

DIVISION III

CA06-1299

7 November 2007

JOHN EDWARD AUBREY,  
APPELLANT

AN APPEAL FROM THE POPE  
COUNTY CIRCUIT COURT  
[DR-04-861]

v.

LAURIE LEIGH AUBREY,  
APPELLEE

THE HONORABLE GORDON WILLIAM  
MCCAIN JR., CIRCUIT JUDGE

AFFIRMED

This divorce case has boiled down to a dispute over \$12,975.02 that Laurie Aubrey inherited in 2004. Shortly after she inherited the money, it was deposited into a checking account. Within two months, all of the inheritance had been spent, and her husband John filed for divorce. The circuit court found that the money was not marital property, and ordered John to repay Laurie the entire amount. The court also refused to re-open the record after the divorce hearing to allow John to present additional evidence about the account. John appeals both rulings.

At the hearing, the parties agreed that the inheritance started out as Laurie's separate property. The dispute was about the nature of the account into which the money was deposited. The proof about this bank account was mostly testimonial. John said

that he and Laurie agreed to deposit the money into what he called their joint account. He claimed they agreed to use the money to pay bills and household expenses. The evidence presented at the hearing showed that only John spent the inheritance money, not Laurie. Laurie said that John handled all of their finances. She said she made it clear to John that she intended the inheritance to be held separately for her daughter's (John's stepdaughter) education.

If the money was deposited into a "joint account," then that act created a legal presumption that John and Laurie owned the money as tenants by the entirety. *Lofton v. Lofton*, 23 Ark. App. 203, 204–05, 745 S.W.2d 635, 636–37 (1988). Laurie could overcome this presumption only by clear and convincing evidence that she did not intend to make a gift of a one-half interest to John. *Lofton*, 23 Ark. App. at 206, 745 S.W.2d at 637.

After hearing testimony from both sides, the circuit judge ruled from the bench that there was no evidence of a joint account other than John's testimony and that he did not believe John. The judge described John's attitude about money as: "what was his, was his, what was theirs was his, and what was hers was his." Because the court found that "[the account] was not a real joint account," Laurie did not have to rebut the presumption that she intended to make a gift. The court further found that:

[T]he \$12,975.02 was to be the separate property of [Laurie] which was

to be deposited into the bank account and was to be held for the use and benefit of [Laurie's] daughter. The Court finds [Laurie's] testimony to be credible on this issue and the Court finds this to be [Laurie's] \$12,975.02 separate property.

The circuit court then ordered John to repay Laurie the \$12,975.02.

The first question for us is whether the court's credibility-based ruling was clearly erroneous or clearly against the preponderance of the evidence. *Cuzick v. Lesly*, 16 Ark. App. 237, 240, 700 S.W.2d 63, 65 (1985). It was not. There is evidence in the record to support the court's decision. Both parties testified about their version of events. The judge based his decision on the witnesses' credibility—a matter on which we defer to the circuit court's judgment. *Meinholz v. Meinholz*, 283 Ark. 509, 512, 678 S.W.2d 348, 350 (1984). When there are two permissible views of the evidence, the circuit court's choice between them is not clearly erroneous. *Rymor Builders, Inc. v. Tanglewood Plumbing Co.*, \_\_ Ark. App. \_\_, \_\_, \_\_ S.W.3d \_\_, \_\_ (October 10, 2007).

Two weeks after trial, but before the circuit court entered its final order, John moved to re-open the record so that he could introduce bank records and a letter from Laurie. The records showed that the account was a joint account. They also showed that Laurie knew it was a joint account and even withdrew money from it. The second question before us is whether the circuit court abused its discretion when it refused to re-open the record. *Sugarloaf Development Co. v. Heber Springs Sewer Imp. Dist.*, 34

Ark. App. 28, 34, 805 S.W.2d 88, 92 (1991).

The belated evidence was certainly relevant. Though we cannot be sure what impact it would have had on the circuit court's ultimate decision about the nature of the account, the evidence seems weighty. John would have had grounds for his motion or for a new trial if these documents had been newly discovered evidence that he could not, with reasonable diligence, have discovered and produced at the hearing. Ark. R. Civ. P. 59(a). But that is not what happened.

The parties knew long before the hearing that the bank account would be at issue. And the documentary evidence was as readily available for the year and a half before the hearing as it was two weeks afterward. That this evidence now seems so important from the vantage point of the circuit court's ruling does not trump John's failure to timely produce it. Instead, the circumstances presented an occasion for discretionary judgment. Whether achieving a more perfect justice between these parties outweighed the law's preference for finality after the trial was for the circuit court to decide—by exercising its sound discretion informed by all the circumstances of the case. We see no abuse of that discretion in the court's refusal to re-open this record. *Sugarloaf Development Co., supra*.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.

