Rel: May 1, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180194

Gaylyn M. Horne-Ballard

v.

William R. Ballard

Appeal from Jefferson Circuit Court
(DR-16-901702)

On Application for Rehearing

THOMPSON, Presiding Judge.

The opinion of January 24, 2020, is withdrawn, and the following substituted therefor.

On October 31, 2016, William R. Ballard ("the husband") filed in the Jefferson Circuit Court ("the trial court") a

complaint seeking a divorce from Gaylyn M. Horne-Ballard ("the wife"). No children were born of the parties' marriage. In his complaint, the husband sought an equitable property division, an award of alimony in gross, and an attorney fee. The wife answered and counterclaimed for a divorce, also seeking an equitable property division and an award of an attorney fee.

The trial court conducted a trial at which evidence was presented ore tenus over the course of seven days, and, during that trial, it admitted into evidence numerous documentary exhibits. On August 1, 2018, the trial court entered a judgment divorcing the parties, dividing their marital property, awarding the husband alimony in gross, and awarding the husband an attorney fee. The wife filed a postjudgment motion. On October 16, 2018, the trial court amended its August 1, 2018, judgment; hereinafter, we refer to the August 1, 2018, judgment, as amended by the October 16, 2018,

postjudgment order, as "the divorce judgment."[1] The wife filed a timely notice of appeal.

The record indicates that the parties married on December 23, 2009, and that they separated in September 2016. The wife has a child from a previous marriage who was 4 years old when the parties married and was approximately 13 years old at the time of the entry of the divorce judgment; that child resided with the parties during their marriage.

The husband has a total of four children. The husband's three oldest children, who were born of his relationship with a previous wife, had reached the age of majority at the time of the entry of the divorce judgment. The husband also has a son who was 18 or 19 years old at the time of the entry of the divorce judgment. That son ("the teenaged son") was born of an extramarital relationship during the husband's first marriage.

[1]On July 17, 2018, the trial court entered a judgment divorcing the parties, but it subsequently entered an order on July 23, 2018, vacating that July 17, 2018, judgment as having been entered in error. Apparently because of the entry of that vacated July 17, 2018, judgment, the trial court titled the August 1, 2018, judgment as an "amended judgment" and titled the October 16, 2018, postjudgment order as the "second amended judgment."

When the parties married in 2009, the husband was employed as the president and general manager of a television station. In 2011, the husband's income was $411,665, and, in 2012, the husband's income totaled $1,537,615; some of the husband's 2012 income was from the sale of the husband's interest in a television business. The husband lost his employment at the television station on October 31, 2013, and he had received approximately $210,000 in income for 2013 at that time. The husband received a payout or bonus upon the termination of his employment in October 2013 in the net amount of $419,942.50.

The husband testified that, although he received consulting income of $23,582 in 2014, he had not been employed in his field again before the trial. The husband testified that, after he lost his employment in 2013, the parties agreed that he would manage the remodeling of their marital home and be the primary caregiver for the wife's child. The wife disputed that testimony.

The wife is an anesthesiologist. Her employment changed several times during the parties' marriage. The wife's income was $650,000 in 2011, $637,888 in 2012, $571,000 in

2013, and $563,545 in 2014. In January 2015, the wife opened her own private medical practice, Ballard Pain and Wellness ("BPW"). The husband testified that he was extensively involved in forming, opening, and operating BPW, but the wife disputed the amount of the husband's involvement. The wife's income from BPW in 2015 was $42,750, and her income from BPW in 2016 was $735,923. The husband received a $500 salary from BPW for only one month before the parties separated. However, the record indicates that he had used a company vehicle, a company credit card, and a gas card since BPW was opened and that he paid himself $25,000 in salary from BPW shortly after the parties separated.

The record also demonstrates that, when the husband lost his employment in October 2013, he initiated litigation in Florida ("the Florida child-support litigation") to reduce his $1,300 per month child-support obligation for the teenaged son. The parties do not dispute that, to hide assets for the purposes of the Florida child-support litigation, the husband moved almost all of his financial assets, including the $419,942.50 payout he received in 2013, into accounts held jointly in the names of the husband and the wife and that he

eventually moved all of those assets into accounts held solely in the wife's name. The husband testified that the wife agreed with his plan and method of hiding assets.

Each party alleged misconduct on the part of the other, and each presented evidence in support of those allegations. The wife alleged that, during the marriage, the husband had had an affair. The husband answered in the negative to questions regarding whether he had physically abused the wife. The wife admitted, during the trial, that she had had an affair in mid to late 2016. The wife also admitted that she had untruthfully denied that affair in her deposition and that she had changed her testimony only after her paramour had testified by way of deposition that the affair had occurred.

In its divorce judgment, the trial court ordered that the marital home be sold and the proceeds of that sale be divided equally between the parties, and it awarded the husband the proceeds of the sales of a lake house owned by the husband before the parties' marriage and of another property ("the Beckham Drive property") owned by the husband before the parties' marriage; in doing so, the trial court stated that it had taken into consideration the wife's payment of the

mortgage indebtedness on those properties in fashioning its alimony-in-gross award. The trial court awarded the wife sole ownership of BPW, denied the husband's claim for periodic alimony, and awarded the husband $550,000 as alimony in gross. The trial court also, among other things, divided the parties' financial assets.

I.

On appeal, the wife first argues that the trial court erred in failing to make a factual finding concerning its determination of the value of BPW, the medical practice awarded to her in the divorce judgment.[2] In support of her argument, the wife cites Shewbart v. Shewbart, 19 So. 3d 223 (Ala. Civ. App. 2009). In that case, the trial court, in pertinent part, made a finding in its divorce judgment that a business owned by the parties was valued at $14,000. The wife in that case argued that the trial court had erred in reaching its determination of the value of the business, and this court agreed, explaining:

> "The trial court accepted the husband's testimony that those assets were worth $14,000 and awarded the wife one-half of that amount, along with one-half of

[2]The wife has not challenged on appeal the trial court's determination that BPW is a marital asset.

