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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Kevin L. Saucier

v.

Ramona R. Saucier

Appeal from Baldwin Circuit Court  
(DR-18-900609)

EDWARDS, Judge.

Kevin L. Saucier ("the husband") appeals from a judgment entered by the Baldwin Circuit Court ("the trial court")

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awarding Ramona R. Saucier ("the wife") a portion of his retirement benefits in their divorce action.

The parties married on February 8, 1997. On May, 16, 2018, the husband filed a complaint for a divorce in the trial court. He requested a divorce on the grounds of incompatibility of temperament and an irretrievable breakdown of the marriage. The wife filed an answer to the complaint, requesting, among other things, an award of a portion of the husband's retirement benefits. The wife subsequently amended her answer to include a counterclaim for a divorce.

On August 27, 2019, the trial court held a hearing at which evidence was presented ore tenus. The husband testified that he began working for Mobile Gas Company ("MGC") in June 1979 and that he contributed to a 401(k) retirement account with MGC during the 18-year period before he married the wife. He stated that, after he married the wife, he continued to contribute to his 401(k) retirement account until he left his employment with MGC in October 2012 and began working for Riviera Utilities.<sup>1</sup> The husband admitted that during the

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<sup>1</sup>At the time of trial, the husband was receiving pension benefits from MGC in the amount of \$1,053.07 per month and was participating in a retirement plan through Riviera Utilities; the husband's retirement benefits through Riviera Utilities are not at issue in this appeal.

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marriage he and the wife had borrowed funds from his 401(k) retirement account on two occasions to pay marital debts.

After he left MGC, the husband moved his 401(k) retirement account into an "IRA" account that was held in the form of an annuity, the Polaris Platinum III Variable Annuity ("the annuity"), issued by American Insurance General Life Insurance Company. Based on a March 31, 2019, statement for the annuity, the husband had made total contributions in the amount of \$182,452.40 to the annuity (apparently the amount rolled over from the 401(k) retirement account) and had received \$18,245.24 as "withdrawals/related charges" from the annuity; the annuity had a market value on that date of \$193,141.35. The husband introduced no evidence regarding the value of the contributions he had made to his 401(k) retirement account before or after he married the wife or the value of the 401(k) account when the parties married.

When the wife's counsel questioned him on cross-examination, the husband purportedly did not know what the "\$18,254.24 withdrawal" from the annuity had been for, but he also testified that, "when it was a 401k, we took I think two separate loans off of it at that time. And when I left [MGC],

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you had to agree to pay the loan back or be responsible for the taxes for the distributions. And then I had the tax bill for the distribution." The husband affirmed that there were no current loans from or debts against the annuity at the time of trial.

Regarding the "tax debt" associated with the 401(k) retirement account, the wife testified on direct examination by her counsel that

"[t]hat was from 2013 when he was penalized for a withdrawal from his 401k. So when you have to take that as income, you're penalized three and a half times plus for taking it as income. So we've been paying that over the period since 2014. And it's almost paid off because it was an automatic deduction."

The wife later identified the \$18,254.24 withdrawal from the annuity as being associated with the payment of the tax obligation she and the husband had referenced.

On September 9, 2019, the trial court entered a judgment divorcing the parties, dividing the marital property and debts, and awarding the wife \$1,000 per month as periodic alimony. As part of the marital-property division, the trial court awarded the wife, "[s]ubject to a Qualified Domestic Relations Order, ... one-half of [the annuity]. The Court

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retains jurisdiction to execute an Order dividing this account, as need be, in order to effectuate this divorce decree."

On September 19, 2019, the husband filed a postjudgment motion. He argued, in part:

"3. ... It was undisputed at trial that the [retirement] account at issue was accumulated as a result of [the husband's] employment with [MGC] and is a rollover retirement account therefrom. The evidence is undisputed at trial that [the husband] worked for [MGC] for a period of thirty-three (33) years of which only fifteen (15) years of the same was during the course of this marriage.

"4. [The wife], by law, should only be entitled to one-half of the percentage attributable to fifteen (15) years of the marriage from said account and the percentage related thereto. [The husband] requests the [September 2019 judgment] be amended and that [the wife] be awarded only that portion allowed to her under law as being accumulated during the 15 years of the marriage in which he was employed with [MGC]."

On October 29, 2019, the trial court held a hearing on the husband's postjudgment motion. At the outset of that hearing, the wife's counsel argued that,

"under ... [Ala. Code 1975, §] 30-2-51(b)(3), ... the party claiming that the amount excluded -- 'any party asserting that all or a portion of his [or her] interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or the amount of the excluded interest ....'

