DOMESTIC RELATIONS LAW UPDATE

BY JUDGE BILLY BELL

1. (A) STANDARD TEST FOR MODIFICATION OF CHILD SUPPORT.

(B) IF A PARENT IS FOUND BY THE COURT TO BE VOLUNTARILY UNEMPLOYED OR UNDEREMPLOYED, THE COURT SHALL IMPUTE INCOME TO THAT PARENT.

(C) FACTORS TO CONSIDER IN DECIDING HOW MUCH INCOME TO IMPUTE.

Parker v. Parker, 87 So.3d 581, Alabama Court of Civil Appeals, January 6, 2012

The parties were divorced in 2006 by a divorce judgment which awarded the father custody of the parties' minor child, awarded the mother visitation, but did not order the mother to pay child support. In 2010, the father filed a modification action requesting that the mother be ordered to pay child support. Following a trial, the trial court entered a judgment which denied the father's request for relief. The father filed a postjudgment motion which was denied, and the father timely appealed.

The ACCA stated that "An award of child support may be modified only upon proof of a material change of circumstances that is substantial and continuing," citing Browning v. Browning, 626 So.2d 649 (Ala. Civ. App. 1993); and further stated that "The standard for determining changed circumstances is the increased needs of the child and the ability of the parent to respond to those needs," citing Campbell v. Tolbert, 656 So. 828 (Ala. Civ. App. 1994).

Citing Daniels v. Daniels, 4 So.3d 479 (Ala. Civ. App. 2007), the ACCA stated as follows:

> "Under Rule 32(B)(5), Ala. R. Jud. Admin., a trial Court 'shall' impute income to a parent and calculate his or her child-support obligation based upon that parent's potential income if 'the court finds that [the] parent is voluntarily unemployed or underemployed.' This court, noting that the language of Rule 32 is mandatory, has held that when a trial court finds a parent to be voluntarily unemployed or underemployed, it is required to impute income to that parent. T.L.D. v. C.G., 849 So.2d 200, 206 (Ala. Civ. App. 2002). The determination of whether a parent paying child support is voluntarily underemployed or unemployed is discretionary with the trial

> court. Mitchell v. Mitchell, 723 So.2d 1267 (Ala. Civ. App. 1998). 'A determination that a parent is voluntarily unemployed or underemployed "is to be made from the facts presented according to the judicial discretion of the trial court."' Berryhill v. Reeves, 705 So.2d 505, 507 (Ala. Civ. App. 1997) (quoting Winfrey v. Winfrey, 602 So.2d 904, 905 (Ala. Civ. App. 1992)). Under Rule 32(B)(5) Ala. R. Jud. Admin.,
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> > "'[in] determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of that parent, based on that parent's recent work history, education, and occupational qualifications, and on the prevailing job opportunities and earning levels in the community.'"

In reviewing the evidence which indicted that the parties' child was 9 years old when the parties divorced, and was now 13 years old during the modification proceeding, and further noting that the mother was not required to pay child support in the divorce because she had no job training and had not been employed during the marriage; and further finding that since the divorce, the cost of supporting the child had increased due to the child's increased age, and that the mother had worked at several jobs since the divorce, including a job which she voluntarily quit about two weeks before the trial of the modification case, and further noting that the mother was living with her parents and was spending approximately $75 per month on cigarettes, which she admitted that she could pay some amount of child support instead of smoking cigarettes, the ACCA found that the undisputed evidence established that "the mother had voluntarily quit her job at the gas station approximately two weeks before the trial," and further concluded that the undisputed evidence "established that the mother was voluntarily unemployed within the meaning of Rule 32(B)(5), Ala. R. Jud. Admin." The ACCA concluded that "the trial court exceeded its discretion in impliedly finding that the mother was not voluntarily employed. Moreover, the undisputed evidence established that there had been a material change in the needs of the child since the entry of the divorce judgment."

As a result, the ACCA concluded that the trial court had exceeded its discretion in denying the father's modification request, reversed the

judgment of the trial court, and remanded the case to the trial court for further proceedings consistent with its opinion.

(2) (A) TO MODIFY A JOINT CUSTODY ORDER, THE PETITIONER MUST PROVE (1) A MATERIAL CHANGE IN CIRCUMSTANCES SINCE ENTRY OF THE JUDGMENT HAS OCCURRED; AND (2) A CHANGE IN CUSTODY IS IN THE BEST INTERESTS OF THE CHILD.

(B) MERE ASSERTIONS THAT THE CHILD IS "QUIET" AFTER TIME WITH THE OTHER PARENT; OR HAS "A HARD TIME READJUSTING" AFTER AN EXCHANGE OF CUSTODY; OR THAT GOING BACK AND FORTH IS "HARD ON THE CHILD" IS NOT LEGALLY SUFFICIENT WITHOUT MORE SPECIFIC EXPLANATION, TO CONSTITUTE A MATERIAL CHANGE IN CIRCUMSTANCES.

Kilgore v. Kilgore, 2012 WL 165066, Alabama Court of Civil Appeals, January 20, 2012. [Opinion modified by substitute opinion dated April 20, 2012, but with same result.]

The parties were divorced in 2009, pursuant to a settlement agreement in which they agreed to exercise joint custody of their child on an alternating weekly basis. In 2010, the father filed a motion for contempt and a petition seeking a modification of the custody order to award him sole physical custody of the child on the basis that the mother had been entertaining overnight visitors of the opposite sex who she had met on the Internet. He filed a motion for pendente lite custody of the child, which was granted, following a hearing at which the mother failed to attend. Thereafter, the mother filed an answer and a counterpetition also seeking a modification of custody, and filed a motion requesting that the trial court set aside the pendente lite custody order in favor of the father on the basis that she had not been served with notice of the pendente lite hearing. The trial court set aside that order. Following an ore tenus hearing, the trial court entered a judgment awarding sole physical custody of the child to the mother, finding that a change in circumstances had occurred, denied the father's motion for contempt, and ordered the father to pay the mother monthly child support. She filed a postjudgment motion seeking reconsideration on the amount of child support awarded to her, and the father also filed a postjudgment motion, which was dismissed by the Court as not being timely filed. The father did file a timely notice of appeal, and the mother's postjudgment motion was denied by operation of law.

On appeal, the father argued that the trial court had erred in finding that there had been a material change in circumstances affecting the best interest of the child since the time of the divorce, challenging the sufficiency of the evidence. The ACCA recited the burden of proof required to modify a prior joint custody award, stating that it is well settled that:

> "[w]here, as in the present case, there is a prior judgment awarding joint physical custody, '"the best interests of the child"' standard applies in any subsequent custody-modification proceeding. Ex parte Johnson, 673 So.2d 410, 413 (Ala. 1994) (quoting Ex parte Couch, 521 So.2d 987, 989 (Ala. 1988)). To justify a modification of a preexisting judgment awarding custody, the petitioner must demonstrate that there has been a material change of circumstances since that judgment was entered and that '"it [is] in the [child's] best interests that the [judgment] be modified'" in the manner requested. Nave v. Nave, 942 So.2d 372, 376 (Ala. Civ. App. 2005) (quoting Means v. Means, 512 So.2d 1386, 1388 (Ala. Civ. App. 1987))."

The ACCA agreed with the father that the evidence had been insufficient to establish that there had been a material change in circumstances affecting the best interests of the child, stating that "The only evidence presented at trial that supports the trial court's finding that there had been a material change in circumstances because the child is 'experiencing difficulties' with the joint-physical-custody arrangement was the mother's and the paternal grandmother's testimony that the child was 'quiet' after the weekly custody exchanges. Neither the mother nor the paternal grandmother testified that the child had any other issues regarding the parties' exercising joint physical custody, and neither expounded on why the child's 'quiet' demeanor was unusual."

The ACCA found that the evidence presented was insufficient, holding that "The mother's testimony is speculative at best. Further, the mere mention of behavior such as being 'quiet' after a custody exchange and having to readjust to each parent's house, which are natural occurrences following a divorce, without more specific explanation does not indicate that the arrangement is disruptive or that the child is 'having difficulties'."

In concluding that the mother had failed to meet her burden of proving that a change of circumstances affecting the child's best interests had occurred since the time of the divorce judgment, the ACCA reversed the trial court's order and remanded the case to the trial court for entry of a judgment consistent with that opinion.

It is interesting to note that the mother had tried to also claim on appeal that the father had relocated to the State of Tennessee after the entry of the divorce judgment, which the ACCA stated that "We note that the mother is correct in stating that, pursuant to Sec. 30-3-169.4, Ala. Code 1975, "a change in the principal residence of the child is 'presumed not to

be in the best interest of [the] child [and] is necessarily a material change' when that relocation is to a location that is more than 60 miles away or across state lines." McElheny v. Peplinski, 66 So.3d 274, 281 (Ala. Civ. App. 2010) (quoting Marsh v. Smith, 37 So.3d 174, 178 (Ala. Civ. App. 2009). However, the ACCA found that the mother had failed to argue, or to present any evidence to the trial court that the father's relocation to Tennessee was a ground for finding that a material change in circumstances had occurred; and as a result the ACCA stated that it could not be considered for the first time on appeal.

(3) (A) FACTORS TO CONSIDER IN MAKING DECISION ON AWARD OF ALIMONY.

(B) NO NEED TO RESERVE RIGHT TO AWARD PERIODIC ALIMONY IN AWARD OF REHABILITATIVE OR SHORT TERM ALIMONY.

(C) DISTINCTION BETWEEN PERIODIC ALIMONY AND REHABILITATIVE ALIMONY DISCUSSED.

Alfred v. Alfred, 89 So.3d 786, Alabama Court of Civil Appeals, February 3, 2012

The parties were married in 1991, and had two children. They separated in 2009, and the husband filed for a divorce. After a trial, the Court entered a judgment ordering the father to pay child support, college expenses for the parties' older child, alimony in gross, and the sum of $500 per month in periodic, rehabilitative alimony, for 60 months to the wife, among other orders. The wife appealed, arguing that the $500 per month alimony award was inequitable, and that the trial court erred by failing to reserve jurisdiction to award her permanent periodic alimony after the expiration of the rehabilitative alimony award.

The ACCA reviewed the evidence presented at trial, which indicated that even though the husband, who was a State Farm agent, made a lot of money from his insurance business and real estate investments, and that the wife was unemployed and suffered from serious physical disabilities, the evidence was also found to indicate that "Although the parties enjoyed a high standard of living, it appears clear in hindsight that they overextended themselves by living above their actual means, resulting in financial ruin."

The ACCA set out the factors that a trial court may consider in making a decision to award alimony, and the purpose of periodic alimony, stating as follows:

> "In making the decision to award alimony, the trial court may consider several factors, including the parties' respective present and future earning capacities, their ages and health, their conduct, the duration of the marriage, and the value and type of marital property. Lutz v. Lutz, 485 So.2d 1174 (Ala. Civ. App. 1986) "[The] purpose of periodic alimony is to support the former dependent spouse and enable that spouse, to the extent possible, to maintain the

> status that the parties had enjoyed during the marriage, until that spouse is self-supporting or maintaining a lifestyle or status similar to the one enjoyed during the marriage." O'Neal, 678 So.2d at 164.

