

REL: 03/03/2017

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, 2016-2017

2150936

Beauford Ray Johnson

v.

Jacqueline Johnson

Appeal from Lee Circuit Court
(DR-14-900204)

THOMAS, Judge.

Beauford Ray Johnson ("the husband") and Jacqueline Johnson ("the wife") were married in 2003. On May 28, 2014, the husband filed in the Lee Circuit Court a complaint seeking a divorce from the wife. The circuit court held a trial and,

2150936

on May 10, 2016, entered a judgment divorcing the parties and, in pertinent part, ordering the husband to pay the wife \$20,000 in the form of a property settlement or alimony in gross.¹ The judgment provided that the husband could pay the

¹The judgment denotes the award of \$20,000 as a property settlement. The dissent takes issue with our characterization of the award as an award of alimony in gross. ___ So. 3d at ___. As explained infra, the judgment required payments at specified times, and the obligation was vested -- the two criteria for classification as alimony in gross. See Le Maistre v. Baker, 268 Ala. 295, 105 So. 2d 867 (1958). In Pressnell v. Pressnell, 519 So. 2d 536, 537 (Ala. Civ. App. 1987), we noted the historical equation of alimony in gross with a property settlement in Alabama:

"In the landmark case on alimony in gross in Alabama, the supreme court distinguished between 'periodic alimony' and 'alimony in gross.' See Hager v. Hager, 293 Ala. 47, 299 So. 2d 743 (1974). Unlike periodic alimony, the court held, alimony in gross is nonmodifiable and in the nature of 'a property settlement award, compensating the wife only for the loss of her rights in her husband's estate.' Hager, 293 Ala. at 55, 299 So. 2d at 751.

"Although the cases that follow Hager sometimes use the word 'support' in discussing alimony in gross, the word is typically used in the following context:

"'Alimony in gross is intended to compensate a wife for the inchoate marital rights and right to future support which she loses by virtue of the divorce, as well as substitute for a property settlement where liquidation of the marital property is not practical.'

2150936

wife either in one lump sum or in installment payments spanning a period of more than six years. The husband filed a postjudgment motion, which the circuit court denied.

The husband filed a timely notice of appeal. The husband urges this court to reverse the judgment insofar as it ordered him to pay the wife \$20,000 in alimony in gross because the sum is not payable from his present estate.

"The trial court has wide discretion over the issues of alimony and the division of property, and it may use whatever means are reasonable and necessary to equitably divide the parties' property. Grimsley v. Grimsley, 545 So. 2d 75, 77 (Ala. Civ. App. 1989). The only limitation on that discretion is that the division of property must be equitable under the circumstances of the particular case, and the task of determining what is equitable falls to the trial court. Ross v. Ross, 447 So. 2d 812 (Ala. Civ. App. 1984). The trial court's judgment as to those issues is presumed correct and will not be reversed unless it is so unsupported by the evidence ... as to be unjust and palpably wrong. Grimsley, 545 So. 2d at 76."

"Andrews v. Andrews, 454 So. 2d 1026, 1028 (Ala. Civ. App. 1984)."

Numerous other opinions have equated an award of alimony in gross with a property settlement. See, e.g., Ex parte Cole, 538 So. 2d 22, 23 (Ala. 1989); Lambert v. Lambert, 22 So. 3d 480, 485 (Ala. Civ. App. 2008); TenEyck v. TenEyck, 885 So. 2d 146, 151-52 (Ala. Civ. App. 2003); Akridge v. Akridge, 738 So. 2d 1277, 1278 (Ala. Civ. App. 1999); Ex parte Manakides, 564 So. 2d 983, 987 (Ala. Civ. App. 1990); Powers v. Powers, 518 So. 2d 140, 140 (Ala. Civ. App. 1987; and Cherry v. Cherry, 422 So. 2d 784, 786 (Ala. Civ. App. 1982).

2150936

Redden v. Redden, 44 So. 3d 508, 510 (Ala. Civ. App. 2009).

The husband, who was 74 years old at the time of the trial, testified that he has a third-grade education and is illiterate. He said that he had been employed for 30 years before he "was hurt on the job and came out on disability" in 2002, which was before the parties' marriage. The husband's testimony regarding his monthly income was not entirely clear; however, he offered a document into evidence indicating that he received net monthly retirement benefits in the amount of \$1,108 and net monthly Social Security benefits in the amount of \$1,408. Subsection (b) of § 30-2-51, Ala. Code 1975, provides how retirement benefits are to be treated for purposes of dividing property pursuant to a divorce:

"(b) The judge, at his or her discretion, may include in the estate of either spouse the present value of any future or current retirement benefits, that a spouse may have a vested interest in or may be receiving on the date the action for divorce is filed, provided that the following conditions are met:

"(1) The parties have been married for a period of 10 years during which the retirement was being accumulated.

