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## ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

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David L. Rose

v.

Ruby F. Rose

Appeal from Calhoun Circuit Court  
(DR-93-80.01)

PITTMAN, Judge.

David L. Rose ("the former husband") appeals from a judgment of the Calhoun Circuit Court holding him in contempt for stopping payment of a share of his military-retirement benefits to Ruby F. Rose ("the former wife"), which was

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awarded pursuant to the property settlement incorporated into the parties' divorce judgment. The trial court reached its ruling based on its conclusion that the former wife's share of those military-retirement benefits was an unmodifiable award of a portion of the parties' marital property. We affirm in part and reverse in part.

The facts of this case are not disputed. The parties divorced in 1993. A portion of the parties' divorce judgment, which incorporated an agreement of the parties, provided for the division of three identified "assets," including the former husband's military-retirement benefits, labeling the division of those "assets" as a "property settlement." The parties agreed that each would receive a 50% share of the former husband's military-retirement benefits and that the former wife would be entitled to one-half of any cost-of-living increases in benefit payments. The parties further agreed that the former wife's entitlement to those benefits would terminate if she remarried or died.

In approximately October 2008, the former husband contacted the Defense Finance and Accounting Service, the agency responsible for paying the former husband's military-

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retirement benefits, and instructed that agency to stop issuing his benefit payments to the former wife. When those payments ceased, the former wife filed a petition seeking a finding that the former husband was in contempt for not paying her share of his military-retirement benefits. In her petition, she argued that the former husband's actions had violated the divorce judgment, and she requested calculation of the former husband's arrearage. She also requested incarceration of the former husband until he satisfied the arrearage; a declaration of the rights of each party; reinstatement of payments to her of a share of the military-retirement payments; an award of attorney fees; and other relief deemed appropriate. The trial court granted the former wife's request for a hearing.

In response to the former wife's petition, the former husband filed a pleading denying her allegations and asserted a counterclaim for modification of the divorce judgment. He argued that the award to the former wife of a share of his military-retirement benefits was a periodic-alimony award and thus, he averred, was subject to the operation of Ala. Code 1975, § 30-2-55, pertaining to termination of such awards upon

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remarriage or cohabitation with a member of the opposite sex. He further alleged that both parties' financial situations had changed such that it was necessary and proper for the trial court to terminate the payment of military-retirement benefits to the former wife.

At the hearing held on the former wife's petition, the parties stipulated that the case does not involve the issue whether the former wife has remarried at common law. Instead, the former husband insisted that the payments should be terminated under § 30-2-55 because, he said, the former wife had been cohabiting with a member of the opposite sex for over five years and that his instruction the agency responsible for paying those benefits to terminate the payments to the former wife was consistent with that statute. The trial court requested briefs from each party discussing whether the former wife's share of the former husband's military-retirement benefits was an alimony award subject to modification under § 30-2-55. After review, the trial court determined that the former husband's military-retirement benefits had been divided as marital property and, thus, were not subject to modification under § 30-2-55. The court further held the

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former husband in contempt based upon his having withheld the payments to the former wife.

The issue presented to this court on appeal by the former husband is whether the trial court erred in determining that the former wife's entitlement to payments from his military-retirement benefits stems from an unmodifiable division of marital property. The nature of this appeal requires us to review the trial court's application of the law to the facts, which are not in dispute. We review the trial court's decision de novo without affording any presumption of correctness to the trial court's opinion. Boudreau v. Slaton, 9 So. 3d 495, 498 (Ala. Civ. App. 2008).

The former husband argues that the former wife's share of his military-retirement benefits constituted periodic alimony, as opposed to alimony in gross, because, he says, the former wife's receipt of those benefits under the divorce judgment is not permanent. The former husband further argues that the award of his military-retirement benefits is subject to modification under § 30-2-55 and should be terminated because, he avers, the former wife, has admitted that she has cohabited

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with a member of the opposite sex for the five years preceding this litigation.

The former wife argues that, because Alabama decisions have previously stated that retirement benefits may be divided as property pursuant to a property settlement, her award of a share of the former husband's military-retirement benefits is a property settlement. In that argument, the former wife relies heavily on Ex parte Vaughn, 634 So. 2d 533 (Ala. 1993). In doing so, she mischaracterizes Vaughn as supporting the erroneous proposition that because military-retirement benefits may be divided as marital property in a property settlement, such benefits necessarily cannot be the source of periodic-alimony payments. Her argument oversimplifies the issue at hand. Although it is indeed true that retirement benefits may be divided as property, such benefits may also be treated as a source of income from which to pay periodic alimony. Singleton v. Harp, 689 So. 2d 880, 882 (Ala. Civ. App. 1996); see also Daniel v. Daniel, 841 So. 2d 1246, 1251 (Ala. Civ. App. 2002), and Strong v. Strong, 709 So. 2d 1259, 1261 (Ala. Civ. App. 1998).

