While a mandamus petition is a proper method for obtaining appellate review on this issue, it is not the sole method for obtaining it."

Ex parte Crawford, 686 So. 2d at 198.

(indicating that allegations that a trial court committed errors in ruling is not a proper basis for recusal).

The wife's initial motion for recusal asserted that the basis for recusal was solely the trial-court judge's supposed "long-standing relationship" with the husband's grandfather. The wife has presented no evidence of the type of relationship the trial-court judge had with the husband's grandfather, and the trial-court judge's knowledge of him through casual contact or his standing in the community is simply not sufficient to demonstrate that the trial-court judge was biased. Insofar as the wife also complains that the inappropriate conduct of the husband's family members in contacting the law partner of the initial guardian ad litem is a basis for recusal, we note that the trial-court judge immediately replaced the initial guardian ad litem upon her disclosure of the conduct of the husband's relatives. We fail to see a demonstration of bias against the wife in the actions of the trial-court judge in that regard. Thus, we affirm the trial-court judge's denial of the wife's motion to recuse.

We next turn to the wife's argument that her due-process rights were infringed when Smith submitted the guardian ad

litem's report solely to the trial court and not to the parties. The husband has candidly conceded that, pursuant to our supreme court's holding in Ex parte R.D.N., 918 So. 2d 100 (Ala. 2005), it appears that the trial court should have held a hearing on the wife's postjudgment motion insofar as she challenged Smith's failure to provide the parties a copy of the guardian ad litem's report. See Wicks v. Wicks, 49 So. 3d 700, 701 (Ala. Civ. App. 2010) (explaining that the failure to hold a hearing on a postjudgment motion is not harmless error when there is probable merit in the motion). In Ex parte R.D.N., our supreme court explained that a guardian ad litem is not permitted to have ex parte communication with the trial court and that a guardian ad litem's recommendation should be provided to the parties so that they have the opportunity to challenge that recommendation. Ex parte R.D.N., 918 So. 2d at 104. The court explained:

> "The guardian ad litem's recommendation ... was not presented as evidence produced in open court and was based on information that may or may not have been properly presented to the court. As a result, the father was denied the opportunity to respond with rebuttal evidence and to present reasons why the recommendation of the guardian ad litem should not be followed. The mother was also denied the opportunity to respond and present reasons why the

> guardian ad litem's recommendation should be followed."

Id. (footnote omitted).[3]

The husband also admits that the wife's complaint that she was not permitted to challenge the reasonableness of Smith's fee also entitled her to a hearing on her postjudgment motion insofar as it raised that issue. As our supreme court explained in Ex parte R.D.N., a parent who might be assessed a guardian ad litem fee is "entitled to an evidentiary hearing for the purpose of determining a reasonable fee for the guardian ad litem and an order setting forth 'with some particularity the findings from the evidence adduced.'" Id. at 105 (quoting Lolley v. Citizens Bank, 494 So. 2d 19, 21 (Ala. 1986)). Like in Ex parte R.D.N., Smith submitted her fee request after the conclusion of the trial, and neither the wife nor the husband was permitted to challenge the reasonableness of the fee requested by Smith.

We appreciate the candor of the husband in admitting that the irregularities in the submission of the guardian ad

[3]We note that we have recently held similarly in Rogers v. Rogers, [Ms. 2170980, August 30, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019), a case in which Smith was also the guardian ad litem.

litem's report and Smith's fee request appear to be error requiring further action by the trial court. We agree that the trial court should have held a hearing on the wife's postjudgment motion insofar as it raised those issues so as to address the potential error and the impact on the parties' rights to due process. Accordingly, we will not consider the propriety of the trial court's custody award at this time. Because the trial court must now consider the wife's challenge to the guardian ad litem's report, we reverse the judgment insofar as it awards sole physical custody to the husband, and we instruct the trial court, on remand, to reconsider its custody award after the guardian ad litem's report is provided to the parties and they are permitted to challenge Smith's findings and conclusions at a hearing for that purpose.

Insofar as the wife challenges that portion of the trial court's judgment addressing her failure to pay her portion of Malone's fee, we note that the wife presented argument regarding that issue to the trial court during the trial. She contended before the trial court, and contends again on appeal, that the fact that the husband's relatives attempted to influence Malone's recommendation regarding custody should

absolve her of responsibility for Malone's fee. The wife has presented no authority indicating she should not be responsible for sharing in Malone's fee, which included fees for meeting with the children, for contacts with the wife, for reviewing motions and orders, and for attending court hearings. See Rule 28(a)(10), Ala. R. App. P.; White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008) ("Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived."). Thus, we cannot agree that the wife has presented a sufficient or convincing argument that the trial court's decision to require her to pay a portion of Malone's fee is error entitling the wife to a reversal of that aspect of the trial court's judgment, and, therefore, we conclude that the trial court did not err by failing to hold a hearing on the wife's postjudgment on that issue. See Palmer v. Hall, 680 So. 2d 307, 307-08 (Ala. Civ. App. 1996) ("On appeal, ... if an appellate court determines that there is no probable merit to the motion, it may affirm based on the harmless error rule.").

