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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2008-2009

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Rebecca R. Grelier

v.

Maximilian J. Grelier III

Maximilian J. Grelier III

v.

Rebecca R. Grelier

Appeal from Madison Circuit Court
(DR-04-956)

PITTMAN, Judge.

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Rebecca R. Grelier ("the wife") appeals from a judgment divorcing her from Maximilian J. Grelier III ("the husband"); in particular, she challenges the trial court's valuation of and division of certain business interests of the husband's and the trial court's failure to reserve jurisdiction to award periodic alimony in the future.

The wife and the husband were married on May 13, 1995; the parties' two children, who were born during the marriage, were ages 4 and 8 years old at the time of trial. On June 28, 2004, the wife filed a complaint that sought, among other things, a divorce on the grounds of adultery, an award of custody of the parties' children, and an equitable division of the marital assets and debts. The husband filed an answer to the complaint 11 days later; he subsequently filed his own complaint in which he sought a divorce on the grounds of incompatibility of temperament.

On June 10, 2005, the wife filed a motion requesting that the trial court appoint a special master for the purpose of auditing, examining, and inspecting the accounting books, records, and physical assets of the husband's business interests and reporting its findings to the court. During a

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subsequent hearing, the trial court instructed the wife's attorney to draft an order appointing a special master and to obtain the husband's attorney's approval of the proposed order before submitting the order to the trial court. On August 2, 2005, the trial court, using an order drafted by the wife's attorney, appointed Gary Saliba to serve as a special master "for the purpose of identification and determination of the fair market value of all business entities in which the [husband] possesses any interest as well as analysis and determination of the fair market value of Queen Bee of Beverly Hills, the business operated by the [wife]." That order bore the signatures of the wife's counsel and the husband's counsel indicating their approval of the order at the time it was rendered by the trial court.

The trial court conducted an ore tenus proceeding over 6 days: November 13-15 and December 20-22, 2006. During the ore tenus hearing, the trial court heard testimony from the husband, the wife, the special master, and numerous witnesses; the testimony alone comprises over 1,800 pages of the 2,400-page record on appeal. Various documentary exhibits,

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including pertinent financial computations regarding the parties' business interests, were also admitted into evidence.

Although the testimony revealed that both parties had earned undergraduate business degrees, the evidence also indicated that the wife had worked primarily as an accountant before the birth of the parties' children and as a home-based entrepreneur following the birth of the children. In contrast, the husband had been self-employed, primarily as a commercial retail-property and office-property developer and broker, and he was serving as executive vice president of Chase Commercial Properties, LLC, at the time of trial. In addition, the husband regularly participated in real estate and commercial ventures through a variety of closely held corporations: Flint Crossing, LLC; Trinity Associates, LLP; Chase Commercial Properties, LLC; Village Builders, Inc.; Rosemary Corners, LLC; Research Park Associates, LLC; and RMC Investors, LLC. Those entities, in turn, owned wholly or in part a number of other business entities, namely Park Place Associates, LLC; Hughes Retail Associates, LLC; Bradford Associates, LLC; and The Falls at Grants Mill, LLC. In December 2005, while the divorce action was still pending, the

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husband and his three business partners (his father; his brother; and Remy Gross, his college friend) reorganized all the previously listed business interests under one entity, CG Partners, LLC, with each partner owning a 25% interest. The husband testified that consolidating the businesses was necessary to handle the outstanding debt that he and his father still owed from the financial failures of Village Builders, Inc., and The Ledges, an expensive residential-subdivision development. The husband also testified that during the pendency of the divorce action he had been forced to borrow \$30,000 from Gross to employ his attorney and to pay child support. Additionally, the husband testified that he had borrowed a total of \$40,000 from Chase Commercial Properties, LLC, to hire Sam Wessinger, a financial expert witness; he also stated that he owed the United States Internal Revenue Service \$15,000.

