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ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-189

TERRY GOULD

APPELLANT

V.

GAYLA GOULD

APPELLEE

Opinion Delivered March 1, 2023

APPEAL FROM THE FULTON
COUNTY CIRCUIT COURT
[NO. 25DR-21-16]

HONORABLE DON MCSPADDEN,
JUDGE

AFFIRMED; MOTION TO DISMISS
APPEAL DENIED

CINDY GRACE THYER, Judge

Appellant Terry Gould and appellee Gayla (Guffey) Gould were divorced in the Fulton County Circuit Court in December 2021. As part of the decree, the circuit court awarded Gayla \$1,050 a month in permanent alimony and ordered the sale of a 2018 Harley Davidson motorcycle with the proceeds payable to their adult daughter. Terry has now appealed the decree, arguing that the circuit court erred in making an unequal division of marital property without explanation; in directing the motorcycle proceeds to be paid to the parties' adult daughter; and in awarding an excessive amount of alimony.

Gayla first responds that the appeal is moot because Terry, without obtaining a supersedeas bond or a stay of the judgment, voluntarily sold the motorcycle and provided the proceeds to their daughter. In the alternative, she argues on the merits that the circuit

court did not err in the property division or alimony award. Each of these arguments will be addressed in turn.

I. Facts and Procedural History

Gayla and Terry Gould were married on April 23, 1988, and separated in January 2021. On March 11, 2021, Terry filed for divorce. At the time the divorce petition was filed, Terry and Gayla's eighteen-year-old daughter was set to graduate high school in May. Gayla responded to Terry's petition by entering a general denial of the grounds for divorce. She also filed a motion for temporary and permanent spousal support, alleging she was on disability and had an extremely limited income. An agreed order for temporary spousal support of \$500 a month was entered on July 1, 2021.

The bench trial on the divorce petition was held on December 15, 2021. Before the trial began, the parties announced that they had reached an agreement to sell or divide most all of their personal possessions. Under the agreement Terry would receive \$44,630.50 and a 2004 Ford Ranger pickup truck, and Gayla would receive \$45,010.05 and a 2016 Jeep Latitude. They further announced that the only issues for the court's determination involved the ownership of a 2018 Harley Davidson motorcycle and the amount, if any, of spousal support.¹

¹The court also resolved issues regarding the payment of personal property taxes and the beneficiary designation on Terry's life insurance policy, but neither are challenged as issues on appeal.

Regarding the motorcycle, Terry testified that it had become his sole source of transportation after the Ford Ranger pickup truck had become inoperable. He testified he wanted to keep and drive it. He explained that the court should award the motorcycle to him because it and his truck were approximately equal in value to the Jeep Gayla was keeping. Gayla agreed that Terry could keep the motorcycle on the condition that he paid their daughter its fair market value. She was unequivocal in her testimony that the motorcycle had been purchased using disability funds earmarked for their daughter² and that she and Terry had agreed to repay their daughter for the use of the funds.

As for alimony, it was undisputed that Gayla suffers from inorganic bipolar disorder and fibromyalgia and that she had not worked since 2008. She testified she is on medication and receives therapy for her issues. Each month she receives \$1,016 in disability and \$20 in food stamps. She testified that her expenses are approximately \$1,410 a month, leaving her with only \$20 in her bank account after adding in \$500 in temporary alimony that Terry had been paying. Terry, on the other hand, testified that Gayla is capable of working a part-time job earning up to \$1,016 a month without interfering with her disability benefits. He also questioned the expenses Gayla claimed.

Terry further testified that he had been an eye technician for thirty-three years and had been employed at his current job for approximately three years. His gross income is approximately \$52,000 a year depending on overtime. He also receives disability benefits,

²Some of the funds came from the sale of other marital property purchased, in part, with the daughter's disability funds.

which he expected to decrease to \$600 a month after the divorce. He claimed expenses of approximately \$2,700 a month.