Having determined that the trial court erred in failing to hold a hearing on the wife's postjudgment motion insofar as it challenged the trial court's reliance on the guardian ad litem's report and Smith's fee request and having rejected the wife's argument related to Malone's fee, we can now turn to the wife's other argument on appeal, which concerns the propriety of the trial court's property division. In general, our review of the trial court's division of property is limited.

> "'In reviewing a judgment in a divorce case in which the trial court was presented conflicting evidence ore tenus, we are governed by the ore tenus rule. Under this rule, the trial court's judgment will not be disturbed on appeal unless it is plainly and palpably wrong. Hartzell v. Hartzell, 623 So. 2d 323 (Ala. Civ. App. 1993). Matters of property division rest soundly within the trial court's discretion and its determination regarding those matters will not be disturbed on appeal unless its discretion was plainly and palpably abused. Goodwin v. Estate of Goodwin, 632 So. 2d 500 (Ala. Civ. App. 1993). A division of marital property in a divorce case does not have to be equal, only equitable, and a determination of what is equitable rests within the sound discretion of the trial court. Pride v. Pride, 631 So. 2d 247 (Ala. Civ. App. 1993). When dividing marital property, a trial court should consider several factors, including the length of the marriage; the age and health of the

> parties; the future prospects of the parties; the source, type, and value of the property; the standard of living to which the parties have become accustomed during the marriage; and the fault of the parties contributing to the breakup of the marriage. Hartzell, supra.'"

Yokley v. Yokley, 231 So. 3d 355, 360 (Ala. Civ. App. 2017) (quoting Golden v. Golden, 681 So. 2d 605, 608 (Ala. Civ. App. 1996)).

The evidence submitted at trial indicated that, during the early years of their marriage, the parties had resided in a house ("the Allsboro house") provided to them rent free by the husband's great-aunt, Mary Ruth Ford. The husband testified that the Allsboro house had been his great-grandfather's house and that it had been in his family for over 100 years. Ford conveyed the Allsboro house and the 105 acres associated with it solely to the husband in April 2014 as a gift. The parties continued to live in the Allsboro house after its conveyance to the husband. During the time the parties lived in the Allsboro house, they made certain improvements to it, including ripping up carpet, restoring hardwood floors, tiling certain rooms, painting, and beginning, but not completing, kitchen renovations. The wife

valued the Allsboro house and associated property at $1,000,000.

Two years after Ford conveyed the Allsboro house to the husband in April 2014, the parties purchased a lot and began construction on another house ("the Riviera house"). The parties moved into the Riviera house in June 2016, and they lived in that house together for approximately five months before the husband filed for a divorce in October 2016 and the wife vacated the Riviera house in November 2016. The Riviera house was valued by the husband at $240,000 and by the wife at $350,000 to $400,000. The balance owed on the mortgage on the Riviera house was approximately $198,000.

Ford had also conveyed to the husband an unimproved lot located in Muscle Shoals; the evidence indicated that the conveyance was a gift. The parties had not utilized that lot in any way. The husband valued the lot at $11,250, while the wife contended that it was valued at $25,000.

The parties owned three vehicles: a 2007 Toyota Tundra truck, which neither party valued; a 2012 Honda Civic automobile, valued at $8,000; and 2014 Honda CRV sport-utility vehicle, valued at $13,000 by the wife. Only the CRV had any

associated debt; the payoff on the loan associated with the CRV was $7,000. The parties also owned a Kawasaki Mule utility side-by-side worth $8,000 and a personal watercraft worth $2,500. The husband testified that his grandfather had gifted him a 2006 Rancher four-wheeler and that Ford had purchased a 2012 John Deere lawnmower for the parties to use to maintain the lawn at the Allsboro house. The parties also owned a boat, which, according to the husband, was purchased for $15,000. However, the wife testified that the boat cost $20,000.

The parties were both employed. The husband is a teacher employed by the Florence City school system. His yearly gross income is approximately $70,000. The wife is a licensed insurance procurer. She earns approximately $40,000 per year.

