

**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

---

2150814

---

Shawna Day Mayo Yokley

v.

Brandon Alan Douglas Yokley

Appeal from Mobile Circuit Court  
(DR-15-901225)

PITTMAN, Judge.

Shawna Day Mayo Yokley ("the wife") appeals from a judgment of the Mobile Circuit Court divorcing her from Brandon Alan Douglas Yokley ("the husband"). On appeal, the wife argues that the trial court erred in awarding the husband

2150814

the parties' marital residence and in failing to make a final child-support award retroactive. We affirm the trial court's judgment to the extent it awarded the husband the marital residence, reverse the judgment to the extent it failed to award the wife retroactive child support, and remand the cause for further proceedings.

#### Facts and Procedural History

The parties were married in May 2007. They had two children during the marriage ("the children"). In June 2015, the wife and the children moved out of the marital residence, and, two months later, the wife filed a complaint for a divorce. In October 2015, the trial court awarded the wife pendente lite custody of the children pending resolution of the divorce proceedings. The trial court, however, did not award the wife pendente lite child support. In March 2016, the trial court held a trial.

According to the testimony given at trial, at the time the parties married, the husband was employed as a police officer for the City of Mobile. The wife testified that, in May 2008, the husband left his job as a police officer so that he could attend nursing school. While the husband was

2150814

attending nursing school, the wife worked at a nonprofit counseling service, where she earned approximately \$20,000 per year. The wife's testimony is not entirely clear, but it appears she claimed that, during at least some of the time the husband was in nursing school, the wife paid the parties' living expenses, including the husband's \$350-per-month child-support obligation from a previous marriage. The husband, on the other hand, testified that he had worked part time while attending nursing school and that the money he had earned had been used "to pay bills and to pay [for] school."

In January 2011, before the husband completed nursing school, the parties had their first child, E.L.Y. E.L.Y. was placed in day care six weeks after his birth. In May 2011, the husband obtained his nursing degree and began working the night shift as an emergency-room nurse at a hospital in Mobile.

In January 2013, the parties had their second child, E.T.Y. Like the parties' first child, E.T.Y. was placed in day care at six weeks of age. In April 2013, the husband quit his job at the hospital in Mobile so that he could pursue a career as a traveling nurse. The wife agreed during the trial

2150814

that the husband had done so because he believed he could earn more money as a traveling nurse.

Two months after he stopped working at the hospital in Mobile, the husband began working as a nurse in California. The wife testified that, during the two months the husband had been out of work, she had paid the parties' living expenses, including the husband's child-support obligation from his previous marriage. It is not entirely clear, but the wife also appears to have suggested during the trial that the husband's child-support obligation had, by that time, increased to \$652 per month and that she had also paid a child-support arrearage the husband had accrued in the amount of \$3,000. The wife also testified that she had had to borrow \$4,000 against her retirement savings in order to pay the parties' expenses. The husband, however, testified that the wife had borrowed funds at least in part so that she could attend college courses over the Internet. In addition, the wife admitted on cross-examination that the husband's mother had loaned the parties money so they could pay their expenses, including the husband's child-support obligation.

2150814

The husband worked in California for approximately 13 weeks. The wife testified that, during the time the husband was in California, she had cared for the parties' children, as well as the husband's son from his previous marriage, who was scheduled to visit with the husband while he was working in California. The wife admitted that the husband had sent her money from California each week while he was there. According to the husband, he sent the wife between \$1,500 and \$1,800 every week during that period.

The wife testified that, approximately two months after returning from California, the husband resumed working the night shift as an emergency-room nurse at the hospital in Mobile and that, during the two-month interim period, she had paid the parties' living expenses. The husband, however, testified that he had been out of work for only two or three weeks after returning from California.

The wife testified that the husband's new job at the hospital in Mobile allowed him to work only on an "as needed" basis, suggesting that the husband did not work full time. The husband's pay stubs from that period indicate that he had worked an average of 31 hours per week. In February 2014, the

2150814

husband began working a more consistent schedule at the hospital, which he maintained until May 2015, at which time he obtained employment as a day-shift nurse at a different hospital near Mobile. The husband was still working at that particular hospital at the time of the trial.