After hearing the evidence, the court granted the divorce and found the parties' division of property to be equal. It also found that the motorcycle had been purchased with disability money earmarked for their daughter and ordered it to be sold with the proceeds payable to the daughter. The court also awarded Gayla \$1,050 a month in permanent alimony based, in part, on her disability; her limited prospect of reentering the workforce; Terry's income; their relative ages; and the length of their marriage. Terry timely appealed.

On July 7, 2022, Gayla filed a motion with this court to dismiss the appeal. She claimed in an affidavit that Terry had voluntarily satisfied the judgment by "purchasing" the motorcycle for \$24,280 and paying the proceeds to their daughter without obtaining a supersedeas bond or stay thereby rendering the issue—and the appeal—moot.

Terry responded to the motion with his own affidavit denying that he had sold the motorcycle. He admitted that he gave his daughter a check for \$24,280 but claimed that the check was immediately returned. He asserted that because the motorcycle had not been sold and there had been no exchange of title, there was no satisfaction of judgment. He disagreed that the issues on appeal were moot. Instead, he continued to assert that the circuit court lacked jurisdiction to divide the marital property with their adult daughter and that the court's award of alimony was excessive.

II. *Motion to Dismiss*

First, we must determine whether we should grant Gayla's motion to dismiss the appeal on the basis of mootness. With only a few exceptions, appellate courts of this state will not review issues that are moot. *Warren Wholesale Co., Inc. v. McLane Co., Inc.*, 374 Ark. 171, 286 S.W.3d 709 (2008); *Black, Inc. v. Dunklin*, 2018 Ark. App. 3, 540 S.W.3d 696. To do so would be to render advisory opinions, which this court will not do. *Black, supra*. A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Id.*

The question before us is whether Terry paid the fair market value of the motorcycle to the parties' adult daughter in satisfaction of the court's directive, thereby rendering that issue moot on appeal. It is not clear from our record whether this has occurred. As a general proposition,

[a]n appeal will be dismissed on motion only where appellee shows him or herself clearly entitled to that relief. Generally, the burden is on the party moving to dismiss to show facts entitling him or her to dismissal. Thus, for example, the party moving for dismissal of an appeal as moot has the burden to establish the case is moot, and that includes establishing that the decision being challenged on appeal will have no further practical effect on the rights of the parties. In particular, the fact that the controversy has ceased to exist must be shown by clear and convincing proof to entitle appellee to a dismissal, and a mere probability that such is the fact is not sufficient.

5 C.J.S. *Appeal and Error* § 768 (internal citations omitted.)

Here, Gayla and Terry submitted conflicting affidavits regarding whether the payment to their daughter was ever completed. As such, Gayla has failed in her burden of proving that the judgment has been satisfied and the appeal moot. Accordingly, we deny the motion to dismiss and proceed to the merits of the appeal.

III. *Division of Property and Alimony*

A. Standard of Review

This court reviews domestic-relations cases de novo, but the circuit court's findings will not be reversed unless they are clearly erroneous. *Booker v. Booker*, 2022 Ark. App. 473, 655 S.W.3d 562. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.* Due deference is given to the circuit court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.* As to issues of law, however, we give no deference to the circuit court; rather, we review issues of law and statutory construction de novo. *Id.*

With respect to the division of property, we review the circuit court's findings of fact and affirm them unless they are clearly erroneous or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. *Doss v. Doss*, 2018 Ark. App. 487, 561 S.W.3d 348. When the evidence in a case is conflicting or evenly poised or nearly so, the judgment of the circuit court is persuasive. *Henslee v. Ratliff*, 66 Ark. App. 109, 989 S.W.2d 161 (1999).