The ACCA found that the evidence supported a conclusion that the husband was financially unable to pay more in alimony than he had been ordered to pay; the trial court's alimony award was affirmed. The wife next argued that the trial court erred in failing to reserve the right to award her periodic alimony in the future after the 60-month period for the payment of alimony, as ordered, ceased. The ACCA stated, however, that:

> "The wife is correct that, in the past, 'this court has reversed judgments when trial courts have failed to reserve the right to award permanent periodic alimony in light of the length of the parties' marriage, the disparity between the earning abilities of the parties, the parties' future prospects, and other factors.' Edwards v. Edwards, 26 So.3d 1254, 1261 (Ala. Civ. App. 2009) (citing Giardina v. Giardini, 987 So.2d 606, 620 (Ala. Civ. App. 2008)). This court, however, has since overruled Edwards on that point, holding, instead, that an award of limited or rehabilitative alimony is an award of periodic alimony and that a trial court need not reserve the right to award something it has already awarded."

The ACCA affirmed the trial court's judgment on that issue as well.

In an interesting concurring opinion, Judge Moore cited the distinction between rehabilitative alimony and periodic alimony, stating that the trial court had not awarded the wife rehabilitative alimony, but rather had awarded her periodic alimony limited to a period of 60 months, stating as follows:

> "As I set forth in my special writings in Enzor v. Enzor, [Ms. 2100105, Dec. 30, 2011 ___ So.3d ___. ___ (Ala. Civ. App. 2011) (Moore, J., concurring in part and dissenting in part), and Standford v. Stanford, 34 So.3d 677 (Ala. Civ. App. 2009) (Moore, J., dissenting), rehabilitative alimony is distinct from periodic alimony."
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> "[Rehabilitative alimony] is designed to provide temporary support for a dependent spouse until that spouse can become self-supporting through vocational rehabilitation or otherwise.

> [Periodic alimony] is designed to provide more long-term support for a dependent spouse who cannot otherwise achieve the economic level necessary to maintain the former marital lifestyle."

Enzor v. Enzor, ___ So.3d at ___, Moore, J. concurring in part and dissenting in part)

As a result, Judge Moore agreed that there was no need to reserve the right to award the wife periodic alimony in the future in this case, because the trial court had actually awarded the wife periodic alimony for a period of 60 months, and concurred in the result of the main opinion on that issue.

4. (A) TRIAL COURT'S ENTRY OF AN EX PARTE CUSTODY ORDER WAS ORDERED TO BE VACATED ON MANDAMUS, AS BEING BASED ON INSUFFICIENT ALLEGATIONS.

(B) A PARENT CANNOT BE DEPRIVED OF CUSTODY OF A CHILD, IN EITHER AN ORIGINAL ACTION OR IN A MODIFICATION ACTION, WITHOUT ADEQUATE NOTICE AND BEING GIVEN AN OPPORTUNITY TO BE HEARD. THE ONLY EXCEPTION IS WHEN THE "ACTUAL HEALTH AND PHYSICAL WELL-BEING OF THE CHILD ARE IN DANGER."

Ex parte Norlander, 90 So.3d 183, Alabama Court of Civil Appeals, February 17, 2012

The Mother filed an action for a writ of mandamus to direct the trial court to vacate an ex parte order awarding pendente lite custody of the parties' 10-year-old son to the father. The ACCA granted the petition and issued the writ. In 2011, the father filed a divorce action and a motion for immediate pendente lite relief, including custody of the child, asserting that the mother was mentally unstable and unable to provide a safe environment for the child, and other allegations. The trial court entered an ex parte order granting the father's motion for pendente lite relief the same day it was filed, and the mother was served with the divorce complaint and order two days later. Thereafter, she filed a motion to set aside the ex parte order, attaching documents which indicated that the father had filed an almost identical action in 2009 based upon identical grounds and assertions made against the mother, as well as letters sent by the father to the mother after the dismissal of the 2009 divorce complaint, in which he admitted that he was a pathological liar, and that it was actually he and not the mother who was suffering from mental problems, which were caused by his past drug use. The father filed a response to the mother's motion to set aside the ex parte order, asserting that the statements he had made in those letters had not been made under oath, and that he was merely trying to save his marriage and appease the mother. The trial court denied the mother's motion, and the mother timely filed a petition for a writ of mandamus to the ACCA.

In setting out the basis under which a parent can be deprived of custody of a minor child, the ACCA stated as follows:

> In Ex parte Williams, 474 So.2d 707, 710 (Ala. 1985), our Supreme Court held that "a parent having custody of a minor child cannot be deprived of that custody, even temporarily without being given adequate notice under Rules 4 and 5, [Ala.] R. Civ. P., and an opportunity to be heard." Id.

(emphasis omitted; quoting Thorne v.Thorne, 344 So.2d 165, 171 (Ala.Civ.App. 1977) See also Ex parte Franks, 7 So.3d 391 (Ala.Civ.App. 2008), and Ex parte Russell, 911 So.2d 719 (Ala.Civ.App. 2005)."

The ACCA found that even if it took all of the father's assertions concerning the mother's conduct, and the alleged effect of her conduct on the child as true, "the assertions are simply insufficient, either singly or in combination, to infer a danger to the child's 'actual health and physical well-being.' The father's allegations amount to no more than a description of the mother's verbal display of anger at the father, accompanied by shouting, insults, and disparagement of the father's family members. That such rancor would be displayed in the presence of the parties' child is unfortunate, but, we daresay, it is hardly unheard-of between spouses who are on the threshold of a divorce."

The father had alleged that the rule set forth in Ex parte Williams did not apply in this case because this action was an original divorce proceeding, rather than a modification proceeding as was the casein Ex parte Williams. However, the ACCA found that argument to be absurd, stating as follows:

"That argument – the acceptance of which would result in the absurd declaration that married parents do not have 'custody' of their children and that neither member of a couple that is separated has custody of his or her children until the order of a court makes it so – is belied by our decision in Ex parte Franks, supra, also an original divorce proceeding in which the first and only custody order at issue was the ex parte pendente lite order in favor of the mother and in which this court repeated the well-established rule set out in Ex parte Williams:

"In the absence of allegations indicating that the 'actual health and physical well-being of the minor child are in danger,' the trial court was without authority to enter an order removing custody from the father without affording the father notice and an opportunity to be heard. Ex parte Williams, 474 So.2d at 710; Thorne v. Thorne, 344 So.2d at 171."

The ACCA granted the mother's petition for mandamus, finding it to be the proper vehicle to review an interlocutory order in a divorce action, and found that the allegations in the father's motion were insufficient to

warrant the entry of the ex parte pendente lite custody order without providing the mother notice and opportunity to be heard. As a result, the ACCA ordered that the trial court vacate the ex parte pendente lite custody order, and to conduct a hearing.

5. (A) FACTORS SET OUT THAT A COURT IS TO CONSIDER IN DIVIDING THE MARITAL ESTATE.

(B) BECAUSE OF INSUFFICIENT EVIDENCE, THE DIVISION OF MARITAL ESTATE AND AWARD OF ALIMONY TO THE WIFE WAS REVERSED ON APPEAL, BEING FOUND INEQUITABLE.

Lee v. Lee, 91 So.3d 63, Alabama Court of Civil Appeals, February 24, 2012

The parties were divorced in 2010 after an ore tenus hearing, in which there was a partial stipulation which narrowed the issues for the trial court to decide to the division of the parties' real estate, the division of a mobile home, and the wife's request for alimony. The trial court entered a judgment which awarded the marital residence, the personal property in her possession, 50% of an insurance claim to the wife, and ordered her to pay her credit card debt in her name. The husband was awarded his construction business, two trucks used in the business, another parcel of real property, the mobile home, the personal property in his possession, and the other ½ of the insurance claim proceeds. He was ordered to pay the credit card debt in his name, the mortgage on the marital residence awarded to the wife, the debt on the mobile home, and in addition, he was required to pay the wife $500 a month in permanent periodic alimony. He filed a postjudgment motion, which was denied, and he appealed.

On appeal, the husband argued that the trial court's division of property and award of alimony to the wife was inequitable, and was due to be reversed. The ACCA set forth the factors to be considered by the trial court in dividing the marital property to be as follows:

> "[t]he factors the trial court should consider in dividing the marital property include 'the ages and health of the parties, the length of their of their marriage, their station in life and their future prospects, their standard of living and each party's potential for maintaining that standard after the divorce, the value and the type of property they own, and the source of their common property.' Covington v. Covington, 675 So.2d 436, 438 (Ala.Civ.App. 1996)"

In reviewing the evidence, the ACCA found that the value of the majority of the property awarded to the parties was undisputed; but found some confusion about whether the parties contended that the husband's construction business was marital property, and further found that there

was no evidence presented as to the value of the husband's business, or any asset owned by it. In considering the undisputed evidence presented at trial, the ACCA found the wife had been awarded assets totaling $75,060, and that she was ordered to pay her credit card debt which totaled $7,300, for a total property award to her of $67,760. In addition, she was awarded $500 a month in periodic alimony. On the other hand, the husband was awarded assets totaling $25,690, and was ordered to pay marital debts totaling approximately $39,217. As a result, the value of the husband's property award was a negative $13,527. Even though he was awarded his business, tools and two trucks used in the business, no evidence was presented regarding the value of any of those items at trial.

The ACCA further stated that the evidence presented at trial indicated that the parties had been married for 31 years, and that there was no evidence presented that indicated the misconduct of either party contributed to the breakdown of the marriage. The wife's age was not set forth at trial, but the record indicated that the husband was 48 years old and that he had recently been diagnosed with rheumatoid arthritis, and that the doctor had indicated that his future earning capacity was likely to be diminished as a result of that condition. The evidence presented at trial indicated that the wife had recently been certified as a nursing assistant, and that she had begun earning more income in 2009 than she had in the two years before she filed for divorce. There was no evidence presented that indicated that she had any disabling health problems or that her future earning capacity would be diminished in any way.

As a result, the ACCA found as follows:

> "We conclude that the trial court's division of property and award of alimony in the present case is inequitable. Certainly, a division of property may favor one party over the other, but, in this case, we find no evidence to support such a disproportionate division of property. See Stewart v. Stewart, 62 So.3d 523, 530 (Ala.Civ.App. 2910)"

As a result, the ACCA reversed the trial court's judgment insofar as it divided the parties' marital property and awarded the wife periodic alimony and remanded the case with instructions to the trial court to adjust the division of property and the award of alimony "in a manner it deems appropriate in order to award the husband an equitable share of the parties' marital estate."

(6) (A) UNDER UIFSA, A FOREIGN SUPPORT ORDER MUST BE PROPERLY REGISTERED IN ORDER TO GIVE AN ALABAMA COURT SUBJECT-MATTER JURISDICTION TO MODIFY IT.

(B) AN ORDER ENTERED WITHOUT SUBJECT-MATTER JURISDICTION IS VOID.

(C) JUDGMENTS ENTERED WITHOUT SUBJECT-MATTER JURISDICTION CAN BE SET ASIDE AT ANY TIME AS VOID, EITHER ON DIRECT OR ON COLLATERAL ATTACK.

(D) SUBJECT-MATTER JURISDICTION CANNOT BE CONFERRED BY CONSENT OF THE PARTIES.

Williams v. Williams, 91 So.3d 56, Alabama Court of Civil Appeals, February 24, 2012

The parties were divorced in the State of Missouri, which awarded the father custody of the parties' two minor children, did not require the mother to pay the father child support, but required her to contribute towards the children's uninsured medical and dental expenses. Both parties and the children moved to Alabama, and in 2005, the father filed a petition to modify in which he sought a modification of child support, and the mother filed a counterclaim requesting a modification of the custody and visitation provisions of the Missouri divorce judgment. Following a trial, the trial court entered a final order in that case which purported to modify the visitation, medical, dental and child support provisions of the Missouri divorce judgment. In 2009, the father filed an action for contempt and modification, alleging that the mother had willfully refused to pay her share of the children's medical and dental expenses, and further alleged that she should be required to pay monthly child support for the benefit of the parties' youngest child. The mother filed an answer denying those allegations. The trial court held a hearing in the 2009 action, but during the presentation of evidence, the trial court raised the issue, sua sponte, as to whether it had subject-matter jurisdiction over the father's petition, asking the parties if the Missouri divorce judgment had been properly registered in the 2005 action as required by UIFSA. The trial court recessed the hearing so that the parties could gather information to address that issue. The next day, the mother filed a motion to dismiss the 2006 order for lack of subject-matter jurisdiction. After listening to oral argument, the trial court entered a judgment dismissing the 2009 action, and also set aside the 2006 modification judgment. The father filed a motion to reconsider and

requested an evidentiary hearing, following which his motion to reconsider was denied, and he timely appealed.

