

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA08-805

March 18, 2009

PETER KOFLER

APPELLANT

V.

LANA BETH KOFLER

APPELLEE

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[DR-2007-0796-4]

HONORABLE JOHN R. SCOTT,
JUDGE

AFFIRMED

Appellant, Peter Kofler, and appellee, Lana Beth Kofler, were divorced by decree entered on March 31, 2008. Appellant filed his notice of appeal on April 10, 2008; he also moved for a new trial on that date. His motion for a new trial was denied on April 24, 2008; he did not file a notice of appeal from that denial. Consequently, our review of this case is limited to the appeal from the divorce decree and does not include an appeal from the denial of the motion for new trial. In this appeal, appellant raises three points involving 1) the denial of his motion for a continuance, 2) the manner in which certain real property was divided, and 3) the division by the American court of a German bank account. We affirm.

At the time of trial, appellant and appellee had been married for approximately seventeen years and had four children, ranging in age from eleven to twenty-three. Appellant is a citizen of Switzerland. Appellee is a citizen of the United States. During their marriage, the parties and their children lived in Germany for several years. In October 2002, the parties separated and a divorce action was filed in Germany. Four years later, in 2006, appellee and the children returned to northwest Arkansas while the German action was still pending. In March 2007, appellant filed a petition in federal court seeking the return of the children to Germany. By order filed July 18, 2007, the federal district court denied appellant's motion and dismissed the case. On May 4, 2007, appellee filed a petition in Benton County Circuit Court seeking sole custody of the children, and on July 31, 2007, she filed her amended petition for custody and also sought a divorce from appellant. As grounds for the divorce, appellee contended that she and appellant had lived separate and apart for longer than eighteen months. In his answer, appellant objected to the trial court's "jurisdiction pertaining to all matters due to the pending action in Germany, by and between the parties." That argument is not seriously pursued in this appeal, and, as part of the divorce action, the parties had the following agreement, which was incorporated into paragraph 11 of their divorce decree:

[T]he retirement and similar benefit plans acquired during the marriage, and the increase attributable thereto, shall be divided equally as of March 12, 2008, and the cash value of the Scandia Life Insurance Policy on the Defendant's life shall be divided equally between the parties as of March 12, 2008. That the Court shall make no Order regarding any similar types of assets not located in America, pursuant to the parties' agreement. That should any Qualified Domestic Relations Orders be necessary to effectuate this provision, the parties agree to participate in

the drafting and execution of these aforementioned Qualified Domestic Relations Orders. Appellant did not attend the trial of his divorce, which was held on March 12, 2008, but he was represented at trial by his retained counsel.

Denial of Continuance

For his first point of appeal, appellant contends that the trial court committed reversible error by denying his motion for a continuance. We disagree.

The grant or denial of a motion for continuance is within the sound discretion of the trial court. *Looney v. Raby*, 100 Ark. App. 326, 268 S.W.3d 345 (2007). The court's decision on a continuance will not be reversed absent an abuse of discretion amounting to a denial of justice. *Id.* An appellant must show prejudice from the denial of a continuance, and when a motion is based on a lack of time to prepare, the appellate court considers the totality of the circumstances. *Id.*

Appellant's argument for a continuance at trial had three components: 1) that his counsel learned for the first time on March 10, 2008 – two days prior to the trial and while counsel was involved in another trial – that appellee planned to claim that all of the Arkansas real estate was non-marital property belonging solely to her, and he needed time to retrieve a transcript of a federal court proceeding to establish that he did not intend for his transfer of property to appellee to be a gift; 2) that he learned on March 11 that appellant had refinanced two of the real properties (located at 19 Meadow Ridge and 28 Oak Forest, Maumelle, Arkansas), involving at least \$50,000, that the refinancing documents had not been provided during discovery, and that he needed time to receive

and study those documents; and 3) that after the belated receipt of documents from appellee he was confused about whether the parties were dealing with four or five pieces of property, and that he needed additional time to sort it out. He also noted that certain documents he received on March 5 were in German, but he did not rely upon that basis in making his arguments to the trial court.

In this appeal, appellant makes several arguments not presented to the trial court. He recounts the facts that he contends support his motion for continuance. In doing so, he relies upon the fact that the March 5th documents were in German and needed to be translated. To the extent that he does rely on such an argument here, it was not properly preserved because it was not argued below. Therefore, we do not address it. Similarly, he contends that he did not know until 10:47 a.m. on March 10 that appellee was questioning the withdrawal of €11,000 from a joint German bank account. Like the previous argument, this argument was not presented below either, and therefore we do not address it. Appellant also argues for the first time in this appeal that the trial court abused its discretion in denying his request for a continuance because it was his understanding that the parties had stipulated that all matters pertaining to foreign accounts would not be adjudicated by the Arkansas court. Again, we do not address this argument.

