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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Colin Joseph Brune

v.

Paula Jane Brune

Appeal from Shelby Circuit Court
(DR-17-900476.01)

THOMPSON, Presiding Judge.

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Colin Joseph Brune ("the husband") appeals from a judgment of the Shelby Circuit Court ("the trial court"), entered on February 19, 2020, in a post-divorce proceeding. We affirm in part, reverse in part, and remand.

Facts and Procedural History

The husband and Paula Jane Brune ("the wife") were divorced in April 2018. In the divorce judgment, the trial court, among other things, ordered the parties to sell the marital residence; awarded the wife all the household goods, furniture, and furnishings in the marital residence, except certain household furnishings the parties agreed should be awarded to the husband; awarded each party his or her personal property; ordered that "[n]either party shall at any time allow an unrelated person of the opposite sex to remain with the party after 10:00 p.m. when the children are present"; and ordered the husband to pay the wife periodic alimony beginning the month following the sale of the marital residence and continuing each month thereafter until April 1, 2023. The divorce judgment further permitted the wife and the parties' children to reside in the marital residence until it sold.

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On November 11, 2018, the husband filed a complaint in which he sought to modify the divorce judgment. In his modification complaint, he requested, among other things, that he be allowed to sell the marital residence because, he said, the wife was obstructing the sale of the residence by refusing to take the advice of real-estate agents and by failing to have the house ready and available for showings. On November 29, 2018, the husband filed a motion for pendente lite relief, alleging that, since he had filed the modification complaint, the wife had not paid the utility bills for the residence and the children were, therefore, living in an unsafe and unhealthy environment. On January 4, 2019, the wife filed her answer. On January 30, 2019, the trial court conducted a hearing with both parties present. The trial court ordered the wife to pay the utility bills and to work with a realtor to show the residence.

On March 8, 2019, the husband filed a motion seeking to hold the wife in contempt of court, alleging that the wife had failed to work with the realtor to show the residence to potential buyers. Additionally, the husband alleged that the wife had allowed her boyfriend to stay overnight at the residence on numerous occasions while the children were present.

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On March 20, 2019, the trial court conducted a hearing on the husband's contempt motion. Counsel for both parties and the husband appeared. The wife did not. After hearing oral argument, the trial court entered an order finding the wife in contempt of court, awarding the husband temporary custody of the children, and awarding the husband possession of the marital residence to effectuate its earlier orders related to the sale of the residence. The order specifically provided: "The wife shall be immediately evicted from the marital residence and shall not go within 300 feet of the marital residence."

On April 1, 2019, the wife filed an emergency motion to set aside the March 20, 2019, order. In her motion, the wife alleged that the husband's allegations that her boyfriend had stayed overnight at the marital residence were false and that the children had not been in danger at any time while in her custody. On April 24, 2019, the wife filed a motion seeking to hold the husband in contempt of court, alleging that the husband had violated the March 20, 2019, order by changing realtors, reducing the price of the marital residence, and disposing of her property inside the residence without providing her with an opportunity to retrieve

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it. The wife asked the trial court, among other things, to order the husband to reasonably compensate her for her allegedly disposed of property. On April 24, 2019, the trial court denied the wife's contempt motion and her emergency motion to set aside the March 20, 2019, order.

On May 20, 2019, the husband filed a "motion to permit sale of personal property," alleging that the wife had property at the marital residence and that attempts to communicate with the wife's counsel to arrange a time for the wife to pick up her remaining property had been unsuccessful. The husband requested that the trial court order the wife "to have a moving company remove all personal property within 15 days of the order" and, if the wife failed to remove the property after 30 days, authorize him to auction the property. On June 13, 2019, the trial court granted the husband relief in part by ordering the wife to make arrangements to remove her property from the residence within 30 days, and, further, it "allowed" the husband, if the wife did not remove her property, to move the wife's property to a storage unit. The order specifically provided: "Items shall not be auctioned until further order of this court."

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On July 19, 2019, the husband filed a contempt motion, alleging that the wife had been cohabiting with her boyfriend since March 2019 and asking the trial court to terminate his periodic-alimony obligation, in accordance with § 30-2-55, Ala. Code 1975.