> the moneys held in the bank account of the sole proprietorship. That valuation entirely ignores the income produced by the sole proprietorship.
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> "Based on the evidence before the trial court, it cannot be disputed that the sole proprietorship has provided a significant and consistent stream of income sufficient to support this family for many years and has consistently produced a profit. That substantial stream of income continued to the date of the trial, and the evidence indicates that it will continue into the future."

Shewbart v. Shewbart, 19 So. 3d at 232. This court noted that there are three recognized methods for determining the fair-market value of a privately held business, i.e., the income approach, the asset approach, and the market approach. Id. In reversing that part of the trial court's judgment addressing the valuation of the business, this court held that, although it was not directing what method the trial court should use to determine the value of the business, on remand the trial court was required, in determining valuation, to "assess some value to the business apart from the value of the materials used in the business." 19 So. 3d at 233.

In Blasdel v. Blasdel, 65 So. 3d 428 (Ala. Civ. App. 2010), the parties owned, among other things, a business in which the wife in that case had a 51% interest and the husband in that case had a 49% interest. An accountant who testified

stated that she was not qualified to value the business, and the parties submitted to the trial court financial documents "in an effort to present evidence of the value" of the business. 65 So. 3d at 431. The wife's evidence indicated that the parties had earned substantial income from the business, but the husband's testimony was that the business had a $100,000 negative net worth. 65 So. 3d at 432-33. In its judgment in that case, the trial court awarded the wife $100,000 for her interest in the business. The husband argued that that determination was not supported by the evidence, and this court agreed, stating:

> "Our review of the evidence presented by the parties fails to lead us to evidence supporting the trial court's judgment. Although the trial court is generally afforded broad discretion in making factual determinations in ore tenus proceedings, we are unable to ascertain, from our review of the record, how the trial court determined that the value of the wife's 51% interest in [the business] was $100,000. Accordingly, we must reverse that aspect of the divorce judgment and remand the cause with instructions to the trial court to reconsider its valuation of the wife's interest in [the business] and to enter a new judgment indicating the method by which the value of the wife's 51% interest in [the business] is determined."

Blasdel v. Blasdel, 65 So. 3d at 433.

This court, in both Shewbart v. Shewbart, supra, and Blasdel v. Blasdel, supra, held that, in those particular cases, the trial court's determination of valuation of a business was not supported by the evidence in the record. Neither of those cases stands for the proposition that a trial court is always required to make a finding with regard to a valuation of a marital asset or that it is reversible error for a trial court to fail to make such a determination.

The wife has not cited to any case, rule, or statute that requires a trial court in a divorce action to make a specific finding regarding the valuation of a marital asset such as BPW. In fact, our caselaw supports the opposite conclusion. "There is no requirement that a trial court make such a finding as part of a property division, and this court may presume that, in fashioning its property division and alimony award, the trial court made those findings necessary to support its judgment." K.W.M. v. P.N.M., 116 So. 3d 1179, 1192 (Ala. Civ. App. 2013). See also Rule 52(a), Ala. R. Civ. P. ("In all actions tried upon the facts without a jury ..., the [trial] court may upon written request and shall when required by statute, find the facts specially ...."); Swindle

v. Swindle, 157 So. 3d 983, 992 (Ala. Civ. App. 2014) ("With limited exceptions, the trial court is not required to provide findings of fact or to express, either orally on the record or within a writing, any or all of its reasoning for the decision it makes."); Alverson v. Alverson, 28 So. 3d 784, 789 (Ala. Civ. App. 2009) ("[I]n the absence of a statute requiring that specific findings of fact be made, a trial court is not required to make any specific factual findings in support of its judgment."). Given the authority cited above, and considering the argument in the wife's appellate brief, we hold that the wife has failed to demonstrate that the trial court erred in not making a specific finding regarding the value of BPW.[3]

II.

The wife also argues that the trial court erred in admitting into evidence the testimony of Michelle Parks, the

[3]In her reply brief, the wife argues that, in failing to make a factual determination of the value of BPW, the trial court "has insulated its judgment from review" because of the presumption of correctness afforded a judgment reached after a trial court receives ore tenus evidence. See TenEyck v. TenEyck, 885 So. 2d 146, 155 (Ala. Civ. App. 2003). As is discussed later in this opinion, however, caselaw does not support that argument. Zarr v. Zarr, 201 So. 3d 559, 566 (Ala. Civ. App. 2016)

husband's expert witness, who testified regarding the value of BPW. In her testimony, Parks testified that she is a certified public accountant and that she has been employed by Warren Averett, an accounting firm, for 15 years. Parks stated that she had been the head of Warren Averett's valuation-services division for three years. Parks testified regarding the method she used and the facts and figures upon which she relied in reaching her determination of the value of BPW. She explained that her estimate was based on a calculation of value, which differs from an opinion of value. Parks explained the differences between the two, stating that a calculation of value eliminates some "methodology" of calculations, which she did not believe were appropriate in this case, and that a calculation of value requires less speculation than does an opinion of value.

When the husband asked Parks about her determination of the value of BPW, the wife objected, arguing that Parks's calculation of value was not as thorough as an opinion of value and, that, therefore, Parks's determination of the value of BPW was not admissible under Rule 702, Ala. R. Evid. The trial court questioned Parks regarding whether the valuation

process Parks used was used regularly in her job of valuing assets in situations other than in a divorce context. Parks responded in the affirmative, and the trial court overruled the wife's objection, stating that the wife's objection "goes to ... how much weight and credibility [the trial court would] give" to Parks's testimony rather than to its admissibility under Rule 702. Thereafter, Parks testified that she believed that the fair-market value of BPW was $2,470,000 as of December 31, 2016. The wife cross-examined Parks regarding the merits of the methodology she used in reaching her determination of the value of BPW and the facts and figures on which she based that determination. The wife again objected to the submission into evidence of the exhibit summarizing Parks's determination of the value of BPW. The trial court again overruled that objection, stating that it would determine the weight and credibility of the evidence.[4]

[4]The wife's attorney, in objecting to the initial question concerning Parks's valuation of BPW, stated: "Can I ask the Court to do this? I mean, I don't want to just interrupt this whole examination. Can I, just for the record, to protect the record, could I ask the court to go ahead and hear what she's going to say?" When the court answered in the affirmative, the wife's attorney stated that, in order to "protect the record," he would cross-examine Parks, "[a]nd then I'm going to renew my objection, and then you can decide then; is that fair?" Neither party has addressed whether the wife's

The wife's expert witness, J. Wray Pearce, a certified public accountant with the accounting firm Pearce, Bevill, Leesburg, Moore, P.C., testified that he used an opinion-of-value methodology in valuing BPW, and he stated that the value of BPW was $241,000. Pearce explained that additional factors and calculations were used in reaching an opinion of value and that an opinion of value was a more thorough valuation methodology.

