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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150252

Michael T. Cowperthwait

v.

Carrie Ann Cowperthwait

Appeal from Madison Circuit Court
(DR-14-900868)

On Application for Rehearing

MOORE, Judge.

This court's opinion issued on October 21, 2016, is withdrawn, and the following is substituted therefor.

Michael T. Cowperthwait ("the husband") appeals from a judgment entered by the Madison Circuit Court ("the trial court") divorcing him from Carrie Ann Cowperthwait ("the wife") to the extent that it divided the parties' property, awarded the wife alimony, and awarded the wife sole physical custody of the parties' children. We affirm the trial court's judgment in part and reverse it in part.

Procedural History

On October 9, 2014, the husband filed a complaint seeking a divorce from the wife. On October 22, 2014, the wife answered the complaint and counterclaimed for a divorce. The husband filed a reply to the counterclaim on October 23, 2014.

On September 9, 2015, the parties entered into a stipulation of partial settlement providing for the division of several of the parties' retirement accounts. After a trial, the trial court entered a judgment on September 15, 2015, that, among other things, divorced the parties, awarded the wife sole physical custody of the parties' two children; ordered the husband to pay monthly child support in the amount of $1,398; ordered the husband to pay monthly alimony in the amount of $1,000 for 104 months; divided the proceeds from the

sale of the marital home and a boat equally between the parties; divided the parties' joint bank accounts equally between the parties; divided the parties' retirement accounts as set forth in the parties' joint stipulation; ordered the husband to pay the balance owed on the parties' joint USAA MasterCard credit-card account; ordered each party to pay the debts in his or her individual name; divided the parties' personal property; and ordered the husband to pay $10,000 to the wife to "to equalize the division of personal property."

On October 14, 2015, the husband filed a postjudgment motion. That motion was denied on November 6, 2015. On December 11, 2015, the husband filed his notice of appeal to this court.

Discussion

A.

On appeal, the husband first argues that the trial court erred in its division of the marital property and in its award of alimony to the wife.

> "In reviewing a judgment of the trial court in a divorce case, where the trial court has made findings of fact based on oral testimony, we are governed by the ore tenus rule. Under this rule, the trial court's judgment based on those findings will be presumed to be correct and will not be disturbed

> on appeal unless it is plainly and palpably wrong. Hartzell v. Hartzell, 623 So. 2d 323 (Ala. Civ. App. 1993). This presumption of correctness is based on the trial court's unique position to observe the witnesses and to assess their demeanor and credibility. Hall v. Mazzone, 486 So. 2d 408 (Ala. 1986). Additionally, matters of alimony and property division rest soundly within the trial court's discretion, and rulings on those matters will not be disturbed on appeal except for a plain and palpable abuse of discretion. Welch v. Welch, 636 So. 2d 464 (Ala. Civ. App. 1994). Matters of alimony and property division are interrelated, and the entire judgment must be considered in determining whether the trial court abused its discretion as to either of those issues. Willing v. Willing, 655 So. 2d 1064 (Ala. Civ. App. 1995)."

Zinnerman v. Zinnerman, 803 So. 2d 569, 572 (Ala. Civ. App. 2001).

With regard to the property division, the husband specifically argues that the trial court erred in ordering him to pay the debt on his Best Buy credit-card account and on the parties' joint USAA MasterCard credit-card account. The evidence in the record shows that, after the parties separated, the wife purchased several appliances as an authorized user on the husband's Best Buy credit-card account, leaving a balance of $1,476.76. The judgment provides that, unless specifically stated otherwise, the wife shall pay any debt she has incurred regardless of whether that debt was

incurred in her name or "in the joint names of parties hereto." The judgment does not specify that the husband must pay the Best Buy credit-card debt. Thus, the judgment does not impose any liability on the husband for that debt; instead, it requires the wife to pay that debt. Thus, we do not address this argument further.

The judgment does specifically order the husband to pay the balance of the USAA MasterCard credit-card account, which totaled $5,718.27. The evidence in the record shows that, while the divorce action was pending, the wife charged $2,857 on the USAA MasterCard credit-card account to pay her attorney's fees and that she also took a $2,500 cash advance. The trial court specifically indicated that it would not order the husband to pay the wife's attorney's fees because the wife had made no claim for those fees, so that portion of the judgment requiring the husband to pay $2,857 of the balance owed on the USAA MasterCard credit-card account cannot stand. See Cinader v. Cinader, 367 So. 2d 487, 488 (Ala. Civ. App. 1979) ("[A] request [for attorney's fees] must be made, and evidence of financial need and performance of the service shown before the authority of the court to grant such fees is

properly invoked."); Kelley v. Kelley, 414 So. 2d 126, 129 (Ala. Civ. App. 1982) (reversing trial court's judgment insofar as it awarded the plaintiff in that case attorney's fees "[b]ecause of the absence of any request for an attorney's fee and [because] that issue was not tried by either express or implied consent of the parties"). We therefore reverse the trial court's judgment to the extent it ordered the husband to pay that portion of the USAA MasterCard credit-card balance that is attributable to the wife's attorney's fees.