Both parties provided some evidence of the fault of the other in contributing to the breakdown of the marriage. The wife testified that the husband was emotionally abusive to her; she specifically recalled that he had belittled her and had called her "uneducated" and "fat." She also recounted an incident during which the husband abruptly turned the automobile the family was riding in around in the middle of

the roadway, which, she said, almost resulted in an accident. The husband presented evidence indicating that the wife had engaged in an extramarital affair with a client of hers, including alleged electronic-mail communications between the two and a photograph of the wife in lingerie that he alleged the wife had sent to her alleged paramour.

The trial court awarded the Allsboro house and its associated 105 acres to the husband after determining that it was "his sole and separate property" because it had been a gift from his family. Regarding the Riviera house, the trial court provided two options. The first option required the husband to pay the wife $20,000 representing her equity in the Riviera house within 120 days, while the second option required the sale of the house and payment to the wife, after the mortgage had been satisfied and all expenses of the sale deducted, of $20,000 of the proceeds and half of any amount of the proceeds exceeding $20,000, or, if the sale did not realize sufficient proceeds to award the wife $20,000, the entire balance of the proceeds. The unimproved lot was also awarded to the husband as his sole property.

The trial court determined that the John Deere lawnmower and the Ranger four-wheeler were not marital property. The husband received the Tundra truck, the Honda Civic, and the Kawasaki Mule. The wife received the personal watercraft and the Honda CRV; however, the trial court ordered the husband to assume the remaining payments on the CRV. The trial court ordered that the boat be sold or that either party could purchase the other party's interest in the boat for $8,500. The parties were awarded certain of the personal property located in each house; for example, the husband was awarded any furniture or household items that belonged to his family, and the wife was awarded certain specified personal property, including the washer and dryer, a master bedroom suite, a leather couch located at the Allsboro house, and "The Arthur Court collection."

On appeal, the wife contests the division of marital property as inequitable. She contends that the Allsboro house, which had been the parties' marital residence for the majority of the marriage, was used for the common benefit of the parties and, therefore, that, pursuant to Ala. Code 1975,

§ 30-2-51(a), it should have been included in the marital estate. We disagree.

Section 30-2-51(a) reads:

> "If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage."

We have explained the application of § 30-2-51(a) thusly:

> "The trial judge is granted broad discretion in determining whether property purchased before the parties' marriage or received by gift or inheritance was used 'regularly for the common benefit of the parties during the marriage.' See § 30-2-51, Ala. Code 1975. Even if the trial court determines that such property was regularly used for the common benefit of the parties during the marriage, the determination whether to include such property in the marital assets to be divided between the parties lies within the discretion of the trial court. [Ex parte] Durbin, 818 So. 2d 404 (Ala. 2001)."

Nichols v. Nichols, 824 So. 2d 797, 802 (Ala. Civ. App. 2001) (emphasis added).

The above-quoted discussion in Nichols is rooted in our supreme court's explanation of the operation of § 30-2-51(a) set out in Ex parte Durbin, 818 So. 2d 404 (Ala. 2001), which in turn rested on its construction of § 30-2-51(a) as set out in Ex parte Drummond, 785 So. 2d 358 (Ala. 2000):

> "'Section 30–2–51 states that if a party does not use his or her inheritance or gifts for the common benefit of the parties to the marriage, then the trial judge may not consider the inheritance or gifts when making a property division. Nothing in the statute states that if one party's inheritance or gifts are used for the parties' common benefit then the trial judge must consider the inheritance or gifts when making the property division. In fact, the statute leaves such a determination to the discretion of the trial judge. "[T]he judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family." Section 30–2–51(a), Ala. Code 1975.'"

Ex parte Durbin, 818 So. 2d at 408 (quoting Ex parte Drummond, 785 So. 2d at 362). Although Judge Moore, in his special writing, characterizes these portions of both Ex parte Durbin and Ex parte Drummond as dicta, the construction given to § 30-2-51(a) in both Ex parte Drummond and Ex parte Durbin is, if not binding, highly persuasive, and it appears sound. Nothing in the language of § 30-2-51(a) indicates that property acquired by one spouse before marriage or property

acquired through inheritance or gift is transmuted into marital property by its use for the common benefit of the parties. See Smith v. Smith, 964 So. 2d 663, 670 (Ala. Civ. App. 2005) (explaining that an appellate court construes a statute based upon its plain language). If that were so, our supreme court would not have stated in both Ex parte Durbin and Ex parte Drummond that a trial court may include such property in its consideration of the division of property. As explained in both Ex parte Durbin and Ex parte Drummond, § 30-2-51(a) grants a trial court the discretion to make an allowance for one spouse out of the estate of the other if property acquired before the marriage or by inheritance or gift is used for the common benefit of the parties during the marriage, but the statute does not require a trial court to do so.