As indicated in the discussion of the previous issue, the trial court made no findings of fact regarding the valuation of BPW. In her brief submitted to this court, the wife appears to assume that, given the $550,000 alimony-in-gross award in favor of the husband, the trial court used the $2,470,000 valuation to which Parks testified in valuing BPW. For the purposes of addressing the wife's argument on this

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objections to Parks's testimony constituted a continuing objection such that the wife's argument on this issue is preserved for appellate review. See, generally, Crowne Invs., Inc. v. Reid, 740 So. 2d 400, 408 (Ala. 1999) ("If a question is repeated in a different form after the opponent has objected to the original question, then the opponent must make an additional objection in order to preserve error."). Out of an abundance of caution, we have interpreted the trial court's consideration of the wife's objection to Parks's testimony as granting a continuing objection.

issue, we assume, without deciding, that the trial court used Parks's valuation of BPW in determining its property division.

The wife argues on appeal that Parks's testimony and her calculation-of-value methodology for determining the value of BPW did not meet the requirements of Rule 702, Ala. R. Evid., which provides, in pertinent part:

> "(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

The wife argues in her appellate brief that an opinion of value is "much more exacting" than a calculation of value, and, she says, for that reason, a calculation of value should not be admissible under Rule 702(a) to support Parks's expert opinion in this action. In making her argument on this issue, the wife urges this court to reexamine the holding of Rohling v. Rohling, 266 So. 3d 51 (Ala. Civ. App. 2018). In that case, the husband argued, among other things, that the trial court in that case had erred in accepting into evidence an expert's valuation of a business under a "'calculation engagement' versus a 'valuation engagement.'" 266 So. 3d at

59. The trial court in that case stated that it "'very well understands that [the expert] only conducted the lesser "calculation engagement,"'" but it stated that it was clear that, "'based on the knowledge, skill, experience, training, and education of the proffered expert, [the expert] was properly qualified as an expert witness in those specific areas.'" Id. In rejecting the husband's argument that the trial court had erred in relying on the wife's expert's valuation, this court explained:

> "Both a calculation engagement and a valuation engagement result in an estimate of value; the valuation engagement requires the analyst to employ more procedures in reaching an estimate of value than a calculation engagement does. The undisputed evidence established that [the expert] performed his calculation in accordance with the standards for a calculation engagement contained in [acceptable standards described in the case]. Rule 702(a), Ala. R. Evid., provides:
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> > "'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.'
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> "There is no dispute that [the expert] is an expert in the field of valuing businesses. Pursuant to Rule 702(a), the trial court properly considered the fact that [the expert] had estimated the value of

> the dental lab pursuant to a calculation engagement rather than estimating it pursuant to a valuation engagement to be a factor bearing on the weight to be accorded [the expert's] estimate rather than a factor disqualifying [the expert's] estimate from consideration by the trial court. The trial court found that, despite the fact that [the expert] had estimated the value of the dental lab pursuant to a calculation engagement rather than estimating it pursuant to a valuation engagement, his estimate was nonetheless a reliable basis for determining the value of the dental lab. We cannot substitute our judgment for that of the trial court regarding the weight to be accorded [the expert's] estimate. See Woods [v. Woods, 653 So. 2d 312 (Ala. Civ. App. 1994)]."

Rohling v. Rohling, 266 So. 3d at 69-70.

The wife's argument concerning the reliability of a calculation of value, rather than an opinion of value, is similar to the argument asserted by the husband in Rohling, supra. In other words, the wife in this case and the husband in Rohling, supra, disputed the reliability of the differing valuation methods. The wife does not argue on appeal that Parks was not properly considered to be an expert witness; she does not challenge Parks's expertise or qualifications. Rather, the wife's argument on appeal criticizes the methodology used by Parks, and the wife contends that that methodology renders Parks's valuation of BPW as "speculation" and, thus, that it should not be admissible under Rule 702.

We decline the wife's request that this court overrule Rohling v. Rohling, supra, and make a determination as to which methodology is best in valuing assets in the context of a divorce action. Rather, determining the efficacy of a method of valuation is dependent on the facts, which is an issue within the province of the trial court. To the extent that the wife argues on appeal that some aspect of Parks's testimony was not based on reliable information, the wife thoroughly cross-examined Parks on the pertinent facts, which also impacted the weight to be afforded Parks's testimony. During the trial, the trial court properly ruled that Parks's evidence was admissible, and it stated that it would consider the wife's arguments regarding the methods of valuation in determining the weight it would give to that evidence. The evidence supports the conclusion that we have assumed the trial court reached, i.e., that the trial court relied on Parks's valuation of BPW in reaching its property division. As this court has previously stated, we "cannot substitute our judgment for that of the trial court regarding the weight to be accorded" to an expert witness's determination of value.

Rohling v. Rohling, 266 So. 3d at 70. The wife has not demonstrated error with regard to this issue.

III.

The wife next challenges the trial court's division between the parties of certain financial assets that had been placed solely in her name. The wife maintains that the husband should be barred from claiming an interest in those financial assets because they were placed in her name to shield those assets from being discovered in the Florida child-support litigation. The wife also contends that the trial court erred in dividing two financial accounts and in deeming certain promissory notes to be satisfied. The wife contends that the husband had "no equitable standing" to ask that the promissory notes he executed in her favor be deemed satisfied.