The primary issue with which we are faced is whether, in this particular case, the former husband's military-retirement benefits are to be viewed as a source of periodic alimony, which is modifiable under § 30-2-55, or as marital property equitably divided among the parties (whether alimony in gross or merely property subject to equitable division).<sup>1</sup> Both parties concede that the divorce judgment refers to the military-retirement benefits as "assets" divided pursuant to the property settlement incorporated into the parties' divorce judgment. However, it is well settled that "the substance of the award takes precedence over the form or label." Kenchel v. Kenchel, 440 So. 2d 567, 569 (Ala. Civ. App. 1983); see also Kelley v. State Dep't of Revenue, 796 So. 2d 1114, 1117 (Ala. Civ. App. 2000) (labels are not controlling on the question of the true nature of the obligation; to be a property settlement, the amount and time of payment must be certain and the right to payment must be vested and not subject to modification). Therefore, we must look at the true nature of the award to the former wife of a share of the former

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<sup>1</sup> Under Alabama caselaw, an award of alimony in gross is considered to be "a form of property settlement." Daniel, 841 So. 2d at 1250 (citing Hager v. Hager, 293 Ala. 47, 54, 299 So. 2d 743, 749 (1974)).

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husband's military-retirement benefits to determine into which category it falls.

Alimony in gross "'must satisfy two requirements[:] (1) the time of payment and the amount must be certain, and (2) the right to alimony must be vested.'" Daniel, 841 So. 2d at 1250 (quoting Cheek v. Cheek, 500 So. 2d 17, 18 (Ala. Civ. App. 1986)). "It must also be payable out of the present estate of the paying spouse as that estate exists at the time of the divorce." Daniel, 841 So. 2d at 1250. Such an award is intended as "'compensation for the [recipient spouse's] inchoate marital rights [and] ... may also represent a division of the fruits of the marriage where liquidation of a couple's jointly owned assets is not practicable.'" Daniel, 841 So. 2d at 1250 (quoting Hager v. Hager, 293 Ala. 47, 54, 299 So. 2d 743, 749 (1974)).

On the other hand, periodic alimony need not be payable out of the estate of the paying spouse as it exists at the time of the divorce. Bray v. Bray, 979 So. 2d 798, 801 (Ala. Civ. App. 2007). A periodic-alimony award "'is an allowance for the future support of the [recipient spouse]'" and is subject to modification under § 30-2-55. Bray, 979 So. 2d at



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800 (quoting Daniel, 841 So. 2d at 1250, quoting in turn Hager, 293 Ala. at 55, 299 So. 2d at 750). Another distinctive characteristic of periodic alimony is that it is treated as taxable income to the party receiving the award. Adkins v. Adkins, [Ms. 2080744, January 22, 2010] \_\_\_\_ So. 3d \_\_\_\_, \_\_ (Ala. Civ. App. 2010).

The source of periodic-alimony payments must be the current income of the payor spouse. Smith v. Smith, 866 So. 2d 588, 591 (Ala. Civ. App. 2003) (holding that a retirement account from which a payor spouse was not already drawing benefits could not be a source of periodic-alimony payments). "[A] trial court may consider retirement accounts as a source from which a party may be required to pay alimony if the trial court has evidence from which it can determine that those retirement accounts are being used as a source of current income to the party." Stamm v. Stamm, 922 So. 2d 920, 923 (Ala. Civ. App. 2004). Evidence that a person has begun drawing benefits from his or her retirement account has been considered sufficient to show that such retirement benefits are current income of that person. See Yohey v. Yohey, 890 So. 2d 160, 168 (Ala. Civ. App. 2004); Stamm, 922 So. 2d at 924.

In Yohey, we held that a trial court had acted properly in requiring a payor spouse to treat his retirement account as a source from which to pay periodic alimony even though he had testified that the draws from that account had been made only for emergency purposes. Yohey, 890 So. 2d at 168. We reached that result because the trial court could have discredited his testimony and could have concluded that he had used those drawn benefits as current income to pay for general living expenses. Similarly, in Stamm, a payor spouse testified that he had been drawing benefits from his retirement account, but he did not indicate the purpose for which he had drawn the benefits. We concluded that the trial court could have properly inferred that he had drawn benefits to pay for general living expenses. Stamm, 922 So. 2d at 924.

