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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Brian James Merrick

v.

Brandi Rhodes Merrick

**Appeal from Autauga Circuit Court
(DR-18-900070)**

EDWARDS, Judge.

Brian James Merrick ("the husband") appeals from a judgment entered by the Autauga Circuit Court ("the trial court") in a divorce proceeding between him and Brandi Rhodes Merrick ("the wife"). We

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dismissed a previous appeal by the husband as being from a nonfinal judgment. See Merrick v. Merrick, 321 So. 3d 1268 (Ala. Civ. App. 2020).

The husband and the wife married on July 17, 2010, and separated in February 2018. On April 11, 2018, the wife filed a petition in the trial court, seeking a legal separation from the husband. Thereafter, the husband filed an answer and a counterclaim for a divorce, and the wife filed a reply to the husband's counterclaim. The wife subsequently amended her pleadings to also seek a divorce. Subsequently, the husband and the wife filed a complaint in the divorce proceeding, asserting claims against Ben Milam and U Park U Sell, LLC ("UPUS"), an Alabama limited-liability company of which Milam is a member, alleging breach of a purported loan agreement and fraud.

The trial court conducted ore tenus proceedings on August 6, 2019, and November 6, 2019. On December 26, 2019, the trial court entered an order purporting to divorce the husband and the wife, to divide their marital property, and to award the wife "periodic, rehabilitative alimony" of \$2,800 per month for 60 months. The December 2019 order also included a judgment against Milam for \$35,000 in compensatory damages

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and \$35,000 in punitive damages but failed to adjudicate any claim as to UPUS.

The husband filed a purported postjudgment motion, which he subsequently amended, requesting that the trial court modify its property division and arguing, in part, that the alimony award to the wife was not supported by the evidence and exceeded his ability to pay. On January 17, 2020, the husband filed a notice of appeal to this court, see Merrick, supra, which divested the trial court of jurisdiction to rule on the husband's purported postjudgment motion.¹ See, e.g., Horton v. Horton, 822 So. 2d 431, 434 (Ala. Civ. App. 2001)(noting that an appeal from an interlocutory order divests the trial court of jurisdiction to act except in matters collateral to the appeal).

On February 10, 2020, the wife filed a response to the husband's purported postjudgment motion, and the trial court held a hearing on that motion. The following day the trial court purported to enter an order

¹Had the December 2019 order been a final judgment, the notice of appeal would not have divested the trial court of jurisdiction to rule on the husband's postjudgment motion. See Rule 4(a)(3), Ala. R. App. P.

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making certain adjustments to the December 2019 order, specifically as to the property division between the husband and the wife, but denying all other relief requested by the husband. The February 11, 2020, order was a nullity. See Horton, supra.

As noted above, on September 11, 2020, this court dismissed the husband's appeal as being from a nonfinal judgment, see Merrick, supra. On November 4, 2020, the husband and the wife filed a joint motion to sever their claims against Milam and UPUS "so the parties can proceed in a separate, severed action to litigate those claims to finality."² The following day, the trial court entered an order granting the motion to sever.

²The certificate of judgment in Merrick was issued on September 30, 2020. The joint motion to sever was actually the second such motion. The husband and the wife initially had filed a joint motion to sever after the issuance of this court's opinion but before the issuance of the certificate of judgment. The trial court had purported to enter an order granting that motion on September 16, 2020; however, that order was a nullity. See Ex parte Wynn, 227 So. 3d 534, 535 (Ala. Civ. App. 2017) ("[A] trial court does not have jurisdiction to enter any order on remand until this court has entered its certificate of judgment.").

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On December 2, 2020, the trial court entered a judgment, based on the ore tenus proceedings conducted on August 6, 2019, and November 6, 2019, divorcing the husband and the wife, dividing their marital property, and awarding the wife "periodic, rehabilitative alimony" of \$2,800 per month for 60 months. The trial court made no findings in the December 2020 judgment regarding the award of alimony.

On December 3, 2020, the husband filed a postjudgment motion requesting that the trial court modify its property division and arguing, in part, that the alimony award to the wife was not supported by the evidence, that the trial court had improperly considered his military-disability income in making the alimony award, and that the award exceeded his ability to pay. The trial court summarily denied the husband's postjudgment motion. On December 7, 2020, the husband filed a notice of appeal to this court.