In his postjudgment motion, the husband argued that he should not be required to pay the balance on the USAA MasterCard credit-card account because "[t]his debt was incurred exclusively by the [w]ife" and "cannot be considered to have been accrued for the benefit of the parties." On appeal, the husband reasserts that argument; however, in his appellate brief, the husband does not cite any evidence as to how the wife used the $2,500 cash advance, arguing only generally that, if the wife used the cash advance for her own personal benefit, it cannot be considered a marital debt. See generally Carnes v. Carnes, 82 So. 3d 704 (Ala. Civ. App.

2011). "This Court does not have the obligation to search the record for substantiation of unsupported factual matter appearing in an appellant's brief in order to determine whether a judgment should be reversed." Friedman v. Friedman, 971 So. 2d 23, 31 (Ala. 2007). The husband asserts other arguments as to why he should not be liable for the cash advance, but those arguments were not presented to the trial court and, hence, cannot be considered by this court for the first time on appeal. See Andrews v. Merritt Oil Co., 612 So. 2d 409 (Ala. 1992). Thus, we affirm the judgment insofar as it requires the husband to pay the charges on the USAA MasterCard credit-card account for the cash advance received by the wife.

The husband next argues that the trial court erred in awarding the wife $10,000 to "equalize" the personal-property division. He argues that the award of $10,000 actually resulted in the wife's receiving personal property in an amount significantly greater than that awarded to the husband. However, the wife points out in her appellate brief that, using the values of the personal property that she presented at the trial, the personal-property division is only $45.01

from being equal. See Driver v. Hice, 618 So. 2d 129, 131 (Ala. Civ. App. 1993) (noting that "we are required to review the evidence in a light most favorable to the prevailing party").

Furthermore,

> "a property division pursuant to divorce is not required to be equal, but merely equitable. Huntress v. Huntress, 555 So. 2d 1103 (Ala. Civ. App. 1989).
>
> "The trial court is also free to consider the conduct of the parties in regard to the cause of the divorce in its property division. Huntress, supra. Even when the grounds of the divorce are incompatibility, the trial court may consider fault when making a division of property. Lutz v. Lutz, 485 So. 2d 1174 (Ala. Civ. App. 1986)."

Allen v. Allen, 565 So. 2d 653, 655 (Ala. Civ. App. 1990).

In the present case, although the trial court divorced the parties based on the grounds of incompatibility of temperament and irreconcilable differences, the trial court specifically found "the Husband's inappropriate relationships with other women and his lack of honesty with the Wife about said relationships to be a significant factor contributing to the breakdown of the parties' marriage." The husband does not challenge that finding on appeal. Based on the foregoing, we cannot conclude that the trial court's award of $10,000 to the

wife to equalize the personal-property division was inequitable even if it did result in the wife's being awarded property valued at more than the property the husband was awarded.

The husband also argues that the trial court erred in its award of alimony to the wife because, he says, the wife failed to prove the parties' standard of living during the marriage, having, instead, presented evidence only of her expenses during the parties' separation. In our opinion on original submission, we determined that the husband had not preserved this argument by raising it before the trial court in his postjudgment motion. In his application for rehearing, the husband points out that he raised this argument in the hearing on his postjudgment motion, and he points the court to the appropriate pages of the transcript of that hearing. We agree with the husband that he did properly raise the argument, see New Props., L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004) ("[I]n a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence

in order to preserve that question for appellate review." (emphasis added)), and we now address the argument on rehearing. We note, however, that Rule 28(a)(5), Ala. R. App. P., was amended effective August 1, 2015, to specifically require parties in civil appeals to include in their initial briefs a reference to the pages of the record in which any adverse ruling has been made. To comply with Rule 28(a)(5), an appellant asserting that a trial court has adversely ruled against the party necessarily should cite the pages of the record in which he or she raised any objection, motion, or argument, along with the pages of the record in which the trial court ruled on that objection, motion, or argument. This court has no duty to search the record to determine if an error has been properly preserved and whether a judgment should be reversed. See Roberts v. NASCO Equip. Co., 986 So. 2d 379, 385 (Ala. 2007).

We acknowledge that the wife presented evidence of her monthly expenses during the separation and that she did not present a detailed list of the monthly expenses incurred by the parties during the marriage. However, the wife testified that she had calculated the monthly amount that she needed to

maintain the family's standard of living and that that amount was $1,000 per month for eight years. She testified that she felt that it was the husband's obligation to maintain her at the same standard of living that the parties had maintained before their separation. From that testimony, the trial court could have properly determined that the wife needed $1,000 per month in order to maintain the marital standard of living.