The husband testified that he had earned \$63,227 in 2005; he also stated that his annual income had peaked sometime between 1999 and 2000, when he had earned more than \$100,000 in commissions. The husband testified that all of his various business interests had undergone financial trouble beginning

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in 2001; those troubles began with The Ledges, a residential subdivision whose lots and expensive houses failed to sell before the construction loans were due to be paid. He stated that in 2003 he and his father had signed a promissory note representing the outstanding debt secured by that development and that as of August 1, 2005, the principal amount owed on that debt was \$973,954.20. The husband testified that the parties had lived beyond their means throughout their marriage, defraying expenses through the use of credit cards, salary advances, and loans. At the time of trial, neither party had a retirement account; the wife testified that she had liquidated her retirement account to pay the parties' living expenses during a period when they had no income.

The wife testified that during the parties' worst financial period, which had occurred during the three years before the divorce complaint was filed, the parties had borrowed substantial sums from the wife's mother and stepfather. The trial court admitted into evidence a promissory note executed by the parties and payable to the wife's mother and stepfather on demand and no later than September 20, 2006, in the amount of \$100,735.15; she stated

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that the total amount, including interest, owed on that note by the time of trial was \$118,833.15. In addition, the wife testified that the parties had incurred large balances on joint credit-card accounts during the same period. She stated that at the time of the parties' separation her father had paid several of the parties' credit-card debts and was still owed \$30,000 for those payments. Moreover, the wife testified that her mother had "rolled over" two other credit-card account balances onto her own credit-card accounts when the wife was unable to make required payments after the parties had separated; she stated that her mother was owed \$8,800 in reimbursement for paying those marital debts.

The wife testified that her attorney had billed her for a total amount of \$50,345.29. By the time of trial, she had paid \$31,770.74 to her attorney by borrowing from her mother, but she stated that she still owed \$18,574.55 to her attorney. The husband testified that he had paid his attorneys over \$30,000 by the time of trial and, he stated, although he knew that he would owe more, he did not have a final bill.

The parties had purchased a lot in The Ledges in 1999 for

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approximately \$165,000; they had built a house costing about \$750,000 on that lot. Because the parties did not have enough money to complete construction of the house, they had borrowed \$50,000 from the wife's aunt, Betty Ladas, in order to finish building the house. At the time of trial, the parties owed \$592,379.67 on the first mortgage and \$74,070 on the second mortgage on the house; additionally, there were two liens recorded against the house totaling \$10,500. Moreover, the wife testified that the house needed major repairs, including repair of a leaking roof, before the property could be sold.

The trial court entered a judgment divorcing the parties on January 8, 2007.¹ In that judgment, the trial court, among other things, awarded to the husband all of his business interests. The trial court's judgment noted:

"In making an equitable distribution of the marital assets and liabilities accumulated by these parties during their marriage, and in determining the fair market value of the interest owned by the [husband] in the above entities, this Court finds that it is reasonable to apply a combined forty percent (40%) minority discount and marketability discount to the evaluations made by the Special Master in this case. In addition, this Court has taken into account the

¹Although the husband admitted to having conducted an adulterous relationship during the latter part of the parties' marriage, the trial court divorced the parties on the ground of incompatibility of temperament.

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fact that some of the underlying projects owned by the above awarded entities have a negative fair market value; and ha[s] also taken into account the substantial debt for which the [former husband] is personally liable, on a joint and severable basis, which exceeds the total amount of \$1,000,000.00. To do otherwise would be to ignore the reality of the financial condition of these parties."

In the divorce judgment, the husband was also ordered to pay rehabilitative alimony to the wife in the amount of \$1,500 per month for 36 months. In addition, the husband was instructed to pay the necessary educational expenses for the former wife to renew her license to practice as a certified public accountant, so long as those expenses did not exceed \$5,000. The judgment also ordered that the marital residence be sold and that the wife was to receive the first \$200,000 of the proceeds from that sale; in the event that the net sale proceeds did not amount to \$200,000, the judgment instructed the husband to pay any such deficiency in monthly installments of \$1,000 per month as an additional property settlement.

