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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-886

CLIFFORD MARSHALL DAVIS APPELLANT V. ANDREA DENISE DAVIS APPELLEE	**Opinion Delivered** March 13, 2013 APPEAL FROM THE FULTON COUNTY CIRCUIT COURT [NO. DR2009-63-4] HONORABLE TIM WEAVER, JUDGE AFFIRMED

RITA W. GRUBER, Judge

This is a divorce case. Appellant Marsh Davis and appellee Andrea Davis, who are both pharmacists, owned a pharmacy, a cattle farm, and real estate in Fulton and Sharp Counties. This appeal concerns the judicial sale of the pharmacy to appellee and the application of the proceeds from the sales of the parties' properties to the marital debts. We affirm the circuit court's rulings in all respects.

Appellee filed for divorce in 2009.Under a temporary order, each party agreed to keep the pharmacy in good standing as an ongoing business; to continue receiving a salary from it; and to account to the other for all expenses and receipts of the pharmacy and the cattle farm, which was under appellant's control. Appellant, who lost $20,000 gambling in 2009, took no interest in running the pharmacy. Appellee ran the business, filled about 200 prescriptions a day, paid approximately $10,000 per month in mortgage payments, and kept the parties out of bankruptcy.

Before the hearing in May 2010, the parties agreed that appellant would take the divorce; that if they could not agree on the distribution of property within seven days, everything would be sold at public auction; that secured debts would be paid first; and that the remainder of the proceeds would pay other debts. Both parties stated that the agreement as described by their attorneys was correct and that they would honor that agreement. On August 10, 2010, the circuit court entered a decree finding that, because the parties had not been successful in reaching a settlement, all property would be sold at auction as soon as practicable; that all debts that encumbered property would be paid out of those specific proceeds; that the pharmacy would be sold to another pharmacy or between the parties; and that all other personal property would be sold if they could not agree. The cattle were sold on September 8, 2010, and the proceeds were applied to the debts they secured. The personal property was sold at auction on October 2, 2010. In October 2010, the court granted appellant's attorney's motion to be relieved as his counsel. On December 21, 2010, the trial court directed the commissioners to conduct public auctions as soon as practicable.

In December 2010, appellant's new attorney filed several motions challenging the court's previous orders. At a hearing on January 6, 2011, the court expressed its disgust that the pharmacy had not yet been sold. Appellant's counsel urged the court to close the pharmacy.Appellee's counsel told the court that appellee had done everything she could to comply with the court's orders but had received no cooperation from appellant. Appellee testified at length about her efforts to keep the pharmacy open and to pay her and the children's living expenses and the marital debtswhile appellant refused to take any interest. She

explained that it was essential that she keep running the pharmacy so they wouldn't "lose everything." Appellee explained that, since the pharmacy board had fined appellant $2000 in 2009 (because nine bottles of Oxycodone were missing while he was the pharmacist in charge), she had been forced to run it alone. Appellant could give no answer as to why he had done nothing toward selling the pharmacy. He admitted that he had not worked at all from June through December 2010 and had otherwise worked only part-time. He asked for an inventory and an accounting but admitted that his accountant would do no more work for him because appellant owed him $300.

The trial judge commended appellee for keeping the business going but stated that he thought he had no choice but to close the business and give the parties thirty days to find a buyer for it. Over the next few days, appellee's attorney sent emails to the circuit judge, with copies to appellant's attorney, in which she explained that the state pharmacy board had serious concerns about the closing of the pharmacy, and that they had been unsuccessful in meeting these concerns because they could not find a pharmacy willing to assume responsibility for their customers' prescriptions and the scheduled drugs. She asked for an emergency hearing. The circuit judge notified the parties' attorneys that he would allow appellee to continue operating the pharmacy while the sale was pending. Appellant's attorney strenuously objected.

On February 3, 2011, the court entered an order appointing an accountant to conduct an accounting of the pharmacy from June 2009 to the present; each party would be responsible for one-half of the fee. Appellee bought most of the marital property, including the pharmacy, at the judicial sales. After the sales, $632,567.07 was ready for distribution. The circuit court

confirmed the sales and entered an order distributing the proceeds and applying them to the remaining marital debts. It concluded the order as follows:

> Marsh Davis has requested an audit of the distribution of funds of Davis Drug Store, Inc. If Mr. Davis desires that an audit be conducted he shall be solely responsible for payment of same. In the event Mr. Davis desires that an audit be conducted he must make arrangements to have the audit conducted at his expense and in the event he seeks any relief in regards to the audit a petition setting forth the request for relief in connection with the audit must be filed on or before May 27, 2011. In the event a petition for relief is not filed on or before that date then the matter will be closed and no audit will be conducted.

Appellant then pursued this appeal.