Although the trial court was not required to include the Allsboro house in the marital assets, despite its clear use for the common benefit of the parties, we are permitted to determine whether it abused its discretion in not doing so. See Stewart v. Stewart, 62 So. 3d 523, 529 (Ala. Civ. App.

2010); Mayhann v. Mayhann, 820 So. 2d 836 (Ala. Civ. App. 2001).

> "In Mayhann v. Mayhann, 820 So. 2d 836 (Ala. Civ. App. 2001), this court reversed a trial court's divorce judgment because it failed to award the wife an allowance from the husband's separate property, which this court determined was '"used regularly for the common benefit of the parties during their marriage."' Mayhann, 820 So. 2d at 839 (quoting § 30-2-51(a), Ala. Code 1975). The trial court had awarded the wife 'only $350 per month in periodic alimony for a period of two years, a 1991 Honda Accord automobile, a bedroom suite, a set of cookware, and a set of china.' Id. Based on our supreme court's holding in Ex parte Durbin, 818 So. 2d 404 (Ala. 2001), this court held:
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> > "'The [Supreme] Court explained that, while the trial court may, at its discretion, award one spouse an allowance out of the other spouse's separate property, it is not compelled to do so, even if the property was used for the common benefit of the marriage. Ex parte Durbin, 818 So. 2d [404,] 408 [(Ala. 2001)]. This court cannot reverse the trial court simply because it failed to award the wife an allowance out of the marital residence and rental house. However, we can consider whether the trial court abused its discretion in failing to do so.'
>
> "Mayhann, 820 So. 2d at 839."

Stewart, 62 So. 3d at 529.

In the present case, the largest assets of the parties were the two houses. The trial court equitably divided the

Riviera house. The remaining personal property appears also to have been divided equitably, and the wife makes no argument concerning any of the personal-property award.

Because the Allsboro house and the unimproved lot were considered to be the husband's separate property, his separate estate, before the marital assets were divided, amounted to either $1,025,000 or $1,011,250, depending on which valuation is ascribed to the unimproved lot.[4] Out of the marital estate, the trial court awarded the husband the Toyota Tundra truck of unknown value, an automobile worth $8,000, and the Kawasaki Mule worth $8,000. He was also awarded his half of the equity on the Riviera house and half the value of the parties' boat. He was ordered to pay $7,000 to retire the debt associated with the wife's automobile. Thus, considering the assets the trial court found to be marital property, other than the personal property for which we have no value, and deducting the debt the husband was required to assume, the husband was awarded $37,500.

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[4]The husband did not testify to his opinion on the value of the Allsboro house and associated property.

On the other hand, the wife had no separate estate at the time of the divorce. As a result of the divorce, she was awarded an automobile worth $13,000, a personal watercraft worth $2,500, her $20,000 portion of the equity in the Riviera house, $8,500 representing her interest in the parties' boat, and various personal property of unknown value. When totaled, the wife's award of the marital estate equals $44,000.

Based on those figures, the husband contends that the division of the marital estate was equitable. He distinguishes the authorities the wife relies on in her appellate brief, including Davis v. Davis, 237 So. 3d 892 (Ala. Civ. App. 2017), Bentley v. Bentley, 222 So. 3d 1165 (Ala. Civ. App. 2016), and Stewart, 62 So. 3d at 529. Specifically, he discounts the wife's reliance on Bentley because that case involved the affirmance of a trial court's determination that certain property was marital property and her reliance on Davis because the evidence in Davis disclosed that the husband had purchased his family farm during his marriage to the wife, making the farm marital property. We agree that the factual situations and issues presented in

Bentley and Davis are sufficiently distinguishable from the present case.

Although we find this court's opinion in Stewart more generally instructive regarding this court's review, we agree with the husband that it, too, is distinguishable. In Stewart, the trial court ordered the parties' marital residence sold and required that the proceeds of sale be used to satisfy the debts of the parties, including the husband's debt related to his separate property; any amount remaining after the debt was satisfied was to be equally divided. Stewart, 62 So. 3d at 529. The trial court in Stewart awarded the husband all interest in the real estate owned by the parties and awarded the wife her automobile and the debt associated with it. Id. We reversed the judgment, noting that, after the expected exhaustion of the proceeds of the sale of the marital residence on the parties' debts, "the wife is left with nothing from the division of the marital property. Further, the wife was not awarded periodic alimony or an allowance from the husband's separate property." Id.