With respect to appellant's argument in this appeal that he did not learn until the evening of March 10, 2008, that appellee planned to claim the Arkansas real estate as her sole property, *i.e.*, that it was not marital property, the issue was preserved but we find no abuse of discretion in the trial court's denial of a continuance on this basis. As noted by

appellee, appellant was clearly aware that at least two of these properties had been deeded to appellee because appellant was the one who executed the quitclaim deeds to her. Furthermore, the chart prepared by appellee (which lists three of the four properties as non-marital and one as jointly held—even though she contradicted the chart regarding the jointly held designation and recounted at trial that it, too, was non-marital), was given to appellant on January 15, 2008, three months prior to trial. Though appellant contended at trial he needed additional time to be able to retrieve a transcript from a federal case involving paternity, during which he contended that appellee admitted that the deeds he conveyed to her did not really constitute a gift of the property, appellant had sufficient time to become aware that there was an issue with respect to ownership of some of the property and to retrieve any desired transcripts from federal court.

While appellant points to the fact that he learned on March 11, 2008, that appellee had refinanced two of the properties, that he had never received the refinancing documents pursuant to discovery requests, and that he needed time to get the refinancing documents in order to prepare for trial, he does not demonstrate how he was prejudiced in this regard by the denial of his request for a continuance.

Appellant disputes the trial court's characterization of the first continuance of this matter as being sought by him. His counsel explains that when this case was first set for trial by notice to the parties, he already had another trial set on that date and this case was immediately reset to the March 12 date. We agree with his account of the facts; the trial court may well have mischaracterized that set of circumstances as a prior request for a

continuance by appellant. But, the fact remains that there has been no demonstration of how appellant was prejudiced, and looking at the totality of the circumstances, we find no basis for reversal due to the trial court's denial of appellant's request for a continuance.

Division of Maumelle Real Estate

For his second point of appeal, appellant contends that the trial court committed reversible error in the division of the rental properties located in Maumelle, Arkansas. We disagree.

Of the four pieces of Arkansas property involved in this case, appellant disputed the ownership of only three: 61 Oak Forest Loop, 28 Oak Forest Drive, and 19 Meadow Ridge Loop. He acknowledged the fourth piece of property, located at 47 Oak Forest Place, as belonging to appellee prior to the marriage.

In ruling on these pieces of property, the trial court in paragraph 9 of the decree concluded:

- a. The Plaintiff's uncontroverted testimony was, and this Court so finds, that 47 Oak Forest Place, Maumelle, Arkansas, also known as Lot 47, Rolling Oaks Addition, Pulaski County, Arkansas, was the Plaintiff's premarital property and shall be her property free and clear of any claim of the Defendant. (See Plaintiff's Exhibit No. 8)
- b. The Plaintiff's uncontroverted testimony was, and this Court so finds, that 61 Oak Forest Loop, Maumelle, Arkansas, Lot 165, Rolling Oaks Addition, Pulaski County, Arkansas, was property acquired by her prior to her marriage to the Defendant and shall be Plaintiff's property free and clear of any claim of the Defendant. (See Plaintiff's Exhibit No. 9)
- c. The Plaintiff's uncontroverted testimony was, and this Court so finds, that 28 Oak Forest Drive, Lot 14, Phase One Rolling Oaks Addition,

Maumelle, Arkansas, was rental property that both parties considered to be the property of the Plaintiff, and the Defendant conveyed his interests to the Plaintiff. (See Plaintiff's Exhibit No. 10) That the Plaintiff shall retain this property free and clear of any claim of the Defendant.

- d. The Plaintiff's uncontroverted testimony was, and this Court finds, that Plaintiff as "a married person" acquired 19 Meadow Ridge Loop, Maumelle, Arkansas, Lot 19, Meadow Ridge Addition, Pulaski County, Arkansas, (See Plaintiff's Exhibit No. 11) on February 19, 2002, during the marriage. This property shall be considered marital property and shall be divided equally between the parties.