"(2) The court shall not include in the estate the value of any retirement benefits acquired prior to the marriage

2150936

including any interest or appreciation of the benefits."

In this case, the evidence presented demonstrated that the husband's retirement benefits had been acquired before the marriage; therefore, pursuant to § 30-2-51(b)(1)&(2), the circuit court could not properly divide the husband's retirement accounts, and, moreover, there was no testimony regarding the value of (as opposed to the monthly income from) his retirement accounts. Regardless, no language in the judgment leads us to believe that the circuit court considered the value of the husband's retirement accounts in deciding to order him to pay the wife \$20,000.

The husband testified regarding his seasonal "side job," which the parties referred to as "Ray's Deer Processing." It was undisputed that the husband still offered deer-processing services and that no tax documentation had ever been prepared regarding Ray's Deer Processing.² When the husband offered certain "printouts" into evidence, the wife objected. The circuit court sustained her objection. The husband admitted

²The husband and the wife filed individual income-tax returns during the marriage. The husband's 2009 through 2012 income-tax documents indicated that, each year, his taxable income, derived exclusively from his retirement benefits, had been less than \$23,000.

2150936

that he had no proof of the value of Ray's Deer Processing. The wife, who did the "book work," testified that Ray's Deer Processing "probably took in about" \$28,000 to \$30,000 per year. Although the wife referred to paying "employees" in cash and acknowledged that the husband had been habitually unable to pay "bills that lingered," she did not offer specific testimony regarding the annual expenses of Ray's Deer Processing.³

The wife requested an award of \$25,000 in alimony in gross because, she said, she had supported the husband during the marriage, although she conceded that he did not have "that kind of money" in his present estate. See Johnson v. Johnson, 840 So. 2d 909, 912 (Ala. Civ. App. 2002) (alimony in gross ""is payable out of the [payor]'s present estate as it exists at the time of the divorce"" (quoting Burnett v. Burnett, 339 So. 2d 68, 69 (Ala. Civ. App. 1976), quoting in turn Hager v. Hager, 293 Ala. 47, 55, 299 So. 2d 743, 750 (1974)). In Beck v. Beck, 142 So. 3d 685, 695 (Ala. Civ. App. 2013), we explained:

³We have not overlooked the wife's testimony that, from 2009 through 2013, she had used funds from the checking account for her nonprofit business to pay over \$25,000 for deer-processing supplies.

"The burden of proving the value of marital property rests with both parties. Edwards v. Edwards, 26 So. 3d 1254, 1261 (Ala. Civ. App. 2009). We are well aware that in some divorce proceedings trial judges frequently suspect that parties have more assets than the parties are willing to acknowledge and that that suspicion is often correct; however, in the present case, if this court were to affirm the ... alimony-in-gross award, we would not be deferring to the trial court's evaluation of the witnesses and the evidence, as the ore tenus rule requires, but would be yielding to speculation."

The record does not contain sufficient evidence from which the circuit court could have inferred that the husband's present estate was valued at \$20,000, much less a greater amount from which \$20,000 could be equitably deducted. Because property-division and alimony awards are considered to be interrelated, we often reverse both aspects of a trial court's judgment "so that [the trial court] may consider the entire award again on remand." Redden, 44 So. 3d at 513. However, in this action the wife withdrew her request for a division of personal property (with the exception of an automobile that the circuit court awarded to her) and did not request an award of periodic alimony. Furthermore, the circuit court could not further adjust the equities in light of the fact that the parties did not assign values to the

2150936

property contained in the marital estate. Therefore, we reverse the judgment and remand the cause for the circuit court to strike that portion of the judgment that orders the husband to pay the wife \$20,000 in alimony in gross.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman and Donaldson, JJ., concur.

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

Thompson, P.J., dissents, with writing.

2150936

THOMPSON, Presiding Judge, dissenting.

During the parties' divorce trial, Jacqueline Johnson ("the wife") waived her claim to certain personal property that had been in dispute between the parties, and she argued to the trial court that she should be awarded \$25,000 as repayment for large amounts of money she contends she expended for the benefit of Beauford Ray Johnson ("the husband") during the parties' marriage. In its May 10, 2016, divorce judgment, the trial court awarded the wife \$20,000 as a property settlement, divided the parties' vehicles, and specified that it would retain jurisdiction over "the property-settlement issues until they are properly discharged."