However, unlike the trial court in Stewart, the trial court in the present case awarded the wife an equitable share

of the marital estate. The wife was awarded her share of the equity in the Riviera house and in the boat, the personal watercraft, and her automobile, free from its associated debt, for which the trial court made the husband responsible. The fact that the wife was awarded a share of the marital estate distinguishes the present case from Stewart.

In her reply brief, the wife asserts that Culver v. Culver, 199 So. 3d 772 (Ala. Civ. App. 2016), is "remarkably similar" to the present case and supports the conclusion that the trial court's property division should be reversed. However, although this court reversed a property division in Culver, we did so because the trial court had declined to award the wife any portion of the marital estate, of which the parties' marital residence was the primary asset, based on the fact that she had a sufficient separate estate from an inheritance from her mother. Culver, 199 So. 3d at 779. We explained that "the fact that a spouse has a separate estate does not negate the requirement that marital property is to be divided equitably between the parties." Id. This principle has no application to the present case, however, and, because the Allsboro house, unlike the marital residence in Culver,

was the husband's separate property, we see no correlation between the facts of Culver and the facts of the present case.

Thus, we reject the wife's argument that the trial court's division of property is inequitable. The trial court was not required to include the Allsboro property in the marital estate, and its failure to do so in the present case is not an abuse of its discretion, especially considering that the Allsboro house had been gifted to the husband in April 2014, just over 2 years before the parties separated, and that the Allsboro house had been in the husband's family for over 100 years. Because the wife's postjudgment argument on this issue lacks merit, the trial court did not err by failing to hold a hearing on this aspect of the wife's motion. See Palmer v. Hall, 680 So. 2d at 307-08 ("On appeal, ... if an appellate court determines that there is no probable merit to the motion, it may affirm based on the harmless error rule."). Accordingly, we affirm that portion of the December 2018 judgment dividing the parties' property.

In conclusion, we affirm the trial court's December 2018 judgment insofar as it denied the wife's request for recusal, insofar as it required the wife to pay a portion of Malone's

fee, and insofar as it divided the parties' property. However, the trial court erred by denying the wife's postjudgment motion insofar as she complained that she had not been given an opportunity to controvert the guardian ad litem's report, which had not been provided to the parties, or an opportunity to challenge the fee sought by Smith. As a result, and because the trial court considered the guardian ad litem's report without its having been provided to the parties, its custody award is reversed and the cause is remanded for the trial court to require that the guardian ad litem's report be provided to the parties and to conduct a hearing at which the parties may seek to challenge Smith's recommendation and her fee request.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Donaldson and Hanson, JJ., concur.

Thompson, P.J., and Moore, J., concur in part and dissent in part, with writings.

THOMPSON, Presiding Judge, concurring in part and dissenting in part.

I concur in the main opinion except for that portion that addresses the property division set forth in the trial court's divorce judgment.

Even assuming that the trial court correctly determined that the Allsboro property was a part of the "separate estate" of John Jason Morgan ("the husband"), I conclude that the trial court erred in determining that the Allsboro property was not marital property. The evidence clearly demonstrates that the Allsboro property was regularly used for the common benefit of the parties during the marriage. See Culver v. Culver, 199 So. 3d 772, 777 (Ala. Civ. App. 2016) (holding that the marital home in which the parties lived for the majority of their marriage was used for the common benefit of the parties); and Nichols v. Nichols, 824 So. 2d 797, 803 (Ala. Civ. App. 2001) (holding that the house the parties lived in during their marriage and in which they raised their children was used for the common benefit of the parties). Given that evidence, I conclude that the failure to award Jennifer Morgan ("the wife") an interest in that property constituted an abuse of the trial court's discretion.

Although the trial court is free to award that property to the husband, especially given his family's history with that property, "an allowance out of the estate of the [husband]" should have been made given the wife's marital interest in the Allsboro property. § 30-2-51(a), Ala. Code 1975.

Further, a property division must be reviewed as a whole. See, e.g., Cunningham v. Cunningham, 964 So. 2d 678, 680 (Ala. Civ. App. 2007). Therefore, I conclude that the main opinion errs in stating that certain individual assets could be "equitably divided." ___ So. 3d at ___ (Ala. Civ. App. 2020) ("The trial court equitably divided the Riviera house."). I note, however, that, ultimately, the main opinion does address the marital estate as a whole, although I disagree with the conclusion that, with the Allsboro house being awarded solely to the husband, the trial court's division of the marital property was equitable.

MOORE, Judge, concurring in part and dissenting in part.