The wife testified that, during the marriage, she had been responsible for taking the children to day care, picking them up from day care, and caring for them while they were at home. The husband, however, testified that he had helped with the children when he could, pointing out that he had worked mostly as a night-shift emergency-room nurse, which had required him to leave the marital residence around 5:00 p.m. and return around 7:00 a.m. each day.

After the wife and the children left the marital residence in June 2015, they moved in with the wife's parents, where they were still living at the time of the trial. The wife testified that, since she and the children had moved out of the marital residence, she had been responsible for providing for all of the children's financial needs, with the exception of approximately \$60 the husband had given her and some groceries the husband had purchased. The husband did not

2150814

deny that he had not provided much support for the children after they had moved out of the marital residence, other than to claim that he had spent "a few hundred dollars" and had provided the wife with a check for \$60.

According to the wife's testimony, the parties purchased the marital residence in February 2012, at a price of \$134,000. She testified that, in connection with that purchase, the parties had made a down payment of \$2,500, which had come from the wife's bank account.

It appears that the husband made all the mortgage-loan payments with respect to the marital residence, which were in the amount of \$1,021 per month. The husband also testified that he had always provided the parties and the children with health-insurance coverage. The wife testified that she had been responsible for paying the remainder of the parties' living expenses. The husband agreed when asked during the trial if the wife had "normally paid the bills," although he testified that some of the money he had sent home from California should have been used to pay bills. We note that there also was some testimony indicating that the wife's

2150814

father had "helped" with maintenance and improvements to the marital residence.

In August 2015, after the wife and the children had moved out of the marital residence, the parties agreed to take out a home-equity loan, which was to be secured by a mortgage on the marital residence. The net proceeds from that loan were approximately \$21,150. The parties initially intended to use the funds for improvements to the marital residence and for cosmetic surgery for the wife, but, at the husband's request, the money was placed in the trust account of the wife's attorney. The husband testified that, when the parties took out the home-equity loan, the wife had led him to believe that she wanted to reconcile and that, in his opinion, the wife had misled him.

The wife testified that, in connection with the home-equity loan, the marital residence had been appraised at a value of \$210,000, although she also testified that, in her opinion, the residence was worth approximately \$180,000. The husband, on the other hand, testified that, in his opinion, the house was worth between \$160,000 and \$170,000. He claimed to have based that opinion on the sale prices of other homes



2150814

in the neighborhood. According to the wife's testimony, which the husband did not dispute, at the time of the trial, the marital residence was encumbered by debt in the amount of \$157,000, including the debt resulting from the home-equity loan. Depending upon the valuation accepted by the trial court, that amount of debt would leave equity in the marital residence in an amount between \$3,000 and \$53,000.

At the time of the trial, the wife carried student-loan debt in the amount of \$82,000 and credit-card debt in the amount of \$4,600, which, she informed the trial court, she was willing to pay. At the time of the trial, the wife was earning approximately \$40,000 per year, and the husband was earning approximately \$44,292 per year.

The wife testified that she had sought a divorce because the husband had not sufficiently contributed to the parties' marriage and to raising the parties' children. The husband, however, testified that he had begun contributing to household matters after the parties had started marriage counseling and that he had cared for the children when he had had time to do so. The wife also claimed that the marriage had broken down because the parties did not share a loving relationship, and

2150814

she suggested that the husband had withdrawn his affection from her. The husband, however, testified that the wife had refused to have a sexual relationship with him.

The husband testified that, at some point in 2013, a man with whom the wife had a working relationship had sent the wife a text message at 1:00 a.m. The husband testified that the text message had stated that the man had "had a good time with [the wife] and [that] he wanted to do it again." The husband testified that, when he had confronted the wife about the message, the wife had claimed that she had only had breakfast with the man and that, in any event, it would not happen again. The wife, however, denied altogether that the text message had been sent. The husband also testified that, at a subsequent time, he had discovered several photographs of a different man, which had been stored on the wife's cellular telephone, but that the wife had denied that she had had an inappropriate relationship with that man. In response to questioning by the husband's counsel, the wife denied having sexual relations with anyone other than the husband during the marriage. After the trial, the trial court commented on the

2150814

record that, although the husband had implied that the wife had been unfaithful, "he hadn't proven she was unfaithful."

