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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Colburn Alison Bragg

v.

Hattie B. Bragg

Appeal from Jefferson Circuit Court
(DR-15-900325)

MOORE, Judge.

Colburn Alison Bragg ("the husband") appeals from a judgment entered by the Jefferson Circuit Court ("the trial court") granting the request of Hattie B. Bragg ("the wife")

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for a legal separation. We affirm the trial court's judgment in part and reverse it in part.

Procedural History

On July 23, 2015, the wife filed in the trial court a verified complaint for a legal separation from the husband. On August 19, 2015, the trial court entered an order restraining both parties "from disposing of, transferring, secreting, selling or damaging any marital assets" and ordering "both parties ... to maintain and preserve all marital assets until further Order of this Court." On August 27, 2015, the husband answered the wife's complaint and counterclaimed for a divorce. The wife replied to the counterclaim on September 9, 2015.

On February 2, 2018, the trial court entered an order awarding the wife monthly spousal support. On February 15, 2018, the wife filed a motion requesting that the trial court hold the husband in contempt of the trial court's order requiring the parties not to dispose of marital assets. That motion was set for a hearing to be held on March 14, 2018. After the husband failed to appear for that hearing, the trial court entered an order on March 26, 2018, ordering the husband

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to be incarcerated but stating that he could be released upon the payment of a \$50,000 cash bond. Subsequently, the cash bond was posted. On April 12, 2018, a guardian ad litem was appointed to represent the husband pursuant to Rule 17(c), Ala. R. Civ. P.

On April 25, 2018, the wife filed a motion to compel the husband to pay her the court-ordered spousal-support payments that he owed. On June 21, 2018, the trial court entered an order condemning \$16,800 of the \$50,000 in funds held by the trial-court clerk and directing the clerk to pay that sum to the wife's attorney to satisfy the spousal support owed by the husband for January 2018 through June 2018. The trial court also ordered the husband to pay "support payments in the amount of \$2,800 per month directly to [the wife] beginning on July 1, 2018."

On October 23, 2018, the guardian ad litem for the husband requested the trial court to condemn the sum of \$2,500 "as a retainer fee for the [guardian ad litem's] legal representation for [the husband] from the funds currently being held in the Office of the Circuit Clerk." On October 24, 2018, the trial court entered an order granting the

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guardian ad litem's motion. On November 19, 2018, the trial court entered an order adding the husband's brother, Armond Bragg, as a party.

After a trial, the trial court entered, on March 18, 2019, a final judgment that, among other things, granted the wife a legal separation from the husband. The wife filed a postjudgment motion on April 17, 2019. On July 2, 2019, the trial court set aside its judgment and entered a new judgment of legal separation, providing, in pertinent part:

"The Husband and [the] Wife have been married more than 61 years. During this time, they raised four (4) children. The Wife worked as a bookkeeper and contributed money to help care for the family and toward the parties' investments. The Husband was employed by and retired from the Internal Revenue Service. The parties held joint bank accounts during this time and the marital bills were paid from the joint accounts to which both of their paychecks were deposited. In addition, the Husband maintained separate bank accounts during the marriage and those bank accounts contained funds received from inheritance.

"The Wife managed the home and cared for the Husband until she sustained neurologic injuries and other illnesses that caused her to be unable to walk. The husband refused to make the home handicap accessible and the Wife had to seek the assistance of the local fire department, on several occasions, to be able to leave the home.

"In 2013, because of her ailing health, the Wife left the marital residence to reside with her

daughter, Diane, who is in the medical profession. The Wife planned on returning to the marital residence after her illness subsided. The Husband failed to make the necessary modifications to the marital residence to accommodate the Wife's illness; therefore, she was displaced for 6 years while the Husband remained in the marital home.

"The Wife filed for legal separation on or about July 23, 2015; and, the husband counter-complained for divorce.

"Upon conclusion of trial, this matter was submitted to the Court for final judgment upon the pleadings and the record. Upon consideration thereof, together with the ore tenus testimony and properly admitted evidence, the Court is of the opinion that the following order should be entered. ... Accordingly, it is ORDERED, ADJUDGED and DECREED as follows:

"....

"1.. [The wife and the husband] are hereby legally separated each from the other pursuant to the authority of Section 30-2-40 Code of Ala. (1975).

"....

"7. The sum of \$1,355.64 ... is hereby condemned and the Clerk of Court is ordered to pay said sum directly to [the wife]. This amount shall ... constitute payment toward [the husband's] temporary alimony payments.

"8. [The wife] shall be entitled to receive outstanding temporary alimony of \$14,944,36 from cashier's checks held by the Court.

"....

"11. The Husband withdrew the sum of \$400,000.00 from two Regions Bank accounts on August 17, 2015 (\$250,000.00 from account ending *672 and \$150,000.00 from account ending *186), and received the funds in cashier's checks. These funds were withdrawn from Regions Bank accounts held solely in the name of the Husband and contained funds gifted/inherited by the husband, from two of his aunts. However, the Wife provided evidence that the Husband was on a joint account with his aunt during the parties' marriage, and that during the marriage the Husband used funds derived from account ending *672 (containing \$250,000) to pay marital bills and to repair and/or replace other marital property. There was no evidence that the account ending *186 (containing \$150,000) was used regularly for the common benefit of the marriage, nor was there evidence that account ending *186 was used regularly for the common benefit of the marriage, and therefore the funds in the amount of \$150,000 contained in account ending *186 are the separate property of the Husband. See Alabama Code [1975, §] 30-2-51: Bushnell v. Bushnell 713 So. 2d 962 (Ala. Civ. App. 1997); Hull v. Hull 887 So. 2d 904 (Ala. Civ. App. 2003). However, the funds in the amount of \$250,000 in account ending in *672 constitute marital property.