I concur in all aspects of the main opinion except for that part affirming the property division, to which I dissent.

Section 30-2-51(a), Ala. Code 1975, provides:

> "If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage."

(Emphasis added.) The last sentence of § 30-2-51(a), which is completely unique to this state, see Brett R. Turner, Equitable Distribution of Property § 6.84 (4th ed. 2019), was added by the legislature in 1979, see Ala. Acts 1979, Act No. 79-486, without explanation. See Dees v. Dees, 390 So. 2d 1060, 1062 (Ala. Civ. App. 1980).

In Ex parte LaMoreaux, 845 So. 2d 801, 806-07 (Ala. 2002), our supreme court, in construing the last sentence of § 30-2-51(a), quoted with approval an excerpt from this court's decision in Durbin v. Durbin, 818 So. 2d 396 (Ala.

Civ. App. 2000), although that decision had been reversed a year earlier by Ex parte Durbin, 818 So. 2d 404 (Ala. 2001). That excerpt from Durbin provides, in pertinent part:

> "Section 30-2-51(a) states a single circumstance that, if found by the trial court, authorizes the court to treat nonmarital property as marital property, namely: when that 'property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage.'"

818 So. 2d at 401 (emphasis added).

The leading treatise on the subject of equitable distribution of marital property notes that courts commonly refer to the treatment of nonmarital property as marital property for the purpose of equitable distribution as "transmutation." See Turner at § 5.65. The legal theory of transmutation recognizes that, under certain circumstances, the character of property changes after its acquisition. Id. at § 5:64. Section 30-2-51(a) adopts the "family use doctrine," a form of transmutation theory by which "separate property becomes marital property when used for family purposes." Id. at § 10:26.1. Turner describes § 30-2-51(a) as "the broadest transmutation statute in the nation," id. at § 10:2.3, because, as construed by this court in cases like

Durbin v. Durbin, and as recognized by our supreme court in Ex parte LaMoreaux, the statute allows separate property to be wholly transmuted into marital property subject to equitable division solely on the basis of its regular use by the family, a concept rejected by every other state other than Mississippi. Turner at § 10:26.1.

However, as the main opinion correctly points out, § 30-2-51(a) does not mandate that a court dividing property include in the marital estate separate property that has been transmuted into marital property through regular family use. In Ex parte Drummond, 785 So. 2d 358 (Ala. 2000), the supreme court stated, in dicta:

> "Nothing in [§ 30-2-51(a)] states that if one party's inheritance or gifts are used for the parties' common benefit then the trial judge must consider the inheritance or gifts when making the property division. In fact, the statute leaves such a determination to the discretion of the trial judge."

785 So. 2d at 362. The supreme court repeated that dicta a year later in Ex parte Durbin, supra. In Nichols v. Nichols, 824 So. 2d 797, 802-03 (Ala. Civ. App. 2001), this court, relying on Ex parte Durbin, stated, also in dicta, that,

> "[e]ven if the trial court had concluded that [certain real] property [not used as the marital

> home] was regularly used for the benefit of the parties and their family, it is within the trial court's discretion to exclude the property from the marital estate."

That dicta has since become entrenched in the law so that § 30-2-51(a) is now viewed as granting a trial court permission to exclude property from the marital estate even if that property has been transmuted into marital property through regular family use. See Turner at § 10:2.2. This construction of § 30-2-51(a) places Alabama law in a completely unique position because all other states hold that separate property, to the extent that it has been transmuted into marital property, must be included in the marital estate. See id. at §§ 5:64-5:70. In Alabama, however, a trial court may conclude that separate property, such as property acquired by gift by one spouse during the marriage, has been transmuted into marital property but nevertheless exempt that property from equitable division.

Opinions issued by this court have clarified that, before a trial court may exercise its discretion under Ex parte Drummond and Ex parte Durbin, the court still must first properly classify the property. It remains reversible error for a trial court to classify property as the "separate

property" of one spouse and to exclude that property from even being considered as marital property subject to equitable division if the property has, in fact, been used regularly for the common benefit of the parties during their marriage. See Davis v. Davis, 237 So. 3d 892 (Ala. Civ. App. 2017); Stewart v. Stewart, 62 So. 3d 523 (Ala. Civ. App. 2010). This court has further held that the decision to exclude from the marital estate formerly separate property that has been transmuted into marital property through regular family use can be reviewed for an abuse of discretion. See Mayhann v. Mayhann, 820 So. 2d 836, 839 (Ala. Civ. App. 2001).

