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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2017-2018

2160806

J.S.

v.

S.S.

**Appeal from Coffee Circuit Court
(DR-15-900113)**

THOMPSON, Presiding Judge.

On May 22, 2015, J.S. ("the husband") filed a complaint in the Coffee Circuit Court ("the trial court") seeking a divorce from S.S. ("the wife"). In his complaint, the husband also sought custody of the parties' four minor children, an

2160806

award of child support, and an equitable distribution of the parties' marital property. The wife answered and filed a counterclaim in which she sought an award of custody of the parties' children, an award of child support, an equitable property division, and an award of periodic alimony.

The trial court conducted an ore tenus hearing. On July 12, 2017, the trial court entered a divorce judgment that incorporated certain stipulations of the parties and resolved the remaining issues in dispute. In its divorce judgment, the trial court awarded the parties joint legal and physical custody of the children, ordered the husband to pay child support, fashioned a property division, and awarded the wife \$1,500 per month in periodic alimony. The husband timely appealed on July 14, 2017.

On November 27, 2017, while this appeal was pending in this court, the wife died.¹ If a party dies during the

¹No suggestion of death has been filed in this court. However, in December 2017, the husband filed petitions for a writ of mandamus in this court alleging that on November 27, 2017, the wife had been murdered and that, as a result of his being considered a "person of interest" in that murder, the Coffee County Department of Human Resources ("DHR") had removed the children from his custody. The Coffee Juvenile Court entered shelter-care orders finding that an emergency existed and transferring pendente lite custody of the children

2160806

pendency of an appeal, the appeal does not abate. Rule 43(a), Ala. R. App. P.; Cox v. Dodd, 242 Ala. 37, 4 So. 2d 736 (1941); Woodruff v. Gazebo E. Apartments, 181 So. 3d 1076, 1080 (Ala. Civ. App. 2015); and Kaufman v. Kaufman, 22 So. 3d 458, 460 (Ala. Civ. App. 2007). Accordingly, we address the issues raised by the husband.

The husband first argues that the trial court erred in its award of periodic alimony to the wife. In making that argument, the husband fails to recognize that, under its express terms, the periodic-alimony obligation created in the divorce judgment terminated upon the wife's death. We note that "[a]n award of periodic alimony need not expressly specify, however, that the obligation ceases upon the death or remarriage of the recipient spouse because 'the term "periodic alimony," by definition, means a payment to a spouse that will cease upon death, remarriage, or cohabitation.'" Peace v.

to DHR; the husband's petitions for a writ of mandamus filed in this court challenged those orders. On January 31, 2018, this court entered orders dismissing the husband's petitions in part and denying them in part. We take judicial notice of those filings and of the representations in those filings that the wife died in November 2017. City of Mobile v. Matthews, 220 So. 3d 1061, 1063 (Ala. Civ. App. 2016) ("[A] court may take judicial notice of its own records.").

2160806

Peace, 137 So. 3d 905, 911 (Ala. Civ. App. 2012) (quoting Wheeler v. Wheeler, 831 So. 2d 629, 635 (Ala. Civ. App. 2002)). Thus, because the husband's periodic-alimony obligation was extinguished at the time of the wife's death, the arguments the husband raises in his brief to this court on the issue of periodic alimony with regard to any time after the wife's death are moot.

With regard to the periodic-alimony obligation created by the divorce judgment, which the husband had a duty to pay until the date of the wife's death, the husband contends that the trial court erred when it "mischaracterized" the purpose of such an award by stating that the award was for the wife's "contribution to the marital estate." The husband points out that the trial court may consider a number of factors, including the length of the marriage, the parties' respective prospects, and their standard of living, in fashioning an award of periodic alimony. The husband appears to contend that the trial court's failure to mention the specific factors listed above while, instead, mentioning the wife's contribution to the marriage rendered the award of periodic alimony erroneous. We cannot agree.

An award of periodic alimony is reviewed together with an overall division of property.

