

REL: 1/6/12

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2100345

Charles Lance Paulk

v.

Vickie Gail Paulk

Appeal from Winston Circuit Court
(DR-09-900003)

BRYAN, Judge.

Charles Lance Paulk ("the husband") appeals from a judgment entered by the Winston Circuit Court ("the trial court") that divorced him from Vickie Gail Paulk ("the wife"). For the reasons set forth herein, we remand the cause with

2100345

instructions to the trial court to clarify its judgment.

The wife filed a complaint for a divorce on January 9, 2009. In her complaint, she alleged that the parties had married on April 15, 2006, and that they had separated on December 6, 2008. The husband subsequently filed an answer to the wife's complaint and a counterclaim for a divorce. There were no children born during the parties' marriage, and the parties sought only a division of their property and debts. The trial court conducted an ore tenus hearing on June 24, 2010, but the transcript of that proceeding abruptly ends during the direct examination of the wife by her attorney after a discussion was held off the record. No other testimony was presented at an ore tenus hearing. On August 3, 2010, the wife filed a written summary of her testimony with the trial court, and, on October 7, 2010, the husband filed a written summary of his testimony with the trial court.

On October 26, 2010, the trial court entered a judgment divorcing the parties and dividing their real and personal property. Pursuant to that judgment, each party was awarded any real property that that party owned before the marriage and each party was assigned any indebtedness on the property

2100345

that party was awarded. The husband was awarded all personal property that he owned before the parties married, and he was assigned responsibility for any indebtedness on that property. The wife was awarded the real property described as "the farm," and all personal property located thereon. The wife was assigned any outstanding indebtedness on the farm, and both parties were assigned responsibility for any other debts in their names.

The husband filed a motion to alter, amend, or vacate the trial court's judgment pursuant to Rule 59, Ala. R. Civ. P. The husband raised issues about certain items of personal property that were located at the farm, and he argued that the trial court had erred by failing to award him any interest in the farm. The trial court denied the husband's postjudgment motion, and the husband timely appealed.

On appeal, the husband first argues that the trial court erred by restricting his ability to present ore tenus testimony.¹ The husband specifically contends that the trial

¹The husband alleges that, during the ore tenus hearing, the parties and the trial-court judge had an off-the-record discussion and, during that time, the trial-court judge instructed the parties' attorneys to "submit the case in writing for a final decision." This instruction from the

2100345

court erred by restricting his right to cross-examine the wife and by restricting his right to present evidence in support of his claim. In her brief on appeal, the wife argues that this court cannot consider these arguments because the husband failed to raise any objection before the trial court regarding how the proceedings below were conducted. Indeed, our review of the record reveals that the husband failed to raise the arguments he now presents on appeal. It is well settled that this court cannot consider an argument that is raised for the first time on appeal. See Lewis v. Lewis, 958 So. 2d 896, 899 (Ala. Civ. App. 2006) (holding that the mother did not preserve for appellate review her argument that the trial court had erred by limiting the testimony she presented during trial because she did not object to the time limitation or request additional time in which to complete presentation of her evidence); and Davis v. Southland Corp., 465 So. 2d 397, 402 (Ala. 1985) ("Timely objection is a condition precedent to raising an error on appeal."). Accordingly, we cannot

trial-court judge does not appear in the record on appeal. The record on appeal cannot be altered or varied by statements in appellate briefs, and this court is limited to a review of the record alone. See Hail v. Regency Terrace Owners Ass'n, 782 So. 2d 1271, 1277 (Ala. 1999).

2100345

consider these arguments on appeal.

Next, the husband argues that the trial court's division of property was inequitable because it failed to award him any interest in the real property known as "the farm." Before we begin our discussion of this issue, however, we must first determine our standard of review of the trial court's judgment in light of the fact that the record indicates that the only ore tenus testimony presented to the trial court was a partial direct examination of the wife; the remainder of the evidence that was presented to the trial court was in the form of exhibits and written "testimony."

This court was faced with a similar situation in Hospital Corp. of America v. Springhill Hospitals, Inc., 472 So. 2d 1059, 1060-61 (Ala. Civ. App. 1985). In that case, the trial court heard live testimony from one witness called by the plaintiffs; the plaintiffs did not finish their examination of that witness, and the defendants were not given an opportunity to cross-examine the witness. Id. at 1060. The case was then submitted on briefs, depositions, and exhibits filed with the trial court. Id. In discussing what standard of review should apply to the trial court's judgment, we stated:

"We are aware of the cases holding that when the evidence is taken ore tenus before the trial court, or partly so, on review we grant the trial court a presumption of correctness. See, e.g., Jones v. Moore, 322 So. 2d 682 (Ala. 1975); Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 302 So. 2d 517 (1974); State v. Frazier, 222 Ala. 180, 131 So. 442 (1930); Penn v. Penn, 437 So. 2d 1053 (Ala. Civ. App. 1983); Nero v. Moore-Handley, Inc., 370 So. 2d 1043 (Ala. Civ. App. 1979). However, in each of these cases at least one witness was examined and cross examined orally before the trial court.