The Father first argued on appeal that the mother could not collaterally attack the 2006 modification judgment entered between the parties. However, the ACCA stated that "As a general rule, a judgment that is regular on its face and that indicates subject-matter and personal jurisdiction is conclusive on collateral attack. Reneke v. Reneke, 287 So.2d 1101, 1105 (Ala.Civ.App. 2003). However, "'[j]udgments entered without subject-matter jurisdiction can "be set aside at any time as void, either on direct or on collateral attack." ' " Kaufman v. Kaufman, 934 So.2d 1073, 1082 (Ala.Civ.App. 2005) (quoting Alves v. Board of Educ. For Guntersville, 922 So.2d 129, 134 (Ala.Civ.App. 2005), quoting in turn International Longshoremen's Ass'n v. Davis, 470 So.2d 1215, 1217 (Ala. 1985). The ACCA concluded that the mother was not precluded from collaterally attacking the 2006 modification judgment on the ground that the trial court had lacked subject-matter jurisdiction to enter it.

The father next argued that the trial court did not have any evidence before it upon which to conclude that it did not have subject-matter jurisdiction to enter the 2006 modification judgment. However, the ACCA stated that "a trial court can take judicial notice of the pleadings and other materials on file in the clerk's record," citing Richardson v. Richardson, 531 So.2d 1241 (Ala.Civ.App. 1988). The trial court had stated on the record that after reviewing the materials in the clerk's files in the 2005 action, it had discovered that the father had not properly registered the divorce judgment from Missouri, and that a jurisdictional defect appeared on the face of the record.

The father next argued that the trial court, for a variety of reasons, erred in setting aside the 2006 modification judgment. However, the father had only appealed the 2011 judgment which dismissed only the petition for a rule nisi and the petition to modify the divorce judgment filed by the father in 2009. As a result, the ACCA stated that it could not consider those arguments for the first time on appeal. However, the ACCA further stated that the trial court relied on the vacation of the 2006 modification judgment as its basis for dismissing the 2009 action as well, and that "out of an abundance of caution, we address the father's contentions and find that the trial court did not err in setting aside the 2006 modification judgment."

In finding that Sec. 30-3A-609, Code of Alabama (1975), which is a part of UIFSA, clearly mandates that a party seeking a modification of a foreign child support order must register that order in the manner

prescribed by UIFSA, and that the father "essentially acknowledges in his brief to this court that he did not strictly comply with Sec. 30-3A-602, the ACCA found that the trial court's judgment dismissing the action for lack of subject matter jurisdiction was due to be affirmed, stating as follows:

> "However, this court, like the appellate courts of many other states, see, e.g., Auclair v. Bolderson, 6 A.D.3d 892, 895, 775 N.Y.S.2d 121 (N.Y.App.Div. 2004); Lamb v. Lamb, 14 Neb App. 337, 707 N.W.2d 243, 436 (2005); and Cepukenas v. Cepukenas, 221 Wis. 2d 166, 584 N.W.2d 227, 229 (1998), has consistently held that a foreign child-support order must be registered before an Alabama circuit court obtains subject-matter jurisdiction to modify that order. See R.J.R. v. C.S., 72 So.2d 643, 647 (Ala.Civ.App. 2011); and S.A.T v. E.D., 972 So.2d 804, 807 (Ala.Civ.App. 2007)."

Because the father did not register the Missouri divorce judgment, the ACCA found that "the trial court lacked subject-matter jurisdiction to enter its 2006 modification judgment."

(7) (A) IF AN ORDER DOES NOT DISPOSE OF ALL PENDING ISSUES; IT IS NOT A FINAL ORDER AND WILL NOT SUPPORT AN APPEAL.

(B) THE TRIAL COURT'S ORDER RESERVED THE ISSUE OF THE EXACT AMOUNT OF THE CHILD SUPPORT ARREARS OWED BY THE FATHER. AS A RESULT, THE ORDER WAS NONFINAL, AND THE APPEAL FILED BY THE MOTHER WAS DISMISSED.

D.M.P.C.P. v. T.J.C., JR., 91 So.3d 75, Alabama Court of Civil Appeals, March 2, 2012

The trial court entered a judgment in 2007 which purported to divorce the parties, divide their marital assets and debts, and to reserve the issues of custody, support and visitation with the parties' minor child until the conclusion of criminal proceedings then pending against the father for sexual abuse of the mother's minor child by a former marriage. Pendente lite custody of the parties' minor child was awarded to the mother, the father was awarded visitation rights and was ordered to pay pendente lite child support. The trial court "reserved jurisdiction to hold . . . further hearings . . . upon written motion of either party." In 2009, the father sought a hearing on the reserved issues alleging he had been acquitted of the criminal offense. Following an ore tenus hearing, the trial court entered a Final Decree Concerning Child Custody, Visitation and Support in 2010, which awarded custody of the parties' minor child to the father, ordered the mother to pay child support, and found that the father was in arrears in the payment of pendente lite child support, but reserved jurisdiction to set the exact amount of the child support arrears in some future proceeding. The mother appealed.

On appeal, the ACCA found that the circuit court had failed to adjudicate all of the issues pending in the case, namely the amount of the father's child support arrearage. As a result, the appeal was due to be dismissed, as being from a nonfinal appeal.

8. VA DISABILITY PAYMENTS, IF NOT PAID IN LIEU OF MILITARY RETIREMENT BENEFITS, CAN BE CONSIDERED IN MAKING AN AWARD OF ALIMONY, EVEN WHEN ALL OR PART OF THE ALIMONY WILL NECESSARILY BE PAID FROM THE VA DISABILITY PAYMENT.

Nelms v. Nelms, 99 So.3d 1228, Alabama Court of Civil Appeals, March 2, 2012

The parties were divorced by a judgment which divided the parties' marital property, ordered the husband to pay the wife $900 a month in periodic alimony, and ordered him to pay the wife's attorney's fees and court costs. He appealed. On appeal, the main issue revolved around the fact that the husband received a monthly disability payment of $2,833 from the VA, and an additional $445 each month in Social Security disability income. There was no testimony presented that the VA disability payment received by the husband was paid to him in lieu of military retirement pay. The husband claimed on appeal that the trial court erred by awarding the wife periodic alimony because the alimony would necessarily have to be paid out of his VA disability benefits, which he asserted was prohibited by federal law.

However, the ACCA analyzed the case of Mansell v. Mansell, 490 U.S. 581 (1989), in which the Supreme Court of the United States was called upon to decide whether the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408, excluded a veteran's disability benefits that are paid in lieu of military retirement pay from marital property subject to division in a divorce action. The Supreme Court of the United States held that the plain language of the law specifically precluded the States from treating a veteran's disability benefits that were paid in lieu of military retirement benefits as community property, subject to division. The ACCA also analyzed the case of Ex parte Billick, 777 So.2d 105 (Ala. 2000), in which the Supreme Court of Alabama held that a veteran's disability benefits received in lieu of military retirement pay are not divisible as community property subject to division, and further held that state courts are precluded from even considering those disability benefits when making an award of alimony.

However, the ACCA found that the husband had made no contention that his VA disability benefits at issue were received in lieu of military retirement benefits, and further found there was no evidence in the record indicating that was the case. In determining that it did not appear that Alabama courts had decided that issue before, the ACCA relied upon the case of Rose v. Rose, 481 U.S. 619 (1987), in which the Supreme Court of the United States found that the VA disability benefits were

comparable with Social Security disability benefits, and that Congress had allowed Social Security disability benefits to be garnished for spousal and child support. As a result, a majority of state courts had considered the issue and determined that a state court "can consider, and use, VA disability benefits as a source of income when awarding alimony." The ACCA held that "a spouse whose income includes VA disability benefits can be ordered to pay periodic alimony, even when all or a portion of the alimony necessarily will be paid from those benefits."

Regarding the husband's contention that the trial court erred in ordering him to pay the wife's attorney fees because those fees and expenses would necessarily be paid out of his VA disability payments, the ACCA indicated that the husband's argument on that issue was one page long, and offered no analysis or specific legal authority, other than the statues cited. As a result, the ACCA held that "Because of the complexity of this issue, and because of the paucity of the argument and analysis of the husband's brief as to this issue, we will not reverse the trial court's judgment ordering the husband to pay the wife's attorney fee."

(9) (A) ONCE AN APPEAL IS FILED, THE TRIAL COURT LOSES JURISDICTION TO ACT, EXCEPT IN MATTERS ENTIRELY COLLATERAL TO THE APPEAL.

(B) UNTIL THE APPELLATE COURT ISSUES A CERTIFICATE OF JUDGMENT, ITS DECISION IS NOT FINAL; AND THE TRIAL COURT DOES NOT REACQUIRE JURISDICTION.

Landry v. Landry, 91 So.3d 88, Alabama Court of Civil Appeals, March 9, 2012

The parties were divorced in 2007. In 2010, the father filed a petition to modify his child support obligation, and the mother counterclaimed, seeking to hold the father in contempt. The trial court entered an order addressing those issues, and the father appealed. However, the ACCA dismissed the father's appeal because it was taken from a nonfinal judgment, and issued its certificate of judgment on May 17, 2011. On February 28, 2011, while the case was still pending on appeal, the trial court entered a judgment addressing the father's petition to modify child support and the mother's counterclaim for contempt. Thereafter, the father filed two postjudgment motions, and later filed a notice of appeal, with the mother filing notice of cross-appeal.

On appeal, the ACCA first addressed jurisdictional issues, and stated that "It is well settled that 'once an appeal is taken, the trial court loses jurisdiction to act except in matter entirely collateral to the appeal,' " citing Portis v. Alabama State Tenure Comm'n, 863 So.2d 1125 (Ala.Civ.App. 2003). In addition the ACCA stated as follows:

> "Alabama law is clear that '[j]urisdiction of a case can be in only one court at a time.' Ex parte State ex rel. O.E.G., 770 So.2d 1087, 1089 (Ala. 2000). Furthermore, 'while an appeal is pending, the trial court "can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court." ' Reynolds v. Colonial Bank, 874 So.2d 497, 503 (Ala. 2003) (quoting Foster v. Greer & Sons, Inc., 446 So.2d 605, 608 (Ala. 1984)."

The ACCA also noted that "until an appellate court enters its certificate of judgment, its decision is not yet final and its jurisdiction over a case is not terminated," citing Rule 41(a), Ala.R.App.P. In finding that the certificate of judgment was not issued until May 17, 2011, the ACCA

found that "the trial court did not reacquire jurisdiction over the case until that date."

The ACCA found that since the trial court entered its judgment before the certificate of judgment was issued, its judgment was void, and since a void judgment will not support an appeal, the father's appeal and the mother's cross-appeal from the void judgment were due to be dismissed. The ACCA remanded the case to the trial court with instructions to vacate its void judgment.

(10) (A) IF A PARTY CALLS AN ADVERSE PARTY AS A WITNESS, THE ADVERSE PARTY'S LAWYER MAY ASK LEADING QUESTIONS ON CROSS-EXAMINATION.