On August 30, 2019, the husband filed an emergency motion, alleging, among other things, that an offer had been made to purchase the marital residence, that the closing for the sale was scheduled on September 20, 2019, and that the wife had made no attempts to remove her property from the residence. The husband asked the trial court to provide him with a power of attorney to effectuate the sale of the residence if the wife refused to sign the closing documents related to the sale of the residence and for permission to dispose of the wife's property remaining in the residence before he relinquished possession of the residence. On September 17, 2019, the trial court ordered the wife to sign voluntarily a power of attorney by close of business on September 17, 2019, authorizing the husband to finalize the closing of the residence, and ordered that, if the wife did not voluntarily sign the power of attorney, she would be held in contempt of court and "incarcerated until she signs

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the power of attorney and moves her personal belongings from the marital home, or this matter is hereby set for an emergency hearing," which it scheduled for September 18, 2019. The trial court reserved ruling on all other pending issues. The record indicates that the wife executed the documents required to sell the marital residence.

On September 30, 2019, a trial was conducted. With regard to the husband's request to terminate his periodic-alimony obligation, the husband testified that the wife had moved her boyfriend into the marital residence, that the boyfriend had received mail at the residence, and that the boyfriend had provided the address of the residence on his resume. The wife testified that her boyfriend had never lived in the residence. The wife explained that her boyfriend worked out of town and had received mail at the marital residence due to his work situation. She stated: "[He] wouldn't decide where he was going to live but it was never discussed. He was never going to live with me."

The evidence with regard to the sale of the marital residence and the disposition of the wife's property inside the residence showed that the residence had been on the market for approximately a year before it sold.

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The husband testified that, while she resided in the residence during that year, the wife did not properly maintain the house and refused to work with realtors to make it presentable for showings. He explained that, when he was awarded temporary possession of the residence, he had asked the wife to remove her property so that he could stage the house for showings, but that she had refused to arrange to have her property moved. He testified that a few days before closing he removed his property from the residence and left the wife's property inside the residence. According to the husband, after he removed his property from the residence, the following property remained: the living-room suite, the bedroom suites, the kitchen table, the pots and pans, silverware, decorations on the walls, etc. When asked if he had sold the remaining furniture and furnishings with the residence, the husband responded: "I'm telling you the house was sold as is. So whatever she didn't pick up was left in the house."

The wife testified that, because she had been evicted immediately from the residence and ordered to stay away from the residence, she had not been able to remove her property, including her clothes, shoes,

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jewelry, and personal documents. She stated that the husband had told her that her property had been moved to a storage unit and that at closing she would receive the key to the storage unit. She testified that she had asked about the storage-unit key at closing and that no one had any knowledge of it. When asked to recall her property that had remained at the residence, the wife testified:

"Five fully furnished bedrooms, actually six including the basement. All that were furnished with complete bedroom sets, you know, dressers, lamps, rugs, quilts, all of that, armoires. There were -- it was a formal dining area that had a 10, you know, seater table. There was an antique clock in there, humidor, like a formal buffet to store china and what not. There's a keeping room with three couches, an armoire, a coffee table, a couple of plant stands. There was a kitchen table. Several pieces of art throughout the house. There's a formal living room that had two couches, two formal chairs, a coffee table. We probably had six or seven wing back chairs, you know, upholstered chairs throughout the house just for people to sit in or what not. It was a large space. A master bedroom with a king size bed, an armoire, bedside tables, large jewelry box that was, you know in my bathroom. There's a basement full of furniture that had four couches, a couple of big screens, a coffee table, ping-pong table, an office, fully furnished bedroom with two beds in it."

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The wife further testified that she had silverware, china, two laptop computers, a large 32- inch computer monitor, 8 "smart" televisions, rugs, draperies, and bedding in the residence.

The trial court admitted into evidence photographs of several rooms in the marital residence that depicted the furnishings in those rooms. At the close of the evidence, the trial court reviewed the closing documents and observed that the documents did not disclose that the furniture and furnishings had been sold with the residence.