The wife filed a timely notice of appeal; she alleges that the trial court erred in its valuation of the husband's business interests, in its division of those business interests, and in its failure to reserve the issue of periodic alimony. The husband cross-appealed, claiming in his

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docketing statement that the trial court erred in ordering him to pay a portion of the wife's attorney fees, to pay a majority of the special master's fee, and to purchase an automobile for the wife; however, the husband failed to present those issues or arguments in his appellate brief.² Therefore, we affirm the trial court's judgment as to the husband's cross-appeal, and we address only the wife's allegations of error.

The wife asserts that whether a minority-interest discount and/or a lack-of-marketability discount should be applied to the valuation of the business property to be divided in a divorce judgment is an issue of first impression. Although the wife may be correct that this court has not previously addressed the precise issue, we need not accept her premise in order to properly resolve this appeal.

Our standard of review in divorce cases is well established. A trial court's judgment based on ore tenus evidence will be presumed to be correct and will not be

²This court has consistently held that when a party does not make an argument or cite any authority to support an allegation of error, that allegation of error is deemed waived on appeal. See Rule 28, Ala. R. App. P.; see also Cain v. Howorth, 877 So. 2d 566, 581 (Ala. 2003).

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reversed on appeal absent a showing that the trial court acted outside its discretion or that the judgment is unsupported by the evidence so as to be plainly and palpably wrong. See Clements v. Clements, 990 So. 2d 383, 389 (Ala. Civ. App. 2007); see also Harmon v. Harmon, 928 So. 2d 295, 298 (Ala. Civ. App. 2005).

We note that

"matters of alimony and property division rest soundly within the trial court's discretion, and rulings on those matters will not be disturbed on appeal except for a plain and palpable abuse of discretion. Welch v. Welch, 636 So. 2d 464 (Ala. Civ. App. 1994). Matters of alimony and property division are interrelated, and the entire judgment must be considered in determining whether the trial court abused its discretion as to either of those issues. Willing v. Willing, 655 So. 2d 1064 (Ala. Civ. App. 1995)."

Henderson v. Henderson, 800 So. 2d 595, 597 (Ala. Civ. App. 2000). "There is no rigid standard or mathematical formula on which a trial court must base its determination of alimony and the division of marital assets." Yohey v. Yohey, 890 So. 2d 160, 164 (Ala. Civ. App. 2004).

A careful reading of the voluminous transcript in this case reveals several procedural facts pertinent to the wife's first contention. First, after requesting that the trial

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court appoint a special master to determine the value of the husband's business interests, the wife's legal counsel was instructed to draft a document outlining the duties of that special master. In that document, which the wife's counsel drafted and which both parties' counsel approved before it was entered by the trial court, the special master was instructed to determine the "fair market value" of the minority business interests at issue.

During the ore tenus proceeding, the husband and the wife each offered a different financial expert as a witness to discuss whether various claimed discounts applied in making a determination as to the value of the husband's business interests. At the conclusion of the trial on the merits, the trial court invited the parties to submit memoranda discussing the applicability of any discounts to the values of the business interests at issue in the divorce.

In her memorandum, the wife only challenged the application of discounts to a proper determination of the "fair market value" of the business interests; she did not challenge the use of the fair market-value standard of valuation. On appeal, for the first time, the wife asserts

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that the trial court erred in relying on the fair-market-value standard which included applicable discounts, instead of applying what she terms a "fair value" standard. In determining the value of closely held businesses, our Supreme Court has stated that "'[u]nder a fair market value standard a marketability discount should be applied because the court is, by definition, determining the price at which a specific allotment of shares would change hands between a willing buyer and a willing seller.'" Ex parte Baron Servs., Inc., 874 So. 2d 545, 549 (Ala. 2003) (quoting Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 361 (Colo. 2003)).