In this case, the main opinion, following the principles from Mayhann and its progeny, concludes that the trial court did not abuse its discretion in excluding property located in Allsboro ("the Allsboro property") that John Jason Morgan ("the husband") and Jennifer Morgan ("the wife") had jointly used as their marital home from 2008 to 2016 because, the main opinion concludes, its property division was otherwise fair. The main opinion overlooks that the trial court did not first properly classify the Allsboro property as required by our decisions in Davis and Stewart.

The pertinent portion of the judgment provides:

> "The [w]ife currently resides [on the Allsboro property,] which was provided to the [h]usband via gift from his family. ... This property shall be awarded to the [h]usband <u>as his sole and separate property</u>. The [w]ife shall provide the [h]usband with a quit-claim deed divesting herself of any interest in said property, provided, however, the [w]ife shall be permitted to continue to reside in the residence pending the payment of funds or sale of the [marital home] ...."

(Emphasis added.) The wife filed a postjudgment motion in which, among other things, she objected to the treatment of the Allsboro property as the sole and separate property of the husband, asserting that the Allsboro property should be considered a marital asset because it had been regularly used for the common benefit of the parties during their marriage and because she had contributed to improvements made to the Allsboro property. The trial court denied the postjudgment motion, stating: "The division of property, real and personal, was equitable. <u>Portions of real property were gifted to the [h]usband by his [a]unt</u>. The remainder was equally divided, taking into consideration the value of the properties, the equity and the [h]usband's paying debts." (Emphasis added.)

As the wife argues, the judgment classifies the Allsboro property as the "sole and separate property" of the husband because, as the trial court explained in its order denying the wife's postjudgment motion, that property was gifted to the husband by his great-aunt in 2014. However, under § 30-2-51(a), property acquired by gift becomes marital property when it is used regularly for family purposes during the marriage. See Ex parte LaMoreaux, 845 So. 2d at 806. The undisputed evidence in the record shows that, besides using the Allsboro property as the marital home for eight years, the parties both contributed to improving the residence. See Smith v. Smith, 423 So. 2d 884 (Ala. Civ. App. 1982); Ingram v. Ingram, 602 So. 2d 418, 421 (Ala. Civ. App. 1992) (treating the marital home as marital property based upon the improvement of the home during the marriage from joint marital contributions). The parties further used the Allsboro property as collateral to obtain a construction loan in 2016, for which they were jointly liable, in order to build a new marital home. After that home was constructed and the parties separated, the wife moved back to the Allsboro property, where she was still residing at the time of the trial. Those undisputed facts

show that the Allsboro property was regularly used as the marital home for the common benefit of the parties so that it could not be properly classified as the sole and separate property of the husband. See Johnson v. Johnson, 423 So. 2d 871 (Ala. Civ. App. 1982); Kaiser v. Kaiser, 434 So. 2d 264 (Ala. Civ. App. 1983); Easterling v. Easterling, 454 So. 2d 1019 (Ala. Civ. App. 1984); Nelson v. Nelson, 611 So. 2d 113 (Ala. Civ. App. 1992), overruled on other grounds by Ex parte Vaughn, 634 So. 2d 533 (Ala. 1993); Hall v. Hall, 631 So. 2d 1051, 1052 (Ala. Civ. App. 1993); Childree v. Childree, 831 So. 2d 635 (Ala. Civ. App. 2002) (authored by Pittman, J., with Yates, P.J., concurring and Crawley, Thompson, and Murdock, JJ., concurring in the result); Baggett v. Baggett, 855 So. 2d 556 (Ala. Civ. App. 2003); Sumerlin v. Sumerlin, 964 So. 2d 47 (Ala. Civ. App. 2007); McMillan v. McMillan, 51 So. 3d 367 (Ala. Civ. App. 2010); Harris v. Harris, 59 So. 3d 731 (Ala. Civ. App. 2010); Stewart v. Stewart, 62 So. 3d 523 (Ala. Civ. App. 2010); Williams v. Williams, 75 So. 3d 132 (Ala. Civ. App. 2011); and Culver v. Culver, 199 So. 3d 772, 777 (Ala. Civ. App. 2016).