"So there was no testimony as to what the excluded interest was, Judge. And my position is that ... you can give up to 50 percent of it.

". . . .

"It's two parts. You've got to prove it's excluded and the value of it pursuant to [§ 30-2-51(b)(3)]. And there was no testimony as to what the value of the money accrued during the term of the marriage was. So, Your Honor, it's within your rights to grant a 50 percent cut."

The husband's counsel responded to that argument, stating:

"That's not accurate. I mean, you can prove as to the valuation by simply showing we proved the full amount of the value, which was around \$185,000, and you show the appropriate amount of the share that could apply at that period of time. So 15 years of 33, which would have been 45 percent of it, and then one half of that. So you came into it with \$42,000. That's easiest enough to prove.

"In fact, she benefits even greater by that fact because she gets the back-end of that 15 years. So she gets the more benefit with paying less into it.

"I would have liked to have been able to prove the valuation that showed that she got substantially less, you know, but she gets the higher end of the deal.

"But you can prove it simply by showing the amount of years versus time worked and the total value of the account, which is what we did.

"Our position is that the way it was divided -- because it was just one lump sum and one lump sum got moved over. And it stayed separate in a retirement account. You added the sum of \$185,000 and she shouldn't be entitled to \$92,000 of it. She

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should be entitled to \$42,045, which would be an appropriate amount. That, I believe should have proved it enough."

The wife's counsel then responded:

"[M]y position is based on that statute that he didn't prove it enough.

"And he was trying to say he's showing his half of it but you have to pursuant to that statute prove what occurred during the period of time, the valuation -- the fluctuations -- the valuation in the account during the time of the marriage, and he didn't do that.

"So Your Honor was left with one lump sum for which you could give her half ...."

The trial court then summarized the arguments as follows.

Regarding the argument made by the wife's counsel, the trial court stated:

"Your position is that it's possible. That just by applying the number of years it's possible quite simply with the number of years with the money that's in there.

"It's possible that whatever, that 80 percent of the money in there could have been earned in the last 15 years or it's possible that 80 percent of the money that's in there could have been earned during the first 18 years."

Regarding the argument made by the husband's counsel, the trial court stated:

"So your position ... is that I should go just with the number of years, that we know the gross

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amount in the account, which I guess is an IRA at this point.

"And therefore we'd just apply -- we'd say, okay, well, they were married for 15 years during which this was being accumulated, therefore 45 percent of the total is all that I can consider, the only portion of the retirement account that I can consider."

The husband's counsel then added that "the statute is relatively new, there's not a lot of caselaw on it," that it might be difficult to prove valuation in certain cases, and that it would be inequitable to allow the wife to receive benefits relating to the period when she and the husband were not married.

The trial court then addressed the "rollover" issue, noting that, "when it's rolled over, it's a different vehicle. ... So at that point isn't it all earned during the marriage." The husband's counsel responded: "No, because it was still a retirement. It's still of retirement nature."

The colloquy with the trial court continued:

"THE COURT: Well, how about this, it says any interest, whether vested or unvested, either spouse has acquired, received, accumulated or earned.

"So when it rolls over, is that not being acquired, received or accumulated during the marriage?



"[The husband's counsel]: It is but --

"THE COURT: It's earned during the marriage.

"[The husband's counsel]: -- it's still excluded because it wasn't earned during the marriage.

"And the reason they put that language in there is because it was the removal of the ten years. It used to be you couldn't even touch anybody's retirement unless you've been there for ten years.

"THE COURT: Ten years.

"[The husband's counsel]: The idea was to go, okay, now we're opening up it all.

"THE COURT: Yes, but my point is this doesn't say it has to be earned during the marriage. It says that's one of the ways that it's divisible.

"[The husband's counsel]: I understand that, and as --

"THE COURT: But if it is accumulated, received or acquired and the IRA was acquired during the marriage, wasn't it?

"[The husband's counsel]: The new one was because it rolled over. But the basis of which the new IRA was from monies that he earned outside the scope of this marriage, which was the intent.

"So would it be fair, Judge, if somebody drew on their retirement for 30 years and then married somebody, cashed in the retirement and then have one year, just one year that they were married, rolled it over to a brand-new vehicle and then they said, okay, now I'm entitled to half of it?

"THE COURT: The entitlement still makes it an equitable division. The question is whether you can consider it.

"[The husband's counsel]: Right. And, Judge, I said this is a new statute.

". . . .

"But ultimately this goes to the equity of a man putting 18 years of his life into an account. And then we're not disputing, you know, her getting \$42,000 at all, but just not \$90,000-something, so there's a substantial difference."