After the ore tenus proceedings, the trial court entered a judgment divorcing the parties. The trial court awarded the parties' joint legal custody of the children, awarded the wife "primary physical custody" of the children, and awarded the husband visitation with the children. The trial court directed the husband to pay the wife \$759.78 per month in child support and to provide the children with health-insurance coverage. Any uncovered medical expenses are to be split equally between the parties.

The trial court awarded the wife a 2006 Kia sport-utility vehicle, awarded the husband a 2004 Chevrolet truck, divided the parties' personal property, directed the parties to equally split an outstanding day-care bill, directed the husband to pay an outstanding medical bill in the approximate amount of \$1,600, and made each of the parties responsible for all other debts in their own names. The trial court directed the parties to split equally the approximately \$21,150 in proceeds from the home-equity loan.

2150814

The trial court awarded the husband the marital residence and directed him to refinance the debt encumbering the residence to make himself solely responsible for that debt. The trial court stated that, in the event the husband does not refinance the debt within one year, he is to sell the marital residence and to provide the wife with half of any net sale proceeds.

After the entry of the divorce judgment, the wife filed a motion requesting the trial court to alter or amend that judgment so as to make the child-support award retroactive.<sup>1</sup> The wife also asked the trial court to award her either 50% of the alleged equity in the marital residence or to award her all of the proceeds of the home-equity loan.

Statements made by the trial court during the hearing on the wife's postjudgment motion suggest that the trial court had been of the opinion that there had remained almost no

---

<sup>1</sup>We note here that, in her postjudgment motion, the wife asked the trial court to make the child-support award retroactive to the date she had been awarded pendente lite custody. However, on appeal, and during the hearing on the wife's postjudgment motion, the wife asked the trial court to make the award retroactive to the date the wife had filed her divorce complaint.

2150814

equity in the marital residence after the home-equity loan had been taken:

"[The trial court:] Well, if I remember correctly, and I'm going to go back and pull my bench notes and re-read them, but the \$21,[150] ... was the equity in the house. When they refinanced it, they took the equity out of the house and that's the \$21,[150] that was sitting in the [trust] account [of the wife's attorney]. So if you -- I don't think there is any equity in the house. I'll go back and look at my notes. ...

"So the [\$21,150], if I remember correctly, ... that was the equity in the house. At this point in time, there is no equity in the house unless -- other than what he has been paying on for the last year and a half and will continue to pay on for the next year."

In response to the trial court's statements, the wife's counsel pointed to the appraisal that had been performed in connection with the home-equity loan, which suggested that there was, indeed, equity remaining in the marital residence after the home-equity loan had been taken. After the hearing, the trial court entered a judgment denying the wife's postjudgment motion without explanation.

The wife appeals, arguing that the trial court erred in awarding the husband the marital residence and in failing to award the wife retroactive child support. The husband did not favor this court with an appellee's brief.

DiscussionMarital Residence

"In reviewing a judgment in a divorce case in which the trial court was presented conflicting evidence ore tenus, we are governed by the ore tenus rule. Under this rule, the trial court's judgment will not be disturbed on appeal unless it is plainly and palpably wrong. Hartzell v. Hartzell, 623 So. 2d 323 (Ala. Civ. App. 1993). Matters of property division rest soundly within the trial court's discretion and its determination regarding those matters will not be disturbed on appeal unless its discretion was plainly and palpably abused. Goodwin v. Estate of Goodwin, 632 So. 2d 500 (Ala. Civ. App. 1993). A division of marital property in a divorce case does not have to be equal, only equitable, and a determination of what is equitable rests within the sound discretion of the trial court. Pride v. Pride, 631 So. 2d 247 (Ala. Civ. App. 1993). When dividing marital property, a trial court should consider several factors, including the length of the marriage; the age and health of the parties; the future prospects of the parties; the source, type, and value of the property; the standard of living to which the parties have become accustomed during the marriage; and the fault of the parties contributing to the breakup of the marriage. Hartzell, supra."

