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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Ex parte Timothy A. Hoye

PETITION FOR WRIT OF MANDAMUS

(In re: Lori E. Hoye

v.

Timothy A. Hoye)

(Madison Circuit Court, DR-19-900230.01)

MOORE, Judge.

Timothy A. Hoye ("the former husband") petitions this court for a writ of mandamus directing the Madison Circuit

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Court ("the trial court") to vacate its July 31, 2020, order declining to approve a settlement agreement reached in mediation ("the mediated settlement agreement") between the former husband and Lori E. Hoyer ("the former wife") and to enter a final order adopting the mediated settlement agreement.

The parties were divorced by a judgment of the trial court entered on December 17, 2019; that judgment incorporated a settlement agreement that had been executed by the parties, which provided, among other things:

"1. ... [T]hat the former marital residence ... shall be listed with a realtor agreeable to both parties and placed upon the market for sale, at a competitive market price, immediately after the entry of a decree or judgment of divorce incorporating this agreement, with the net proceeds of the sale to be split evenly between the parties. The [former] Wife shall have the exclusive right to occupy the said premises as a residence for herself until the close of sale of same, and the [former] Husband shall be responsible for payment of the utilities, insurance and taxes associated with same, until said property sells. As an alternative to the sale of said property, the [former] Wife shall have the option, at her election, to buy-out the [former] Husband's interest in same by paying to him one-half the value of said property (as determined by an appraisal which the parties shall have done if the [former] Wife elects this option, the cost of such appraisal to be shared equally by the parties) on or before February 28, 2020, at which time [the former husband] will execute a quitclaim deed conveying to

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the [former] Wife all his right, title and interest[] in and to the subject property, upon presentation of the same to him by the [former] Wife.

". . . .

"5. The parties have divided or will divide to their satisfaction their household furniture, appliances, equipment, and other personal property, and each shall retain those items of personal property presently in the possession of each. It is specifically agreed that each party will retain as his or [her] sole property the property that each owned prior to the marriage to each other, or received by each as personal gifts during the marriage. The [former] Husband shall remove his personal property from the former marital residence on or before March 31, 2020.

". . . .

"7. Each party shall be entitled to receive one-half of the monthly mortgage indebtedness payments made to them by their daughter and her husband.

"8. The [former] Husband shall receive, as his sole property, the 2009 Hyundai Sonata and the 1977 Chevrolet Camaro. The [former] Wife shall receive, as her sole property, the 2006 Volkswagen New Beetle."

The agreement incorporated into the divorce judgment also provided that a number of named accounts owned by the parties, either individually or jointly, would be split evenly between the parties, that "the parties shall not withdraw, use or dissipate [the] funds [in the accounts] other than [a]s

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allowed under the Standing Pendente Order of the court ..., and the Pendente Lite Consent Order entered by Agreement on May 6, 2019," and that "neither [party] shall in any way harass, threaten nor intimidate the other nor interfere with the life of the other."

On February 17, 2020, the former husband filed in the trial court a petition seeking to enforce provisions of the divorce judgment and to hold the former wife in contempt. He asserted, among other things, that the former wife had failed to perform her obligations under the divorce judgment by failing to list the marital residence for sale with a realtor agreeable to both parties; by failing and refusing to divide the parties' personal property, including household furniture, appliances, equipment, and other personal property; by failing to produce copies of bank accounts in her personal name and to cooperate with the former husband to divide the accounts as required by the divorce judgment; by failing to allow the former husband to pick up the Camaro automobile and car parts as required by the divorce judgment; and by continuously harassing the former husband since the entry of the divorce judgment. The former husband requested, among other things,

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that the trial court hold the former wife in contempt for her failure to comply with the terms of the divorce judgment and that it also award him attorney's fees.