"When dividing marital property and determining a party's need for alimony, a trial court should consider several factors, including "the length of the marriage, the age and health of the parties, the future employment prospects of the parties, the source, value, and type of property owned, and the standard of living to which the parties have become accustomed during the marriage.'" Ex parte Elliott, 782 So. 2d 308 (Ala. 2000) (quoting Nowell v. Nowell, 474 So. 2d 1128, 1129 (Ala. Civ. App. 1985)) (footnote omitted). In addition, the trial court may also consider the conduct of the parties with regard to the breakdown of the marriage, even where the parties are divorced on the basis of incompatibility, or where, as here, the trial court failed to specify the grounds upon which it based its divorce judgment. Ex parte Drummond, 785 So. 2d 358 (Ala. 2000); Myrick v. Myrick, 714 So. 2d 311 (Ala. Civ. App. 1998). It is well-settled that where a trial court does not make specific factual findings, the appellate court must assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous. Ex parte Fann, 810 So. 2d 631 (Ala. 2001); Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996).'

"Baggett v. Baggett, 855 So. 2d 556, 559-60 (Ala. Civ. App. 2003). In addition to the factors listed in Baggett v. Baggett, the trial court may also consider the spouses' relative economic and noneconomic contributions to the marriage in dividing the marital property and awarding periodic

2160806

alimony. Weeks v. Weeks, 27 So. 3d 526, 532-33 (Ala. Civ. App. 2008)."

E.A.B. v. D.G.W., 127 So. 3d 422, 431 (Ala. Civ. App. 2012) (emphasis added).

The trial court was free to consider, as a part of its decision to award periodic alimony, the wife's contributions to the parties' marriage. E.A.B. v. D.G.W., supra; see also Huckabee v. Huckabee, 544 So. 2d 170, 171 (Ala. Civ. App. 1989) ("The division of property and the award of alimony, after consideration of the equities and contributions of the parties, are matters which fall within the broad discretion of the trial court."), and Walton v. Walton, 409 So. 2d 858, 861 (Ala. Civ. App. 1982) (same).

The provision awarding the wife periodic alimony states, in pertinent part:

"The Court finds in favor of the wife for her contribution to the marital estate and awards unto the wife periodic alimony. The husband shall pay to the wife, as periodic alimony, the sum of One Thousand Five Hundred and No/100 (\$1,500) Dollars per month. Said payments shall begin on the 1st day of August 2017, and shall continue due and payable on the 1st day of each calendar month thereafter in consecutive months, except that same shall terminate in the event of the [husband's] death, the [wife's] death, the [wife's] remarriage or cohabitation with a member of the same or opposite sex, or other order of the Court."

2160806

We note that it is clear from the trial court's judgment that it did not mistakenly award the wife periodic alimony instead of alimony in gross, because, in another section of its judgment, the trial court awarded the wife alimony in gross using language similar to that in its periodic-alimony award.²

The husband focuses most of his argument on this issue on a contention that the wife requested an award of periodic alimony as an additional means of support for the parties' children. Even assuming that the husband's characterization of the wife's request for periodic alimony is accurate, the nature a party's request would not make an award by the trial court erroneous. "It is well established that this Court will not presume error and will affirm a judgment appealed from if it is supported on any valid legal ground." Odom v. Blackburn, 559 So. 2d 1080, 1082 (Ala. 1990). The trial court determined that an award of periodic alimony, together with

²In awarding the wife \$10,000 in alimony in gross, the trial court specified that,

"[a]s a portion of the property settlement, the Court finds in favor of the wife for her contribution to the marital estate and hereby awards unto the wife the sum of Ten Thousand Dollars (\$10,000), the same to be paid by the husband to the wife within thirty (30) days of this judgment."

2160806

the property division, was appropriate under the facts of this case, and the husband has not demonstrated that the trial court erred in reaching that conclusion. See Albertson v. Albertson, 678 So. 2d 118, 120 (Ala. Civ. App. 1996) (noting that the issues of property division and alimony are interrelated and must be considered together).