The record indicates that the parties maintained separate financial accounts until late 2013, when the husband lost his employment and initiated the Florida child-support litigation. The husband used $50,000 of the $419,942.50 payout he received in October 2013 from his former employer toward the mortgage indebtedness on either the lake house or the Beckham Drive

property; the husband stated that he could not recall toward which property's mortgage indebtedness he made that payment. The husband placed approximately $370,000 of the payout amount in a TD Ameritrade account ("account 4951") that the husband had owned before the parties' marriage, and the husband placed the wife's name on account 4951 as a joint owner. In late 2013, $468,392 was transferred from account 4951 to another TD Ameritrade account ("account 8780") that was titled solely in the wife's name. On March 5, 2014, an LPL Financial account ending in -7278 ("the LPL Financial account") was opened in the wife's name, and on April 21, 2014, $380,703 was transferred from account 8780 into the LPL Financial account. The testimony of both the husband and the wife establish that amounts from account 8780 and the LPL Financial account were spent on the marital home and other marital expenses or purchases.

The husband testified during the hearing that he placed those financial assets in the wife's name to hide those assets from consideration in the Florida child-support litigation. The wife testified that she paid $39,000 in legal fees to assist the husband in seeking to lower his child-support

obligation.[5] On questioning, the wife did not concede that she had "participated" in the husband's fraudulent hiding of his assets. She stated that, in "receiving" substantial sums of money that were placed in her name, she was "doing what [her] husband asked [her] to do." In response to a question regarding whether she had had discussions with the husband about putting the financial assets solely in her name to hide those assets for the purposes of the Florida child-support litigation, the wife answered: "I believe so."

The husband testified that he had executed four promissory notes to the wife in exchange for her financial contributions toward paying the mortgage indebtedness on the lake house and Beckham Drive property, for her paying some of his child-support obligation, and for her paying legal fees on his behalf for his prosecution of the Florida child-support litigation. The amounts of those four promissory notes totaled $68,140.43. The husband claimed that he had signed those notes because it would benefit him in hiding assets in

[5]The Florida child-support litigation resulted in the husband's child-support obligation being reduced to $500 per month. As noted by the wife, the $39,000 in legal fees amounted to approximately the same amount the husband would have paid in child support had he not engaged in the Florida child-support litigation.

the Florida child-support litigation; he further asserted that he and the wife had agreed that he did not need to repay those promissory notes.

In the divorce judgment, in pertinent part, the trial court awarded the money in account 8780 and in two other financial accounts to the wife; the amounts in those accounts totaled approximately $475,000. The trial court ordered that the approximately $241,000 in the LPL Financial account be divided equally between the parties; it also divided between the parties an account not at issue on appeal.[6] In arguing that the trial court erred in dividing the LPL Financial account, the wife contends that the trial court "allowed the husband to benefit from a fraudulent scheme." She maintains that the husband should not be allowed to benefit from his conduct in hiding assets for the purpose of lowering his child-support obligation in the Florida child-support litigation.

The wife relies on Webb v. Webb, 260 Ala. 426, 70 So. 2d 639 (1954), in which the husband in that case transferred title to two parcels of real property and a vehicle to his

[6]The wife makes no argument pertaining to the trial court's division of an LPL Financial account ending in -8195.

wife to protect that property from creditors. The attorney who drafted the deeds and a bill of sale transferring property to the wife in that case testified that there had been no discussion regarding the reason for those transfers, and the wife in the case testified that nothing had been said about transferring the property to her for a limited purpose. 260 Ala. at 431, 70 So. 2d at 642-43. The trial court in Webb v. Webb entered a judgment divesting the wife of any interest in the property at issue. Our supreme court reversed, rejecting the argument of the husband in that case that a constructive trust in his favor had been imposed on the various items of property. In reversing the trial court's judgment, our supreme court stated:

> "Another conclusive reason why the husband cannot prevail is because the transfer of the property to his wife was, according to his own testimony, for the purpose of protecting it from existing claims of his creditors. Being so, he has no standing in equity to have the beneficial interest in the property declared in his favor. A fraudulent conveyance is operative as between the parties, and only those who are or may be injured by the fraudulent transaction may avail themselves of the fraud."

Webb v. Webb, 260 Ala. at 432, 70 So. 2d at 643.

The wife relies on that part of Webb v. Webb that states that "[a] fraudulent conveyance is operative as between the parties, and only those who are or may be injured by the fraudulent transaction may avail themselves of the fraud." 260 Ala. at 432, 70 So. 2d at 643. She contends that, once the LPL Financial account was created solely in her name, the husband could not assert a claim to the money in that account. Initially, we note that in Webb v. Webb, supra, the husband sought to divest the wife of her entire interest to the property at issue. In this case, however, the husband did not seek to divest the wife of title to the financial assets; rather, his position was that those assets, although titled solely in the wife's name, were subject to division as marital assets. It is clear from the facts of this case that the LPL Financial account, and the other financial accounts, were created using marital property and that the LPL Financial account was used for the common benefit of the parties during the marriage. We conclude that, assuming other facts or legal claims would not bar the husband's claim to the LPL Financial account, it is subject to division as a marital asset. § 30-2-

51(a), Ala. Code 1975; Culver v. Culver, 199 So. 3d 772, 777 (Ala. Civ. App. 2016).

The wife's primary argument with regard to the LPL Financial account is that the husband's conduct was similar to that of the husband in Webb v. Webb, supra, and that, therefore, the trial court's award to the husband of a portion of the LPL Financial account should be reversed. We conclude, however, that the facts of this case distinguish it from the situation in Webb v. Webb, supra. A review of the testimony in the record reveals evidence supporting the conclusion that the wife knew of the husband's fraudulent hiding of his financial assets for the purposes of lowering his child-support obligation and that the wife was fully aware that his transfer of those financial assets to her was in furtherance of that fraud. The trial court could well have interpreted the wife's testimony as establishing that she was an active and willing participant in the husband's hiding assets from the mother of his teenaged son and in supporting the husband's fraudulent concealment of assets in furtherance of the husband's claims in the Florida child-support litigation.

"[I]t is clear that the parties presented conflicting versions of events that were open to interpretation by the trial court." Frederick v. Frederick, 92 So. 3d 792, 798 (Ala. Civ. App. 2012).