(B) WHETHER OR NOT TO FIND A PARTY IN CONTEMPT LIES WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

(C) ATTORNEY'S FEES CANNOT BE AWARDED IN A CONTEMPT ACTION WHERE NO FINDING OF CONTEMPT IS MADE.

Frederick v. Frederick, 92 So.3d 792, Alabama Court of Civil Appeals, March 23, 2012

The parties were married in 1978, and in 1994, the husband filed a complaint for divorce. The trial court entered a judgment of divorce in 1996, incorporating the parties' stipulated settlement agreement, which contained a provision for the division of the parties' personal property. In 1997, the former wife filed a petition for contempt against the former husband alleging that he had failed to comply with numerous provisions of the divorce judgment. He answered and filed a counterclaim alleging that the former wife was in contempt for failing to comply with the provision for the division of personal property. Those contempt petitions were settled and a consent order was entered in 1999, in which neither party was found in contempt. The 1999 consent order provided for a specific date for the parties to conduct an inventory of their personal property, and a specific date for the parties to exchange a list of the personal property each wished to receive.

In 2007, the former husband filed a civil action against the former wife alleging conversion and unjust enrichment, based upon her alleged failure to comply with the provisions regarding the division of personal property set forth in the divorce judgment. The trial court entered a summary judgment in that case in favor of the former wife. Thereafter, the former husband filed another action, seeking to hold the former wife in contempt for her alleged failure to comply with the provision for the division of personal property contained in the original divorce judgment and in the trial court's 1999 consent order. She answered and denied the former husband's allegations, and also requested that the trial court dismiss the action and award her attorney's fees. Following an ore tenus hearing, the trial court entered a judgment finding that the former wife was not in contempt, as alleged by the former husband, and ordered the former husband to pay $3,220 to the former wife as attorney fees. He filed a postjudgment motion, which was denied, and he appealed.

On appeal, the former husband challenged the trial court's award of attorney's fees, the trial court's decision to allow the former wife's counsel to ask leading questions of her on cross-examination, and the trial court's finding that she was not in contempt. The ACCA first addressed the former husband's challenge to the trial court's allowing the former wife's counsel to ask leading questions of her because the former wife had been called to testify by the former husband. However, the ACCA stated that the Supreme Court of Alabama had already decided that issue in Newman v. Bankers Fidelity Life Insurance Co., 628 So.2d 439 (Ala. 1993), stating that "our Supreme Court sanctioned a lawyer's use of leading questions when cross-examining his or her own client when that client was called as a witness by the other party." The ACCA further found that Rule 611© of the Alabama Rules of Evidence "specifically allows the use of leading questions on cross-examination."

The former husband next argued that the trial court erred in failing to find the former wife in contempt. However, the ACCA reviewed the evidence presented at trial, found that there were differing versions of the facts asserted in the testimony of the parties, further found that there was sufficient evidence upon which the trial court could have based its decision, and found no reversible error in the trial court's failure to find the former wife in contempt of court.

The former husband next argued that the trial court erred in ordering him to pay the wife's attorney's fees. The ACCA agreed with the former husband, stating that "We find no basis in the record to support an award of attorney fees to the former wife. In contempt proceedings, attorney fees may be awarded only when the defendant is found in contempt. See, e.g., Robbins v. Payne, [Ms. 2100427, Nov. 4, 2011] ___ So.3d ___, ___, (Ala.Civ.App. 2011)." The ACCA reversed the trial court's judgment to the extent that it ordered the former husband to pay the former wife the sum of $3,220 as attorney's fees and affirmed the trial court's judgment on all other issues submitted in the former husband's appeal.

(11) (A) CANADA IS A "STATE" UNDER THE UCCJEA AND UNDER UIFSA.

(B) ALABAMA TRIAL COURT FOUND TO HAVE LACKED SUBJECT-MATTER JURISDICTION TO ENTER A CHILD CUSTODY DETERMINATION, BECAUSE CANADA WAS THE "HOME STATE" OF THE CHILDREN WHEN THE CASE WAS FILED, AND THEREFORE LACKED SUBJECT-MATTER JURISDICTION TO MAKE AN INITIAL CHILD CUSTODY DETERMINATION.

(C) THE ALABAMA TRIAL COURT WAS FOUND TO HAVE SUBJECT-MATTER JURISDICTION TO ENTER THE CHILD SUPPORT ORDER UNDER UIFSA, BECAUSE THE PRIOR CHILD SUPPORT ORDERS ENTERED IN CANADA WERE FOUND TO BE VOID.

(D) THE TRIAL COURT WAS REVERSED FOR DEVIATING FROM RULE 32 BY REFUSING TO USE THE FAMILY POLICY MEDICAL INSURANCE PREMIUM OF THE MOTHER'S NEW HUSBAND IN THE CHILD SUPPORT CALCULATION, EVEN THOUGH THE INCLUSION OF THAT PREMIUM WOULD HAVE RESULTED IN THE FATHER PAYING 79% OF THE MONTHLY PREMIUM FOR THAT FAMILY COVERAGE, WHICH COVERED THE MOTHER, HER PRESENT HUSBAND, HIS OWN CHILD, AND THE PARTIES' TWO CHILDREN.

(E) THE TRIAL COURT WAS AFFIRMED ON THE ISSUE OF IMPUTING INCOME TO THE MOTHER AND IN THE PAYMENT OF RETROACTIVE CHILD SUPPORT, BUT WAS REVERSED BECAUSE OF AN ERROR IN THE CHILD SUPPORT ARREARAGE CALCULATION.

Hein v. Fuller, 93 So.3d 961, Alabama Court of Civil Appeals, April 13, 2012

The parties married in 1999, and separated in 2004, while the mother was pregnant with twins. She moved to Canada, and the children were born in 2005. That same year, the father filed for a divorce from the mother in Alabama, seeking not only a divorce, but a determination of paternity of the children. He also requested in the divorce action that if paternity was established, the trial court determine child-custody and child-support issues. However, the trial court determined at that time that the only subject-matter jurisdiction over the parties at that time was *in rem* jurisdiction to grant a divorce. The parties agreed and entered into a settlement agreement addressing certain property issues. However, the judgment did not address paternity, child custody or child support. Meanwhile, the mother sought and obtained an order in Canada which awarded her custody of the children, awarded the father no

visitation, and ordered him to pay child support. He had moved to dismiss the Canadian action alleging that the Canadian court lacked personal jurisdiction over him, but he was unsuccessful. The mother thereafter attempted on two occasions to register the Canadian judgment in Alabama, but was unsuccessful, with the Alabama court declaring that the Canadian judgment was void, presumably on the ground that the father was not properly served with the complaint that initiated that action. She did not appeal from those decisions.

In 2009, the mother filed what was styled a petition for modification in Alabama, seeking a modification of the 2005 Alabama divorce judgment, requesting that the Alabama court address the child-custody and child-support issues, and also sought retroactive child support, an order that the father carry the children as beneficiaries on a life insurance policy on his life, and an award compensating her for her travel expenses and attorney's fees. The father answered her petition and filed a counterclaim in which he sought visitation with the children. In his answer, however, he raised questions regarding the trial court's jurisdiction over the proceeding. Thereafter, the mother amended her petition for modification to state that no court of any other state would have jurisdiction over the child-custody and child-support issues, and that the mother expressly "consents to the jurisdiction of the trial court with respect to the child-custody and support issues."

Following a trial, the trial court entered a judgment in 2011 modifying the 2005 divorce judgment, determining that it had subject-matter jurisdiction over the child- custody and child-support issues, awarded the parties joint legal custody, the mother sole physical custody, the father was awarded specified visitation rights, and he was ordered to pay child support to the mother, retroactive to the date on which the paternity test results confirmed that he was the biological father of the children. The trial court also calculated the child-support arrearage resulting from that retroactive order for the payment of child support, and entered a judgment for the mother in that amount. The judgment also ordered the mother to maintain medical insurance coverage for the children and required the parties to equally share in the children's uninsured medical and dental expenses.

The father filed a postjudgment motion, requesting that he be allowed to maintain the medical insurance for the children, asserting that he would not be required to pay any additional premium for the coverage for the children, and that the inclusion of the health insurance premium paid by the mother's present husband would result in him being required to pay 79.27% of the health insurance premium paid by her current husband for

health insurance coverage which covered him, the mother, his own child, and the parties' two children who were the subject of this case. After a hearing, the trial court amended its judgment to delete the health insurance premium of the mother's present husband, deviated from Rule 32, in that regard, and made a specific finding that the application of the Rule 32 guidelines would be manifestly unjust and inequitable by including the health insurance premium of the mother's present husband, under the facts of this case. The mother filed a postjudgment motion, which was denied, and she appealed.

The ACCA first addressed the issue of jurisdiction on appeal, and determined that the UCCJEA provides the basis for subject-matter jurisdiction in an Alabama court to enter an initial child custody determination, stating that the provisions of Sec. 30-3B-201(a) of the Act is the exclusive jurisdictional basis for making a child-custody determination by a court of this state. The mother had argued that based on Sec. 30-3B-201(a)(4), the Alabama court had jurisdiction to make a child-custody determination because no other state had jurisdiction to make a child-custody determination. However, the ACCA pointed out that Sec. 30-3B-105 governs the international application of the UCCJEA and provides as follows:

> "(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this article [Sec. 30-3B-201 through 30-3B-112] and Article 2 [Sec. 30-3B-201 through 3-3B-210].
>
> "(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter [i.e., the UCCJEA] must be recognized and enforced under Article 3 [Sec. 30-3B-301 through 30-3B-114].
>
> "(c) A court of this state need not apply this chapter if the child-custody law of a foreign country violates fundamental principles of human rights."

In finding that neither party had suggested that the child-custody law of Canada violated fundamental principles of human rights, the ACCA correctly stated that it was required to treat Canada as if it were a state of the United States for the purpose of applying the UCCJEA's jurisdictional provisions. Since it was undisputed that Canada was the home state of the children when the case was filed by the mother, the

ACCA found that "the trial court in Alabama lacks subject-matter jurisdiction to make an initial-child custody determination in the present case. Subject-matter jurisdiction may not be conferred by agreement or consent." As a result, the child-custody determination entered by the Alabama trial court was void, and would not support an appeal. As a result, the mother's appeal on that ground was dismissed.

With regard to the subject-matter jurisdiction of the Alabama trial court to render the child-support part of its judgment, the ACCA noted that the provisions of UIFSA were pretty much identical to the provisions of UCCJEA, in that an Alabama court is allowed to issue a child support order if no other child support order entitled to recognition under UIFSA had been issued, and if the individual seeking the order resides in another state, citing Sec. 30-3A-401(a). The ACCA also noted that the UIFSA also provides that a foreign country may be considered to be a state for purposes of jurisdictional analysis under UIFSA. However, the ACCA also found that "An Alabama court has already determined that the Canadian court lacked jurisdiction over the father, apparently based on his assertions that he was not properly served and on his lack of contact with Canada. In addition, we note that the Canadian judgment would not have been recognized under UIFSA, based on the fact that the father met none of the bases for the exercise of personal jurisdiction set out in Sec. 30-3B-201 and . . . ." As a result of the Canadian child support order having been determined to be void, the ACCA found that there was no other child support order due to be recognized under UIFSA, and since the mother resided in another state, namely Canada, "the trial court had jurisdiction to enter its child-support order in the present case."

