

REL: September 11, 2020

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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Barry A. Graham

v.

Joy Vick Graham

Appeal from Mobile Circuit Court
(DR-16-900003.02)

MOORE, Judge.

Barry A. Graham ("the former husband") appeals from a judgment of the Mobile Circuit Court ("the trial court") to the extent it interprets and enforces certain provisions of a November 17, 2017, judgment divorcing the former husband from

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Joy Vick Graham ("the former wife"). We affirm the trial court's judgment.

Facts and Procedural History

On November 17, 2017, Judge Rosemary Chambers entered a judgment ("the divorce judgment") divorcing the parties. In the divorce judgment, the former wife was awarded, among other things, GTM Timber Management, LLC ("GTM"), a business created by the parties to manage certain property owned by the parties, which property included timberland and a cabin, as well as the real property managed by GTM ("the GTM property"). The parties agreed that the value of the GTM property was approximately \$3,000,000 and that the balance owed on the GTM property was approximately \$371,000. Additionally, the former wife was awarded 30% of the shares of Barry Graham Oil Services, LLC ("BGOS"), a company owned primarily by the former husband. With regard to the division of BGOS, the divorce judgment states:

"9. With respect to [BGOS], the [former] wife shall be awarded 30 percent of the shares of the company (from the shares that the [former] husband owns) and the [former] husband shall be awarded the remaining 67.36 percent of the shares. The [former] husband shall have the first right of refusal to buy the [former] wife out for same shares for \$4.3 million within 90 days. Thereafter, the terms of

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sale shall be left up to the [former] wife regarding whether she wants to sell the shares.

"The Court does consider the voluntary and unnecessary change of the loan from Regions [Bank] to Servis[First Bank] and the removal of the [former] wife's name from the accounts to be an effort of the [former] husband to shelter assets from the [former] wife as a potential creditor in this divorce litigation. In the event the [former] husband does not buy the [former] wife's interest in the company, the parties are encouraged to immediately begin efforts to ask the bank for permission to sell boats in order to free up collateral."

The last paragraph quoted above spoke to the former husband's decision to move BGOS's banking business from Regions Bank to ServisFirst Bank, including paying off a loan of approximately \$18 million that had been held by Regions Bank and had been secured by 5 vessels owned by BGOS by acquiring a new \$18 million loan from ServisFirst Bank that was secured by all of BGOS's 19 vessels and other financial assets.

Notably, the divorce judgment did not award the former wife any properties that were encumbered by a lien other than the GTM property and the 30% of the shares of BGOS. The divorce judgment also stated:

"21. With respect to the \$15 million policy with Prudential Life, the [former] wife shall remain the named ... owner of same policy and the [former] husband shall pay the premium thereon and shall name

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the [former] wife as beneficiary of 5 million dollars so long as there is a bank lien on any of the property to which she has been awarded. The [former] husband may name the beneficiary of the remaining 10 million dollars. Once there is no lien on the [former] wife's assets herein, the [former] husband shall be the named owner and may choose the beneficiary for the entire 15 million [dollars]."

Following the entry of the divorce judgment, the former husband filed a postjudgment motion requesting, among other things, clarification of the trial court's judgment with regard to paragraph 21. The former wife also filed a postjudgment motion. At the December 19, 2017, hearing on the parties' postjudgment motions, the following colloquy occurred between the former husband's attorney and the Judge Chambers, who rendered the divorce judgment, with regard to paragraph 21:

"[The former husband's attorney]: ... The threshold question that I have is what bank lien and what assets? To my knowledge, other than the [GTM property] having a mortgage on it, there are no bank liens against [the former wife's] assets. Thereafter --

"[Judge Chambers]: That would be the 30 percent in the company would be the main item.

"[The former husband's attorney]: Membership interest, Your Honor, is not subject to any lien.

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"[Judge Chambers]: The bank has used the shares and assets of the company as collateral for the loan as I recall.

"[The former husband's attorney]: Has used the assets, there is no question about that.

"[Judge Chambers]: That's what I'm talking about. All of the assets that make up the value of the shares is what we are talking about."¹

The trial court entered an order on the parties' postjudgment motions on December 20, 2017, addressing the parties' arguments but declining to modify or otherwise amend paragraph 21 of the divorce judgment. Both parties appealed from the divorce judgment, and this court affirmed that judgment. See Graham v. Graham (No. 2170443, March 15, 2019), 292 So. 3d 331 (Ala. Civ. App. 2019) (table), and Graham v. Graham (No. 2170451, March 15, 2019), 292 So. 3d 332 (Ala. Civ. App. 2019) (table).