> "'In ore tenus proceedings the trial court is the sole judge of the facts and of the credibility of witnesses.' Driver v. Hice, 618 So. 2d [129,] 131 [(Ala. Civ. App. 1993)]. In New Properties, L.L.C. v. Stewart, 905 So. 2d 797 (Ala. 2004), our supreme court stated:
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> > "'[W]hen a trial court makes no specific findings of fact, "this Court will assume that the trial judge made those findings necessary to support the judgment." Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992). Under the ore tenus rule, "'appellate courts are not allowed to substitute their own judgment for that of the trial court if the trial court's decision is supported by reasonable inferences to be drawn from the evidence.'" Yates v. El Bethel Primitive Baptist Church, 847 So. 2d 331, 345 (Ala. 2002) (quoting Ex parte Pielach, 681 So. 2d 154, 155 (Ala. 1996)).'
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> "905 So. 2d at 799."

Frederick v. Frederick, 92 So. 3d at 798. When a trial court receives ore tenus evidence, its judgment based on that evidence is entitled to a presumption of correctness on appeal and will not be reversed absent a showing that the trial court

exceeded its discretion or that the judgment is so unsupported by the evidence as to be plainly and palpably wrong. Scholl v. Parsons, 655 So. 2d 1060, 1062 (Ala. Civ. App. 1995). This "presumption of correctness is based in part on the trial court's unique ability to observe the parties and the witnesses and to evaluate their credibility and demeanor." Littleton v. Littleton, 741 So. 2d 1083, 1085 (Ala. Civ. App. 1999). This court is not permitted to reweigh the evidence on appeal and substitute its judgment for that of the trial court. Somers v. McCoy, 777 So. 2d 141, 142 (Ala. Civ. App. 2000). Rather, this court must defer to the inferences and determinations reached by the trial court.

Further, this court will not presume that the trial court was unaware of the law, i.e., the precedent established in Webb v. Webb, supra. Our courts have held that "'[w]e presume that trial court judges know and follow the law.'" Anderson v. Anderson, 199 So. 3d 66, 69 (Ala. Civ. App. 2015) (quoting Ex parte Atchley, 936 So. 2d 513, 516 (Ala. 2006)); see also Brewer v. Hatcher Limousine Serv., Inc., 708 So. 2d 163, 166 (Ala. Civ. App. 1997) (a trial court is presumed to know the law). The wife asserted, among other things, her argument

based on Webb v. Webb in her postjudgment motion, on which the trial court conducted a hearing. The trial court clearly considered the wife's arguments in her postjudgment motion, as is evidenced by the trial court's changes to its August 1, 2018, judgment in the October 16, 2018, postjudgment order. That further supports the conclusion that the trial court was well aware of applicable law and that it determined that, given the facts of this case, the holding of Webb v. Webb, supra, also applied to bar the wife's claim to sole possession of the LPL Financial account.

When viewed with a presumption in favor of the trial court's judgment, the evidence supports a determination that the wife participated in and furthered the fraudulent concealment of assets for the purposes of supporting the husband's claims in the Florida child-support litigation. In arguing before this court that the trial court erred in refusing to award the entirety of the LPL Financial account to her, the wife is asking this court to allow her to avail herself of the fraudulent transfers that she admitted she knew were accomplished to conceal assets for the purpose of decreasing financial support for the husband's teenaged son.

"In a divorce action, one who seeks equity must invoke equity with clean hands." Burson v. Burson, 363 So. 2d 778, 781 (Ala. Civ. App. 1978). See also Hilson v. Hilson, 598 So. 2d 955, 956 (Ala. Civ. App. 1992) ("The equitable principle of 'clean hands' or that 'he who seeks equity must do equity' is still appropriately viable even though the forms of common law equity actions have been deleted from practice.").

> "'The purpose of the clean hands doctrine is to prevent a party from asserting his, her, or its rights under the law when the party's own wrongful conduct renders the assertion of such legal rights "contrary to equity and good conscience."' J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999) (quoting Draughon v. General Fin. Credit Corp., 362 So. 2d 880, 884 (Ala. 1978)). It is well settled that the decision whether to apply the clean-hands doctrine is within the sound discretion of the trial court. Borcicky v. Borcicky, 763 So. 2d 265 (Ala. Civ. App. 2000); Grant v. Smith, 661 So. 2d 752 (Ala. Civ. App. 1994)."

Burkett v. Gresham, 888 So. 2d 505, 509 (Ala. Civ. App. 2004).

That part of the trial court's judgment that divides the LPL Financial account equally between the parties operates to prevent either party from receiving the sole benefit of their hiding of financial assets for the purpose of lowering the husband's child-support obligation. See, e.g., Carter v. Carter, 666 So. 2d 28, 30 (Ala. Civ. App. 1995) ("Because

trial courts are presumed to know and follow the law, we must presume the trial court considered the issue and decided not to award the wife any portion of the husband's retirement.").

The wife's argument on appeal with regard to the promissory notes executed by the husband to her is also unsupportable for the same reason. The divorce judgment provides that "[t]he promissory notes previously executed by [the husband] to [the wife] are considered satisfied and paid in full and are taken into consideration by the court in its settling of a property settlement amount in Paragraph 14, below." The divorce judgment clearly states that the promissory notes are satisfied and that the trial court considered the amounts of those notes in determining its alimony-in-gross award. The trial court could have concluded that the wife does not have clean hands with regard to those promissory notes.

This court does not condone the conduct of either of the parties to this action with regard to their concealing assets for the purpose of lowering the husband's child-support obligation in the Florida child-support litigation. We hold that the trial court's determinations that the financial

assets subject to the parties' fraud were divisible and that the promissory notes were satisfied as a part of the property division to be equitable decisions by the trial court under the specific facts of this case and as between the parties to this appeal.

IV.

The wife also argues that that part of the trial court's property division concerning the disposition of the parties' real property was inequitable. In its judgment, the trial court ordered the parties' marital home sold and the proceeds divided equally between the parties. The trial court also awarded the husband the proceeds of the sale of the lake house and the proceeds of the sale of the Beckham Drive property.

The wife argues that the trial court did not consider the lake house and the Beckham Drive properties to be marital property. She contends that the trial court erroneously concluded that she had no interest in those properties because the husband had owned those properties before the marriage.