On appeal, appellant argues (1) that the trial court erred in not holding a trial so that he could present proof of the pharmacy's value, (2) that the trial court erred in changing its decision about shutting down the pharmacy, (3) that the trial court erred in directing sales proceeds to be applied to the marital debts, and (4) that the trial court should be directed on remand to order appellee to provide appellant with the pharmacy's database. We review divorce cases de novo on appeal. *Brown v. Brown*, 2012 Ark. 89, 387 S.W.3d 159.We give due deference to the circuit court's superior position to evaluate witnesses and their testimony, and will not reverse a circuit court's finding of fact unless it is clearly erroneous. *Id.*

Appellant argues in his first point that he was not permitted to have a trial before the trial court signed the divorce decree and, therefore, was not given the opportunity to introduce proof of the pharmacy's value. This resulted, he contends, in his receiving nothing for his interest in the business after appellee purchased it. We disagree. First, appellant did receive a benefit from the sale: his debt on the business was extinguished. Also, he *was* given the opportunity to present evidence on any issue he wished at the May 2010 divorce hearing, at

which the parties reached a partial agreement and agreed to try for seven more days to settle the property issues. They agreed that, if they did not accomplish this goal, "everything will be sold at public auction. Any debts that are in place which are encumbered by a specific piece of property [sic] will be paid first. The remainder will be placed in the pot to pay other debts." Appellant testified that he agreed to this; he did not, however, sign the decree, nor did his attorney. The court waited until August 10, 2010, to enter the decree.Appellant did nothing about offering evidence of the pharmacy's value before entry of the divorce decree, nor did he make any effort to do so after it was entered. He asked for an accounting at the January 6, 2011 hearing, and the trial court granted him that relief, on which he did not follow through. In fact, his argument that he was not afforded a trial is made for the first time before this court. We will not consider an argument raised for the first time on appeal but are bound by the scope and nature of the arguments made at trial. *Rudder v. Hurst*, 2009 Ark. App. 577, 337 S.W.3d 565. A party cannot complain of action he has induced, consented to, or acquiesced in. *Dew v. Dew*, 2012 Ark. App. 122, 390 S.W.3d 764. In any event, even if the court had erred in this regard, appellant has offered no proof that he was prejudiced in any way. We do not presume that prejudice has resulted from a trial court's error, and will not reverse for error unless prejudice is demonstrated. *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995). We affirm on this point.

In his second point, appellant contends that the trial court erred in permitting appellee to continue to operate the pharmacy until it was sold on the basis of hearsay email communications exchanged after the hearing. Again, we disagree. First, appellant cites no

authority for this argument. We will not consider an argument on appeal that has no citation to authority or convincing legal argument, nor will we research or develop an argument for an appellant. *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). Second, if a trial court's ruling from the bench is not reduced to writing and filed of record, it is free to change its decision upon further consideration of the matter. *See McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006); *Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994).

Additionally, there was more than enough evidence in the record to support the trial court's ultimate decision, without considering the email communications. Appellee testified at length about the disastrous effect that closing the pharmacy would have on both parties, their children, their employees, and their customers. Parties to a divorce case must often use marital funds to meet necessary expenses incurred during the pendency of the action, and a trial court has the discretion to determine when it is necessary to use these funds, whether the amount used was reasonable, whether fraud or overreaching occurred, and whether an offset is appropriate. *Rudder*, *supra*. Additionally, appellant could have followed through with an accounting, but he chose not to do so and has shown no prejudice in the trial court's decision. We affirm on this issue.

In his third point, appellant asserts, without citation to authority, that the trial court erred in applying the excess proceeds from the judicial sales to the marital debts because the property was supposed to be sold subject to the debts. Appellant, however, waived this argument by agreeing to the terms of the divorce decree, which clearly provided that the debts

on encumbered property would be paid from the proceeds of the sales. The court distributed the proceeds precisely as the parties had agreed. In any event, appellant benefited from this reduction of marital debt as much as appellee did; his obligations to third parties were extinguished or significantly reduced, and he has failed to demonstrate how he was prejudiced by this ruling. Additionally, appellee correctly points out that appellant argued below about only one debt—the vacant commercial lot that appellee purchased for $1000. Arkansas Code Annotated § 9-12-315 (Repl. 2009), with its presumption of equal division, does not apply to the division of marital debts. *Elliott v. Elliott*, 2012 Ark. App. 290, 423 S.W.3d 111; *Rudder*, *supra*. A determination as to the allocation of marital debts will not be reversed unless it is clearly erroneous. *Id*. We also affirm on this issue.

Appellant's last point, that the pharmacy's customer list must be addressed on remand, is therefore moot.

Affirmed.

PITTMAN and WHITEAKER, JJ., agree.

Scott Emerson, P.A., by: *Scott Emerson*, for appellant.

Blair & Stroud, by: *Michelle C. Huff* and *Barrett S. Moore*, for appellee.