¹Although the record on appeal does not contain copies of the postjudgment motions filed by the parties or a transcript of the hearing on those motions, this court may take judicial notice of our own records in Graham v. Graham (No. 2170443, March 15, 2019), 292 So. 3d 331 (Ala. Civ. App. 2019) (table), and Graham v. Graham (No. 2170451, March 15, 2019), 292 So. 3d 332 (Ala. Civ. App. 2019) (table), in which this court considered the appeals filed by both parties following the entry of the divorce judgment. See City of Mobile v. Matthew, 220 So. 3d 1061, 1064 n.3 (Ala. Civ. App. 2016) (outlining the circumstances under which an appellate court may take judicial notice of its own record in another case).

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On October 22, 2018, the former husband filed in the trial court a "motion for rule nisi and related instanter relief," in which he asserted that the former wife had failed to comply with certain aspects of the divorce judgment. The former husband asserted, among other things, that the outstanding mortgage and associated debt owing on the GTM property had been paid and that, as a result, he was entitled to full ownership of the life-insurance policy referenced in paragraph 21 of the divorce judgment. He further asserted in his motion that the former wife had denied that the former husband was entitled to full ownership of the life-insurance policy and requested, among other things, an order directing the former wife to execute an assignment of ownership of the policy to the former husband. On February 11, 2019, the former wife filed a response to the former husband's motion, as well as a motion for a rule nisi and a finding of contempt against the former husband.

Judge Chambers had retired by the time the former husband filed his October 22, 2018, motion; thus, the hearing on the former husband's motion was conducted by Judge Michael Sherman on March 19, 2019. At that hearing, Alex Arendall, the senior

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vice president of commercial banking at ServisFirst Bank in Mobile, testified that ServisFirst Bank was not claiming any lien on or security interest in the former wife's membership interest in BGOS and that the various items of collateral and security in which ServisFirst Bank was claiming an interest were in the name of BGOS. The former wife testified that there was no mortgage or other indebtedness owed with regard to GTM or the GTM property. On April 10, 2019, Judge Sherman entered a judgment disposing of all the claims presented by both parties and finding, in pertinent part:

"With respect to the \$15,000,000.00 life insurance policy with Prudential Life, Judge Chambers ordered the former husband to name the former wife as the owner of said policy and as beneficiary of \$5,000,000.00 of that policy 'so long as there is a bank lien on any of the property to which she has been awarded' and that ownership and the former husband's ability to name the beneficiary on the entire policy would not occur until 'there is no lien on the [former] wife's assets herein.' In light of the specific findings of fact in paragraph 9 of the Judgment of Divorce, this Court finds that those conditions have not yet been met. Therefore, the terms of the Judgment of Divorce requiring the former husband to name the former wife as beneficiary of \$5,000,000.00 and to be named owner of the policy still exists."

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The former husband filed a "motion to amend, modify, alter and clarify order of court and related relief" on May 10, 2019; the trial court denied that motion on June 14 2019.

On June 19, 2019, the former husband filed a "request for entry of specific findings of fact and conclusions of law," requesting that the trial court elaborate on its April 10, 2019, judgment with regard to the life-insurance policy. Specifically, the former husband requested the trial court "to factually identify (1) which 'conditions' have not been met, as set forth in the Court's referenced Order and particularly paragraph #3 thereof; (2) what 'bank liens' or 'liens' presently legally encumber the [former wife's] membership interest in [BGOS]; [and] (3) which person or entity holds a security interest in or upon the [former wife's] membership interest in [BGOS]." The trial court denied the former husband's June 19, 2019, motion on July 1, 2019. The former husband timely filed his notice of appeal to this court on July 22, 2019.

Analysis

The former husband first argues on appeal that the trial court erred by denying him full ownership of the life-

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insurance policy. He asserts that, because the evidence presented indicates that there was no mortgage or other lien on the GTM property, because ServisFirst Bank did not claim any lien on or security interest in the former wife's membership interest in BGOS, and because the remaining property awarded to the former wife in the divorce judgment was not encumbered by a lien, the former husband is entitled to full ownership of the insurance policy. We disagree.