> "The separate estate of the parties in a divorce proceeding includes property owned prior to the marriage and property received by gift or inheritance during the marriage. § 30-2-51(a), Ala. Code 1975. Although marital property generally includes property purchased or otherwise accumulated

> by the parties during the marriage, it may also include the property acquired before the marriage or received by gift or inheritance during the marriage when it is used, or income from it is used, regularly for the common benefit of the parties during their marriage. See § 30-2-51(a), Ala. Code 1975."

Nichols v. Nichols, 824 So. 2d 797, 802 (Ala. Civ. App. 2001).

There does not appear to be any dispute that the lake house and the Beckham Drive property were used for the common benefit of parties during the marriage and, therefore, that those properties were marital property subject to division. More significantly, the clear language of the trial court's divorce judgment does not support the wife's argument; that language indicates that the trial court determined the lake house and the Beckham Drive properties to be marital assets subject to division. The trial court noted in its awards pertaining to the lake house and the Beckham Drive property that the wife had paid the mortgages on those properties during periods when the husband was not employed. The trial court further stated that "[t]he court has taken that testimony into consideration in setting the property settlement award hereinbelow." The trial court reiterated those statements, i.e., that it had considered the wife's

financial contributions toward the indebtedness on those properties, later in its divorce judgment in awarding a financial account to the husband. It is clear that the trial court considered the parties' real estate, including the lake house and the Beckham Drive property, to be marital assets subject to division in the divorce action.

The wife contends in her appellate brief that because the money used for paying the mortgage on and for renovating the marital home came from accounts in her name,[7] she should "receive a disproportionate distribution from the sale" of the marital home. The wife also argues that she should have been awarded a percentage of the proceeds of the sales of the lake house and the Beckham Drive property. Those arguments ignore the trial court's statements indicating that it had considered the wife's interest in those assets in fashioning its overall property division.

In her appellate brief, the wife cites generally to Zarr v. Zarr, 201 So. 3d 559 (Ala. Civ. App. 2016), and

[7]The record indicates that some of the money from the wife's banking account used to pay the mortgage on and for renovations to the marital home came from amounts placed in other accounts in the wife's name to shield that money from discovery in the Florida child-support litigation.

acknowledges cursorily that "the division of the marital estate does not have to be equal, just equitable under the circumstances." She argues that the trial court should have awarded her an interest in both the lake house and the Beckham Drive property and that she should have been awarded a greater interest in the marital home. In essence, the wife has asked this court to conduct a piecemeal analysis of the equitable distribution of only one part of the trial court's property division in its divorce judgment.

In examining the equity of a trial court's judgment, an appellate court must consider the entirety of the property division, any alimony-in-gross award, and any award of periodic alimony. Barnes v. Barnes, 521 So. 2d 58, 60 (Ala. Civ. App. 1988). "'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.'" Ex parte Yost, 775 So. 3d 794, 797 (Ala. 2000) (quoting Kennedy v. Kennedy, 743 So. 2d 487, 489 (Ala. Civ. App. 1999)).

> "This court is mindful of our supreme court's admonition that, when reviewing a property division, we are not to substitute our judgment for that of the trial court. Ex parte Durbin, 818 So. 2d 404,

> 409 (Ala. 2001); Ex parte Drummond, 785 So. 2d 358, 363 (Ala. 2000). As mentioned above, the trial court may consider several factors, including the parties' respective present and future earning capacities, their ages and health, their conduct, the duration of the marriage, and the value and type of marital property, when dividing the marital property."

TenEyck v. TenEyck, 885 So. 2d 146, 155 (Ala. Civ. App. 2003). See also Zarr v. Zarr, 201 So. 3d at 565 (setting forth the same criteria as factors to be considered and analyzed in reviewing a property division and periodic-alimony award).

As the husband points out in his brief submitted to this court, the wife's argument on this issue pertains only to the equity of the division of the parties' real property and does not address the property division as a whole or any of the factors set forth in TenEyck v. TenEyck, supra. In her reply brief responding to the husband's argument, the wife contends that it is "impossible" to evaluate the property division because the trial court did not determine the value of BPW. The wife also contends that the trial court was "silent" on whether the lake house and the Beckham Drive property constitute marital assets; we have rejected that argument. However, the wife has made assumptions regarding the trial court's valuation of BPW in asserting her arguments on appeal.

As we have held already, the trial court was not required to make specific findings pertaining to the valuations of the parties' marital assets, and its failure to make such findings does not excuse the wife, as the appellant, from asserting an argument concerning the equity of the overall property division. See Zarr v. Zarr, 201 So. 3d at 566 ("The evidence regarding the value of the parties' property was in dispute, and the trial court made no express findings regarding the value of that property. Therefore, '[w]e must view the evidence [regarding the value of the parties' property] in the light most favorable to the trial court's judgment.'" (quoting Williams v. Williams, 905 So. 2d 820, 827 (Ala. Civ. App. 2004))).

The record on appeal in this matter is 10 volumes in length, contains more than 1,500 pages of transcript, and includes voluminous exhibits separately. The wife has not attempted, in either her appellant's brief or her reply brief, to detail for this court the property awarded to each party and the approximate values of that property, to compare the percentages of the overall marital property awarded to the parties, or to address the facts as they pertain to the

factors relevant to a property division. See TenEyck v. TenEyck, supra; Zarr v. Zarr, supra. Evidence pertaining to many of those factors are contained in the record on appeal. Significantly, both parties alleged that the other had engaged in misconduct that had brought about the end of the marriage. Given the record, that factor could have impacted the overall property division and award of alimony in gross. See Ex parte Yost, 775 So. 2d at 797 ("When the court is fashioning a property division, 'the conduct of the parties and fault with regard to the breakdown of the marriage are ... factors for the trial court to consider, even where the parties are divorced on the grounds of incompatibility.' Smith v. Smith, 727 So. 2d 113, 116 (Ala. Civ. App. 1998)."). "It is well established that it is not the function of an appellate court to create, research, or argue an issue on behalf of the appellant." Gonzalez v. Blue Cross/Blue Shield of Alabama, 760 So. 2d 878, 883 (Ala. Civ. App. 2000).