On February 19, 2020, the trial court entered its judgment. In its judgment, the trial court denied the husband's request to terminate his periodic-alimony obligation, finding that the husband had failed "to prove through clear and convincing evidence that [the wife] cohabited with another male to which she was involved romantically per [§ 30-2-55, Ala. Code 1975]." The trial court further found that the husband had disposed of the wife's property, including but not limited to furniture, personal clothing, shoes, jewelry, household decor, cleaning supplies, linens, kitchenware, dishes, pots, pans, etc. The trial court ordered the husband to return "all of the items as listed in Exhibit A" or in the alternative to

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reimburse the wife the value of the property in the amount of \$125,000.¹

On March 17, 2020, the husband filed, pursuant to Rule 59(e), Ala. R. Civ. P., a motion to alter, amend or vacate the February 19, 2020, judgment, arguing that the trial court's judgment was against the great weight of the evidence. Specifically, he argued that the trial court had erred in refusing to terminate his periodic-alimony obligation because, he said, clear and convincing evidence presented at trial established that the wife had cohabited with her boyfriend. The husband further argued that the trial court had erred in finding that he had improperly disposed of the wife's property. He maintained that he had provided the wife with ample opportunity to retrieve her property from the marital residence before it sold but that she had refused to do so. He further argued that no evidence had been presented at trial to support the trial court's finding that the wife's property that he had allegedly disposed of was valued at \$125,000. On June 15, 2020, the husband's motion was denied by operation of law.

¹According to the husband's brief, Exhibit A is a list of the wife's property with a value listed by each item. Exhibit A is not in the record.

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See Rule 59.1, Ala. R. Civ. P. On that same day, the husband filed his notice of appeal.

Standard of Review

The trial court heard evidence ore tenus.

"'Under the ore tenus rule, the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness and will not be reversed unless found to be plainly and palpably wrong. The trial court's judgment in such a case will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment.'

"Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala.1992) (citations and internal quotation marks omitted). This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility. Williams v. Williams, 402 So. 2d 1029, 1032 (Ala. Civ. App. 1981)."

McNatt v. McNatt, 908 So. 2d 944, 945 (Ala. Civ. App. 2005).

Analysis

The husband contends that the trial court erred in holding that he had improperly disposed of the wife's property, including but not limited to furniture, personal clothing, shoes, jewelry, household decor, cleaning supplies, linens, kitchenware, dishes, pots, pans, etc. Specifically, he

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maintains that the evidence supports a finding that the wife violated the trial court's orders of June 13, 2019, and on September 17, 2019, when she failed to remove her property and that, consequently, he did not improperly dispose of her property by leaving it at the marital residence when he relinquished possession.

The record, however, supports the trial court's finding that the husband improperly disposed of the wife's property. On March 20, 2019, the trial court evicted the wife immediately from the marital residence and ordered her to stay away from the residence. Even though the husband petitioned the trial court several times for permission to dispose of the wife's property, the trial court never granted the husband the authority to do so. Rather, in addressing the husband's final request regarding the disposal of the wife's property made before the closing of the sale of the residence, the trial court, in its September 17, 2019, order, directed the wife to remove her property from the residence and provided that, if she did not, an emergency hearing would be conducted. The husband testified that, when he relinquished custody of the residence, he left the wife's property. Because the evidence demonstrates that the

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husband was in possession of the residence, that the wife was forbidden to enter the residence, that the husband was never granted authority to dispose of the wife's property, and that the husband left the wife's property in the residence when he relinquished its possession, the trial court's judgment holding that the husband improperly disposed of the wife's property is supported by competent evidence and is not plainly and palpably wrong. See Davis v. Davis, 451 So. 2d 316 (Ala. Civ. App. 1984)(recognizing that a trial court's judgment based on evidence presented ore tenus is presumed correct and that the judgment will be affirmed when it is supported by competent evidence unless it is palpably wrong).

The husband further contends that the trial court erred in considering evidence not admitted at trial to determine the value of the wife's property. According to the husband, after trial the wife submitted to the trial court an eight-page handwritten list of her property -- Exhibit A -- that, she maintained, he had left in the marital residence when he relinquished possession of the residence. Exhibit A is not in the record. According to the husband, the list allegedly itemizes the wife's property

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and lists a value beside each item. The husband further states that the list indicates that the total value of all of the wife's personal property left in the residence was \$355,190. The husband contends that, because evidence of the value of the property was not submitted at trial, the trial court erred in determining the value of the wife's property without providing him notice and an opportunity to respond.²

"[U]nder Alabama law, a trial court must determine the value of property with the only limitation being that the value must be equitable under the circumstances of the particular case. See generally Yohey v. Yohey, 890 So. 2d 160 (Ala. Civ. App. 2004). That standard implies that the valuation must be fair to all parties concerned."

Grelier v. Grelier, 44 So. 3d 1092, 1097 (Ala. Civ. App. 2009). The determination, however, must be based on evidence produced in open court to satisfy each party's right to due process. See Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982)("The fundamental principle is that the

²The trial court did set the husband's postjudgment motion for a hearing to be conducted on June 15, 2020. On June 2, 2020, the trial court purported to reset the hearing for July 15, 2020. However, the postjudgment motion was denied by operation of law and the husband filed his notice of appeal on June 15, 2020.