Our supreme court has stated:

"Courts are to construe judgments as they construe written contracts, applying the same rules of construction they apply to written contracts. See Hanson v. Hearn, 521 So. 2d 953, 954 (Ala. 1988). Whether a judgment is ambiguous is a question of law to be determined by the court. See Chapman v. Chapman, 634 So. 2d 1024, 1025 (Ala. Civ. App. 1994); Grizzell v. Grizzell, 583 So. 2d 1349, 1350 (Ala. Civ. App. 1991). If the terms of a judgment are not ambiguous, then they must be given their usual and ordinary meaning and their 'legal effect must be declared in the light of the literal meaning of the language used' in the judgment. Wise v. Watson, 286 Ala. 22, 27, 236 So. 2d 681, 686 (1970); see Moore v. Graham, 590 So. 2d 293, 295 (Ala. Civ. App. 1991). However, if a term in a trial court's judgment is ambiguous, then the trial court's interpretation of that term 'is accorded a heavy presumption of correctness and will not be disturbed unless it is palpably erroneous.' Chapman, 634 So. 2d at 1025."

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State Pers. Bd. v. Akers, 797 So. 2d 422, 424-25 (Ala. 2000) (emphasis added).

In the present case, although the original trial-court judge, Judge Chambers, had retired at the time the former husband filed his motion for a rule nisi, Judge Chambers had the opportunity to clarify the divorce judgment. As stated above, Judge Chambers interpreted paragraph 21 of the divorce judgment to refer specifically to the shares and assets of BGOS. Additionally, Judge Sherman reached the same conclusion. Accordingly, this court will not disturb that interpretation unless it is palpably erroneous. See Akers, supra.

In Boykin v. Law, 946 So. 2d 838, 848 (Ala. 2006), our supreme court stated, in pertinent part:

"[An appellate court will] construe the trial court's judgment like other written instruments: the rules of construction for contracts are applicable for construing judgments. Hanson v. Hearn, 521 So. 2d 953, 954 (Ala. 1988); Moore v. Graham, 590 So. 2d 293, 295 (Ala. Civ. App. 1991). We are free to review 'all the relevant circumstances surrounding the judgment,' and 'the entire judgment ... should be read as a whole in the light of all the circumstances as well as of the conduct of the parties.' Hanson, 521 So. 2d at 955."

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Our supreme court also observed in Bruce v. Cole, 854 So. 2d 47, 55 (Ala. 2003), that a court "will so interpret a contract as to reconcile and to enforce all of its terms and not to ignore or to disregard any of its terms so long as such an interpretation is not patently unreasonable." As stated in Bruce, appellate courts have consistently considered whether the interpretation of a contract or judgment is reasonable.

Paragraph 21 of the divorce judgment ordered that the former wife remain the owner of the life-insurance policy and that she remain the beneficiary of \$5,000,000 of the policy "so long as there is a bank lien on any of the property to which she has been awarded." The former wife argues on appeal that Judge Chambers's use of the plural "assets" and her reference to "any of the property" in paragraph 21 clearly contemplate the applicability of that paragraph to more than one lien rather than only the lien on the GTM property. We agree with the former wife that, when considering the circumstances surrounding the divorce judgment, the specific language used in paragraph 21, and Judge Chambers's statements in paragraph 9 of the divorce judgment, the only reasonable

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interpretation of paragraph 21 would include the lien on the financial assets of BGOS.

It is apparent, in light of Judge Chambers's statements in paragraph 9 of the divorce judgment, that her intention in drafting paragraph 21 was to protect the interest of the former wife in the property that she was awarded in the divorce judgment. It was neither necessary nor reasonable for Judge Chambers to implement paragraph 21 to require the former husband to maintain a life-insurance policy in the amount of \$5 million to protect the former wife's interest in the GTM property, which was valued at approximately \$3,000,000, when the existing lien on that property had a balance of only \$371,000. Conversely, Judge Chambers made a specific finding in the divorce judgment that the former husband's transfer of the \$18 million loan to BGOS from Regions Bank to ServisFirst Bank had been an effort by the former husband to shelter assets from the former wife in the divorce litigation. Judge Chambers included in the divorce judgment a clause allowing the former husband to purchase the shares of BGOS that were awarded to the former wife for the amount of \$4.3 million. Notably, 30% of \$18 million, the amount of the loan secured by

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the vessels and other financial assets of BGOS, totals \$5,400,000. Thus, even without the benefit of Judge Chambers's comments at the hearing on the parties' postjudgment motions directed to the divorce judgment, it is far more reasonable to conclude that Judge Chambers reserved \$5 million in benefits of the life-insurance policy in paragraph 21 to protect the former wife's interest in BGOS. Because the interpretation of paragraph 21 of the divorce judgment by both Judge Chambers and Judge Sherman is reasonable when considering the full language of that judgment and the relevant circumstances surrounding that judgment, the April 10, 2019, judgment at issue in this appeal is due to be affirmed in accordance with Boykin, Bruce, and Akers, supra.