Issues not raised in an appellant's brief are deemed to have been waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."). In failing to address the

equity of the property division and alimony-in-gross award as a whole, the wife has failed to demonstrate that the trial court's failure to award her a percentage of the proceeds from the sales of some of the parties' real-estate assets impacted her substantial rights. Rule 45, Ala. R. App. P., provides that "[n]o judgment may be reversed ... unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

V.

The wife's final argument is that the trial court erred in awarding the husband an attorney fee. The record indicates that, in support of their respective claims for an award of an attorney fee, the parties stipulated to the qualification of their respective attorneys. The husband's attorney submitted evidence indicating that the husband had incurred a total bill of $69,039.39 in attorney fees and costs. In its divorce judgment, the trial court awarded the husband a $65,000 attorney fee.

The wife acknowledges that, in setting an attorney-fee award, a trial court must consider a number of factors and that a trial court's fee award is a matter of discretion.

> "'"'Whether to award an attorney fee in a domestic relations case is within the sound discretion of the trial court and, absent an abuse of that discretion, its ruling on that question will not be reversed. Thompson v. Thompson, 650 So. 2d 928 (Ala. Civ. App. 1994). "Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney." Figures v. Figures, 624 So. 2d 188, 191 (Ala. Civ. App. 1993). Additionally, a trial court is presumed to have knowledge from which it may set a reasonable attorney fee

> even when there is no evidence as to the reasonableness of the attorney fee. Taylor v. Taylor, 486 So. 2d 1294 (Ala. Civ. App. 1986).'
>
> "'"Glover v. Glover, 678 So. 2d 174, 176 (Ala. Civ. App. 1996)."
>
> "'Frazier v. Curry, 104 So. 3d 220, 228 (Ala. Civ. App. 2012).'
>
> "[Dubose v. Dubose, 172 So. 3d [233,] 245–46 [(Ala. Civ. App. 2014)]. See also Deas v. Deas, 747 So. 2d 332, 337 (Ala. Civ. App. 1999) ('In determining whether to award an attorney fee [in a divorce action], the trial court considers equities similar to those which govern the division of property -- the earning capacity of the parties, their financial circumstances, and the results of the litigation.')."

Dubose v. Dubose, 230 So. 3d 1138, 1144 (Ala. Civ. App. 2016).

The wife contends that because the husband has sold certain assets to pay his attorney the vast majority of his attorney-fee bill, he should be required to pay the last approximately $900 owed to the attorney. However, the wife has cited no authority supporting a conclusion that a trial court or this court should consider whether an attorney has been paid or whether an attorney-fee bill is outstanding in determining the equity of an attorney-fee award. With regard to the factors the courts may consider, the wife points out

that the husband began working at a job with an annual salary of more than $200,000 shortly after the trial in this matter. The wife contends that the husband does not need a "generous" award of an attorney fee. However, the wife has not addressed the parties' respective financial circumstances or the results of the divorce litigation. The husband points out in his brief submitted on appeal that the wife has also failed to address the issue of the conduct of the parties; he cites several facts that could support a determination that the wife's conduct impacted the trial court's determination of the attorney-fee award.

In his affidavit submitted in support of the husband's request for an attorney fee, the husband's attorney explained:

> "Since being engaged for representation in this divorce, there have been numerous conferences, attending mediation, various hearings and motions to attend, numerous email communications with client and the [wife's] three (3) attorneys that she had representing her at different times during the case, completing discovery responses, preparation for parties' depositions plus three (3) additional depositions, drafting of numerous pleadings, conferences with opposing counsel, preparation for and attending the trial over a seven (7) day period in October, November, and December 2017, as well as drafting a proposed judgment and written argument at the request of the [trial] court.

> "There has been a total of One Hundred and Ninety-Five (195) hours incurred through the filing of this affidavit. My billing rate is $350 per hour. That a total of $789.39 in expenses were incurred ...."

Given the history of this litigation, the record on appeal, the arguments of the parties with regard to the factors set forth in Dubose v. Dubose, supra, and the discretion afforded the trial court, we cannot say that the wife has demonstrated that the trial court erred in awarding the husband the attorney fee.

The judgment of the trial court is affirmed.

APPLICATION OVERRULED; OPINION OF JANUARY 24, 2020, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Donaldson, Edwards, and Hanson, JJ., concur.

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

MOORE, Judge, concurring in part and concurring in the result.

I concur in all respects with parts II, IV, and V of the main opinion. I concur in the result as to parts I and III of the main opinion and write separately to explain my reasons for doing so.

In part I, the main opinion addresses the argument of Gaylyn M. Horne-Ballard ("the wife") that the Jefferson Circuit Court ("the trial court") committed reversible error in failing to make a specific finding regarding the value of her medical practice, Ballard Pain and Wellness ("BPW").

> "Generally, in the absence of specific findings of fact, this court will assume that the trial court made those findings necessary to support its judgment. See Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001). However, when, after reviewing the record and the language of the judgment, this court is unable to determine the precise nature of the factual findings of the trial court as to the classification and value of marital property, thereby inhibiting this court's ability to determine whether a property division is equitable, this court should remand the cause for further clarification from the trial court."

Wilson v. Wilson, 93 So. 3d 122, 128-29 (Ala. Civ. App. 2011).

In this case, the trial court clearly treated BPW as a marital asset subject to division, a point not contested by the wife. The wife and William R. Ballard ("the husband")

presented competing evidence as to the value of BPW -- the wife's expert testified to a value of $241,000, and Michelle Parks, the accounting expert for the husband, testified to a value of $2,470,000. The trial court awarded the husband $550,000 as alimony in gross to cover his interest in BPW as well as his interest in the other assets awarded to the wife. The trial court obviously determined that the value of BPW exceeded the amount represented by the wife's expert and determined that the value of BPW was more in line with the testimony presented by Parks. This court has not been hampered in its review of the case by the lack of a specific finding of the value of BPW. I therefore agree with the main opinion that the judgment should not be reversed based on the failure of the trial court to specifically express its determination of the value of BPW.

