REL: June 26, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180718

Joseph Messina

v.

Christine Agee

2180733

Christine Agee

v.

Joseph Messina

Appeals from Jefferson Circuit Court
(DR-04-792.01)

On Applications for Rehearing

MOORE, Judge.

This court's opinion of April 17, 2020, is withdrawn, and the following is substituted therefor.

Joseph Messina ("the former husband") appeals from a judgment entered by the Jefferson Circuit Court ("the trial court") in a postdivorce enforcement action. Christine Agee ("the former wife") cross-appeals to the extent that the trial court declined to award her interest on the judgment entered in her favor. As to the appeal, we affirm the trial court's judgment. With regard to the cross-appeal, we reverse the trial court's judgment and remand the cause.

Background

The parties married in September 1995. The former wife filed a complaint for a divorce in 2004. On July 25, 2006, Judge R.A. "Sonny" Ferguson, Jr., entered a judgment divorcing the parties ("the divorce judgment").

Paragraph 18 of the divorce judgment provides as follows:

> "18. That [the former wife] shall maintain and name the minor child of the parties irrevocable beneficiary of the life insurance policy presently maintained on her life in the amount of Three Hundred Fifty Thousand Dollars ($350,000.00) until the said minor child shall reach majority, marry or become self-supporting. Said insurance policy shall not be assigned or otherwise further encumbered.

> Further, [the former wife] is awarded ownership of [the former husband]'s American Express policy."

Paragraph 30 of the divorce judgment provides as follows:

> "30. That [the former wife] is awarded her Wachovia 401(k) account and all other retirement accounts in her name."

Paragraph 33 of the divorce judgment provides as follows:

> "33. [The former wife] is awarded the sum of Fifty Nine Thousand Seven Hundred Fifty Dollars ($59,750.00) from the parties['][1] American Express [i]nvestment account to be transferred within thirty (30) days of this Order and the [former husband] is awarded the remaining balance."

The former wife filed a postjudgment motion to amend the divorce judgment, which Judge Ferguson granted, making no material changes to the foregoing provisions. The former husband did not file a postjudgment motion or appeal the divorce judgment.

On July 15, 2016, the former wife filed a petition for a rule nisi or, in the alternative, for an accounting and the entry of a judgment in her favor ("the enforcement action"). She asserted that the former husband had paid her only $16,156.04 toward the $59,750 that she had been awarded in

[1]The judgment did not contain an apostrophe, but, in the context used, it is apparent that Judge Ferguson intended the plural possessive term "parties'," so we have made the appropriate grammatical change for purposes of this opinion.

paragraph 33 of the divorce judgment. The former husband answered the former wife's petition on July 25, 2016, denying the material allegations of the petition. The enforcement action was assigned to Judge Nakita R. Blocton, a successor judge to Judge Ferguson, who had retired from the bench in 2011. Judge Blocton scheduled a trial on the petition for August 16, 2018.

At the trial of the enforcement action, the former wife and the former husband testified. The parties testified similarly regarding the following facts. The parties had maintained an American Express investment account ("the investment account"), which was an umbrella account. The investment account consisted of numerous subaccounts, none of which were owned jointly. The subaccounts owned exclusively by the former wife included the two policies referred to in paragraph 18 of the divorce judgment, which were both life-insurance policies, and two individual retirement accounts referred to in paragraph 30 of the divorce judgment. In 2010 or 2011, the former wife transferred all of her individually owned assets from the investment account into a separate account in only her name. The subaccounts owned exclusively

by the former husband included a "money market and cash" subaccount, a "market strategy" subaccount, and several retirement subaccounts. During the divorce trial, the parties submitted into evidence statements regarding the investment account from 2004, 2005, and 2006. The former wife could not locate those exhibits, but the former wife did locate a September 2005 statement and submitted that document into evidence during the 2018 trial in the enforcement action. The former husband had retained copies of the 2004, 2005, and 2006 investment-account statements until 2016, when he disposed of them while cleaning out his home following its sale. The former husband attempted to secure the transcript of the divorce trial, but the transcript had been discarded by the court reporter in approximately 2013.

