Rel: 08/24/2007

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2007

2060245

Esther M. Kaufman

v.

Charles T. Kaufman

Appeal from Houston Circuit Court
(DR-03-1011.80)

THOMPSON, Presiding Judge.

This is the second time this matter has been before this court.

Esther M. Kaufman ("the wife") sued Charles T. Kaufman ("the husband") for a divorce. No children were born of the

parties' marriage, although both parties have adult children from previous marriages. The trial court entered a judgment divorcing the parties and dividing their marital property. The wife appealed that judgment, challenging the property division and alimony award. In Kaufman v. Kaufman, 934 So. 2d 1073, 1081 (Ala. Civ. App. 2005) ("Kaufman I"), this court reversed the judgment of the trial court, concluding that the property division and alimony award were inequitable, and remanded the cause for the trial court to fashion an equitable property division and alimony award.[1]

On remand, the trial judge who had entered the original divorce judgment recused himself, and another trial judge was appointed. The trial court then conducted an ore tenus hearing on August 21, 2006. On October 26, 2006, the trial court entered a judgment that, among other things, divided the parties' property and awarded the wife periodic alimony and alimony in gross. The wife filed a postjudgment motion, which the trial court denied. The wife timely appealed.

[1]That opinion also addressed and ultimately dismissed the wife's appeal from an order finding her to be in contempt. Kaufman v. Kaufman, 934 So. 2d at 1082.

During the pendency of this appeal, the husband's attorney filed a suggestion of death indicating that the husband had died on May 21, 2007. We note that a final divorce judgment had been entered before the husband's death and, therefore, that this appeal was not abated by the death of the husband. Ex parte Parish, 808 So. 2d 30, 33 (Ala. 2001) ("[T]he common law provides that a divorce action in which no final judgment has been entered is abated by the death of a party."); and Ex parte Adams, 721 So. 2d 148 (Ala. 1998)(the settlement agreement was sufficiently final so as to prevent the abatement of the divorce action when the husband died before the trial court incorporated the parties' agreement into a judgment).

A recitation of the facts of this case is not necessary for the resolution of this appeal. On appeal, the wife contends that the trial court failed to comply with this court's appellate mandate in Kaufman I when it received additional ore tenus evidence at the August 21, 2006, hearing and when it considered that evidence in fashioning its October 26, 2006, judgment. We agree with the wife that precedent has established that once an appellate court has determined an

issue and remanded the cause to the trial court for the entry of a judgment in compliance with its decision, the trial court, unless otherwise directed by the appellate court, must enter such a judgment based on the evidence as originally presented to it.

> "It is well settled that, after remand, the trial court should comply strictly with the mandate of the appellate court by entering and implementing the appropriate judgment. See Walker v. Humana Medical Corp., 423 So. 2d 891, 892 (Ala. Civ. App. 1982). In Ex parte Alabama Power Co., 431 So. 2d 151, 155 (Ala. 1983), we held:
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> > "'"It is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court. No judgment other than that directed or permitted by the reviewing court may be entered.... The appellate court's decision is final as to all matters before it, becomes the law of the case, and must be executed according to the mandate, without granting a new trial or taking additional evidence...." 5 Am. Jur. 2d, Appeal & Error § 991 (1962).'"

Auerbach v. Parker, 558 So. 2d 900, 902 (Ala. 1989) (emphasis added).

After the trial court had entered the original divorce judgment, as well as after this court had released its opinion in Kaufman I, the husband and/or his daughter disposed of

certain assets or transferred amounts from the husband's accounts to certain members of the husband's family. The evidence presented at the August 21, 2006, hearing focused on the existence and location of the parties' remaining marital assets. The wife presented the majority of the evidence at the hearing, and the record does not indicate that either party objected to the trial court's taking additional evidence on remand. In fact, the wife represented to the trial court that the issue to be resolved was the disposition of the remaining assets.

> "THE COURT: What are we trying to do, empty our pockets and then decide where the money goes?
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> "[WIFE'S ATTORNEY]: Yes. The [de]pletion of the assets during the appeal included $130,000 that was withdrawn 13 days after the Court of Civil Appeals action, was taken from her own account.
>
> "THE COURT: We can always allow for that, yes.
> ...
>
> "THE COURT: I've got to empty it out; is that right?
>
> "[WIFE'S ATTORNEY]: Take what's left now and divide that up."

(Emphasis added.)