The wife also argues that the trial court erred to reversal in admitting the testimony of Parks regarding her "calculation of value" of BPW. Less than two years ago, this court held in Rohling v. Rohling, 266 So. 3d 51 (Ala. Civ. App. 2018), that a trial court can admit a calculation of value made by an expert witness when it is relevant to the

issue of the valuation of marital property in a divorce case. I have considered the arguments made by the wife and have determined that they do not merit overruling Rohling, which requires the court to defer to the discretion of the trial court regarding the weight to be given a calculation of value. Accordingly, I agree with the main opinion that the trial court did not err to reversal in admitting Parks's testimony.

I concur in the result as to Part III of the main opinion. The record shows that the husband fathered a child out of wedlock during a former marriage. The husband had been ordered to support that child by a Florida court. When the husband lost his employment in 2013, he petitioned the Florida court to reduce his child-support obligation. When his employment was terminated, the husband received a payout of $419,942.50. The husband placed approximately $370,000 of those proceeds in a TD Ameritrade account that he had owned before the parties' marriage, and the husband added the wife as a joint owner of that account. In late 2013, the parties transferred $468,392 from that TD Ameritrade account into a TD Ameritrade account owned solely by the wife. In 2014, the wife opened an LPL Financial account in her own name and

transferred $380,703 from her TD Ameritrade account into the LPL Financial account.

The husband testified that those transactions were made in order to conceal assets from the Florida court overseeing his child-support-modification action. The Florida court ultimately reduced the husband's monthly child-support obligation from $1,300 to $500. The wife indicated that she had discussed with the husband the illicit purpose behind the transactions and that, by agreeing to the transactions, she "was doing what [her] husband asked [her] to do."

The husband also testified that, after he lost his employment in 2013, the wife had helped him pay mortgage payments and expenses on two pieces of real property that he had owned before their marriage. He testified that the wife had also paid child support and litigation expenses on his behalf. The husband signed four promissory notes in favor of the wife in relation to those transactions, totaling $68,140.43, but, he said, he and the wife had agreed that the notes would not be paid. He testified that he had signed the promissory notes because it would benefit him in the Florida child-support litigation.

In the final judgment, the trial court classified the LPL Financial account, containing approximately $241,000, as marital property and ordered that it be divided equally between the parties. The trial court also stated that the four promissory notes executed by the husband in favor of the wife were to be considered "satisfied and paid in full," although, it stated, it had taken those notes "into consideration" when awarding the husband $550,000 in alimony in gross. Citing Webb v. Webb, 260 Ala. 426, 70 So. 2d 639 (1954), the wife argues that trial court erred in awarding the husband any part of the LPL Financial account and in treating the promissory notes as satisfied.

In Webb, the husband in that case deeded the marital homestead, a vacant lot, and a truck to his wife during their marriage for the fraudulent purpose of protecting those assets from the claims of his creditors. The wife disclaimed any knowledge of the reasons for the transfers. The supreme court determined that the husband could not recover the real property under the theory of a resulting trust and that the husband had not rebutted the presumption that his interest in

the truck had been transferred to the wife as a gift. The supreme court then stated:

> "Another conclusive reason why the husband cannot prevail is because the transfer of the property to his wife was, according to his own testimony, for the purpose of protecting it from existing claims of his creditors. Being so, he has no standing in equity to have the beneficial interest in the property declared in his favor. A fraudulent conveyance is operative as between the parties, and only those who are or may be injured by the fraudulent transaction may avail themselves of the fraud."

260 Ala. at 432, 70 So. 2d at 643.

Based on Webb, the wife in this case argues that the husband has no standing in equity to have any beneficial interest in the LPL Financial account declared in his favor. The wife also contends that the promissory notes are operative between the parties. The main opinion rejects those arguments under the theory that, because the wife participated in the fraudulent scheme, the trial court could have relied on the unclean-hands doctrine to deny her claim that the LPL Financial account was her separate property and that the promissory notes should be enforced.

Notably, the main opinion does not cite any legal authority to support its legal conclusion that the unclean-

hands doctrine bars property knowingly received by a spouse through a fraudulent conveyance from being treated as separate property. The law in Alabama is well settled that when parties are in pari delicto, i.e., are joint participants in a fraudulent conveyance, the conveyance shall remain in effect as between them, even if that results in one party receiving an unfair or unjust windfall. See Matthews v. Matthews, 292 Ala. 1, 288 So. 2d 110 (1973). Nevertheless, I agree that, under the peculiar circumstances of this case, Webb and Matthews do not require reversal of the judgment of the trial court.

Applying Webb and Matthews, the husband's conveyance of his funds to the wife in furtherance of his fraudulent scheme would be binding on the husband. The funds became the separate property of the wife when she accepted the funds as a "gift," ultimately placing those funds in her LPL Financial account. However, the record shows that the wife thereafter regularly used the funds in the account to pay marital bills. Thus, the separate property of the wife was transmuted into marital property subject to division. See Ala. Code 1975, § 30-2-51(a) (authorizing a divorce court, when equitably

dividing the marital estate, to "take into consideration any property acquired ... by ... gift ... if the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage"); see also Bushnell v. Bushnell, 713 So. 2d 962 (Ala. Civ. App. 1997) (treating funds inherited by husband and placed into financial account regularly used for benefit of the parties during the marriage as marital property). Accordingly, the trial court did not violate Webb and Matthews so as to warrant reversal of the judgment by treating the LPL Financial account as marital property subject to equitable division.

In Matthews, supra, the supreme court followed Glover v. Walker, 107 Ala. 540, 545, 18 So. 251, 253 (1895), which holds: "It is well settled, that conveyances, or gifts, made to hinder, delay, or defraud creditors, are valid and operative between the parties when fully consummated, and that neither party can rescind or defeat them." (Emphasis added.) In this case, the promissory notes remained executory at the time of the divorce trial. A court of equity may refuse specific performance of an executory contract made in

furtherance of fraud. See Roach v. Bynum, 437 So. 2d 69 (Ala. 1983). Webb did not concern an executory contract; rather, it concerned a series of executed conveyances, and I find it distinguishable on that basis. Thus, I agree that the trial court did not err when, essentially, it refused to enforce the terms of the promissory notes, which, the record shows, were made solely for the purpose of defrauding the Florida court.