The husband next argues that the trial court erred in awarding the wife a \$10,000 property settlement as a part of the property division and that the trial court erred in determining the amount of the periodic-alimony award. The husband contends that the evidence did not support those awards. In its July 12, 2017, divorce judgment, the trial court did not make any factual findings. In New Properties, L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004), our supreme court, in interpreting Rule 52(b), Ala. R. Civ. P., held: "[I]n a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review." In this case, the husband did not file a postjudgment motion

2160806

challenging the sufficiency of the evidence supporting the trial court's property division and the amount of the periodic-alimony award. Accordingly, the husband's arguments as to those issues were not preserved for appellate review. New Props., L.L.C. v. Stewart, supra; McMillian v. McMillian, [Ms. 2160760, Feb. 23, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018).

The husband last argues that the trial court erred in addressing in its July 12, 2017, divorce judgment a provision in a will executed by the husband's grandmother; he maintains that the trial court was without authority to address that issue. The record indicates that the husband's grandmother ("the decedent") died in 2013. The decedent's will directs that certain property be inherited by "[the decedent's] grandson and his wife, [J.S. and S.S.]." The husband testified that he had been informed that there were not sufficient estate assets for the parties to inherit under the decedent's will.

Regardless, at the close of the final day of testimony, the wife requested that she be allowed additional time to conduct discovery pertaining to the amounts or property that

2160806

had been or might be distributed pursuant to the terms of the decedent's will. The trial court granted that request, and it later conducted an additional hearing on the issue of the parties' inheritance under the decedent's will. The trial court did not receive any evidence at that portion of the hearing. However, the wife's attorney stated that he "[didn't] know how the Court could make a determination of that. I don't know how you could do that any way as far as jurisdictionally or anything else in New York." The husband's attorney agreed with that argument. The trial court noted that the assets to be inherited under the decedent's will had not yet been distributed.

In the divorce judgment, the trial court stated, in pertinent part: "The parties were jointly named as beneficiaries in the Last Will and Testament of [G.S.] and, as such, this Court finds that any distribution of the estate shall be equally divided between the Husband and the Wife as was bequeathed to them jointly." (Emphasis added.) In his only argument in his appellate brief pertaining to the division of the inherited property, the husband characterizes the trial court's divorce judgment as "directing how an estate

2160806

probated in the State of New York was to be distributed." We disagree with the husband's characterization of the relevant provision. The assets the husband and wife would inherit under the terms of the will were marital property that the parties asked the trial court to consider as a part of their claims pertaining to the property division. The trial court did so, ordering that any property that passed to the parties pursuant to the terms of the will be divided equally between them. Contrary to the husband's argument, the trial court did not direct what property was to be distributed to the husband and the wife pursuant to the terms of the decedent's will or the manner in which any inherited property was to be distributed. The trial court has not made any order pertaining to the distribution of the estate. Rather, the trial court defined the parties' respective interests in any property the parties received pursuant to the terms of the decedent's will.

"There can be no question that a trial court with jurisdiction of the parties, upon considering petitions for divorce and property division, has full authority to settle all of the equities of the parties according to the evidence."

2160806

Southern v. Southern, 558 So. 2d 939, 940 (Ala. Civ. App. 1990); see also Goodwin v. Goodwin, 358 So. 2d 472, 473 (Ala. Civ. App. 1978) (noting that a trial court has the authority to fashion a property division in a divorce action). In its July 12, 2017, divorce judgment, the trial court determined the parties' respective interests in the property they jointly inherited during their marriage under the express terms of the decedent's will. The trial court directed that whatever property the husband and the wife eventually receive as joint beneficiaries under the will is to be divided between them equally, as opposed to one party receiving a greater portion of the inherited property once it is distributed pursuant to the terms of the decedent's will. The husband has failed to demonstrate error on appeal with regard to this issue.

For the reasons set out above, the trial court's judgment is affirmed.

AFFIRMED.

Pittman, Thomas, and Donaldson, JJ., concur.

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