The former husband also argues on appeal that Judge Sherman erred to reversal when he declined to clarify certain provisions of the divorce judgment. The former husband cites authority indicating that a trial court has the continuing and inherent authority to clarify the provisions of a previously entered judgment that is ambiguous or otherwise unclear. See, e.g., Mullins v. Mullins, 770 So. 2d 624, 625 (Ala. Civ. App. 2000) ("[I]f the court finds that a provision dividing

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property is ambiguous, the court has the power to clarify the judgment, and such a clarification is not considered a modification."). He fails, however, to cite any authority indicating that Judge Sherman was required to clarify provisions of the divorce judgment under the circumstances in the present case. See Rule 28(a)(10), Ala. R. App. P. (requiring that an argument in an appellate brief contain, among other things, citations to cases, statutes, or other authorities relied on).

At the hearing on the former husband's October 22, 2018, motion, the former husband's attorney posed a number of inquiries related to the former wife's ownership of the life-insurance policy, including whether the former wife's estate would be the secondary beneficiary of the benefits of the policy if the former wife predeceased the husband; whether the former wife's interest in BGOS should be transferred if the former husband predeceased the former wife and she were to receive the \$5 million in insurance proceeds; and whether the former wife would still be entitled to collect the \$5 million in insurance proceeds if she first sold her interest in BGOS to an unrelated third party. The former husband poses on

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appeal additional hypothetical questions, asserting that, "[i]f the requested clarification is not forthcoming, the continuing 'judicial mess' is destined to continue." Specifically, he asks what effect the former wife's remarriage would have on the life-insurance benefits, what effect formal bankruptcy proceedings of BGOS would have on the former wife's life-insurance benefits, what effect the termination of BGOS's business activities would have on the life-insurance coverage, and what liens and/or debts exist relating to the assets awarded to the former wife in the divorce judgment.

With the exception of the former husband's inquiry as to which liens and assets are referenced in paragraph 21 of the divorce judgment, as we interpret the final question posited by the former husband on appeal and which was answered by the foregoing analysis, we note that each of the questions raised by the former husband present a hypothetical situation. There was no testimony presented before the trial court indicating that the former wife planned to remarry, that BGOS was filing for bankruptcy protection or planned to terminate its business activities, that the former wife planned to convey her

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interest in BGOS, or that the death of either party was imminent. Our supreme court has stated:

" "A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned." Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) (quoting American Fed'n of State, County & Mun. Employees v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). 'The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties.' Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004) (citing VE Corp. v. Ernst & Young, 860 S.W.2d 83, 84 (Tex. 1993))."

Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007). Because the former husband's request for clarification presented only hypothetical questions for the trial court's consideration, the former husband's argument related to that request is moot, and, thus, Judge Sherman did not err in declining to address that argument presented by the former husband.

Because the former husband failed to raise any argument on appeal that merits reversal of the trial court's April 10, 2019, judgment, that judgment is affirmed.

AFFIRMED.

Thompson, P.J., and Edwards, J., concur.

Hanson, J., dissents, with writing.

Donaldson, J., recuses himself.

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HANSON, Judge, dissenting.

I respectfully dissent. On appeal, Barry A. Graham ("the former husband") principally contends that the trial court erred in failing to enforce the specific language of paragraph 21 of the parties' divorce judgment, which, he contends, entitles him to full ownership of a particular life-insurance policy and relieves him of the obligation to name Joy Vick Graham ("the former wife") as a beneficiary of that policy in light of the undisputed facts in this case.

"A divorce judgment should be interpreted or construed as other written instruments are interpreted or construed. Sartin v. Sartin, 678 So. 2d 1181 (Ala. Civ. App. 1996). "The words of the [judgment] are to be given their ordinary meaning" Id. at 1183. Whether [a judgment] is ambiguous is a question of law for the trial court. Wimpee v. Wimpee, 641 So. 2d 287 (Ala. Civ. App. 1994). [A judgment] that by its terms is plain and free from ambiguity must be enforced as written. Jones v. Jones, 722 So. 2d 768 (Ala. Civ. App. 1998). An ambiguity exists if the [judgment] is susceptible to more than one meaning. Vainrib v. Downey, 565 So. 2d 647 (Ala. Civ. App. 1990). However, if only one reasonable meaning clearly emerges, then the [judgment] is unambiguous. Id.'