> "'As a first step toward proving a need for periodic alimony, "a petitioning spouse should ... establish the standard and mode of living of the parties during the marriage and the nature of the financial costs to the parties of maintaining that station in life." Shewbart [v. Shewbart], 64 So. 3d [1080,] 1088 [(Ala. Civ. App. 2010)]. Although submitting an itemized monthly budget may be a preferred practice, nothing in the law requires a spouse to submit such a budget to the trial court in order to meet that evidentiary burden, as the husband contends. Because of the broad discretionary power of a trial court over an award of periodic alimony, see Shewbart, 64 So. 3d at 1087, a petitioning spouse need only present sufficient evidence from which the trial court can reasonably infer the costs associated with the marital standard of living.'"

Knight v. Knight, [2150102, July 29, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016) (quoting McCarron v. McCarron, 168 So. 3d 68, 76 (Ala. Civ. App. 2014)) (emphasis omitted). Because an itemized monthly budget based on the wife's expenses during the marriage was not required and because we conclude that

there was "'sufficient evidence from which the trial court [could have] reasonably infer[red] the costs associated with the marital standard of living,'" we cannot find error on this point. Knight, ___ So. 3d at ___ (quoting McCarron, 168 So. 3d at 76) (emphasis omitted).

The husband argues, with regard to the alimony award, that the wife is able to earn more than she currently earns as a part-time labor-and-delivery nurse. We recognize that a trial court should consider a party's earning ability, not just his or her income, in determining a periodic-alimony award. Rockett v. Rockett, 77 So. 3d 599, 603-04 (Ala. Civ. App. 2004). In the present case, the husband points out that, before the parties had children, the wife had earned substantially more than she was earning at the time of the trial. The evidence indicated that the wife had previously worked as an engineer until 2003 and that she had then worked for a short time as a pharmaceutical-sales representative before the parties had their first child. She testified that, at that time, the parties had agreed that she would stay home and raise their children. She testified that, since the time she had worked as an engineer, that field had changed such

that she no longer has the training to work in that field and that, now that she has children, she is no longer free to work the long hours required in her previous job as a pharmaceutical-sales representative. She testified that, while the parties had still been married, once the younger child had begun school, she had gone back to college and obtained a nursing degree so that she could work part-time as a labor-and-delivery nurse and earn extra money for the family. She testified that, since the parties had separated, she had attempted to obtain a full-time position as a labor-and-delivery nurse but had been unable to do so. The wife's nursing-unit supervisor testified that the wife is on a waiting list for full-time employment and that it may take her years to reach the top of that list. Under those facts, we cannot conclude that the wife is able to earn more than she was earning at the time of the trial. See, e.g., Dunn v. Dunn, 891 So. 2d 891, 896 (Ala. Civ. App. 2004) (holding that trial court did not err in finding that the wife was not voluntarily unemployed when she had primarily stayed home to rear the parties' children during the marriage and, after the

parties' separation, had chosen to work as a teacher instead of in another field in which she lacked training).

The husband also argues that, with the alimony award, the wife has more than enough funds to pay her monthly expenses but that he is left with a monthly deficit. The wife presented evidence indicating that her net income was $1,820 per month, that her monthly expenses for her and the children were $4,338, and that, therefore, she had a monthly deficit of $2,518. On the other hand, the husband presented evidence indicating that his net income is $7,048.49 per month and that his monthly expenses total $6,309.24. He argues that, after he pays his $1,398 child-support obligation and his $1,000 alimony obligation, he is left with a monthly deficit of $1,658.75. We note, however, that, after the wife's receipt of child support and alimony, she still has a $120 deficit.[1] The husband argues that the wife's monthly payment to

[1]The husband argues that because he was ordered to pay the Best Buy and USAA credit-card accounts, those payments should be subtracted from the wife's total monthly expenses. However, because we are holding that the judgment does not make the husband responsible for the Best Buy account and because we are reversing the judgment as to the USAA account, we decline to do so. The monthly payments on those accounts are not included in the husband's monthly expenses that he presented at the trial.

Furniture Row should not be included in her monthly expenses because, at the time of trial, there were only three monthly payments left owing on that account. We conclude, however, that the trial court did not err in considering the wife's needs as they existed at the time of the trial; we also note that, even if the Furniture Row payment of $115 is deducted from the wife's total monthly expenses, the wife still has a deficit. With regard to the husband's expenses, the wife points out in her brief to this court that the husband's listed expenses include $535 for a vehicle that is not his primary vehicle, as well as automobile insurance and maintenance related, presumably, to two vehicles, $400 for entertainment, and other expenses that she argues are not regular monthly expenses. The trial court, which was in the best position to judge the credibility of the witnesses, could have determined that the husband's expenses, which totaled almost $2,000 more than the expenses that the wife had listed for herself and the parties' two children, were artificially inflated. See, e.g., Marshall v. Marshall, 168 So. 3d 52, 60 (Ala. Civ. App. 2014) (noting that "the trial court, as the sole judge of the facts and of the credibility of the

witnesses, could have rejected ... testimony [relating to husband's expenses] on the ground that it was not credible").