The former wife filed, on March 17, 2020, an answer to the former husband's petition and a counterclaim for contempt. She asserted, among other things, that the former husband had failed to abide by the terms of the divorce judgment by refusing to agree to a realtor to list the marital residence for sale; by refusing to pay the utilities on the marital residence; by refusing to split the parties' financial accounts as required by the divorce judgment; by refusing to pay to the former wife her half of the monthly mortgage payments paid by the parties' daughter to the former husband each month; and by threatening, harassing, and intimidating the former wife. The former wife sought to hold the former husband in contempt and an award of attorney's fees.

On March 17, 2020, the trial court entered an order referring the parties to mediation. On April 30, 2020, the parties filed in the trial court the mediated settlement agreement, signed by both parties and their attorneys. The mediated settlement agreement provided, among other things,

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that neither party was to be found in contempt of court; that the former husband "shall convey all of his right, title and interest in and to the former marital residence ... to the [former wife] in consideration for her payment to him in the amount of \$129,000.00," to be paid in four equal installments of \$32,250; that each party was to receive one-half of the balance in certain financial accounts and to retain all funds in other financial accounts held in their individual names; that the former husband was to receive certain items of personal property from the former wife; and that the former wife agreed to assign to the former husband her right, title, and interest in the two mortgages and notes secured by those mortgages given to the parties by their daughter and son-in-law and to remit any prior payments on those notes received by her to the former husband. Also on April 30, 2020, the former wife filed a motion for the entry of a final judgment.

On May 5, 2020, the trial court entered an order that states:

"This cause is before the Court on the parties' filing of a joint settlement agreement. However, in reviewing said agreement, it appears to seek a modification of a prior property division. As counsel is aware, once thirty (30) days has passed from entry of the Final Divorce Decree, this Court

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lacks jurisdiction to modify any property division contained therein. The Petition at issue was filed more than thirty (30) days after entry of the Final Divorce Decree. Accordingly, on or before May 12, 2020, the parties shall provide this Court with any authority they contend supports the argument that this Court retains jurisdiction to modify the property division at issue. Failure to satisfy the Court shall result in the denial of the parties' request for a final order of modification."

(Emphasis in original.)

The former husband filed a response to the trial court's order on May 11, 2020, asserting that the mediated settlement agreement does not modify the property division included in the divorce judgment but, rather, merely clarifies ambiguities contained in the settlement agreement incorporated into the divorce judgment. The former husband asserted, in the alternative, that, to the extent the mediated settlement agreement does modify the property division in the divorce judgment, it is a valid contract between the parties that is enforceable by the court. On July 29, 2020, the former husband filed a "renewed petition to enter the joint stipulation," requesting an order adopting the mediated settlement agreement. On July 31, 2020, the trial court entered an order holding that it lacked subject-matter jurisdiction to provide the requested relief, specifically

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noting that it lacked jurisdiction to modify any property division contained in the divorce judgment; denying the former husband's motion to approve the mediated settlement agreement; and setting the case for a final hearing on August 10, 2020. The former husband filed his petition for the writ of mandamus in this court on August 11, 2020.¹

""A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is 'appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.' Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001).""

Ex parte Brown, 963 So. 2d 604, 606-07 (Ala. 2007) (quoting Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

The former husband argues in his mandamus petition that the trial court erred in determining that it lacked subject-matter jurisdiction to enter an order adopting the mediated

¹There is no indication in the contents of the former husband's petition or the exhibits attached thereto regarding whether the hearing scheduled for August 10, 2020, was conducted on that date.

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settlement agreement. First, he asserts that the mediated settlement agreement does not impermissibly modify the property division in the divorce judgment but, instead, merely permissibly clarifies ambiguities related to the property division that existed within the settlement agreement incorporated into the divorce judgment. See Cornelison v. Cornelison, 180 So. 3d 883 (Ala. Civ. App. 2015), and Jardine v. Jardine, 918 So. 2d 127 (Ala. Civ. App. 2005). Second, the former husband argues that, even if the mediated settlement agreement modifies the property settlement included in the divorce judgment, the trial court has the authority to enforce a contract between the parties that alters the terms of a previous judgment. We find the second argument dispositive.