However, the ACCA reversed the trial court's deviation from Rule 32 by not including the mother's present husband's medical insurance premium, finding that Rule 32 requires the inclusion of the family coverage premium, "regardless of whether all children covered are in the same family." The ACCA did acknowledge that a trial court may deviate from the provisions of Rule 32, if it makes a written finding on the record that application of the guidelines would be unjust or appropriate, and "if the finding is supported by '[a] determination by the court, based upon evidence presented in court and stating the reasons 29herefore, that application of the guidelines would be manifestly unjust or inequitable.' Rule 32(A) (ii)."

The ACCA stated that "Although we understand the trial court's concern over the father being required to pay a large percentage of the health-insurance premium that covers three other people and not just the children, it is apparent from the language used in Rule 32(B)(7)(e) that

the guidelines recognize that family or dependent coverage could well include children who are not the subject of the child-support obligation. To determine that the application of Rule 32(B)(7)(e) is unjust or inequitable simply because the health-insurance premium secures insurance covering persons other than the obligor's children would be to ignore the fact that the rule specifically acknowledges this issue yet still requires that the 'actual amount of the total insurance premium' be used in the child-support obligation calculation." The ACCA did suggest that on remand, the trial court "may wish to consider the father's request that he, and not the mother, be responsible for securing health insurance covering the children."

The ACCA did affirm the trial court's ruling which imputed minimum income to the mother for the calculation of child support, finding that the evidence in the record provided support for that decision, and also affirmed the trial court's order requiring the payment of child support retroactive to the date on which the father's paternity was confirmed by DNA testing. The mother had appealed and requested that the child support be made retroactive for a period of two years. However, the ACCA found that the record contains "no evidence regarding the father's income before 2009 upon which the trial court could have calculated and entered such a retroactive child-support order," and affirmed the trial court's order for the retroactive payment of child support.

The trial court was reversed, however, for using an incorrect income amount for a period of time during which the child support was to be paid retroactive. Based upon that error, the child support ordered to be paid, and therefore included in the child-support arrearage calculation, did not comply with Rule 32, and was due to be reversed.

12. (A) A COMMON-LAW MARRIAGE MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE.

(B) ELEMENTS OF PROOF REQUIRED FOR A COMMON-LAW MARRIAGE.

(C) EVIDENCE WAS FOUND INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT A COMMON-LAW MARRIAGE EXISTED.

Dyess v. Dyess, 94 So.3d 384, Alabama Court of Civil Appeals, April 13, 2012

The trial court entered a judgment finding that the parties had entered into a common-law marriage, and divided the real property and debt associated with it, and other personal property owned by the parties. The husband filed a postjudgment motion, as did the wife, following which the trial court entered an amended order for the sale and division of the proceeds of a time-share property in Mexico, as well as requiring the husband to pay towards the wife's attorney fees. The husband appealed. On appeal, he argued that the trial court erred in finding a common-law marriage existed, and asserted other issues. However, the appeal turned on whether or not the trial court's finding that a common-law marriage existed was correct or not.

The ACCA stated that:

> "'Courts of this state closely scrutinize claims of common law marriage and require clear and convincing proof thereof.' Baker v. Townsend, 384 So.2d 1097, 1098 (Ala.Civ.App. 1986), citing Walton v. Walton, 409 So.2d 858 (Ala.Civ.App. 1982). A trial judge's findings of facts based on ore tenus evidence are presumed correct, and a judgment based on those findings will not be reversed unless they are found to be plainly and palpably wrong. Copeland v. Richardson, 551 So.2d 353, 354 (Ala. 1989). The trial court's judgment must be viewed in light of all the evidence and all logical inferences therefrom, and it 'will be affirmed if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment.' Adams v. Boan, 559 So.2d 1084, 1086 (Ala. 1990) (citation omitted)."

Citing Gray v. Bush**,** 835 So.2d 192 (Ala.Civ.App. 2001), the ACCA recited the elements of proof required for the recognition of a common-law marriage in Alabama to be as follows:

> "In Alabama, recognition of a common-law marriage requires proof of the following elements: (1) capacity; (2) present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and (3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation. Stringer [v. Stringer], 689 So.2d [194,] 195 [(Ala. Civ. App. 1997)], quoting Crosson v. Crosson, 668 So.2d 868, 870 (Ala.Civ.App. 1995), citing Boswell v. Boswell, 497 So.2d 479, 480 (Ala. 1986). Whether the essential elements of a common-law marriage exist is a question of fact. Stringer, supra, citing Johnson v. Johnson, 270 Ala. 587, 120 So.2d 739 (1960), and Arrow Trucking Lines v. Robinson, 507 So.2d 1332 (Ala.Civ.App. 1987). Whether the parties had the intent, or the mutual assent, to enter the marriage relationship is also a question of fact. See Mickle v. State, 21 So. 66 (1896)."

Gray v. Bush, 835 So.2d 192, 194 (Ala.Civ.App. 2001).

In reviewing the testimony presented at trial, which included the fact that the parties did not have joint banking accounts; that even though their names appeared on a warranty deed to property they bought together, they were listed as single persons on both the deed and on the mortgage document for the purchase of that property; they did not manage their finances in a way that would be consistent with a marital relationship; they filed income tax returns as unmarried persons; and that she referred to her "husband," and he did not publicly object, was found to be insufficient to establish the existence of a common-law marriage by clear and convincing evidence, as required.

As a result, the trial court's finding that a common-law marriage existed between the parties was reversed. As a result, the ACCA also reversed the trial court's division of property, and found that it did not need to address the remaining issues raised by him on appeal. The case was remanded to the trial court to enter a judgment consistent with the opinion of the ACCA.

Judge Moore wrote an interesting concurring opinion in the judgment of reversal but dissenting as to the rationale. The trial court had refused to allow the man to present witnesses to contradict the witnesses presented by the woman that a common-law marriage existed, on the basis that he had failed to answer her counterclaim which asserted that a common-law

marriage existed. Judge Moore indicated that he agreed with the reversal of the trial court's judgment, but on the basis that he would have concluded that the trial court "erred in not permitting Edward to present evidence on the issue, . . . ," pointing out that the complaint filed by the man which started the case, which sought a sale and division of the real property owned by the parties together, asserted clearly that the parties were not married, and that issue was clearly at issue in the case.

13. (A) A TRIAL COURT MAY NOT MODIFY A CHILD SUPPORT PAYMENT THAT CAME DUE BEFORE THE FILING OF A CASE.

(B) A CUSTODIAL PARENT CANNOT AGREE TO WAIVE CHILD SUPPORT PAYMENTS.

(C) PARTIES MAY NOT CHANGE OR MODIFY CHILD SUPPORT MERELY BY THEIR OWN AGREEMENT.

(D) INTEREST CANNOT BE WAIVED BY A TRIAL COURT ON UNPAID CHILD SUPPORT OR UNPAID MEDICAL AND DENTAL EXPENSES.

Moloney v. Papie, 95 So.3d 9, Alabama Rules of Civil Appeals, April 20, 2012

The parties were divorced in 2002, and the father was ordered to pay monthly child support and to pay one-half of the children's extraordinary medical, dental and other health-related expenses not covered by insurance. In 2009, the mother filed a petition requesting that the court order the father to pay college expenses for the children, to order him to reimburse her for extraordinary medical expenses she had expended on behalf of the children, and to hold him in contempt for his failure to pay child support. The trial court entered a judgment following a trial in which it found that the father was in arrears in the payment of extraordinary medical and dental expenses to the mother in the sum of $9,661.21, but did not award the mother any interest because the mother failed to provide the father with copies of the bills or a demand for payment of those bills. In addition, the trial court awarded the mother a judgment against the father in the amount of $50,132 representing the child support arrearage owed by him, but did not award the mother any interest on it. Both parties filed postjudgment motions, and the trial court entered an amended order which gave the father credit towards the child support arrearage for payments which had come due prior to the filing of the case. The mother appealed.

On appeal, the mother asserted that the trial court had erred by retroactively reducing the father's child support obligation on payments which came due prior to the filing of the case, and by failing to award her interest on the monies owed to her by the father for the children's uninsured medical and dental expenses and the child support arrearage found to be owed to her.

The ACCA first stated, with regard to the credit which the trial court allowed the father towards child support payments which had accrued prior to the filing of the action, as follows:

> "It is well settled that child support payments become final judgments on the day they are due and may be collected as any other judgment is collected; and that payments that mature or become due before the filing of a petition to modify are not modifiable. See State ex rel. Howard v. Howard, 671 So.2d 83 (Ala.Civ.App. 1995), and other cases."

The ACCA also recited the well-established law that "A parent may not unilaterally reduce court-ordered child support payments when the judgment does not provide for a reduction in child support," citing State ex rel Killingsworth v. Snell, 681 So.2d 620 (Ala.Civ.App. 1996); and further that "Neither can a custodial parent agree to waive court-ordered child support," citing McWhorter v. McWhorter, 705 So.2d 423 (Ala.Civ.App. 1997). In addition, the ACCA, citing Holland v. Holland, 406 So.2d 877 (Ala. 1981) stated that "Parties to a divorce decree may not change or modify the decree merely by an agreement between themselves."

In finding that the divorce judgment did not allow the father to reduce his child support if the children were no longer attending private school, which was the basis upon which he alleged he was entitled to that reduction, and further finding that the father was therefore not permitted to unilaterally reduce his child support obligation and the mother was not permitted to waive or agree to modify his child support obligation, the ACCA concluded that "the trial court erred by effectively retroactively reducing the father's monthly child-support obligation when it determined the amount the father owed for past-due child support."

In addition, the trial court was reversed for failing to include an award of interest to the mother on the amount it had determined the father owed her for past-due child support and for the amount it ordered the father to pay towards the children's extraordinary medical, dental, and other health related expenses not covered by insurance, as required by the decree. Finding that the payment of extraordinary medical expenses is actually an award of child support that is added to a parent's basic child support obligation, the ACCA concluded that "the trial court erred in declining to award the mother interest on the amount it determined the father owed for past-due child support and on the amount it ordered the father to pay toward the children's 'extraordinary medical, dental, or other health related expenses not covered by insurance.' Although we

recognize that the trial court declined to award interest on the medical expenses because the mother had failed to present the bills to the father or to demand payment of those expenses, the mother's inaction should not deprive the children of the interest that is due on a payment that was owed for their benefit. See, e.g., Neny v. Neny, 989 So.2d 565, 568-69 (Ala.Civ.App. 2008)."

14. (A) A CREDIT IS GIVEN TO A PARENT PAYING CHILD SUPPORT FOR SOCIAL SECURITY DISABILITY OR DEATH BENEFITS PAID FOR THE BENEFIT OF THE CHILD AS A RESULT OF THAT PARENT'S DISABILITY OR DEATH.

(B) AS A MATTER OF FIRST IMPRESSION, THE ACCA HELD THAT IF SOCIAL SECURITY BENEFITS ARE PAID FOR THE BENEFIT OF A CHILD OF A PARENT RECEIVING SOCIAL SECURITY RETIREMENT BENEFITS, IT IS WITHIN THE TRIAL COURT'S DISCRETION TO ALLOW THAT PARENT A CREDIT AGAINST THE CHILD SUPPORT FOR THOSE BENEFITS.

(C) JUDGE MOORE'S CONCURRING OPINION CONCLUDED, HOWEVER, THAT THE PARENT IS ENTITLED TO A CREDIT, AS A MATTER OF LAW, FOR SOCIAL SECURITY RETIREMENT BENEFITS PAID FOR THE BENEFIT OF THE CHILD.