The parties disagreed as to the meaning and effect of the divorce judgment. The former wife testified that the divorce judgment awarded her the two life-insurance policies referred to in paragraph 18, her individual retirement accounts, and an additional monetary award of $59,570 payable from the investment account. The former wife testified that she could not transfer the $59,750 from the investment account because,

she said, after transferring her assets from the investment account, the only remaining assets of the investment account were the subaccounts titled exclusively in the name of the former husband, to which she had no access. The former husband had tendered a check to the former wife in the amount of $16,156.04 in December 2006. The former wife considered that check as partial payment on the $59,750 owed to her under paragraph 33 of the divorce judgment. After not receiving any further payments, she contacted her attorney, who eventually commenced the enforcement action in order to obtain the remaining allegedly amount owed to the former wife, plus postjudgment interest.

The former husband testified that the divorce judgment awarded the former wife assets with a total value of $59,750, which, he said, included the cash value of the two life-insurance policies referred to in paragraph 18 of the divorce judgment and of the individual retirement accounts referred to in paragraph 30 of the divorce judgment. In 2006, the former husband calculated the total cash value of those assets to be $43,593.96 based on a current statement of the investment account. The former husband then determined that, in order to

satisfy paragraph 33 of the divorce judgment, $16,156.04 needed to be transferred from the investment account to the former wife. However, because the former husband had completely depleted the "fungible" "money market and cash" and "market strategy" subaccounts while the divorce action was pending, and because the only other assets remaining in the investment account were his individual retirement accounts, which he could not access without adverse tax consequences, he elected to issue a check to the former wife in the amount of $16,156.04 from his personal checking account. The former husband testified that he believed the payment of $16,156.04, when coupled with the transfer by the former wife of her two life-insurance policies and her individual retirement accounts, fully satisfied the $59,750 award contained in paragraph 33 of the divorce judgment.

On December 28, 2018, Judge Blocton entered a judgment construing paragraph 33 of the divorce judgment as awarding the former wife the two life-insurance policies, her individual retirement accounts, and an additional $59,750 to be transferred from the investment account. The judgment provides, in pertinent part:

> "The Court further finds that the only [investment-account subaccounts] that the [$59,750 in] funds awarded to [the former wife] could have been paid out of and/or transferred from were from accounts belonging solely to [the former husband] in which [the former wife] did not have the authority or ability to perform the act of paying and/or transferring said funds to herself."

The judgment determines that the former husband had not transferred to the former wife the $59,750 from the investment account, although he had voluntarily paid the former wife $16,156.04 for which he was entitled to a credit. The judgment ordered the former husband to pay the former wife $43,593.96 to satisfy paragraph 33 of the divorce judgment. As for postjudgment interest, the judgment provides as follows:

> "The Court finds that the award to [the former wife] as written in the Paragraph 33 of the Final Judgment of Divorce is not a judgment for which this Court can grant any award of statutory interest as said sum was never reduced to a judgment nor did said decree note the name of a person or an entity in which said judgment was to be rendered against."

Both parties timely filed postjudgment motions; those motions were denied on April 2, 2019. The former husband appealed on May 13, 2019. The former wife cross-appealed on May 24, 2019.

Issues

In his appeal, the former husband argues that the trial court erred in interpreting paragraph 33 of the divorce judgment to award the former wife an additional monetary award of $59,750 payable from his subaccounts. In her cross-appeal, the former wife contends that the trial court erred in failing to award her postjudgment interest.