In Holland v. Holland, 406 So. 2d 877, 878 (Ala. 1981), the Jefferson Circuit Court had entered a 1974 judgment divorcing the parties and incorporating an agreement between the parties that required, among other things, that the wife execute a deed transferring the parties' residential property to the husband within 10 days of the entry of the judgment and to vacate the premises within 30 days. The wife failed to transfer the property to the husband or to vacate the

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property, and, two years after the divorce, the husband offered to divide the proceeds from a subsequent sale of the property equally with the wife if she would execute a deed to the property by August 9, 1976. Id. The wife executed a warranty deed conveying her interest in the property to the husband on August 12, 1976; the husband accepted the deed and sold the property on December 6, 1979; and the wife commenced an action seeking to collect half the proceeds from the sale of the property. Id. The Jefferson Circuit Court concluded that the wife was entitled to half the proceeds from the sale of the property. Id. The husband appealed, and our supreme court reversed the judgment of the Jefferson Circuit Court, concluding that "parties to a divorce decree may not change or modify the decree merely by an agreement between themselves." Id. at 879.

This court considered the holding in Holland in Oliver v. Oliver, 431 So. 2d 1271, 1272-73 (Ala. Civ. App. 1983). In Oliver, the parties were divorced by a 1975 judgment that incorporated an agreement of the parties requiring, among other things, that the husband pay the wife \$850 per month as alimony; that the husband would pay the wife 25% of all of his

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future net pay raises; that upon the wife's remarriage the award of alimony would be reduced by 50% and completely terminate one year later; and that the wife would receive one-third of the husband's net retirement pay. In 1981, the husband, despite the provisions of the divorce judgment, sought to terminate his periodic-alimony obligation entirely, pursuant to § 30-2-55, Ala. Code 1975, because of the wife's remarriage. Id. at 1272. The wife sought past-due alimony, claiming that the husband had not paid the full amount of monthly alimony required under the divorce judgment. The husband presented evidence indicating that, to keep the husband from retiring in July 1978, the wife had agreed to accept reduced alimony in the amount of \$700 per month from the husband. Id. at 1273. The wife argued that she had accepted the reduced amount of alimony, although, she said, she had not agreed or disagreed to the reduction. Id. The Escambia Circuit Court concluded, among other things, that a mutual agreement had been reached by the parties in 1978 to reduce the alimony payments, and the wife appealed. Id. In affirming the Escambia Circuit Court's judgment, this court stated, in pertinent part:

"The use by the trial court of terminology that the parties by agreement 'modified' the original decree of alimony by reducing alimony to \$700.00 per month is perhaps confusing and unfortunate. At first impression it may be thought that that finding is contrary to the decision of the Alabama Supreme Court in the case of Holland v. Holland, 406 So. 2d 877 (Ala. 1981) and the ... decision in the case of Ex parte Eugene Smith, Jr., 429 So. 2d 1050 (Ala. 1983). The court held in those cases that a final judgment may not be modified or amended by a subsequent agreement between the parties. Of course that holding is the law. Only the court may modify or amend its final judgment. However, we do not understand that holding to mean that the parties by agreement may not waive or release, in part or in entirety, their rights to the benefits granted by such judgment. Such waiver, satisfaction, credit or release of judgment by subsequent contract is common at law or in equity. Any right held by a party, whether by judgment or otherwise, may be the subject of contract to alter, exchange, waive, sell or satisfy. 15A C.J.S. Compromise and Settlement § 23; Winegardner v. Burns, 361 So. 2d 1054 (Ala. 1978); Watson v. McGee, 348 So. 2d 461 (Ala. 1977). Whether there was such a contract with consideration was an issue of fact in this case. The finding of the court that by agreement the wife waived or compromised her right to the full amount of alimony and accepted the lesser amount of \$700.00 per month is supported by evidence presented. Though referring to the divorce decree as being modified by agreement, the trial court also found that the wife waived the full amount by agreement. The finding of waiver by agreement viewed with a presumption of correctness is affirmed. McGaha v. Steadman, 410 So. 2d 420 (Ala. Civ. App. 1981)."