Our review of the record here leads us to the conclusion that the former husband's military-retirement benefits are a source of income for payment of a periodic-alimony award. It is undisputed that payments are currently being made from the former husband's retirement account, because the record reveals that, prior to the former husband's terminating the payments, the former wife had been receiving half of each

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payment issued from that account. The record also shows that the former wife has identified her retirement-benefit payments from the former husband as "income" in her tax filings -- a characterization that would not be valid if the former husband's military-retirement benefits actually had been divided as marital property.

Despite the language in the parties' settlement agreement, which was incorporated into the divorce judgment, placing the retirement-benefits issue under a property-settlement heading, the former wife's share of the former husband's military-retirement benefits cannot be deemed as constituting divided property or alimony in gross because both the time at which the former wife's award will completely vest and the total amount the former wife will receive are indefinite. See Kelley v. State Dep't of Revenue, 796 So. 2d at 1117. Therefore, that award is judicially modifiable pursuant to § 30-2-55 because it was incorporated into the divorce judgment. See Ex Parte Murphy, 886 So. 2d 90, 94 (Ala. 2003) (if parties to a divorce proceeding have entered into an agreement in anticipation thereof, and request incorporation of all or part of the agreement into the judgment, the

agreement, if incorporated, loses its contractual nature insofar as the right to modify is concerned).<sup>2</sup> Therefore, we must remand this case to the trial court so that it may determine whether the former wife's admission that she has cohabited with her paramour for a period of more than five years constitutes a change of circumstances under § 30-2-55 sufficient to warrant termination of the obligation to pay military-retirement benefits.

Although we reverse as to the substantive question presented, we affirm the trial court's judgment holding the former husband in contempt for contacting the Defense Finance and Accounting Service and stopping payment of the benefits to

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<sup>2</sup>Although it is undisputed that the parties' settlement agreement was incorporated into the divorce judgment, we nevertheless would have held that, because the former wife's award is contingent on whether she remarries, the award is a periodic-alimony award that is judicially modifiable pursuant to § 30-2-55. We reject the former wife's argument that this case falls in line with Stockbridge v. Reeves, 640 So. 2d 947 (Ala. Civ. App. 1994) and Singleton v. Harp, 689 So. 2d 800 (Ala. Civ. App. 1996), cases in which this court affirmed trial court determinations that military retirement benefits had been divided pursuant to a property settlement, rather than serving as sources of periodic alimony. Those cases are significantly distinguishable from this case because the military-retirement benefits in each of those cases had been awarded to the recipient spouse in each case until the death of the recipient spouse and were not contingent on whether the recipient spouse remarried.

the former wife. In his brief, the former husband argues that if we find that the award of his military-retirement benefits is periodic alimony, we must also reverse the trial court's judgment holding him in contempt because, he says, a determination that the benefits are a form of periodic alimony mandates that payment of those benefits must immediately cease because the former wife has admitted that she has been cohabiting with a member of the opposite sex for more than five years. However, the legal issues of whether the former wife's award of a portion of the former husband's military-retirement benefits is periodic alimony and whether the former husband acted contemptuously are not dependent upon one another. Determinations of contempt are "'committed to the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm.'" Stamm, 922 So. 2d at 924 (quoting Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)). The former husband was held in contempt because he acted in defiance of the divorce judgment, which directed him, until it was modified or vacated, to pay a specified portion

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of his military-retirement benefits to the former wife. As we have noted, it is unwise "'for a paying spouse to simply stop paying periodic alimony based on his or her suspicion of the other spouse's cohabitation,'" because doing so "'could lead to a holding of contempt.'" Scott v. Scott, 38 So. 3d 79, 85 (Ala. Civ. App. 2009) (quoting Sanders v. Burgard, 715 So. 2d 808, 811 (Ala. Civ. App. 1998)). Even though the former husband has correctly contended that the former wife's award of a share of his military-retirement benefits was subject to modification, he was not entitled to terminate the payments unilaterally, and the trial court could properly have determined, as it did, that contacting the Defense Finance and Accounting Service was not the appropriate recourse. See Scott, 38 So. 3d at 86-87 (discussing alternatives to unilaterally terminating periodic-alimony payments when a payor spouse believes he or she should no longer be obligated to make such payments, including payment into court). Moreover, § 30-2-55 clearly requires a party to petition the court in the event that he or she seeks to establish circumstances warranting modification of a divorce judgment

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with respect to alimony. Therefore, we affirm the trial court's decision with respect to the contempt issue.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

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

Bryan, J., dissents, without writing.