Standard of Review

Divorce judgments should be interpreted or construed like any other written instrument. See Vest v. Vest, 215 So. 2d 552 (Ala. Civ. App. 2016). The meaning of a written instrument is a question of law ordinarily to be determined from the language within the four corners of the instrument. Holston v. Holston, 128 So. 3d 736, 743 (Ala. Civ. App. 2013). "Alabama appellate courts have stated that a court will not look beyond the four corners of a written instrument unless the instrument contains latent ambiguities." Judge v. Judge, 14 So. 3d 162, 165 (Ala. Civ. App. 2009). "A latent ambiguity arises when the writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain." Ford v. Ward, 272 Ala. 235, 240, 130

So. 2d 380, 384 (1961); see also Meyer v. Meyer, 952 So. 2d 384, 392 (Ala. Civ. App. 2006). If a written instrument contains a latent ambiguity, parol or other extrinsic evidence is admissible to explain or clarify the meaning of the instrument. Ford, 272 Ala. at 240, 130 So. 2d at 384; Meyer, 952 So. 2d at 391. If a trial court receives oral testimony or other extrinsic evidence to resolve a latent ambiguity in a divorce judgment, its resulting interpretation of that judgment is entitled to a presumption of correctness on appeal. See Jardine v. Jardine, 918 So. 2d 127 (Ala. Civ. App. 2005).

Discussion

The divorce judgment awards the former wife two life-insurance policies, her various individual retirement accounts, and $59,750 from "the parties['] American Express [i]nvestment account." Paragraph 33 does not use the term "additional" to describe the $59,750 monetary award, but it also does not refer back to paragraphs 18 and 30 or indicate in any other manner that the $59,750 is to be considered a cumulative award or an expression of the value of the assets previously awarded to the former wife in paragraphs 18 and 30.

The use of sequential numbered paragraphs identifying and awarding different properties to the former wife conveys an unmistakable intention that each paragraph deals with a separate subject matter. See generally Tilley v. Jessee, 789 F.2d 1074, 1078 (4th Cir. 1986) (holding that judgment that "exhibited a structured drafting that purported to deal with [the] separate issues [of property division and alimony] in totally distinct segments of the document" should be interpreted as separating those issues).

Paragraph 33 requires the $59,750 to be transferred from "the parties['] American Express [i]nvestment account," indicating, according to the former husband, that Judge Ferguson intended for each party to contribute to the total sum by transferring assets from their individual subaccounts. The term "parties'" is a plural possessive term indicating joint possession of ownership of the immediately following item identified in the noun phrase "American Express [i]nvestment account." The phrase "the parties['] American Express [i]nvestment account" describes the investment account, which, as the 2005 statement shows, was a "group" account including two "clients," the former husband and the

former wife. By requiring that the $59,750 be transferred from "the parties[']American Express [i]nvestment account," paragraph 33 mandates only that the funds shall be transferred from the investment account held in both parties' names. As the parties agreed, and as the 2005 statement evinces, none of the subaccounts were jointly owned, so Judge Ferguson could not have intended the phrase "the parties[']American Express [i]nvestment account" to mean the subaccounts jointly owned by both parties. Paragraph 33 says nothing further about from which subaccounts the $59,750 shall be transferred, although, according to both parties, those subaccounts were extensively discussed during the divorce trial.

At best, the omission of any further directive from Judge Ferguson as to the source of the $59,750 monetary award raises a latent ambiguity. See Jardine v. Jardine, supra. In the trial of the enforcement action, Judge Blocton received parol and extrinsic evidence and determined from that evidence that paragraph 33 awarded the former wife an additional monetary award of $59,750 to be transferred from the former husband's subaccounts. The resolution of that latent ambiguity is presumed correct on appeal. See Jardine, supra.

The former husband argues that Judge Blocton's interpretation of paragraph 33 of the divorce judgment violates former § 30-2-51(b), Ala. Code 1975. Former § 30-2-51(b) provided that no part of a spouse's retirement benefits could be divided and awarded to the other spouse if the parties had not been married for at least 10 years on the date of the filing of the complaint for a divorce. See Smith v. Smith, 836 So. 2d 893 (Ala. Civ. App. 2002). In Thompson v. Thompson, 532 So. 2d 1027 (Ala. Civ. App. 1988), this court held that a monetary award of alimony in gross could not be made payable from nondivisible retirement benefits. In the present case, because the parties had not been married 10 years at the time the former wife filed her complaint for a divorce, Judge Ferguson generally was prohibited from ordering the former husband to transfer any part of his retirement benefits to the former wife when he entered the divorce judgment in 2006.