Golden v. Golden, 681 So. 2d 605, 608 (Ala. Civ. App. 1996).

According to the wife, the marital residence had equity in the amount of \$53,000, all of which, she says, the trial court awarded to the husband. As noted, however, the evidence of the value of the marital residence was disputed during the trial. Although the appraisal performed in connection with

2150814

the home-equity loan supports the wife's position on appeal regarding the amount of equity, the wife's own opinion testimony suggested that the house had no more than \$23,000 in equity. In addition, the husband's opinion, which he asserted was based on sales of comparable homes in the parties' neighborhood, would support a conclusion that the marital residence had as little as \$3,000 in equity. Although the wife points to McCrimon v. McCrimon, 207 So. 3d 49 (Ala. Civ. App. 2016), in support of her claim that this court has "approved using the value of an appraisal in contrast to the values stated by the parties," nothing in McCrimon indicates that the trial court in the present case was required to rely on the appraisal. See also Edwards v. Edwards, 26 So. 3d 1254, 1261 (Ala. Civ. App. 2009), overruled on other grounds by Enzor v. Enzor, 98 So. 3d 15 (Ala. Civ. App. 2011) ("Either party was permitted to testify regarding their opinion of the value of the marital property; an appraisal was not required to establish the value of the property."). The trial court's directives in the divorce judgment regarding disposition of the marital residence, as well as the trial court's statements during the postjudgment hearing, suggest that it accepted the

2150814

valuation that resulted in there being almost no equity in the marital residence. We cannot conclude that the wife has demonstrated that the trial court's finding, and its disposition of the marital residence, was plainly and palpably wrong.

#### Retroactive Child Support

Although no pendente lite child-support order was entered in this case, the trial court could have made the final child-support award retroactive. See Brown v. Brown, 719 So. 2d 228, 232 (Ala. Civ. App. 1998) ("Given this state's policy and law requiring a parent to support a minor child, we hold that a trial court may, in its discretion, award child support retroactive to the filing of the complaint for divorce where the trial court has failed to enter a pendente lite child support order for the period in which the parent had a duty to support the child but failed to provide that support.").<sup>2</sup>

---

<sup>2</sup>Although, unlike in Brown, the wife in the present case never specifically asked the trial court to award her pendente lite child support, she did ask the trial court during the trial to make any final child-support award retroactive. See A.B. v. J.B., 40 So. 3d 723 (Ala. Civ. App. 2009) (indicating that a trial court may award retroactive child support for a period of time during which pendente lite child support had not been requested).



2150814

In Pate v. Guy, 942 So. 2d 380 (Ala. Civ. App. 2005), this court, relying on Brown, as well as the subsequent opinion in Vinson v. Vinson, 880 So. 2d 469 (Ala. Civ. App. 2003), reversed a divorce judgment that had failed to make a child-support award retroactive:

"[A] trial court may award child support retroactive to the filing of the complaint for divorce when the trial court has failed to enter a pendente lite child support order during the pendency of the divorce proceedings during which the noncustodial parent had a duty to support the children but failed to provide that support. See Brown, 719 So. 2d at 232. More recently, this court reversed a trial court's failure to award retroactive child support based upon Brown and the well-established principle that parental support is a fundamental right of all minor children. See Vinson v. Vinson, 880 So. 2d 469 (Ala. Civ. App. 2003)."

942 So. 2d at 385. In Pate, it was undisputed that the noncustodial parent had provided very little support for his children during the divorce proceedings. Id at 385. Likewise, in McCaskill v. McCaskill, 404 So. 3d 186 (Ala. Civ. App. 2012), this court, noting that a noncustodial parent had failed to support his children during divorce proceedings, reversed the judgment and remanded the case for the entry of a revised judgment that included an appropriate award of retroactive child support.

2150814

In the present case, it is undisputed that the husband provided little support for the benefit of the children during the divorce proceedings. Accordingly, based on Brown, Vinson, Pate, and McCaskill, we reverse the divorce judgment to the extent the trial court declined to award retroactive child support, and we remand the cause for the entry of such an award, taking into consideration the parties' incomes and pertinent financial provisions of the divorce judgment.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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