With respect to alimony, the decision to grant alimony lies within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. *Dozier v. Dozier*, 2014 Ark. App. 78, 432 S.W.3d 82. A circuit court abuses its discretion when it exercises its discretion improvidently or thoughtlessly and without due consideration. *Id.*

B. Division of Property

First, Terry argues that the circuit court erred by making an unequal division of marital property and then by failing to explain its reason for doing so. In support of his argument, Terry highlights his own trial testimony in which he claimed that the motorcycle was not only purchased with the daughter's disability funds but also with commingled marital funds, including the proceeds from the sale of land and his 401(k); thus, there could be no question the motorcycle is marital. He then argued that the court's decision to allow Gayla to maintain possession of the Jeep but leave him with an inoperable truck was inequitable because the difference in value of the two vehicles is approximately \$20,000. He asserts that this inequity would have been rectified if he had been allowed to retain ownership of the motorcycle.

Gayla disagreed. She testified that the funds used to purchase the motorcycle came both directly and indirectly from the disability payments benefiting their daughter. Gayla acknowledged that they had used part of the proceeds from the sale of land to pay off the motorcycle but stated that the payments on the land were also made with their daughter's disability benefits. And while she admitted that the final \$70,000 payoff for the land came from Terry's 401(k), she insisted that the funds used to pay off the motorcycle were attributable to their daughter's disability funds. Regardless, she claimed there was a clear understanding between her and Terry that the funds borrowed from their daughter would be repaid. Finally, she testified that the motorcycle alone is more valuable than the Jeep she received in the divorce.

Arkansas Code Annotated section 9-12-315(a) (Repl. 2020) provides that, at the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. Ark. Code Ann. § 9-12-315(a)(1). In that event, the court shall make some other division that the court deems equitable taking into consideration the following factors:

(i) the length of the marriage; (ii) age, health, and station in life of the parties; (iii) occupation of the parties; (iv) amount and sources of income; (v) vocational skills; (vi) employability; (vii) estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; (viii) contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and (ix) the federal income tax consequences of the court's division of property.

Ark. Code Ann. § 9-12-315(a)(1)(A). When property is divided pursuant to the foregoing considerations, the circuit court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order. Ark. Code Ann. § 9-12-315(a)(1)(B).

The circuit court in a divorce case has broad powers to distribute the property to achieve an equitable division. *Russell v. Russell*, 2013 Ark. 372, 430 S.W.3d 15. The circuit court is vested with a measure of flexibility in apportioning the marital assets, and the critical inquiry is how the total assets are divided. *Banks v. Banks*, 2019 Ark. App. 166, 574 S.W.3d 187. The overriding purpose of the property-division statute, Arkansas Code Annotated section 9-12-315, is to enable the court to make a division that is fair and equitable; the statute does not compel mathematical precision in the distribution of property. *Id.*

Moreover, allocation of the parties' debt is an essential issue to be resolved in a divorce dispute and must be considered in the context of the overall distribution of the parties' property, but the statutory presumption of equal division does not apply to the division of marital debts. *Id.* We will not substitute our judgment on appeal as to the exact interest each party should have or what debt each party should be responsible for; we will decide only whether the order is clearly wrong. *Id.*

Here, because the circuit court found that the parties' agreement as to the division of their property was equitable, there was no need for the circuit court to make findings on the factors listed in section 9-12-315(a)(1)(A). This finding is not clearly erroneous. The parties, prior to trial, divided the property between them. Each party received a relatively equal amount of cash from the proceeds of the sale of marital property. They also each retained one working vehicle.³ The court noted that the parties had been satisfied with their division of property and had represented to the court throughout the hearing that the only issues to be decided were the disposition of the motorcycle and alimony. Thus, the court was not charged with determining the equitable division of the other marital property. Moreover, the court here did not award the motorcycle to either party. Instead, the court ordered the motorcycle sold and the proceeds paid to the daughter in accordance with their agreement. There is no error in this ruling.

³Although Terry testified during the December bench trial that the truck was inoperable, it had been operable at the time the parties agreed to the division of property the previous March. It should also be noted that the truck was not marital property—it was Gayla's separate property that she received via inheritance.