However, during the 2018 trial, Judge Blocton noted that Judge Ferguson had not, in the divorce judgment, referred to the investment account as a retirement account. Judge Blocton stated that, if the investment account was not a retirement

account, it would have been divisible without implicating former § 30-2-51(b). When questioned, the former wife admitted that some of the former husband's subaccounts were identified in the investment-account statements as retirement subaccounts, but she denied recalling Judge Ferguson's stating that he could not divide any of the former husband's subaccounts because they contained retirement benefits. The former wife testified that the divorce judgment was silent as to any retirement subaccounts.[2] The former husband testified that all of his subaccounts were retirement subaccounts, except for two "fungible" subaccounts, which is the phrase he used to describe the "money market and cash" and "market strategy" subaccounts. However, the former husband did not testify that he identified all or any of those retirement subaccounts as such to Judge Ferguson or that he had requested that the subaccounts be excluded from the property division on the basis of former § 30-2-51(b). The parties testified only that the various subaccounts were discussed during the divorce trial, but they did not specify the content of those

[2]Paragraph 36 of the divorce judgment awards the former husband "his TIAA-CREF and Alabama Teacher retirement accounts." No evidence was submitted indicating that those retirement accounts were part of the investment account.

discussions. If, during the divorce trial, the former husband had not submitted evidence proving that his subaccounts were retirement accounts, or if the former husband had not raised the application of former § 30-2-51(b), Judge Ferguson would not have violated that statutory provision by ordering that the $59,750 be transferred from the former husband's subaccounts. See generally Hill v. Hill, 208 So. 3d 1144 (Ala. Civ. App. 2015) (holding that husband had waived argument regarding division of retirement benefits by failing to raise the argument in trial-court proceedings).

Judge Blocton had to presume that Judge Ferguson knew and applied the law when crafting the divorce judgment so as not to unlawfully award the former wife a portion of the former husband's retirement benefits. See, e.g., Carter v. Carter, 666 So. 2d 28, 30 (Ala. Civ. App. 1995). Based on the lack of any evidence indicating that the former husband raised the application of former § 30-2-51(b) to his subaccounts during the divorce trial, Judge Blocton would have been authorized to conclude that the former husband did not present sufficient evidence to rebut that presumption.

Judge Blocton apparently concluded that the former husband had further failed to prove that the $59,750 could not have been transferred from the fungible subaccounts. The former husband argued that Judge Ferguson could not have ordered a transfer of the funds from the fungible subaccounts because it was "undisputed" that they had a zero balance on the date of the divorce trial.

"Where the decree does not clearly express the exact determination of the court, reference may be had to pleadings and other proceedings to which it refers, and it should be interpreted in light of the pleadings and the entire record." Satterfield v. Satterfield, 419 So. 2d 601, 603 (Ala. Civ. App. 1982). During the 2018 trial of the enforcement action, Judge Blocton noted that the parties had provided to her only an outdated 2005 statement of the investment account, not the 2006 statements upon which Judge Ferguson had relied when entering the divorce judgment. Judge Blocton offered to continue the case in order for the parties to obtain the exhibits and transcript from the divorce proceedings, but she was informed they were no longer in existence. Judge Blocton also offered to call Judge Ferguson as a witness, but the

parties did not respond to that offer. As a result, Judge Blocton could not refer to the evidence Judge Ferguson had before him regarding the state of the investment account in 2006.

Judge Blocton questioned the former husband about the fungible subaccounts. Based largely on his responsive testimony, Judge Blocton found as follows:

> "12. [The former husband] ... admitted that during the divorce proceedings he had taken money out of [the fungible subaccounts,] therefore causing a reduction in the value of said [subaccounts] at the time of the divorce trial.
>
> "13. [The former husband] testified that some of the [sub]accounts were easily liquidated and not as taxable. [The former husband] specifically used the term 'fungible.'
>
> "14. [The former husband] testified that some of the [sub]accounts were not retirement accounts, but money market accounts that he was personally using and at the time of the divorce trial the 'fungible' accounts had a balance of zero (0).
>
> "15. [The former husband] testified that the only way he could come up with the $59,750.00 was to liquidate. The Court notes that this is the same amount specifically awarded to [the former wife] in Paragraph 33 of the [divorce judgment].
>
> "16. [The former husband] testified that he had to write the $16,156.04 check to [the former wife] from his checking account and that he was trying to do what the ruling said."