The wife's counsel then reasserted her argument that the husband had failed to satisfy his burden of proof regarding valuation, and, following further argument, the trial court stated:

"I'm going to rule against you . . . . I'm going to leave the division of the retirement as is because I think that by acquiring the IRA during the marriage, even though the source of it still being the 401k might not have been totally divisible, when it accumulated during the marriage and then it's divisible, I can consider it.

"And I think that I divided it in an equitable manner."

The trial court further confirmed that the husband's counsel was correct in stating that the basis for the trial court's ruling was "because it was rolled over into a new account, it became part of the marital estate and therefore divisible by you and you split it equally."

On November 1, 2019, the trial court entered an order amending the September 2019 judgment as to matters not pertinent to this appeal and rejecting the husband's argument regarding the award of half the funds in the annuity to the wife. Specifically, the trial court stated:

"The Court finds that the [annuity], which was undisputedly rolled over to said account from [the husband's MGC] retirement, is determined in full to be a marital asset and [the husband's] request to amend the award to be limited to only to the fifteen years that the parties were married during the accumulation of the [MGC] retirement, is denied."

The husband filed a timely notice of appeal to this court.

The husband argues that Ala. Code 1975, § 30-2-51(b)(1), prohibited the trial court from awarding the wife a part of the retirement benefits that he purportedly had earned before his marriage to her. According to the husband, the pertinent facts are undisputed. We apply de novo review to questions regarding the application of the law to undisputed facts and to questions of law. See, e.g., Stewart v. Stewart, 62 So. 3d 523, 528 (Ala. Civ. App. 2010).

Section 30-2-51(b), provides:

"(1) The marital estate is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes

any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint, or group retirement benefits including, but not limited to, any retirement plans, retirement accounts, pensions, profit-sharing plans, savings plans, annuities, or other similar benefit plans from any kind of employment, including, but not limited to, self employment, public or private employment, and military employment.

"(2) Notwithstanding the foregoing, unless the parties agree otherwise, the total amount of the retirement benefits payable to the noncovered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court.

"(3) Any party asserting that all or a portion of his or her interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or amount of the excluded interest, including any active or passive income or appreciation on that interest."

The Alabama Comment to § 30-2-51 states, in pertinent part:

"... Act [No. 2017-162, Ala. Acts 2017, amending § 30-2-51, Ala. Code 1975, effective January 1, 2018,] changes prior law by eliminating the requirement that the marriage last at least 10 years in order for retirement benefits to be included in the marital estate and by including nonvested, as well as vested, retirement benefits in the marital estate in order to conform Alabama law to the law in other American jurisdictions. ... The retirement benefits listed in the statute are intended to be illustrative only with the intent that any type of retirement benefits should be included in the marital estate unless expressly excluded by federal or state law. Other examples of retirement benefits that are included are an IRA, a SEP IRA, a 401(k) plan and other similar plans. ...

"Section 30-2-51(b)[(3)] further changes prior statutory law by placing the burden of proof on the spouse seeking to exclude his or her interest, or some portion of that interest, in a retirement plan or retirement account from the marital estate, also to be consistent with the rule prevailing in other American jurisdictions. ... For example, when a spouse claims that part of his or her interest in a defined-benefit retirement plan accrued before the marriage, the burden rests on that spouse to prove the number of years of creditable service accruing prior to the marriage; absent such proof, the court shall presume that the entire interest accrued during the marriage. The statute intentionally fails to define the term 'during the marriage,' leaving it to the court to decide based on the evidence and equitable considerations the appropriate starting and ending date of the marriage for all purposes under the statute."

We pretermitt any discussion of the husband's argument that the trial court erred to the extent that it determined that, under § 30-2-51(b)(1), rolling over a 401(k) retirement account into an individual retirement account during the marriage results in the owner-spouse's acquisition, receipt, accumulation, or earning of the underlying "interest" in the "retirement benefits" during the marriage, because we need not address that issue. See, e.g., Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988) ("[W]e do not need to address [several specific] reasons [on which the trial court's judgment was based], because we can uphold the trial court's

judgment on principles of survival, lack of standing, and inadequate allegation of intentional misconduct, without reaching the reasons specifically assigned by the trial court for granting summary judgment ...."). Section 30-2-51(b)(3) is clear, and this court "'will affirm the judgment appealed from if supported on any valid legal ground,'" particularly one that was argued to the trial court and even if the trial court rejected that legal ground. Smith, 537 So. 2d at 465 (quoting Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983)); see also, e.g., Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). Specifically, under § 30-2-51(b)(3), to exclude all or a part of the annuity from the marital estate, the husband had the burden of proving (1) that "all or a portion of his ... interest in [the annuity was] excluded from the marital estate" and (2) "the value or amount of the excluded interest, including any active or passive income or appreciation on that interest." As the wife correctly argued at the hearing on the husband's postjudgment motion, the husband presented no evidence at trial to support any conclusion regarding "the value or amount of the excluded