Having instructed the special master to determine the fair market value of the husband's business interests, the wife cannot now assert on appeal that the trial court should have applied a different standard in making a determination as to the value of those business interests. "The law is well settled that a party may not induce an error by the trial court and then attempt to obtain a reversal based on that error." Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 808 (Ala. 2003). The doctrine of "invited error" provides that a party may not win a reversal based upon an error that

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that party has invited the trial court to commit. See Neal v. Neal, 856 So. 2d 766, 784 (Ala. 2002); see also C.K. v. J.M.S., 931 So. 2d 724, 734-35 (Ala. Civ. App. 2005).

Even if we had not determined that the wife had invited the trial court to commit the error she has asserted, we note that the trial court heard six full days of testimony, including the lengthy testimony of Gary Saliba, the special master; Sam Wessinger, the husband's financial expert; and Don Nalley, the wife's financial expert. The special master prepared a report and testified on November 13, 2006, concerning his methodology; at that hearing, the trial court asked the special master to revise and expand his report to include other information that had been presented at trial. Regarding that updated report issued on December 15, 2006, the special master later testified that, although the husband had minority interests in entities that held over \$59 million in real estate, based upon the husband's extensive business liabilities, he had determined that the husband's interests had a value of \$1,003,514.

Nalley testified that the special master's report was based largely upon outdated real-estate appraisals, thereby

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resulting in a seriously undervalued estimate of the husband's business interests, but he agreed with the special master that minority-interest and marketability discounts should not be applied in this case. Nalley opined that the special master's report was also deficient because absolutely no real-estate appraisals were utilized in the evaluation of Flint Crossing, LLC; Rosemary Corners, LLC; and The Falls at Grants Mill, LLC. Moreover, Nalley opined that the special master's use of oral statements regarding the value of Research Park Associates, LLC, was not a sufficient basis upon which to determine a proper value of that business.

In contrast, Wessinger testified that, in determining the value of the husband's interests in closely held businesses, the proper procedure was to apply marketability and minority-interest discounts because the husband had not possessed a controlling interest in any of the businesses before the December 2005 reorganization. Following that reorganization, the husband held only a 25% interest in CG Partners, LLC, which now owned or controlled all of the previously established businesses in which the husband had held an interest. Wessinger opined that, because the wife had failed

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to prove that the husband had the right to act independently from the majority-interest holders in any of the various business entities, minority-interest discounts should be applied in computing the value of the husband's business interests. In addition, Wessinger testified that a marketability discount is usually applied whenever difficulties will be encountered in converting an asset, such as a business interest, into cash. Wessinger stated that almost all the business entities' operating agreements had provided that the husband could not sell any of his interests without the unanimous consent of all the other members. According to Wessinger, he would apply a 25% minority-interest discount and at least a 25% marketability discount to properly value the husband's business interests. If the trial court applied a smaller 40% combined discount, Wessinger calculated that the value of the former husband's business interests would be \$350,198. Moreover, Wessinger testified that a determination of the value of the husband's interests without applying the applicable discounts would not be a true determination of the fair market value of those interests. He testified that, as a result, it was his opinion that the

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special master had not properly determined the fair market value of those business interests because the special master had not applied the minority-business and marketability discounts. Wessinger concluded by stating that, because the agreed standard was "fair market value," because the husband had only minority interests in the businesses, and because the business interests were not easily liquidated, both minority-interest and marketability discounts should be applied in order to compute the fair market value of the husband's business interests.

The trial court heard testimony from three experts, received substantial documentary evidence, and accepted posttrial legal memoranda from both the wife's attorney and the husband's attorney addressing whether the two discounts should be applied to the husband's business interests. The trial court has wide discretion to accept or to reject evidence and testimony presented ore tenus. See Clements, 990 S. 2d at 389, and Harmon, 928 So. 2d at 298. Based upon the disputed evidence as to the value of the husband's business interests, as well as the conflicting testimony of the financial experts who testified for the wife and the husband,

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we conclude that the trial court acted within its discretion in making the determination that computing the fair market value of the husband's business interests necessitated applying both minority-interest and marketability discounts.