For the first portion of his argument under this point, appellant contends that the trial court erred in ruling in paragraph 9(b) of the decree that it was "uncontroverted" that 61 Oak Forest Loop was acquired by appellee prior to the marriage. Appellant contends that the matter *was* controverted at trial because he questioned her about the chart she produced in discovery, where she listed this property as joint, and yet she testified at trial that it belonged to her alone. Paragraph 9(b) *does* misstate the facts in that the property appellee owned prior to the marriage was 47 Oak Forest Place, whereas 61 Oak Forest involved one of the quitclaim deeds from appellant. Regardless, however, the trial court determined that the property located at 61 Oak Forest was solely appellee's, and appellant's particular argument challenging the court's use of the word "uncontroverted" does not provide a basis for reversal.

The heart of appellant's argument under this point of appeal is that he did not intend to make a gift to appellee of the rental properties by the quitclaim deeds from him (61 Oak Forest Loop and 28 Oak Forest Drive) because those deeds were executed to her

in order to shelter those assets in light of a paternity suit pending against him at that time and, therefore, the deeds lacked the necessary donative intent. We find no basis for reversal with this argument.

Arkansas Code Annotated section 18-12-401 (Repl. 2003) provides in pertinent part:

(a) Any deed of conveyance of real property located in this state executed after the passage of this act by a married man directly to his wife or by a married woman directly to her husband shall be construed as conveying to the grantee named in the deed the entire interest of the grantor in the property conveyed, or the interest specified in the deed, as fully and to all intents and purposes as if the marital relation did not exist between the parties to the deed.

At trial, it was undisputed that appellant executed two quitclaim deeds to appellee, which purported to convey these two parcels of land. Appellant presented no proof to rebut the construction of those deeds as set forth in Arkansas Code Annotated section 18-12-401. In connection with this argument, appellant contends that the trial court erred in excluding the billing statement from Clarence Cash, a Little Rock lawyer, because it would have corroborated appellant's lack of donative intent. We do not address the issue because the billing statement was not proffered during the trial of the divorce. As our supreme court explained in *Wade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995), it is well established that in order to challenge a ruling that excludes evidence, an appellant must proffer the excluded evidence so that we can review the trial court's decision, unless the substance of the evidence is apparent from the context. Without such a proffer, the argument is not preserved for review. *Id.* The fact that the billing statement was included

in the exhibits accompanying appellant's motion for a new trial is of no help because, as explained previously, the denial of that motion is not encompassed within this appeal.

German Bank Account

For his final point of appeal, appellant contends that the trial court committed reversible error in its ruling affecting one of the German accounts held at ING DiBa. The ruling challenged by appellant is contained in paragraph 12 of the decree, which provides in pertinent part:

12. That on or before April 14, 2008, the [appellant] shall pay to the [appellee] €5,500, representing one-half (½) of the amount transferred by the Defendant out of the parties' joint bank account.

Citing no legal authority, appellant contends that this joint bank account is located outside the United States, that it was not appropriate for the trial court to make any decisions respecting the account because a German court had jurisdiction over it, and that the trial court's ruling violated the stipulation of counsel, which was reflected in paragraph 11 of the divorce decree. Paragraph 11 of the decree, though previously quoted in full in this opinion, is restated here in the context of this final argument:

11. That the retirement and similar benefit plans acquired during the marriage, and the increase attributable thereto, shall be divided equally as of March 12, 2008, and the cash value of the Scandia Life Insurance Policy on the Defendant's life shall be divided equally between the parties as of March 12, 2008. *That the Court shall make no Order regarding any similar types of assets not located in America, pursuant to the parties' agreement.* That should any Qualified Domestic Relations Orders be necessary to effectuate this provision, the parties agree to participate in the drafting and execution of these aforementioned Qualified Domestic Relations Orders.

(Emphasis added.)

The italicized statement within paragraph 11 is the only portion quoted in appellant's brief as support for his argument. When set in the context of the entire paragraph, it is clear that "any similar types of assets not located in America," would have to be similar to "the retirement and similar *benefit* plans acquired during the marriage[.]" The bank account addressed in paragraph 12 of the decree, and challenged by appellant here, is a joint bank account that is accessible worldwide, and it in no way could be considered to be included in the stipulation covering "retirement and similar benefit plans." Because the bank account was not included in the parties' stipulation regarding the types of property the trial court would leave for the German court to handle, and because appellant has provided us with no legal authority nor any convincing argument that the trial court erred in dividing this marital property, we find no basis for reversal.

Affirmed.

GRUBER and MARSHALL, JJ., agree.