The husband argues on appeal that the trial court erred by awarding the wife alimony and, alternatively, by concluding that he had the ability to pay what he characterizes as "an amount higher than [he] can fairly pay on a consistent basis." In the husband's appellate brief, he discusses

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precedents regarding various factors that a trial court must consider in making an alimony award, including the pertinent standards for (1) periodic alimony, see Shewbart v. Shewbart, 64 So. 3d 1080, 1087-88 (Ala. Civ. App. 2010), which addresses whether, based on the recipient spouse's circumstances, that spouse may be in need of "regular installment payments made from one spouse to another to enable the recipient spouse, to the extent possible, to maintain his or her standard of living as it existed during the marriage," id. at 1087, and (2) rehabilitative alimony, which is intended to "allow[] a spouse time to begin (or to resume) supporting himself or herself," Enzor v. Enzor, 98 So. 3d 15, 21 (Ala. Civ. App. 2011), i.e., to allow the recipient spouse "time to re-establish a self-supporting status," generally through additional education or training. Jeffcoat v. Jeffcoat, 628 So. 2d 741, 743 (Ala. Civ. App. 1993), overruled on other grounds by Crenshaw v. Crenshaw, 816 So. 2d 1046 (Ala. Civ. App. 2001). This court has described rehabilitative alimony as a "subclass of periodic alimony," Enzor, 98 So. 3d at 21, but it has been acknowledged that periodic alimony and rehabilitative alimony are intended to serve distinct purposes. See Damrich v. Damrich, 178 So. 3d 872, 880 (Ala. Civ.

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App. 2014) ("The wife's second issue on appeal is whether the circuit court erred by failing to award periodic alimony in an amount sufficient to allow her to enjoy the same standard of living that she had enjoyed during the marriage. The circuit court awarded the wife rehabilitative alimony in the amount of \$2,500 for 24 months. Rehabilitative alimony is a subclass of periodic alimony. ... The purpose of rehabilitative alimony is to allow a spouse to begin or to resume supporting himself or herself."); see also id. at 883 (Thompson, P.J., concurring in part and dissenting in part); Enzor, 98 So. 3d at 23 (Moore, J., concurring in part and dissenting in part).

The issue of alimony in the present case is governed by Ala. Code 1975, § 30-2-57, which is titled "Rehabilitative or periodic alimony" and which applies to "actions for divorce ... filed on or after January 1, 2018."

Ala. Code 1975, § 30-2-58. Section 30-2-57 provides, in pertinent part:

"(a) Upon granting a divorce or legal separation, the court shall award either rehabilitative or periodic alimony as provided in subsection (b), if the court expressly finds all of the following:

"(1) A party lacks a separate estate or his or her separate estate is insufficient to enable the party to acquire the ability to preserve, to the

extent possible, the economic status quo of the parties as it existed during the marriage.

"(2) The other party has the ability to supply those means without undue economic hardship.

"(3) The circumstances of the case make it equitable.

"(b) If a party has met the requirements of subsection (a), the court shall award alimony in the following priority:

"(1) Unless the court expressly finds that rehabilitative alimony is not feasible, the court shall award rehabilitative alimony to the party for a limited duration, not to exceed five years, absent extraordinary circumstances, of an amount to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.

"(2) In cases in which the court expressly finds that rehabilitation is not feasible, a good-faith attempt at rehabilitation fails, or good-faith rehabilitation only enables the party to partially acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall award the party periodic installments of alimony for a duration and an amount to allow the party to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage as provided in subsection (g).

"....

"(d) In determining whether a party has a sufficient separate estate to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall consider any and all relevant evidence, including all of the following:

"(1) The party's own individual assets.

"(2) The marital property received by or awarded to the party.

"(3) The liabilities of the party following the distribution of marital property.

"(4) The party's own wage-earning capacity, taking into account the age, health, education, and work experience of the party as well as the prevailing economic conditions.

"(5) Any benefits that will assist the party in obtaining and maintaining gainful employment.

"....

"(7) Any other factor the court deems equitable under the circumstances of the case.

"(e) In determining whether the other party has the ability to pay alimony, the court shall consider any and all evidence, including all of the following:

"(1) His or her own individual assets, except those assets protected from use for the payment of alimony by federal law.

"(2) The marital property received by or awarded to him or her.

"(3) His or her liabilities following the distribution of marital property.

"(4) His or her net income.

"(5) His or her wage-earning ability, considering his or her age, health, education, professional licensing, work history, family commitments, and prevailing economic conditions.

"....

"(7) Any other factor the court deems equitable under the circumstances of the case.

"(f) In determining whether the award of rehabilitative or periodic alimony is equitable, the court shall consider all relevant factors including all of the following:

"(1) The length of the marriage.