The wife also contends that the trial court erred in failing to make an "in-kind" award of the husband's business interests to the wife. The wife relies on this court's decision in Kelley v. Kelley, 959 So. 2d 109 (Ala. Civ. App. 2006), as the sole authority to support her contention; however, the wife misconstrues the applicability of Kelley. In Kelley, this court upheld the discretion of the trial court to make an in-kind award of closely held corporate stock as part of a division of the parties' marital property but reversed the divorce judgment because it had failed to order that the remaining "shareholders be accorded their right to purchase the shares awarded to the wife as provided in the buy-sell agreement." Kelley, 959 So. 2d at 113. This court also noted that a better practice would be to award other marital assets or periodic alimony in lieu of stock "because of the disadvantages that would result from being an unwelcome minority stockholder in a closely-held corporation." Id. at

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113. Kelley, although affirming the in-kind award of stock in that case, also reflects the principle that such an award presents numerous problems. Just as this court in Kelley recommended that awards of periodic alimony or other martial assets would be more practical than in-kind awards, we recognize that the trial court in the instant case could have properly determined that an in-kind award would not provide the wife sufficient money that a direct award of alimony and a lump-sum property award would provide. We conclude that the trial court did not err in deciding not to award the wife specific shares in the former husband's closely held businesses.

As to the wife's final allegation of error, we note that an award of alimony falls within the trial court's discretion. The wife argues that the trial court exceeded the limits of its discretion by failing to reserve jurisdiction to award her periodic alimony after the expiration of her right to rehabilitative alimony.

At the time of trial, the wife was self-employed, but her home business was involved in litigation and had not been profitable during the pendency of the divorce action.

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However, as the trial court noted, the wife is relatively young, in good health, and has a good work history as an accountant. With the rehabilitative-alimony award, the wife should be able to regain her license as a certified public accountant and obtain gainful employment. Rehabilitative alimony is defined as "'a sub-class of periodic alimony'" that allows a spouse "'time to reestablish a self-supporting status.'" See Giardina v. Giardina, 987 So. 2d 606, 619 (Ala. Civ. App. 2008) (quoting Jeffcoat v. Jeffcoat, 628 So. 2d 741, 743 (Ala. Civ. App. 1993)).

Because rehabilitative alimony is "a sub-class of periodic alimony," Jeffcoat, 628 So. 2d at 743, the wife arguably possesses the right to seek future modification of her alimony award provided that she exercises that right before her right to rehabilitative alimony expires. See Giardina, 986 So. 2d at 620, and Welch v. Welch, 361 So. 2d 1090, 1091 (Ala. Civ. App. 1978). Notwithstanding that principle, this court has previously held that when a trial court awards rehabilitative alimony based on the earning ability of the parties, their probable future prospects, and the length of the marriage, it is reversible error for the

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court not to reserve the power to award "standard" periodic alimony until the right to receive rehabilitative alimony expires. See, e.g., Giardina, 987 So. 2d at 620; Robinson v. Robinson, 623 So. 2d 300, 303-04 (Ala. Civ. App. 1993). Accordingly, we conclude that trial court erred by failing to reserve the power to award periodic alimony.

Although we have concluded that the trial court acted within its discretion to apply certain discounts in order to compute the fair market value of the husband's minority business interests, and although we have concluded that the trial court properly ordered the wife to receive rehabilitative alimony and a lump-sum property settlement of at least \$200,000, we reverse the trial court's judgment insofar as it did not reserve the power to award periodic alimony until the former wife's right to rehabilitative alimony expires; we remand the case to the trial court for that court to amend its judgment in that regard.

The former husband's request for an award of an attorney fee on appeal is denied.

APPEAL -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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CROSS-APPEAL -- AFFIRMED.

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

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