In those findings, Judge Blocton indicated that the former husband controlled the balances of the fungible subaccounts and that he had expended the funds in those accounts only to later pay the former wife $16,156.04 from funds that had accumulated in his personal checking account.

The former husband advocated an alternative theory that Judge Ferguson intended the $59,750 award referenced in paragraph 33 of the divorce judgment to be satisfied by the transfer from the investment account of the former wife's subaccounts, valued at $43,593.36, plus the transfer of an additional $16,156.04 from the fungible subaccounts. Although the $16,156.04 was not in the fungible subaccounts at the time of the divorce trial, the former husband stated that, during the divorce trial, he had testified to removing approximately $16,000 from the fungible subaccounts. During the 2018 trial of the enforcement action, the former husband testified that there would have been sufficient funds in the fungible subaccounts to make up the $16,156.04 if the funds he had spent during the divorce proceedings were "added in." Essentially, the former husband contended that Judge Ferguson could have found that he had dissipated the funds in the

fungible subaccounts and had ordered him to replace the expended funds in order to partially satisfy paragraph 33 of the divorce judgment. See Kelley v. Kelley, 52 So. 3d 534, 540 (Ala. Civ. App. 2010). Judge Blocton rejected that theory, which is not supported by the language of the divorce judgment.

The divorce judgment provides that the former wife was "awarded ... $59,750.00[] from the parties['] American Express [i]nvestment account to be transferred within thirty (30) days of th[e divorce judgment] and the [former husband] is awarded the remaining balance." We agree with Judge Blocton that, because there were no joint subaccounts in the investment account, "the only ... [i]nvestment accounts that the funds awarded to [the former wife] could have been paid out of and/or transferred from were from [sub]accounts belonging solely to the [former husband] in which [the former wife] did not have the authority or ability to perform the act of paying and/or transferring said funds to herself." The divorce judgment does not provide that the $59,750 to be transferred from the former husband's subaccounts be reduced by the value of the former wife's individual retirement accounts or the

life-insurance policies in her subaccounts, which were awarded separately to the former wife in paragraphs 18 and 30. Accordingly, Judge Blocton's judgment ordering the former husband to pay to the former wife the amount of $59,750 less the $16,156.04 that he had already paid (i.e., $43,593.96) is affirmed.

In her cross-appeal, the former wife argues that Judge Blocton erred by not awarding her interest on the judgment. We agree. Judge Blocton specifically found that the $59,750 was to be paid out of subaccounts owned by the former husband and that he had the responsibility for transferring those funds to the former wife. In Self v. Self, 290 So. 3d 431, 451 n.19 (Ala. Civ. App. 2019), this court recognized that "[a]n unpaid property settlement incorporated into a divorce judgment may accrue interest so long as it is unpaid and the judgment fixes the amount owed." In the present case, the property award in the divorce judgment was for a specific amount, i.e., $59,750. Therefore, we conclude that the judgment should be reversed insofar as it fails to award the former wife postjudgment interest to which she was entitled as a matter of law.

Conclusion

Based on the foregoing, we affirm the judgment to the extent that it ordered the former husband to pay to the former wife "the remaining balance owed from the $59,750.00 that was awarded to [the former wife] from the ... [i]nvestment account as noted in Paragraph 33 of the [divorce judgment]." We reverse the judgment to the extent that it declined to award the former wife postjudgment interest on the $43,593.96 ($59,750 - $16,156.04) that the former husband was ordered to pay, and we remand the cause for the trial court to calculate the amount of postjudgment interest owed to the former wife.

2180718 -- APPLICATION GRANTED; OPINION OF APRIL 17, 2020, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

2180733 -- APPLICATION OVERRULED; OPINION OF APRIL 17, 2020, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED WITH INSTRUCTIONS.

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