"(2) The standard of living to which the parties became accustomed during the marriage.

"(3) The relative fault of the parties for the breakdown of the marriage.

"(4) The age and health of the parties.

"(5) The future employment prospects of the parties.

"(6) The contribution of the one party to the education or earning ability of the other party.

"(7) The extent to which one party reduced his or her income or career opportunities for the benefit of the other party or the family.

"(8) Excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition of property.

"....

"(10) Any other factor the court deems equitable under the circumstances of the case.

"(g) Except upon a finding by the court that a deviation from the time limits of this section is equitably required, a person shall be eligible for periodic alimony for a period not to exceed the length of the marriage, as of the date of the filing of the complaint, with the exception that if a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility."

(Emphasis added.) Section 30-2-57 does not expressly define rehabilitative alimony or periodic alimony, although it reflects our precedents regarding factors to be considered in making an alimony award to a significant degree.

At trial, the wife requested that she be awarded rehabilitative alimony, albeit in an amount of one-half (approximately \$4,400) of the

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husband's income, and the trial court's alimony award is consistent with the normal time limitation on rehabilitative alimony provided in § 30-2-57(b)(1). However, the December 2020 judgment is ambiguous because it purports to award the wife "periodic, rehabilitative alimony." The issues raised by the husband in his appellate brief require this court to determine the nature of the alimony awarded to the wife and the grounds for such award, neither of which is clear from the December 2020 judgment.

The legislature has clearly required that an alimony award be either rehabilitative alimony or periodic alimony and that, to award either type of alimony, the trial court must make certain express findings after considering the various factors described in § 30-2-57(d)-(f). We cannot properly review the award in this case without having before us the express findings required by § 30-2-57. In the context of analogous statutory, express-findings requirements, this court has reversed a trial court's judgment and remanded the case for it to enter the mandated findings as to a judgment, see K.J. v. S.B., 292 So. 3d 657 (Ala. Civ. App. 2019)(reversing a judgment in a grandparent-visitation case because the

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judgment failed to make the findings required by Ala. Code 1975, § 30-3-4.2(f)), and we have done so ex mero motu, see, e.g., Regions Bank v. Allen, 256 So. 3d 669, 671 (Ala. Civ. App. 2018) (reversing a judgment in a workers' compensation case for failing to include required findings). Accordingly, because the December 2020 judgment does not satisfy the requirements of § 30-2-57, we reverse the trial court's judgment and remand the case to the trial court with instructions that it enter a new judgment in compliance with § 30-2-57.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore and Fridy, JJ., concur.

Thompson, P.J., dissents, with writing, which Hanson, J., joins.

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THOMPSON, Presiding Judge, dissenting.

I respectfully dissent from the main opinion's decision to reverse the trial court's judgment because I conclude that the reversal is based on issues not preserved for appellate review. I am also of the opinion that the award of alimony is clearly rehabilitative alimony. Moreover, after my review of the record, I believe that this court can conduct an adequate review of the preserved issues without remanding the matter ex mero motu to the trial court.

The main opinion reverses the trial court's judgment because the trial court did not include "express findings" as required by § 30-2-57, Ala. Code 1975, and, consequently, it concludes that this court cannot discern the nature of the alimony award or the grounds for the award. On appeal, the appellant, Brian James Merrick ("the husband"), contends that the trial court erred in awarding alimony to Brandi Rhodes Merrick ("the wife") and, alternatively, that the trial court erred in "awarding an amount [of alimony] higher than [he] can fairly pay on a consistent basis." The husband did not argue in the trial court or on appeal that the trial court had erred by failing to make the findings delineated in § 30-2-57;

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therefore, this issue, which is not jurisdictional, is not preserved for appellate review. McAliley v. McAliley, 638 So. 2d 10, 10 (Ala. Civ. App. 1994)("The record reveals that the husband failed to object at trial to properly preserve error on at least two of his issues, and therefore, those issues are not properly preserved or presented for appellate review.").

I also do not find it necessary to remand the case to the trial court for an express finding of whether the award of alimony is rehabilitative alimony or periodic alimony. The husband also did not raise this issue before the trial court or to this court on appeal. Even if the issues were properly preserved, because of the structure of the alimony awarded in the trial court's judgment and the evidence presented at trial, it is clear that the trial court awarded rehabilitative alimony to the wife.