Adams v. Adams, 2012 WL 1371374, Alabama Court of Civil Appeal, April 20, 2012

The parties were divorced in 2007 by an agreement which required the father to pay child support. In 2009, the father filed a petition to modify the divorce judgment, and the mother answered and counterclaimed seeking an increase in child support. In 2010, the father modified his petition to modify asserting that the child was receiving Social Security dependent benefits equal to ½ of his Social Security retirement benefits at the present time, and that he was entitled to a dollar-per-dollar credit in his child support obligation for those benefits. The trial court denied the mother's request for an increase in child support, and also denied the father's request for a credit against his child support. The father appealed.

On appeal, the issue presented to the ACCA was one of first impression – whether or not a child support obligor is entitled to a credit for Social Security dependent benefits that a child receives on account of the obligor's receiving Social Security retirement benefits. The Court of Civil Appeals noted that it had held in the past that a child support obligor was entitled to a credit against his or her child support obligation for Social Security dependent benefits that a child receives on account of the obligor's disability and/or death.

The ACCA noted that there was a split of authority on the issue, with a majority of states holding that the obligor was entitled, as a matter of law, to a credit for the dependent benefits received from Social Security, regardless of whether those benefits were paid on account of the obligor's

death, disability or retirement. The ACCA also noted that there were two minority views on the issue, indicating that "Some states have adopted a case-by-case approach, leaving the matter to the discretion of the trial court;" and that "Other states take the position that there is a rebuttable presumption favoring a credit for Social Security dependent retirement benefits."

The ACCA agreed with the trial court that "no 'blanket rule' should apply in this case and that the decision whether to grant the father a credit for dependent retirement benefits was a matter within the circuit court's discretion." In reviewing the trial court's reasoning for denying the father the requested benefits, the ACCA, concluded, however, that three of the four reasons cited were invalid, and reversed the judgment of the trial court and remanded the case to the trial court for entry of a judgment in favor of the father receiving the credit he had requested.

Judge Moore wrote an opinion concurring in the result in which he concluded, however, that the father was entitled to the credit he had requested "as a matter of Alabama law." Judge Bryan concurred in Judge Moore's concurring opinion.

15. (A) FUNDS HELD IN A CHILD'S UTMA ACCOUNT CANNOT BE USED BY A PARENT AS A SUBSTITUTE FOR THAT PARENT'S ALREADY COURT-ORDERED COLLEGE EXPENSE OBLIGATION.

(B) SUCH FUNDS IN A CHILD'S COLLEGE ACCOUNT CAN BE AND SHOULD BE CONSIDERED BY A TRIAL COURT IN MAKING AN INITIAL COLLEGE EXPENSE DECISION.

Faust v. Knowles, 96 So.3d 829, Alabama Court of Civil Appeals, May 4, 2012

In 2010, the Mother and the parties' son brought a civil action against the father and the investment bank that had allegedly held funds belonging to the son in a custodial account under the control of the father, seeking a judgment directing the father to provide an accounting and requiring the father to cease disbursement of funds in the custodial account. The father filed an answer generally denying the allegations and filed a counterclaim in which he alleged that the monies deposited into the children's custodial accounts had been given to him by his father for the educational benefit of the children, and sought a judgment declaring that he was the actual owner of the monies in the accounts for the parties' children. At the same time, the father filed a postjudgment action seeking a finding of contempt against the mother and other relief. The trial court held a trial on both actions, and entered a judgment which, among other things, directed the father to pay an amount he was determined to owe the mother for unpaid college expenses and medical expenses for the children. The mother appealed and the father filed a cross-appeal.

On appeal, the mother first contended that the trial court had incorrectly calculated the father's child support obligation, because it used a wrong monthly income for the father. The father had filed a CS-41 form during trial, which was used by the trial court, but it was undisputed that the CS-41 income reflected for the father was incorrect. The ACCA reversed the trial court's child support determination and remanded the issue to the trial court to recalculate his child support obligation using a correct income figure.

An interesting issue on appeal with regard to the calculation of child support also involved the trial court's use of both parents' medical insurance premiums in the calculation. The mother asserted on appeal that that was error as well. However, the ACCA stated as follows:

> "As we suggested in Volovecky v. Hoffman, 903 So.2d 844, 848 & n.3 (Ala.Civ.App. 2004), a court considering an issue of support for minor children might well determine that 'it would be appropriate to impose on both parents an obligation to provide insurance covering the children, even if there is some degree of overlap in the policies' and even though the general rule is that 'a child-support obligation will be calculated using the premium for a single health-insurance policy covering medical expenses.'

The ACCA next considered the mother's contention on appeal that the trial court erred in its decision regarding the children's custodial accounts. The father admitted that he had used a portion of the funds in the son's custodial account to pay the son's educational expenses in lieu of making the payments himself from his own earnings or assets. The father testified that the funds in the custodial accounts had been gifts to him from the paternal grandparents and that the intent of the gifts was to assist the father in paying his ½ of the children's college expenses, as was ordered in the divorce.

The ACCA stated that "It is true that, under Alabama law, a trial court considering whether to establish a postminority-support obligation as to a party's child pursuant to Ex parte Bayliss, 550 So.2d 986 (Ala. 1989), is to consider 'all relevant factors that shall appear reasonable and necessary, including primarily the financial resources of the parents and the child,' citing Goetsch v. Goetsch, 66 So.3d 788 (Ala.Civ.App. 2011). The ACCA further pointed out, however, that the trial court on this case "was not called upon to establish or modify an obligation to provide postminority support; rather, it was called upon to interpret and enforce a preexisting obligation that had been in place since 2000, when the trial court's divorce judgment had ratified the agreement of the mother and the father to equally share all costs not covered by other sources such as the children's prepaid-college-tuition plans."

The ACCA concluded that even though the UTMA generally allows the disbursement of funds from a custodial account for the benefit of a minor's education, "such an expenditure is, as a matter of law, 'in addition to, not in substitution for, and does not affect any obligation of a person to support the minor'." Ala. Code 1975, Sec. 35-5A-15©. The Court of Civil Appeals found that the trial court's decision had allowed the father to use the funds in the son's custodial account as a substitute for his court-ordered obligation to pay towards the son's college expenses. As a result, the trial court was reversed on that issue and the case was remanded to the trial court for a determination of what expenditures were

made by the father from the son’s account in substitution of his duty to pay one-half of the son’s unsatisfied college expenses.

16. AN ALABAMA COURT LOSES CONTINUING, EXCLUSIVE JURISDICTION TO MODIFY CHILD SUPPORT UNDER UIFSA, IF NEITHRE PARENT OR THE CHILD CONTINUES TO LIVE IN ALABAMA, UNLESS THE PARTIES FILE A WRITTEN CONSENT FOR THE ALABAMA COURT TO MODIFY CHILD SUPPORT.

Chapman v. Bunch, 97 So.3d 784, Alabama Court of Civil Appeals, May 25, 2012

The parties were divorced in 1993. In 2001, the mother filed a petition to modify that judgment, seeking an award of postminority educational support for the child. The father filed a motion to dismiss for lack of subject-matter jurisdiction, alleging that he had lived in Tennessee since 1997, and that the mother and the child had lived in Louisiana since at least 2007. He relied upon Sec. 205 of UIFSA, which Alabama codified at Sec. 30-3A-205. The trial court granted the father's motion to dismiss, and the mother appealed.

The mother contended on appeal that case law allowed an Alabama court to exercise continuing jurisdiction to modify child support under the circumstances of this case. However, the ACCA noted that those cases were decided before Alabama's adoption of UIFSA which applies to all cases filed on or after January 1, 1998. Citing Sec. 30-3A-905(a), of UIFSA, the ACCA concluded that an Alabama Court only has continuing, exclusive jurisdiction over a child-support order as long as Alabama remains the residence of the obligor, the obligee, or the child for whose benefit the child-support order is issued, or, when all of the parties who are individuals have filed written consents with the Alabama court for a court of Alabama to modify the order and assume continuing, exclusive jurisdiction to do so.

The ACCA affirmed the trial court's dismissal of the mother's petition, based upon the undisputed facts that neither of the parents, nor the child, continued to reside in Alabama, and that the parties had not filed their written consent for an Alabama court to exercise jurisdiction to modify the child support order entered in their divorce.

17. A TRIAL COURT DOES NOT ACQUIRE SUBJECT MATTER JURISDICTION UNLESS COURT COSTS ARE PAID, OR ARE WAIVED, UPON THE FILING OF THE CASE.

Haynes v. Haynes, 97 So.3d 781, Alabama Court of Civil Appeals, May 25, 2012

The former husband appealed the trial court's finding that he was in criminal contempt. The ACCA determined, however, that the former wife did not properly invoke the trial court's contempt jurisdiction, and dismissed the appeal as being from a void judgment. In 2010, the former wife, acting pro se, sent a letter to the trial court alleging that the former husband had failed to comply with certain provisions of their divorce judgment. The trial court issued a rule nisi order, and after holding a hearing, at which both parties appeared pro se, the trial court entered a judgment finding that the former husband was not in criminal contempt. No appeal was taken from that judgment by either party.

In 2011, the former wife sent another letter to the trial court, again alleging that the former husband had failed to satisfy the judgment amount awarded against him by the trial court in the 2010 action, and requested certain relief. The trial court, notwithstanding the former wife's failure to either pay the applicable docket fee, or to file a verified statement of substantial hardship, again issued a rule nisi order to the former husband. The former husband, acting pro se, then filed a letter of his own in which he accused the former wife of having a mental disorder. After a hearing, the new trial judge who had assumed office just before the hearing, entered a judgment that found the former husband in criminal contempt, and the former husband appealed.

The former husband asserted on appeal that the trial court lacked subject-matter jurisdiction to act on the former wife's 2011 request, because she failed to pay the required docket fee, or to have it waived. The ACCA agreed with the former husband that "The record does not show that the former wife made such a payment. Further, we note that the former wife filed no verified statement of substantial hardship that would, if approved by the trial court, have excused her payment of that fee at the offset of her modification request." In finding that even though the defect had not been first presented to the trial court by the former husband, the ACCA noted that such a defect "as to the trial court's subject-matter jurisdiction, as we noted in Vann, may be raised at any time by any party and may not be waived."

In reciting the well-settled law that a judgment entered by a court lacking subject-matter jurisdiction is "absolutely void and will not support an appeal, and an appellant court was dismiss an attempted appeal from such a void judgment," citing Vann, 989 So.2d at 559, the ACCA dismissed the appeal, and instructed the trial court to vacate its 2011 judgment against the former husband. The ACCA further stated that "Any further pleadings filed in the trial court in which the former wife seeks to enforce or modify the divorce judgment or the November 30, 2010, judgment should be accompanied either by the requisite filing fee or by a verified affidavit of substantial hardship that, if accepted, will allow for waiver of the payment of that fee until the close of the case."

18. (A) IF THE ACCA CANNOT DETERMINE HOW THE CALCULATION OF CHILD SUPPORT WAS MADE, IT WILL BE REVERSED.

(B) RULE 32 REQUIRES THE TRIAL COURT TO USE INCOME OF THE PARENTS FROM ALL SOURCES, INCLUDING BUT NOT LIMITED TO CAPITAL GAINS.

(C) THE FACT THAT CAPITAL GAINS MAY FLUCTUATE, AND/OR IS NOT GUARANTEED, DOES NOT ENTITLE THE TRIAL COURT TO IGNORE THAT INCOME IN THE CALCULATION OF RULE 32 CHILD SUPPORT.

Wellborn v. Wellborn, 2012 WL 2947893, Alabama Court of Civil Appeals, July 20, 2012

The parties were divorced in 2002. The father filed a petition to modify his child support obligation in 2011, and the mother answered and counterclaimed seeking an increase in child support. Following an ore tenus hearing, the trial court decreased the father's child support obligation, making specific findings, including a finding that "The Court notes that the stock market in today's economy does not appear to offer the father an opportunity to receive any capital gains which might provide the father with a regular source of income which could be used for the calculation or payment of child support." The mother appealed.