431 So. 2d at 1274.

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This court applied its reasoning in Oliver in Humber v. Bjornson, 8 So. 3d 995 (Ala. Civ. App. 2008), which the former husband cites in support of his argument. In Humber, the parties were divorced by a 2003 judgment incorporating an agreement of the parties that provided, in pertinent part, that the wife would be the sole owner, free and clear from any claim of the husband, of a 1997 Chevrolet S-10 Blazer motor vehicle ("the Blazer"), that the wife would pay all indebtedness thereon, and that the husband would agree to sign any documents necessary to effectuate the transfer. 8 So. 3d at 996. In 2006, the husband filed a petition for a rule nisi, alleging that the wife was in contempt for her failure to pay the indebtedness on the Blazer as required in the divorce judgment. Id. at 997. The Walker Circuit Court denied the husband's petition, finding instead that the husband was the owner of the Blazer. Id. The husband appealed, and this court affirmed the judgment, citing this court's reasoning in Oliver and evidence indicating, among other things, that the wife had failed to make any payments on the Blazer following the entry of the divorce judgment, that the husband had continued to make the payments on the Blazer,

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that the husband had had title to the Blazer in his name at all times, that the Blazer was registered in the husband's name alone, and that the husband had "repossessed" the Blazer, after which he had the full benefit of the use of the vehicle. Id. at 998. The Walker Circuit Court concluded that the husband was the true owner of the Blazer by novation. Id. at 999. This court disagreed, concluding instead that the judgment was due to be affirmed based on the reasoning in Oliver. Id. at 1002. Accordingly, this court determined that the wife had effectively offered to give the Blazer to the husband and that the husband had accepted her offer by taking possession of the vehicle, paying the indebtedness on the vehicle, and insuring the vehicle. Id. at 1002. This court stated that the judgment of the Walker Circuit Court "merely recite[d] what the parties informally agreed to, as demonstrated by the evidence presented to the trial court," and concluded that the Walker Circuit Court had not erred "in enforcing the parties' informal agreement, albeit under the wrong theory." Id.

The former husband argues that, like in Humber, the mediated settlement agreement is a valid contract between the

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parties that may be enforced by the trial court. We agree with the former husband that the trial court had subject-matter jurisdiction to enforce the mediated settlement agreement. As implicitly concluded in Oliver and Humber, a trial court retains subject-matter jurisdiction to enforce an agreement between former spouses regarding the division or disposition of property awarded in a divorce judgment even if that agreement could be considered a modification of the award made by the court. See also Lisenby v. Lisenby, 434 So. 2d 787, 789 (Ala. Civ. App. 1983) ("We perceive no reasonable prohibition against the court, which has jurisdiction of the parties in all respects, accepting the agreement to release and modifying the rights and obligations previously given."). The trial court erred in refusing to consider enforcing the mediated settlement agreement on the ground that it lacked subject-matter jurisdiction. To the extent that the former husband requests that this court direct the trial court to exercise its jurisdiction, we grant his petition for the writ of mandamus.

Because the trial court erroneously determined that it lacked subject-matter jurisdiction, the trial court did not

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adjudicate the petition by the former husband requesting that the mediated settlement agreement be enforced. In this opinion, we hold only that the trial court had jurisdiction to rule on the petition; we do not express any opinion regarding whether the petition should be granted, which, under Oliver, is dependent on the trial court's determination as to the existence and terms of a valid contract, which, we note, is disputed by the former wife. ""In cases involving the exercise of discretion by an inferior court, [the writ of] mandamus may issue to compel the exercise of that discretion. It may not, however, issue to control or review the exercise of discretion, except in a case [in which the trial court has exceeded its discretion]."" Ex parte Monsanto Co., 794 So. 2d 350, 351-52 (Ala. 2001) (quoting Ex parte Auto-Owners Ins. Co., 548 So. 2d 1029, 1030 (Ala. 1989), quoting in turn Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989)). To the extent the former husband requests that this court direct the trial court to grant his petition to enforce the mediated settlement agreement, we deny the petition for the writ of mandamus.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

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