"The rationale behind the ore tenus rule has historically been that the trial court deserves a presumption of correctness when it is in a position to actually see and hear the testimony, observing firsthand the demeanor of the witnesses. Christian v. Reed, 265 Ala. 533, 92 So. 2d 881 (1957); Steed v. Bailey, 247 Ala. 407, 24 So. 2d 765 (1946); Barran v. Barran, 431 So. 2d 1278 (Ala. Civ. App. 1983). Considering that the trial court heard only part of the testimony of one witness, including only a partial direct examination and no cross examination, and that the case was otherwise tried exclusively on the basis of numerous depositions and exhibits, we hold that the ore tenus rule does not apply. Consequently, no presumption of correctness will be accorded the trial court's findings on the evidence, and this court will sit in judgment on the evidence as if it had been presented de novo. Smith v. Dalrymple, 275 Ala. 529, 156 So. 2d 622 (1963); Lepeska Leasing Corp. v. State Department of Revenue, 395 So. 2d 82 (Ala. Civ. App. [1980]), writ denied, 395 So. 2d 85 (Ala. 1981)."

Id. at 1060-61.

Accordingly, we will not apply the presumption of correctness that would usually accompany the trial court's

2100345

findings of fact that support its judgment dividing the parties' marital property, see, e.g., Long v. Long, 824 So. 2d 778, 781 (Ala. Civ. App. 2001), because the divorce judgment in the present case was not based on ore tenus testimony. As we did in Hospital Corp. of America, supra, we will review the trial court's judgment de novo.

The record indicates that the wife owned a home on a lake free of any mortgage indebtedness before the parties married and that the husband owned a home, a rental house and lot, and a vacant lot before the parties married. The record indicates, however, that the husband sold his home during the parties' marriage. After the parties married, they purchased certain property referred to as "the farm." The record indicates that the farm was, at one time, divided into three parcels consisting of approximately seven acres each. The wife indicated that she had inherited one seven-acre parcel, but she also testified that she paid her mother \$15,000 for the buildings located on the parcel that she had inherited. The parties purchased the other two seven-acre parcels from the wife's siblings for \$21,000 each, for a total of \$42,000. The parties agree that the husband paid the wife's siblings

2100345

\$42,000 for their seven-acre parcels; the record indicates that the husband used an equity line of credit from one of the properties that he owned to finance that purchase. The parties subsequently executed a mortgage in the amount of \$91,500, using the wife's lake house as collateral for the loan. Using that money, the wife repaid the husband \$42,000 for the parcels that he had purchased from her siblings, she paid \$15,000 to her mother (discussed above), and she paid off the loan for her vehicle (approximately \$25,000). The remainder of the money was deposited into a joint account held by the parties.

The parties began constructing a home on the farm property in the fall of 2007, and both parties presented evidence of monetary and nonmonetary contributions they had made toward the payment of the mortgage indebtedness related to the farm property or toward improvements to the farm property. The record indicates that the house on the farm property remained unfinished at the time of trial.

On appeal, the husband argues that the trial court erred in failing to award him any interest in the farm in light of the fact that the evidence indicated that he had made a

2100345

substantial monetary contribution toward the construction of the house on the farm property.

The wife argues that she was the "sole equitable owner" of the farm because it was part of her inheritance and because she had repaid the husband the \$42,000 that he had contributed toward the purchase price of the farm property. Furthermore, although she acknowledges that the husband made financial contributions toward the construction of the house on the farm property, she contends that she had made monetary and nonmonetary contributions toward the improvement of the husband's rental property and that, because she was not awarded any interest in that property, the trial court did not exceed its discretion by failing to award the husband any interest in the farm.

The wife's argument that the judgment is equitable in light of the fact that she was not awarded any interest in the husband's rental property indicates that the wife is operating under the assumption that the husband's rental property was divisible as a marital asset. However, the trial court's judgment does not indicate whether it considered the husband's rental property to be part of the marital estate or part of

2100345

the husband's separate estate. Likewise, the trial court's judgment does not specifically address whether it considered the lake house or the farm to be part of the wife's separate estate or divisible as marital property. As stated above, the wife was awarded the lake house, and she was ordered to be responsible for the remaining mortgage indebtedness on that property. The wife was also awarded the farm, which was valued between \$155,000 and \$200,000. The husband was awarded the rental house and the vacant lot that he owned before the parties married, but there is no value assigned to those properties in the record.

The husband's primary contention on appeal is that he should have been awarded some interest in the farm because the record indicated that he had used the sales proceeds from the home he owned before the parties married toward the construction of the house on the farm property. However, he also argues that the trial court erred because it awarded the wife "any and all personal property located" at the farm. The record indicates that personal property that the husband owned before the parties married was located at the farm at the time the divorce judgment was entered, and the record indicates

2100345

that he valued that property at approximately \$11,000. The husband also indicated that he had owned personal property before the marriage that he valued at \$21,500; however, the record indicates that some of that property was located at the farm, and it is unclear whether the trial court considered that property to be jointly owned by the parties or to be part of the husband's separate estate. Because the trial court awarded the wife all personal property located at the farm, but also awarded the husband all personal property that he had owned before the parties married, we cannot determine which party the trial court intended to award the personal property that the husband owned before the marriage that was located at the farm. Because such a determination affects the analysis of whether the division of property was equitable, we remand the cause with instructions to the trial to clarify its division of personal property. Furthermore, because we are remanding the cause on the ground set forth above, and because we are unable to determine what property was included in the marital estate, we further instruct the trial court, on remand, to specifically set forth the property that it included in the marital estate and the property that it determined to be part

2100345

of either party's separate estate. The trial court shall make a return to this court containing the above-mentioned findings within 28 days.

The wife's request for an attorney's fee on appeal is denied.

REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.