In Santiago v. Santiago, 122 So. 3d 1270, 1279 (Ala. Civ. App. 2013), this court opined:

"The purpose of rehabilitative alimony, which has been described by this court as being a subclass of periodic alimony, is to allow a spouse to begin or resume supporting himself or herself. See, e.g., Alfred v. Alfred, 89 So. 3d 786, 790 (Ala. Civ. App. 2012); Enzor v. Enzor, 98 So. 3d 15, 21 (Ala. Civ. App. 2011). See also Benson v. Benson, 876 So. 2d 1157, 1164 (Ala. Civ. App. 2003)(' "This court has defined rehabilitative alimony

as 'a sub-class of periodic alimony' that allows a spouse 'time to reestablish a self-supporting status.' " (quoting Fowler v. Fowler, 773 So. 2d 491, 495 (Ala. Civ. App. 2000) (overruled on other grounds, Enzor, *supra*), quoting in turn Jeffcoat v. Jeffcoat, 628 So. 2d 741, 743 (Ala. Civ. App. 1993) (overruled on other grounds, Crenshaw v. Crenshaw, 816 So. 2d 1046 (Ala. Civ. App. 2001))). "[R]ehabilitative alimony[]" ... generally connotes an attempt to encourage a dependent spouse to become self-supporting by providing alimony for a limited period of time during which gainful employment can be obtained.' Molnar v. Molnar, 173 W. Va. 200, 202, 314 S.E.2d 73, 76 (1984). Rehabilitative alimony is intended to provide support for a dependent spouse for a limited period of reeducation or retraining following a divorce so that the dependent spouse may gain skills to become self-sufficient. See Enzor, 98 So. 3d at 23. Regarding alimony in general, this court in Korn v. Korn, 867 So. 2d 338, 345-46 (Ala. Civ. App. 2003), stated:

"Under Alabama law, periodic alimony "is to support the former dependent spouse and enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until that spouse is self-supporting or maintaining a lifestyle or status similar to the one enjoyed during the marriage." O'Neal v. O'Neal, 678 So. 2d 161, 164 (Ala. Civ. App. 1996)."

Because rehabilitative alimony is a subclass of periodic alimony, the trial court, in awarding rehabilitative alimony, retains jurisdiction to alter that award via a petition to modify alimony, filed before the rehabilitative-alimony award expires, to consider a request for periodic alimony, see

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Enzor v. Enzor, 98 So. 3d 15 (Ala. Civ. App. 2011); Treusdell v. Treusdell, 671 So. 2d 699, 704 (Ala. Civ. App. 1995); the foregoing precedent does not conflict with the requirement in § 30-2-57(b) that the trial court first award rehabilitative alimony when necessary and feasible, see § 30-2-57(b)(1), and then, if the trial court finds that rehabilitative alimony is not feasible, to award periodic alimony, see § 30-2-57(b)(2).

In this case, the trial court ordered the husband to pay the wife \$2,800 per month for a period of 60 months. Because the awarded alimony is for an amount certain over a definite period of time, and because undisputed evidence was presented indicating that the wife had asked the trial court to award her rehabilitative alimony and that she was working toward fulfilling the requirements to become a fully licensed counselor, a process that would take five years for her to complete, this court can construe the alimony award as constituting rehabilitative alimony. See Santiago, 122 So. 3d at 1279; Damrich v. Damrich, 178 So. 3d 872, 880 (Ala. Civ. App. 2014) ("The purpose of rehabilitative alimony is to allow a spouse to begin or to resume supporting himself or herself.").

Furthermore, § 30-2-57(b)(2) requires:

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"In cases in which the court expressly finds that rehabilitation is not feasible, a good-faith attempt at rehabilitation fails, or good-faith rehabilitation only enables the party to partially acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall award the party periodic installments of alimony for a duration and an amount to allow the party to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage as provided in subsection (g)."

(Emphasis added.) In this case the trial court did not make those express findings, which further supports the conclusion that the award is rehabilitative alimony.

Although I recognize that this court has the ability to, ex mero motu, remand a matter for clarification when the basis for the judgment is unclear, see Grantham v. Grantham, 481 So. 2d 902 (Ala. Civ. App. 1985)(remanding for clarification of amount of child-support award), I do not believe a remand is necessary in this case. My review of the record indicates that this court can address the issues presented by the husband and determine whether the trial court erred in awarding rehabilitative alimony in the amount of \$2,800 for a period of 60 months.

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I, therefore, conclude that reversal of the trial court's judgment to make the findings delineated in § 30-2-57 is based upon unpreserved error, is unnecessary, and will not assist this court in conducting its review. Therefore, I respectfully dissent.

Hanson, J., concurs.