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decision of a court must be based on evidence produced in open court lest the guarantee of due process be infringed.").

Here, the record does not support the trial court's finding with regard to value of the wife's property. Although evidence was admitted at trial regarding what property the wife had at the marital residence, no evidence was admitted concerning the value of that property. The trial court's February 19, 2020, judgment indicates that the trial court received new evidence regarding the value of the wife's property in the form of Exhibit A. Because the trial court's judgment regarding the value of the wife's property is based on new evidence that the husband did not have an opportunity to address, the trial court's judgment is reversed in part and the cause is remanded for the trial court to conduct further proceedings concerning the value of the wife's property.

Lastly, the husband contends that the trial court erred in refusing to terminate his periodic-alimony obligation because, he says, he

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demonstrated by a preponderance of the evidence that the wife had cohabited with her boyfriend.³

Section 30-2-55, Ala. Code 1975, provides:

"Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex."

In McNatt v. McNatt, 908 So. 2d at 945-46, this court stated:

" 'It is a question of fact for the trial court to determine as to whether a spouse is living openly or cohabiting with a member of the opposite sex in order to authorize a termination of periodic alimony under § 30-2-55, Code of Alabama 1975. The burden of proof as to that matter is upon the party seeking relief under the code section. The trial court's decision upon that issue will not be revised upon an appeal unless, after considering all

³To the extent that the husband maintains that the trial court erred by requiring him to demonstrate by clear and convincing evidence, as opposed to the preponderance of the evidence, that the wife cohabited with her boyfriend, this issue has not been preserved for appellate review. The husband did not raise this challenge in his postjudgment motion; therefore, it is not properly before us for review. See Crosby v. Seminole Landing Prop. Owners Ass'n, 265 So. 3d 266, 271 (Ala. Civ. App. 2018)(recognizing that an appellate court's review is limited to those issues raised in the trial court).

the evidence and the reasonable inferences therefrom, the trial court was palpably wrong.'

"Knigh t v. Knigh t, 500 So. 2d 1113, 1115 (Ala. Civ. App. 1986). '[C]ohabitation requires some permanency of relationship coupled with more than occasional sexual activity between the cohabitants.' Hicks v. Hicks, 405 So. 2d 31, 33 (Ala. Civ. App. 1981); see also Vaughn v. Vaughn, 507 So. 2d 960 (Ala. Civ. App. 1987). Direct evidence of sexual intercourse is rarely available, but 'sexual intercourse can be inferred from a chain of circumstances.' Penn v. Penn, 437 So. 2d 1053, 1055 (Ala. Civ. App. 1983); see also Kennedy v. Kennedy, 598 So. 2d 985 (Ala. Civ. App. 1992). To evaluate the permanency of a relationship to determine whether a former spouse is cohabiting with a member of the opposite sex, this court has considered whether the former spouse is sharing a dwelling with a member of the opposite sex; whether the former spouse has ceased to date other members of the opposite sex; payment of the former spouse's creditors by a member of the opposite sex; and the purchase of clothes for the former spouse by a member of the opposite sex. Knigh t v. Knigh t, 500 So. 2d at 1115."

A review of the record establishes that the trial court's decision not to terminate the husband's periodic-alimony obligation was not palpably wrong. The trial court was presented with conflicting evidence. The husband testified that the wife had cohabited with her boyfriend in the marital residence; the wife testified that the boyfriend had visited but had not lived in the residence. The husband testified that the boyfriend had

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used the address of the marital residence on his resume and that he had received mail at the residence; the wife admitted that the boyfriend had received mail at the residence, but she stated that it was due to his work situation. Because the trial court could have reasonably found the wife's testimony more believable than the husband's, credible evidence supports its judgment, and we cannot conclude that it is palpably wrong. Bertram v. Bertram, 579 So. 2d 689, 690 (Ala. Civ. App. 1991)("It is the duty of the trial court, which receives the conflicting evidence ore tenus, to resolve the conflict and render a judgment accordingly.").

Conclusion

Based on the foregoing, the judgment of the trial court is affirmed in part and reversed in part and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Moore, Hanson, and Fridy, JJ., concur.

Edwards, J., concurs in the result, without writing.