Moreover, Terry did not object to the circuit court's disposition of the property as being inequitable nor did he request that the court explain what he considered to be the court's unequal division. Thus, any argument to the contrary is not preserved for our review. An issue must be presented to the circuit court at the earliest opportunity in order to preserve it for appeal. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007). Where nothing appears in the record reflecting that a particular argument was formulated before the circuit court or that any ruling was given, the appellant has waived review of that issue. *Id.* Furthermore, an appellant cannot complain on appeal that the circuit court erred if the appellant induced, consented to, or acquiesced in the court's position. *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001).

Terry next argues that the circuit court lacked the jurisdiction to order the parties to pay the proceeds from the sale of the motorcycle to their daughter. More specifically, he claims that the disability funds had been earmarked for their daughter's college expenses and that the parties are not financially responsible for the secondary educational expenses of their adult child. Thus, it was erroneous for the court to order the proceeds be paid to her.

The court, however, does have the authority to divide marital debt. At trial, both parties testified that they used the disability money earmarked for their daughter to purchase the motorcycle as well as to purchase land and pay off debt, including the remaining debt owed on the motorcycle. Gayla further testified that the parties had agreed to reimburse their daughter for the use of the money for her education or otherwise. This is, in essence,

a marital debt, and Terry has failed to explain how the division of this marital debt was improper.

C. Alimony

Finally, as to the award of alimony, Terry argues that the circuit court erred in awarding \$1,050 a month in permanent alimony because the evidence showed that Gayla's needs were being met by the \$500 a month she had been receiving in temporary alimony and because she can obtain employment without losing her disability payments. He further claims that the award of alimony is unfair. He testified that after the alimony is paid, Gayla is left with \$1,070 a month in disposable income, whereas he is left with only \$785 a month in disposable income. Terry, however, has failed to prove that the circuit court abused its discretion in awarding alimony.

The purpose of alimony is to rectify the economic imbalances in earning power and standard of living in light of the particular facts in each case. *Richards v. Richards*, 2022 Ark. App. 309, 651 S.W.3d 190. The primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Kuchmas v. Kuchmas*, 368 Ark. 43, 243 S.W.3d 270 (2006). The circuit court may also consider other factors, including the couple's past standard of living, the earning capacity of each spouse, the resources and assets of each party, and the duration of the marriage. *Page v. Page*, 2010 Ark. App. 188, 373 S.W.3d 408. The decision to grant alimony lies within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. *Dozier*, 2014 Ark. App. 78, 432 S.W.3d 82. A circuit court abuses its discretion

when it exercises its discretion improvidently or thoughtlessly and without due consideration. *Id.*

Here, the circuit court considered all the factors when making its alimony award. In the divorce decree, the court stated that the alimony award was “[b]ased upon the length of marriage, earning ability of the parties, and their expenses.” The court noted that the parties had been married approximately thirty-three years and that the temporary alimony award of \$500 a month had not been sufficient to sustain Gayla’s lifestyle. The court stated that a divorce did not require a party to live a spartan lifestyle and that Gayla was not required to manage her finances to the point of having only \$20 left at the end of each month. The court further found that her needs and living expenses exceeded what she was currently receiving. The court acknowledged Gayla’s disabilities and her monthly medical treatments. He specifically found that Gayla’s ability to reenter the workforce after not working for thirteen years was questionable and that her ability to earn a living was “basically zero.” Finally, the court also took into account the respective incomes of the parties and found that Terry’s monthly earnings were over \$4,650 a month and that his expenses were only \$2,704 a month. Thus, the court found that Terry has the ability to pay alimony to Gayla. These facts are supported by the evidence presented at trial. Because the circuit court considered all the factors and based its decision on the facts presented at trial, the court did not abuse its discretion in awarding alimony.

Affirmed; motion to dismiss appeal denied.

WOOD and BROWN, JJ., agree.

John Atkins Crain, for appellant.

Emily C. Reed; and *Blair & Stroud*, by: *Barrett S. Moore*, for appellee.