By classifying the property as the "sole and separate property" of the husband, the trial court determined that the Allsboro property was part of the husband's "separate estate," i.e., "that property over which [the husband] exercises exclusive control and from which [the wife] derive[d] no benefit by reason of the marital relationship." Gartman v. Gartman, 376 So. 2d 711, 713 (Ala. Civ. App. 1978) (citing 41 C.J.S. Husband & Wife § 226 (1944); 38A Words & Phrases Separate Estate 396 (1967); and Peek v. Peek, 256 Ala. 405, 54 So. 2d 782 (1951)), rev'd on other grounds, Ex parte Gartman, 376 So. 2d 715 (Ala. 1979). Because the separate estate of a spouse is not subject to equitable division and distribution, see Sides v. Sides, 284 Ala. 39, 42, 221 So. 2d 677, 679 (1969); Vardaman v. Vardaman, 167 So. 3d 342, 347 (Ala. Civ. App. 2014), that determination effectively foreclosed the trial court from considering whether the Allsboro property should be included or excluded from the marital estate pursuant to the discretion granted to the court by § 30-2-51(a), as recognized in Ex parte Drummond and its progeny.

Nothing in the record indicates that the trial court found that the Allsboro property should be excluded from the

marital estate as a matter of judicial discretion. To the contrary, the record indicates that the trial court simply determined that, as a matter of law, the Allsboro property, having been gifted to the husband, was the "sole and separate property" of the husband. Upon making that determination, the trial court foreclosed any further consideration of the Allsboro property altogether when it divided the marital estate. In Davis and Stewart, supra, this court considered the erroneous classification of real property as "separate" property alone to be sufficient to reverse the judgments of the trial courts in those cases. Likewise, in this case, the trial court committed reversible error in treating the Allsboro property as the separate property of the husband solely because it had been acquired by gift from his great-aunt, and, because of that error, its judgment is due to be reversed and the cause remanded for the trial court first to properly classify the Allsboro property and then to exercise its discretion as to whether to include or exclude the Allsboro property from the marital estate.

As a last point, I recognize that some of our cases can be interpreted as holding that regular family use of separate

property makes the entire property divisible as marital property even if it was used for a relatively short period or even when the marital contributions are relatively small, see Turner at § 10:2.1 and cases cited therein, particularly when the marital home is the asset at issue. See Turner at § 6.84 (citing Wolf v. Wolf, 666 So. 2d 17 (Ala. Civ. App. 1995), and Bushnell v. Bushnell, 713 So. 2d 962 (Ala. Civ. App. 1997)). Those cases suggest that § 30-2-51(a) requires a trial court to classify the marital home as marital property regardless of the circumstances in which it was acquired or later used. However, nothing in the language of § 30-2-51(a) prohibits a trial court from determining that the marital home shares a dual status as partly separate property and partly marital property. In Pattillo v. Pattillo, 414 So. 2d 915, 917 (Ala. 1982), the supreme court explained that, "[i]n a divorce action, a property settlement is made giving each spouse the value of their interest in the marriage. Each spouse has a right, even a property right in this."

> "If the court is classifying entire assets, then each asset must constitute either entirely marital property or entirely separate property. Conversely, if the court is classifying interests in assets, the range of outcomes is much greater. The court in that instance is free to conclude that a single asset has

> both marital and separate interests. The former rule is known as the unitary theory of property. The latter rule has no generally accepted name; it will be called in this treatise the mixed theory of property.
>
> "....
>
> "Mixed property is the overwhelming nationwide majority rule.
>
> "....
>
> "In states that recognize mixed property, when both spouses make separate contributions to the same asset, both spouses have partial separate property interests in the asset."

Turner at § 5:20.

In this case, the wife argues that she has an interest in the Allsboro property because of the improvements she and her family made to the property and because of her joint use of the property with the husband after it was gifted to him by his great-aunt. The Allsboro property has been in the husband's family for generations while the marital use of that home was for a little over eight years and for approximately two years after it was gifted to the husband. The Allsboro property was valued by the wife at over a million dollars, but that value was almost certainly accumulated mostly before the marriage and the gifting of it to the husband. The

improvements to the property may have added to that value only incrementally. The Allsboro property consists of the home and 105 acres, which the wife maintains the family regularly used, but the evidence may not support that contention. In considering its classification of the property, the trial court may determine that the wife has only a partial interest in the Allsboro property and that most of the Allsboro property should be classified as the separate property of the husband. The trial court is not bound to classify the entirety of the Allsboro property as marital property, and the wife does not contend that it must do so; instead, she argues only that she is entitled to her interest in that property.

Again, Ex parte Drummond certainly grants the trial court the discretion to exclude the Allsboro property entirely from its equitable division of the martial property. That option might seem fairer if the trial court had no choice but to consider the Allsboro property as either separate property or marital property, but I do not believe § 30-2-51(a) limits the trial court from reaching a more equitable middle ground consistent with the law prevailing around the country. The language in § 30-2-51(a) may be unique, but it does not

indicate a legislative intention to depart so far from the principles underlying equitable distribution that it prohibits a classification system based on the reality of how most property is acquired.