On appeal, the mother first contended that the trial court's calculation of child support was in error. The ACCA found that the trial court made specific findings of fact, including a finding that it would not consider potential income of the father from capital gains because of the uncertainty of the stock market. The ACCA did not have the benefit of the child support forms required by Rule 32(E), A.R.J.A., but did find that the father's brief included a mistake in calculating the father's medical insurance premium and that its calculation of child support did not render the same amount as ordered by the trial court when the correct amount of the father's monthly health insurance premium was used. Since the ACCA could not determine whether the trial court made the same error in calculating the father's child support obligation, the ACCA reversed the trial court's child support determination, and instructed the trial court on remand to comply with Rule 32 by including in the record the required CS-41 and CS-42 forms.

The mother next contended that the trial court erred by failing to include in its calculation of the father's income all of the applicable income of the father, specifically his capital gains income. In finding that Rule 32(B)(2), A.R.J.A., defines "gross income" as including income from all sources

including capital gains, the ACCA stated that "the trial court has no discretion to ignore sources of income when computing a parent's child-support obligation," citing Massey v. Massey, 706 So.2d 1272 (Ala.Civ.App. 1997). The trial court had specifically stated that it did not include any income from capital gains in the calculation of the father's gross income because of the uncertainty in the stock market, and further finding that that uncertainty would not offer the father an opportunity to receive capital gains that would provide the father with a "regular source of income" that could be used for the calculation or payment of child support, the ACCA noted that "it is the very nature of capital gains to fluctuate and to offer no guarantee of income."

The ACCA stated that if a trial court could ignore evidence of the existence of income from capital gains "simply because there was no guarantee that the obligor parent would have a 'regular source of income' from capital gains, it could, in all likelihood, result in child support judgments that never include income from capital gains because capital gains constantly fluctuate – not only year-to-year, but month-to-month and day-to-day." In finding that the trial court had erred by failing to include income from capital gains in the calculation of the father's gross income, the child support determination by the trial court was also reversed on that ground.

The ACCA did state that "Although the trial court has no discretion to ignore sources of income for purposes of determining the father's gross income, see Massey, supra. If the trial court had believed that application of the guidelines would have been manifestly unjust or inequitable, it could have made a written finding on the record indicating its finding supporting a deviation from the child-support guidelines." However, the ACCA found no indication from the record that the trial court intended to deviate from the application of the Rule 32 guidelines.

19. (A) A PARENT CAN BE GIVEN CREDIT AGAINST CHILD SUPPORT ONLY FOR EXPENDITURES THAT GO "DIRECTLY TO THE BASIC SUPPORT OF THE CHILD."

(B) A PARENT CANNOT BE GIVEN CREDIT AGAINST CHILD SUPPORT FOR NONESSENTIAL "EXTRAS, OR GIFTS, OR LUXURIES, LIKE A VEHICLE PURCHASED, VEHICLE EXPENSES, OR CELL PHONE PAYMENTS."

Caswell v. Caswell, 2012 WL 3055534, Alabama Court of Civil Appeals, July 27, 2012

The parties were divorced, by agreement, in 2001, which judgment awarded the parties joint custody of their three children. That judgment was modified by agreement in 2003, in which the mother was awarded sole legal and physical custody of the children and the father was ordered to pay child support. In 2010, the mother filed a petition seeking to hold the father in contempt for failure to pay child support since 2005. The father filed an answer denying the allegations, and later amended his answer to include an affirmative defense of accord and satisfaction, offset, laches, and unclean hands, as well as a counterclaim seeking to hold the mother in contempt. The trial court conducted an ore tenus hearing, at which the parties stipulated that no child support payments had been made by the father since December, 2005, and that the total arrearage owed by the father as child support was approximately $40,100.00. The father testified that he and the mother had mutually agreed in December, 2005, that he would pay for expenses on behalf of the children as they arose in lieu of making monthly child support payments to her.

The father submitted an exhibit that itemized the expenditures he had made for which he was seeking credit, which were supported by bank statements and transaction receipts, including among other things, school, clothing, fishing equipment, truck parts, guns, cell phone bills, dirt-bike bills and skateboard parts. The father argued that he should receive credit for all of those expenditures. The mother contended that he should only be given credit for those expenditures on his list which were essential to the support and maintenance of the children. The trial court entered an order that gave the father credit for expenditures made as itemized in his exhibit, but struck certain expenses, either because those expenditures had been incurred on behalf of a child who had already reached the age of majority, or because the expenditure had been accounted for elsewhere on the list. Additionally, the trial court awarded the father credit against his child-support arrearage for automobile

insurance he had paid on behalf of two of the children and for the amount he had paid for the purchase of an automobile for one of the parties' sons. The mother filed a post-judgment motion which was denied, and she appealed.

On appeal, the mother contended that the trial court had erred in allowing the father credit for certain expenditures which were for the children's extracurricular activities. The ACCA agreed, and reversed the trial court's judgment to the extent that it awarded the father credit against his child support arrearage for the expenditures he had incurred related to the children's extracurricular activities.

The mother also argued that the trial court improperly awarded credit to the father against his child support arrearage for several expenditures that were not essential to the support and maintenance of the children, specifically the expenditures for vehicle purchases, vehicle accessories, vehicle registration fees, vehicle servicing, vehicle parts, automobile insurance, guns, a tree stand, skateboard parts, and monthly cell phone payments. The ACCA stated that it had held that "the trial court has discretion to award credits against an arrearage. McDaniel v. Winter, 412 So.2d 282 (Ala.Civ.App. 1982). However, although the father may be credited for expenses he assumes gratuitously, these expenses must clearly be categorized as essential to basic child support. Evans v. Evans, 500 So.2d 1095 (Ala.Civ.App. 1986)."

The ACCA also stated that the child support guidelines were designed to provide for the "basic support needs of a child." The ACCA agreed with the mother that "expenditures such as vehicle purchases, vehicle accessories, vehicle-registration fees, vehicle servicing, vehicle parts, automobile insurance, guns, a tree stand, skateboard parts, and monthly cellular-telephone payments cannot 'clearly be categorized as essential to basic child support,' Hillis, 646 So.2d at 126. Accordingly, we conclude that the trial court exceeded its discretion by awarding the father credit against his child-support arrearage for those expenditures."

The Court of Civil Appeals reversed the trial court's award of credit to the father holding that "A noncustodial parent may not receive credit against his or her child-support obligation by providing the child with gifts, luxuries, or other nonessential 'extras' that do not directly go to the basic support of the child. To hold otherwise may allow the noncustodial parent to win favor in the eyes of the child by providing nonessential 'extras,' all while the custodial parent is potentially struggling to provide the child's basic necessities, such as, food, clothing and shelter, in the absence of court-ordered child-support payments."

20. (A) IF THE CHILD SUPPORT AWARD SOUGHT TO BE MODIFIED WAS A DEVIATION FROM RULE 32, THE 10% "REBUTTABLE PRESUMPTION RULE" DOES NOT APPLY, AND THE CHILD SUPPORT CAN ONLY BE MODIFIED IF THERE HAS BEEN A MATERIAL CHANGE IN THE CIRCUMSTANCES THAT RESULTED IN THE DEVIATION ORIGINALLY.

(B) CHILD SUPPORT CAN STILL, HOWEVER, BE MODIFIED IF THERE IS NO REBUTTABLE PRESUMPTION, BUT ONLY UPON PROOF OF A MATERIAL CHANGE IN CIRCUMSTANCES THAT IS SUBSTANTIAL AND CONTINUING.

(C) THE STANDARD FOR DETERMINING CHANGED CIRCUMSTANCES IS THE INCREASED NEEDS OF THE CHILD AND THE ABILITY OF THE PARENT TO RESPOND TO THOSE NEEDS.

Jones v. Jones, 2012 WL 3139869, Alabama Court of Civil Appeals, August 3, 2012

The parties were divorced in 2008, by an agreement, which awarded the mother custody and the father was ordered to pay child support, in an amount which was a deviation from the Rule 32 guidelines, because the father had agreed to provide for the daily needs of the children while they were in his care. In 2010, the mother filed a petition for contempt and a petition to modify the father's child support obligation alleging, among other things that the father had not exercised the extended visitation which was the ground for deviating from the Rule 32 guidelines in the original divorce. After an ore tenus hearing, the trial court entered a judgment which incorporated the parties' agreement regarding health insurance and the payment of uninsured medical expenses, with the trial court's finding that "this Court could find no grounds to justify a modification in child support at this time." The mother filed a postjudgment motion which was granted in part by the issuance of an amended judgment that there had been a material change in circumstances justifying a modification of the father's child-support obligation, and increased his child support obligation to the mother. The father appealed.

On appeal, the father argued that the trial court had improperly modified his child-support obligation because there had not been a material change in circumstances, and further arguing that the trial court had erred by making him retroactively responsible for certain expenses that he was not obligated by the divorce judgment to pay.

In noting that the child support obligation of the father set out in the original divorce judgment was a deviation from the Rule 32 child support guidelines, the ACCA, cited Rule 32(A)(3)(c), A.R.J.A., which states in pertinent part:

> "There shall be a rebuttable presumption that child support should be modified when the difference between the existing child-support award and the amount determined by application of these guidelines varies more than ten percent (10%), unless the variation is due to the fact that the existing child-support award resulted from a rebuttal of the guidelines and there has been no change in the circumstances that resulted in the rebuttal of the guidelines."

It was undisputed that the difference between the father's original child-support obligation varied by more than 10% from the amount determined by the application of the child support guidelines in the modification action. However, since the father's original child support obligation was the result of a deviation from the Rule 32 guidelines, the ACCA stated that "Thus, modification of the father's child-support obligation was proper if there 'has been a change in the circumstances that resulted in the initial rebuttal of the guidelines',", citing Duke v. Duke, 872 So.2d 153 (Ala.Civ.App. 2003). In noting that the trial court did not find that the change in circumstances alleged by the mother had occurred, the ACCA found that the mother was not entitled to a rebuttable presumption that the father's child support obligation was due to be modified.

However, the ACCA noted that "even when there is no rebuttable presumption that a parties' child support obligation should be modified we have held that 'a trial court may still modify a child-support award upon proof of a material change in circumstances that is substantial and continuing'," citing Romano v. Romano, 703 So.2d 374 (Ala.Civ.App. 1997). The ACCA further stated that "the standard for determining changed circumstances is the increased needs of the child and the ability of the parent to respond to those needs," citing Allen v. Allen, 966 So.2d 929 (Ala.Civ.App. 2007). In noting that the record indicated that the mother would be incurring an additional $25.00 a month for the needs of the children, the ACCA stated that "this court has held that such a minimal additional monthly expense does not constitute a material change in circumstance," citing Reeves v. Reeves, 894 So.2d 712 (Ala.Civ.App. 2004).

In finding that the record failed to disclose any other evidence that might support a finding that there had been a material change in the needs, conditions or circumstances of the children, the mother had therefore failed to prove that "there has been in circumstances since the divorce judgment was entered." As a result, the ACCA reversed the trial court's judgment modifying the father's child support obligation.

21. A CLAIM FOR FAILURE TO COMPLY WITH A PENDENTE LITE ORDER IS BARRED AFTER ENTRY OF A FINAL ORDER, UNLESS THE CLAIM IS "SAVED" IN THE FINAL ORDER.