Based on the foregoing, we cannot conclude that the trial court erred in its award of alimony to the wife.

B.

The husband next argues that the trial court erred in not awarding the parties joint physical custody of the children.

> "'When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. ...
>
> "'"'....'"
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> "'It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous. ...
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> "'... If custody has not previously been determined, then the "best interest of the child" standard is appropriate. Ex parte Couch, 521 So. 2d 987 (Ala. 1988)....'"

Lamb v. Lamb, 939 So. 2d 918, 921-22 (Ala. Civ. App. 2006) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)).

In Alexander v. Alexander, 65 So. 3d 958 (Ala. Civ. App. 2010), this court determined that the trial court had not erred in declining to award the parties' joint physical custody of the children when the parties "had proved to be unable to consensually reach [a custody] agreement, ... the trial court had been required to set a specific visitation schedule and to supervise it throughout the pendency of the divorce action," and "the parties had disagreed as to which extracurricular activities the child should attend, whether the child's ears should be pierced, and which playmates the child should visit after school." 65 So. 3d at 963.

Similarly, in the present case, the parties had been unable to agree on a custody or visitation arrangement. The wife requested that the husband be awarded "standard" visitation while the husband requested equal parenting times. Although the parties live in close proximity to one another, the husband suggested that the parties' marital problems had stemmed from the fact that they had completely different parenting styles and that they had not been able to cooperate in co-parenting the children. Further, the wife testified that she had been the children's primary caretaker, that the

husband had traveled often, that the husband did not interact well with the children, and that she was afraid for the children to be with the husband for extended periods because of his history of having an explosive temper with the children. Based on that evidence, we cannot conclude that the trial court erred in determining that joint physical custody would not be in the children's best interest. See Lamb, 939 So. 2d at 921-22; Alexander, 65 So. 3d at 963.

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it ordered the husband to pay the wife's attorney's fees that were charged on the parties' joint USAA MasterCard credit-card account, and we remand this cause for the trial court to enter a judgment requiring the wife to pay that debt. The judgment is affirmed in all other respects.

APPLICATION GRANTED; OPINION OF OCTOBER 21, 2016, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the rationale in part and concurs in the result, with writing.

THOMPSON, Presiding Judge, concurring in the rationale in part and concurring in the result.

The main opinion holds that, because Carrie Ann Cowperthwait ("the wife") had not made a claim for an attorney's fee, the trial court erred in ordering Michael T. Cowperthwait ("the husband") to pay that portion of a credit-card balance attributable to the payment of the wife's attorney's fee. Under the facts of this case, I agree with that result. However, I disagree with the main opinion's holding to the extent that it can be read as requiring a party to explicitly request an attorney's fee in a pleading before that party can be entitled to receive such relief.

I wish to point out that, at the trial, the husband explicitly objected to the issue of attorney's fees being tried by the consent of the parties and expressly refused to consent to the litigation of the issue. The record indicates that the wife had attempted to present evidence regarding her attorney's fee and the reasonableness of that fee. I note that in Cinader v. Cinader, 367 So. 2d 487, 488 (Ala. Civ. App. 1979), one of the cases the main opinion relies on in reaching its holding, this court held that the trial court had not erred in refusing to award an attorney's fee to the wife

in that case when the record indicated that her attorney had withdrawn after making an appearance "only through taking of a reference pendente lite" and that no evidence was presented as to the value of the attorney's services or whether he had even charged the wife. In Kelley v. Kelley, 414 So. 2d 126, 129 (Ala. Civ. App. 1982), this court reversed the trial court's award of an attorney's fee because the plaintiff had not requested such relief and the record was silent on the issue, meaning the issue had not been tried with the express or implied consent of the parties.

This case is distinguishable from both Cinader and Kelley because the wife attempted to introduce evidence as to the amount and reasonableness of her attorney's fee. Had the husband not timely objected, the wife would have sufficiently raised the issue of an attorney's fee to merit the trial court's consideration of the issue, even though she had not specifically made a request for an attorney's fee in her complaint. See Davis v. Blackstock, 160 So. 3d 310, 323 (Ala. Civ. App. 2014) (a claim for an attorney's fee was orally asserted at trial and tried by the implied consent of the parties pursuant to Rule 15(b), Ala. R. Civ. P.).