In reversing the trial court's judgment, the main opinion characterizes the property settlement in the divorce judgment as being an award of alimony in gross. I disagree with that characterization. In its judgment, the trial court stated that it had awarded the \$20,000 as a property settlement.⁴

⁴The relevant portion of the divorce judgment provides, in pertinent part:

"4. As a property settlement, [the wife] is awarded the sum of \$20,000. This sum shall be paid by the husband in any of the following methods:

2150936

Although an award of alimony in gross is a form of property settlement, see TenEyck v. TenEyck, 885 So. 2d 146, 151-52 (Ala. Civ. App. 2003), the purpose of an award of alimony in gross is to award an amount for the present value of a spouse's future support. Reuter v. Reuter, 623 So. 2d 735, 736 (Ala. Civ. App. 1992). "Alimony in gross is intended to compensate a [spouse] for the inchoate marital rights and

"a. In one lump sum of \$20,000, payable within 45 days hereof;

"b. In six annual installments of \$3,000, plus a final installment of \$2,000, the first installment due [within] 45 days hereof, with annual installments due every 12 months thereafter;

"c. In equal monthly payments of \$250 until said sum is paid in full, with the first payment due by June 5, 2016, and successive payments due by the 5th of the month thereafter;

"d. In monthly payments of \$200 for the months of March, April, May, June, July, August, September, and October, and \$350 for the months of November, December, January, and February, with the first payment due by June 5, 2016, and successive payments due by the 5th of every month thereafter;

"e. Whether option c. or d. is chosen, the total of \$3000 must be paid for every 12 months for the first six years."

2150936

right to future support which [he or she] loses by virtue of the divorce, as well as substitute for a property settlement where liquidation of the marital property is not practical." Andrews v. Andrews, 454 So. 2d 1026, 1028 (Ala. Civ. App. 1984); see also Hager v. Hager, 293 Ala. 47, 55, 299 So. 2d 743, 750 (1974) ("'Alimony in gross' is the present value of the wife's inchoate marital rights--dower, homestead, quarantine, and distributive share."). In Ex parte Parker, 334 So. 2d 911, 912-13 (Ala. Civ. App. 1976), in discussing whether an obligation could be enforced through the courts' contempt powers, this court explained the difference between a property settlement or division and an award of alimony in gross as follows:

"The award of alimony has as its sole object the support of the [spouse] and is not to be considered a property settlement. Le Maistre v. Baker, 268 Ala. 295, 105 So. 2d 867 [(1958)].

"In the case at bar the intent of the agreement was for the wife to pay the husband for his interest in some property he was giving up, as evidenced by a note and mortgage, not to give support to the wife or to compensate her for her lost inchoate property rights as would be the case in the award of alimony in gross. This ordinary money obligation is not attended with any of those peculiar equitable considerations which attach to alimony."

2150936

See also Dolberry v. Dolberry, 920 So. 2d 573, 576-79 (Ala. Civ. App. 2005) (a provision ordering a husband to pay \$15,000 for the wife's equity in the marital home constituted a property settlement and not an award of alimony in gross).

In this case, the wife asked the trial court for an award of \$25,000 because, she contended, she had contributed significant amounts of money to the marriage, and she sought that award as what she maintained would be an equitable division of the marital property.⁵ The trial court considered that request and the evidence and, in its judgment, awarded the wife a "property settlement" of \$20,000. Given the nature of the wife's request, i.e., that it was for recoupment of a

⁵Specifically, during closing arguments, the wife's attorney argued in pertinent part, the following:

"This lady rightfully or wrongly poured tens of thousands of dollars for this man's benefit, some for her benefit, \$276,000. That's not smok[e and mirrors]. That's up there. It's dollars and cents. And she's simply saying, Ray, the audacity you ask me to cover your future expenses relative to your nonfeasance as to not reporting on your deer processing, hey, I think you owe me. And that's why we're asking for the sum of \$25,000 from him to be paid over a period of time to compensate her for the large amounts of money that he enjoyed during this ten-year marriage. ... That's what we're asking for. ..."

(Emphasis added.)

2150936

portion of her claimed financial contribution to the marriage and not a form of future support, as well as the trial court's specific determination that it had fashioned a "property settlement," I believe the main opinion errs in characterizing the property settlement as an award of alimony in gross. See Marvin's, Inc. v. Robertson, 608 So. 2d 391, 393 (Ala. Civ. App. 1992) (this court will not presume error on the part of the trial court).

Although, at the end of the trial, she withdrew her claim for personal property that had still been in dispute during the trial, the wife continued to seek an equitable division of the parties' marital property.⁶ The trial court expressly divided the parties' property, and I conclude that the record demonstrates that the \$20,000 award was intended to divide marital property rather than to provide a current payment for the wife's future support. Ex parte Parker, supra; Dolberry v. Dolberry, supra. I would affirm the trial court's division of property. Accordingly, I respectfully dissent.

⁶In the closing arguments, the wife's attorney stated that "[the wife] is withdrawing a claim relative to the personal property which the Court heard." In its judgment, the trial court noted that "[the wife,] at trial, withdrew her demand for certain personal property remaining at issue and in the possession of [the husband]."