"R.G. v. G.G., 771 So. 2d 490, 494 (Ala. Civ. App. 2000)."

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Belcher v. Belcher, 18 So. 3d 946, 948 (Ala. Civ. App. 2009). "Generally, Alabama courts "will not look beyond the four corners of an instrument unless the instrument contains latent ambiguities."" Meyer v. Meyer, 952 So. 2d 384, 391 (Ala. Civ. App. 2006) (quoting Kershaw v. Kershaw, 848 So. 2d 942, 955 (Ala. 2002), quoting in turn Ex parte Employees Ret. Sys. Bd. of Control, 767 So. 2d 331, 335 (Ala. 2000)). Furthermore, although we have recognized that "a trial court has the inherent authority to interpret, implement, or enforce its own judgments," Jardine v. Jardine, 918 So. 2d 127, 131 (Ala. Civ. App. 2005), "[t]he trial court's authority is not, however, 'so broad as to allow substantive modification of an otherwise effective and unambiguous final order.'" Jardine, 918 So. 2d at 131 (quoting George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004)).

In this case, paragraph 21 of the parties' divorce judgment awarded the former wife ownership of the policy, required that the former husband pay the policy premiums, and required that the former wife be named as the beneficiary as to \$5,000,000 of the policy proceeds "so long as there is a bank lien on any of the property to which she has been

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awarded" (emphasis added). Paragraph 21 of the divorce judgment further provided that, "[o]nce there is no lien on the [former] wife's assets herein, the [former] husband shall be the named owner and may choose the beneficiary for the entire [\$]15 million" (emphasis added). Here, the undisputed facts indicate that there are no liens or other security interests on any of the property or assets awarded directly to the former wife in the judgment of divorce.

The former wife, however, argues that, given her award of a 30% membership interest in Barry Graham Oil Services, LLC ("BGOS"), the phrases "the property to which she has been awarded" and "the wife's assets herein" encompass the assets owned by BGOS, which undisputedly remain encumbered by a lien held by ServisFirst Bank. The former wife further posits that the judge who rendered the divorce judgment intended the insurance policy to serve as security to protect the value of the former wife's minority interest in BGOS. Furthermore, it is clear that the trial court accepted the former wife's interpretation of paragraph 21 of the divorce judgment. Nevertheless, paragraph 21 is not ambiguous with respect to what property must be lien-free in order to transfer ownership

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and control of the insurance policy to the former husband -- that paragraph clearly and unambiguously applies only to liens on the property and assets awarded to the former wife by the divorce judgment. The former wife was not awarded any of BGOS's assets, nor did the award of a membership interest in BGOS confer upon the former wife any interest in the specific property of BGOS. See, e.g., § 10A-5A-4.02, Ala. Code 1975 ("A member has no interest in any specific property of a limited liability company"); Carey v. Howard, 950 So. 2d 1131, 1135-36 (Ala. 2006) (holding, under former statutes, that members of a limited-liability company did not have any interest in specific property of the limited-liability company).² Accordingly, the trial court, to the extent it concluded that the assets of BGOS must also be free from any liens in order for the former husband to be relieved of his

²The trial judge who rendered the divorce judgment may have held the mistaken belief that either (a) there was a bank lien on the membership interest in BGOS awarded to the former wife or (b) the award of a membership interest in BGOS also conferred upon the former wife a direct interest in the encumbered assets of BGOS. Such a mistake, however, does not render an otherwise unambiguous provision of the divorce judgment ambiguous. See Meyer, 952 So. 2d at 392 (holding that a mistaken belief as to whether wife was entitled to a certain percentage of her spouse's military-retirement benefits was not ground to reform divorce judgment on the basis of ambiguity).

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obligation under paragraph 21 of the divorce judgment, impermissibly imposed an additional substantive condition upon the former husband that had not been specified in the divorce judgment. The April 10, 2019, judgment interpreting and enforcing the divorce judgment, therefore, is due to be reversed. See Barnes v. Barnes, 28 So. 3d 800, (Ala. Civ. App. 2009) (order requiring former spouse to refinance mortgage on the marital home was an impermissible modification of the divorce judgment); Belcher, 18 So. 3d at 949 (holding that trial court erred in ordering former spouse to pay college-age child's medical and dental expenses when the payment of those expenses had not been required by the plain language of divorce judgment).