"12. From the \$400,000 in funds, the Husband gave \$5,000.00 to each of the parties' three adult daughters, leaving the sum of \$385,000, which is presently held in two separate cashier's checks, one for 200,000.00 payable to the Husband and one for \$185,000.00 payable to the Third Party Defendant, Armond Bragg. The Husband shall IMMEDIATELY deposit these cashier's checks with the Clerk of Court.

"13. Within thirty (30) days from the entry of this Order, the parties shall cooperate in renegotiating the cashier's checks as follows: the Wife shall receive the payment for her share of the property settlement in the amount of \$125,000 as set

forth herein, and the Husband (or whomever he may designate at his discretion) shall receive the remainder of the funds. The Court specifically retains jurisdiction to effectuate the terms of this provision, including adding Regions Bank as a party to this action, should that be necessary.

"....

"14. The Husband shall pay to the Wife the sum of one hundred twenty-five thousand dollars (\$125,000.00), which is 1/2 of the funds from account ending *672 that he previously converted into cashier's checks made payable to himself and/or Armond Bragg. Said sum shall be due and payable to the Wife within 30 days of the date of this Order. Regions Bank shall cooperate in converting said checks into funds payable to the Wife.

"....

"16. Armond Bragg, who is properly before the jurisdiction of this court, shall have no claim or right to these funds or other property of the marital estate.

"....

"33. All other relief not specifically addressed in this Order is hereby DENIED."¹

(Capitalization in original.) The husband filed his notice of appeal on August 13, 2019.

¹On July 12, 2019, the trial court entered an additional order concerning the manner in which the transfer of the inherited funds would be achieved, but that order does not affect our assessment of the issues on appeal.

Discussion

On appeal, the husband first argues that the trial court erred in awarding the wife a portion of the \$250,000 in funds that the trial court specifically found had been conveyed to the husband as a gift or inheritance.

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

"[T]he 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."

In this case, although the trial court specifically found that the \$250,000 in funds had been acquired by the husband by inheritance or gift, the trial court also found that those funds had been used for the common benefit of the parties during their marriage. Specifically, the trial court found that those funds had been used "to pay marital bills and to repair and/or replace other marital property." The wife introduced evidence indicating that the husband had used the

²In Frazier v. Curry, 104 So. 3d 220 (Ala. Civ. App. 2012), this court applied § 30-2-51 in the context of a legal separation. The applicability of § 30-2-51 to this case is not challenged by either party.

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account that the \$250,000 was in to pay for utilities, insurance, roof repairs to the marital residence, taxes on property owned by the husband's aunt, gifts to the parties' adult children, a donation to his church, and payments to Ford Motor Credit Corp., Sears, and CVS/Caremark. However, those payments were all made after the date the parties separated while the wife was living in another state, and the record does not disclose how those payments were for the common benefit of the parties. Indeed, the wife herself testified that, since the parties' separation, the only support she had received from the husband was the pendente lite spousal support ordered by the trial court. To the extent that the roof repairs to the marital residence could be deemed "for the common benefit of the parties," we note that a one-time use of inherited funds does not constitute "regular" use. See, e.g., Hull v. Hull, 887 So. 2d 904, 909 (Ala. Civ. App. 2003).

In Cox v. Cox, 531 So. 2d 1232 (Ala. Civ. App. 1988), this court held that the inheritance the husband in that case had received from his mother was not divisible pursuant to § 30-2-51, because, we concluded, the husband's mother had died after the parties had separated and "[t]here was no testimony

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that the mother's property was ever used by the parties or used for the common benefit of the marriage." 531 So. 2d at 1233. Additionally, in K.W.M. v. P.N.M., 116 So. 3d 1179 (Ala. Civ. App. 2013), this court concluded that the wife's inheritance had not been used for the common benefit of the parties during their marriage because, we said, "the wife testified that she had used the money from her inheritance one time before the parties separated," and the husband had not "asserted an argument tending to indicate other instances in which the inheritance was used for the common benefit of the marriage." 116 So. 3d at 1191.

Similarly, in the present case, the wife has failed to present evidence indicating that any of the \$250,000 was regularly used for the common benefit of the parties during the marriage. Therefore, we reverse the trial court's judgment to the extent that it divided those funds.

The husband next argues that the trial court "erred in condemning and distributing the \$50,000.00 which was paid to the Clerk of the Court as an appearance bond for the husband." He asserts that the trial court's order violated Rule 7.6(e), Ala. R. Crim. P., and Ala. Code 1975, § 15-13-42. As the wife

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points out in her brief, however, the husband failed to present this argument to the trial court. Therefore, we cannot reverse the trial court's judgment on this point. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ("This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.").

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it divided the \$250,000 in funds, and we remand the cause for the trial court to enter a judgment in accordance with this opinion. The judgment is affirmed in all other respects.

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

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.