The wife asserts for the first time on appeal that the trial court erred in taking and considering additional

evidence on remand. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) (an issue or argument may not be raised for the first time on appeal). In the cases cited by the wife in her brief submitted to this court, the issue of compliance with the appellate court's mandate was either presented to the trial court for its consideration or the objecting party filed a petition for a writ of mandamus before additional evidence was taken; the issue was not presented for the first time to the appellate court after the objecting party had fully participated, without objection, in a hearing resulting in the receipt of additional evidence. See Ex parte Queen, [Ms. 1050140, Dec. 8, 2006] ___ So. 2d ___ (Ala. 2006) (granting a petition for a writ of mandamus and requiring the trial court to make findings and enter a judgment based on the evidence originally presented to it in the case that had resulted in the remand); City of Gadsden v. Johnson, 891 So. 2d 903 (Ala. Civ. App. 2004) (City objected to the trial court's granting a motion for new trial after a remand from this court); Ex parte Dodson, 459 So. 2d 884 (Ala. Civ. App. 1984) (involving a petition for a writ of mandamus from an order requiring a case on remand to be retried); see also Ex

parte Edwards, 727 So. 2d 792 (Ala. 1998); Ex parte Insurance Co. of America, 523 So. 2d 1064 (Ala. 1988); Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983); and Ex parte Whisenant, 898 So. 2d 761 (Ala. Civ. App. 2004). Although the foregoing is not an exhaustive list of the precedent on this issue, it is not the function of this court to perform an appellant's legal research. Sea Calm Shipping Co., S.A. v. Cooks, 565 So. 2d 212, 216 (Ala. 1990). The wife has failed to demonstrate to this court that she may raise an argument that she failed to assert before the trial court for the first time on appeal. Further,

> "[t]he law is well settled that '[a] party may not predicate an argument for reversal on "invited error," that is, "error into which he has led or lulled the trial court."' Atkins v. Lee, 603 So. 2d 937, 945 (Ala. 1992) (quoting Dixie Highway Express, Inc. v. Southern Ry., 286 Ala. 646, 651, 244 So. 2d 591, 595 (1971)). The doctrine of invited error 'provides that a party may not complain of error into which he has led the court.' Ex parte King, 643 So. 2d 1364, 1366 (Ala. 1993). In other words, '[a] party cannot win a reversal on an error that party has invited the trial court to commit.' Neal v. Neal, 856 So. 2d 766, 784 (Ala. 2002). See also Liberty Nat'l Life Ins. Co. v. Beasley, 466 So. 2d 935, 937 (Ala. 1985); and State Farm Mut. Auto. Ins. Co. v. Humphres, 293 Ala. 413, 418, 304 So. 2d 573, 577 (1974)."

Casey v. McConnell. [Ms. 2060324, June 1, 2007] ___ So. 2d

___, ___ (Ala. Civ. App. 2007).

In this case, during the time the original appeal was pending in this court, certain marital assets were depleted or transferred to the husband's family members. After remand, the initial trial judge recused himself from the action, and a new trial judge was appointed. The wife did not object to the trial court's consideration of additional evidence; in fact, it appears that she presented much of that evidence. The wife first raised an objection to the trial court's receiving additional evidence on appeal, after the trial court had entered a judgment that she felt was adverse to her. Given the unique facts and history of this case, we decline to reverse the trial court's judgment based on the trial court's having received and considered additional evidence on remand.

The wife also challenges the trial court's property-division and alimony awards, contending that those awards are inequitable and exceed the trial court's discretion. However, only the exhibits from the original appeal in Kaufman I are before this court. The trial court had before it voluminous documentary exhibits from the hearing on remand, and those

exhibits have not been submitted to this court.[2] It is the duty of the appellant to ensure that the record on appeal contains sufficient evidence to warrant a reversal of the trial court's judgment. Parker v. Williams, [Ms. 1050040, July 20, 2007] ___ So. 2d ___, ___ (Ala. 2007); Alfa Mut. Gen. Ins. Co. v. Oglesby, 711 So. 2d 939 (Ala. 1997), overruled on other grounds, Ex parte Quality Cas. Ins. Co., [Ms. 1051046, Dec. 22, 2006] ___ So. 2d ___ (Ala. 2006); and In re Coleman, 469 So. 3d 638 (Ala. Civ. App. 1985). Further, when all the evidence before the trial court is not submitted to this court as part of the record on appeal, this court must presume that the evidence not before it was sufficient to support the trial court's judgment. Berryhill v. Mutual of Omaha Ins. Co., 479 So. 2d 1250, 1251 (Ala. 1985); Wilkens v. Kaufman, 615 So. 2d 613, 615 (Ala. Civ. App. 1992).

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[2]Inquiries made by this court's clerk to the trial court's clerk indicated that the trial court's clerk did not have the exhibits. This court's clerk made numerous inquiries to the parties' attorneys over the course of several weeks in an attempt to obtain those exhibits. This court's clerk suggested to the attorneys that if the originals could not be located, the record could be supplemented pursuant to Rule 10(f), Ala. R. App. P., to include copies of the missing exhibits. However, this court has not received the missing exhibits and, as of August 21,, 2007, no attempt to supplement the record had been made by either party.

The exhibits documenting much of the evidence upon which the trial court relied in reaching its judgment on remand are not before this court; therefore, we must presume that those exhibits support the judgment. Berryhill v. Mutual of Omaha Ins. Co., supra; Wilkens v. Kaufman, supra. Accordingly, the wife has failed to present a sufficient record to this court indicating that the trial court erred in fashioning its property-division and alimony awards. The trial court's judgment is affirmed.

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

AFFIRMED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.