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interest" that he asserted the trial court could not consider in making its marital-property division. The ratio between his years of employment at MGC and the years of the marriage provided no evidence of "the value or amount" of any premarriage contributions or postmarriage contributions to the 401(k) retirement account. Even if the trial court accepted the husband's testimony that he had made premarriage contributions to his 401(k) retirement account, which we need not decide, the trial court still had before it no evidence from which it could determine what "the value or amount" of any premarriage contributions might have been. Accordingly, the husband failed to satisfy his burden of proving what part of the annuity could be excluded from the marital estate, and we cannot conclude that the trial court erred by considering the entire annuity, which was held in an individual retirement account that was derived solely from the husband's 401(k) retirement account, to be part of the marital estate.

Based on the foregoing, the trial court's judgment is affirmed.

AFFIRMED.

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

Moore, J., concurs in the result, with writing.

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MOORE, Judge, concurring in the result.

I concur that the judgment should be affirmed.

I agree with Kevin L. Saucier ("the husband") that the trial court erred in its legal conclusion that his retirement funds became wholly divisible when he rolled them over from his 401(k) retirement account into the Polaris Platinum III Variable Annuity ("the annuity") in 2013.

Alabama Code 1975, § 30-2-51(b)(1), as amended by Ala. Acts 2017, Act No. 2017-162, effective January 1, 2018, provides:

"The marital estate is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint, or group retirement benefits including, but not limited to, any retirement plans, retirement accounts, pensions, profit-sharing plans, savings plans, annuities, or other similar benefit plans from any kind of employment, including, but not limited to, self employment, public or private employment, and military employment."

It is undisputed that the husband "acquired, received, accumulated, or earned" his interest in the retirement benefits while working for Mobile Gas Company ("MGC") between June 1979 and October 2012. The husband did not "acquire[],



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receive[], accumulate[], or earn[]" his interest in those retirement benefits by merely rolling the funds over into the annuity in 2013. A "rollover," in this context, is simply "[t]he transfer of funds from (such as IRA funds) to a new investment of the same type, esp. so as to defer payment of taxes." Black's Law Dictionary 1592 (11th ed. 2019). The transfer of retirement funds from one investment vehicle to another during the marriage does not, in and of itself, transform those retirement benefits into marital property under § 30-2-51(b), as the trial court erroneously concluded.

However, that error was harmless in this case. Section 30-2-51(b) (3), as amended by Act No. 2017-162, provides:

"Any party asserting that all or a portion of his or her interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or amount of the excluded interest, including any active or passive income or appreciation on that interest."

In the proceedings below, the husband did not prove the value of the portion of the annuity that he was asserting should have been excluded from the marital estate; thus, the entire annuity was subject to equitable division and distribution.

The husband argued before the trial court that, because the retirement benefits had been acquired over the course of

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his 33 years' employment for MGC, only 15 of which occurred during the marriage, 15/33 of the annuity funds should be considered marital property. That argument was premised on the "coverture-fraction method" for classifying retirement benefits advocated by former Presiding Judge Yates in her special writing concurring in the result in Wilkinson v. Wilkinson, 905 So. 2d 1, 6-17 (Ala. Civ. App. 2004), and which is impliedly endorsed in the Alabama Comment to § 30-2-51. However, the husband did not attempt to prove the terms of his MGC retirement plan or the date he began contributing to the 401(k) retirement account. The husband proved only that he began working for MGC in 1979 and that, generally, he had contributed to the 401(k) retirement account during his employment for MGC. The trial court had no evidentiary basis from which it could have inferred that the husband had consistently contributed to the 401(k) retirement account throughout his entire employment for MGC, as the husband argued in his postjudgment motion. Without that crucial evidence, the trial court could not determine what portion of the retirement funds in the annuity should be excluded from the marital estate. Therefore, under § 30-2-51(b)(3), the

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trial court did not err in treating all the retirement funds in the annuity as marital property.

I believe that, in an appropriate case, a spouse could use the coverture-fraction method to establish the value of retirement benefits to be excluded from the marital estate, without having to prove the exact dollar value of premarital contributions. In this case, however, the evidence in the record was too speculative for the trial court to apply that method. Accordingly, the judgment awarding the wife 50% of the retirement funds in the annuity complies with § 30-2-51(b) and is due to be affirmed.