Duerr v. Duerr, 2012 WL 3538266, Alabama Court of Civil Appeals, August 17, 2012

The former wife filed an action to hold the former husband in contempt of court on the basis that he had failed to comply with the pendente lite order issued during the pendency of a divorce proceeding between the parties. The trial court had entered a pendente lite order during the divorce action between the parties in 2001; however, a final judgment divorcing the parties was entered in 2003. In 2010, the former wife filed her action seeking a modification of child support and a finding of contempt against the former husband based upon his allegedly having failed to comply with the 2001 pendente lite order. The trial court, after a hearing, entered a judgment holding the former husband in contempt based upon his having failed to comply with that pendente lite order, and directed him to pay the wife almost $13,000.00. The former husband had asserted that that claim was barred by the doctrine of res judicata. However, the trial court rejected that argument. The former husband appealed.

On appeal, the ACCA stated that "The court held that because an award of temporary alimony is interlocutory in nature, the final divorce judgment had rendered unenforceable the right to accrued installments of alimony pendente lite, "unless the right to such installments are saved by the final divorce judgment," citing Maddox v. Maddox, 276 Ala. 197 (1964). The ACCA further stated that "It is well settled that a spouse's right to pendente lite support is immediately terminated upon the issuance of the former divorce judgment," citing Thompson v. Thompson, 337 So.2d 1 (Ala.Civ.App. 1976).

As a result, the ACCA held that the former wife's claim of contempt with regard to the pendente lite order should have been barred, reversed the trial court's finding of contempt against the former husband, and remanded the case with instructions to the trial court to dismiss the contempt action.

22. (A) THE RECONCILATION OF THE PARTIES WHILE A SUIT FOR DIVORCE IS PENDING WILL ABROGATE THE CAUSE OF ACTION, THE TRIAL COURT LOSES SUBJECT-MATTER JURISDICTION OF THE PARTIES, AND AS A GENERAL RULE, THE ONLY ALLOWABLE JUDGMENT IS AN ORDER OF DISMISSAL.

(B) THE TRIAL COURT WAS REVERSED FOR SETTING ASIDE A DEFAULT JUDGMENT AFTER FINDING THAT THE PARTIES HAD RECONCILED DURING THE PENDENCY OF THE CASE. THE MAJORITY OPINION FOUND THAT THE MOTION FOR SUCH A DETERMINATION MUST BE FILED BEFORE A FINAL JUDGMENT IS ENTERED.

(C) JUDGE MOORE'S DISSENT SAYS, IN HIS OPINION, IT DOES NOT MATTER WHEN IT IS FILED, AND A FINDING OF RECONCILIATION DURING THE PENDENCY OF A DIVORCE CASE RENDERS ANY RESULTING JUDGMENT VOID FOR LACK OF SUBJECT-MATTER JURISDICTION.

Sola. v. Sola, 2012 WL 4040391, Alabama Court of Civil Appeals, September 14, 2012

A default judgment was entered between the parties in 2009 as a result of the husband's failure to answer the wife's complaint for divorce. In 2010, the wife filed a petition for contempt against the husband alleging that he had failed to comply with certain terms of the default judgment. The husband answered the wife's petition and asked that the default judgment be set aside. He claimed that he was unaware of the default judgment, and that he and the wife had reconciled during the pendency of the case. Following an ore tenus hearing, the trial judge found that the parties had in fact reconciled their marriage during the pendency of the divorce case, which rendered the default judgment void, and set aside the default judgment which had been entered. The wife appealed. On appeal, the ACCA stated that "A reconciliation of the parties while a suit for divorce is pending will abrogate the cause of action and the trial court usually must dismiss it," citing Pride v. Pride, 631 So.2d 247 (Ala.Civ.App. 1993). In addition, the ACCA stated that "Upon reconciliation, the trial court loses subject-matter jurisdiction over the parties, and, as a general rule, the only allowable judgment is an order of dismissal," citing Rikard v. Rikard, 387 So.2d 842 (Ala.Civ.App. 1980).

Even though Rule 60(b)(4) provides that a judgment which is void can be set aside at any time, the ACCA reversed the trial court's judgment stating that "In this case, when the husband sought to have the default judgment set aside based on the parties' 'reconciliation,' there was no

divorce action pending. A final judgment had already been entered based upon the evidence presented."

In a dissenting opinion, Judge Moore reiterated the law regarding reconciliation of parties during the pendency of a divorce case, and stated that he would affirm the trial court's judgment setting aside the default judgment in the divorce action as void, stating that "I cannot conclude that the trial court's finding that the parties had reconciled during the pendency of the divorce action was palpably erroneous or manifesting unjust. Thus, the default divorce judgment entered after that reconciliation was void for lack of subject-matter jurisdiction, and the trial court properly set aside the default judgment as void."

23. (A) COURT'S COLLEGE EXPENSE ORDER WAS REVERSED BECAUSE IT DID NOT INCLUDE A REQUIREMENT THAT THE CHILD HAD TO BE A FULL-TIME STUDENT.

(B) PROOF OF COLLEGE EXPENSES IS REQUIRED FOR SUCH AN ORDER, BUT DOES NOT HAVE TO BE IN ANY PARTICULAR FORM OR FROM ANY PARTICULAR SOURCE.

(C) THE FATHER'S TESTIMONY ABOUT THE TOTAL AMOUNT HE PAID FOR THE CHILDREN'S LIVING ACCOMMODATIONS AND AN EXHIBIT HE INTRODUCED SHOWING THE AMOUNT OF THEIR TUITION WAS FOUND SUFFICIENT TO SUPPORT THE ENTRY OF AN ORDER.

Jacklin v. Austin, 2012 WL 4465568, Alabama Court of Civil Appeals, September 28, 2012

The parties divorced in 1999 and had three children. In 2009, the father filed a complaint asking for certain relief, including an award of college educational expenses for the parties' older daughter. The father later amended his claim to add postminority support for the parties' son as well. Following an ore tenus hearing, judgment was entered which ordered that the mother pay 30% of the tuition, fees, books, room and board expenses of the two older children of the parties; and ordered that the obligation was to be "contingent on the children receiving a complete college degree in four and a half years, and further on those children maintaining at least a 'C' overall average." The mother appealed.

On appeal, the ACCA reversed the trial court's order requiring the mother to pay college expenses for the two older children on the basis that it did not include all of the mandatory provisions required by Ex parte Bayliss and its progeny. Specifically, the trial court failed to include the requirement that the children be full-time students while in college. The ACCA noted that it had directed the trial court, in the case of Kent v. Kent, 587 So.2d 409 (Ala.Civ.App. 1991) to "set a reasonable time limitation on the parent's responsibility for post-minority college support," including (a) "time limits for the child's . . . attainment of a 'four-year' college degree," and further instructed that the support obligation be conditioned (b) "upon the child's maintenance of a 'C' average" and (c) "full-time student status while in college." The ACCA indicated that even though that reference in Kent, supra, to the "particular facts" of that case "subsequent opinions of this court have deemed the inclusion of the three-time limitation and academic-progress

provisions identified above to be mandatory when postminority support is awarded."

In finding that the trial court's judgment contained two of the three provisions directed to be included in Kent, the ACCA indicated that it could not ignore the absence of the full-time student status requirement in the trial court's order, and reversed the trial court's college expense order.

The mother also contended that the judgment should be reversed because the father did not prove the cost of the two older children's college attendance. However, the ACCA disagreed, finding that the father testified that both children were enrolled at Auburn University after having taken courses at Calhoun Community College; that the father testified that he had paid $3,920.94 for living accommodations for the two older children during the year preceding trial; and that the father had introduced an exhibit into evidence indicating his actual tuition payments on behalf of the children at Auburn. The ACCA concluded that that evidence was sufficient, indicating that "we have never held that 'legal evidence' of such monetary obligations must be in any particular form, or come from any particular source, in order to support a Bayliss support judgment."

24. (A) STRICT COMPLIANCE WITH REGISTRATION REQUIREMENTS OF UIFSA IS MANDATORY TO INVOKE THE SUBJECT MATTER JURISDICTION OF AN ALABAMA COURT TO ENFORCE OR MODIFY A FOREIGN CHILD SUPPORT ORDER.

(B) THE MERE ACT OF EXERCISING VISITATION WITH A CHILD IN ALABAMA IS INSUFFICIENT TO ESTABLISH MINIMUM CONTACTS WITH THE STATE FOR JURISDICTIONAL PURPOSES.

Ex parte Ortiz, 2012 WL 4748711, Alabama Court of Civil Appeals, October 5, 2012

The mother filed a petition in Alabama to "annex" a foreign judgment, submitting with that petition a certified copy of a 1998 Florida judgment which divorced the parties. At the same time, the mother filed a petition for a rule nisi and for modification of the Florida judgment by the Alabama court. The father filed a motion to dismiss on the basis that the Alabama court lacked personal jurisdiction over him, and that the mother had failed to comply with the registration requirements of UIFSA. The mother thereafter filed an amendment to her petition to annex the Florida judgment, which amendment included the parties' settlement agreement that she asserted had been incorporated into the Florida judgment. The trial court denied the father's motion to dismiss, and he appealed.

On appeal, the father first argued that the trial court lacked subject-matter jurisdiction over the case. The ACCA stated that "Subject-matter jurisdiction may not be waived; a court's lack of subject-matter jurisdiction may be raised at any time by any party and may even be raised by a court ex mero motu," citing C.J.L. v. M.W.B., 868 So.2d 451 (Ala.Civ.App. 2003). The father specifically argued that the mother failed to comply with the registration requirements of Sec. 30-3A-602, Code of Alabama (1975), a part of UIFSA. Specifically, the father asserted that the mother failed to file the necessary number of copies of the Florida judgment; failed to file copies of the complete Florida judgment; and that she had failed to file a sworn statement showing the amount of the alleged arrearage.

The ACCA agreed with the father that the mother had failed to strictly comply with the registration requirements of UIFSA in that she had failed to file a complete copy of the Florida judgment in her initial filing and that she had failed to include a sworn statement showing the amount of the claimed arrearage, as required by Sec. 30-3A-602(a)(2) and (3). The ACCA stated that "a trial court does not obtain subject-

matter jurisdiction over a petition to modify a foreign support order if it is not registered properly under the UIFSA," citing S.A.T. v. E.D., 972 So.2d 804 (Ala.Civ.App. 207); and further stated that "Only strict compliance with that registration procedure confers subject matter jurisdiction upon an Alabama circuit court to enforce or to modify a foreign-child support judgment," citing Mattes v. Mattes, 60 So.3d 887 (Ala.Civ.App. 2010) and Ex parte Owens, 65 So.3d 953 (Ala.Civ.App. 2010). Because the Florida judgment was not properly registered in strict compliance with UIFSA, the ACCA found that the mother's petition for rule nisi and for modification did not trigger the subject-matter jurisdiction of the Alabama trial court. In addition, the ACCA stated that "The mother also could not correct that fatal deficiency in her petition by filing an amendment to that petition," citing Ex parte Owens, supra.

The ACCA also agreed with the father that the mother had not met the burden of showing that Alabama had personal jurisdiction over the father, who had lived in the State of Maine since the parties' divorce in Florida. The ACCA found that the only allegations which supported the mother's claim of personal jurisdiction over the father was that he had regularly traveled to Alabama to visit with the parties' child and that he had stayed at her apartment on one occasion in 1999. However, the ACCA found that to be insufficient, stating that "This court and our Supreme Court, however, have recognized that the mere act of exercising visitation with a child in Alabama is insufficient to establish minimum contacts with the state for jurisdictional purposes," citing Coleman v. Coleman, 864 So.2d 371 (Ala. 2003).

The ACCA granted the father's petition for writ of mandamus, and directed the trial court to vacate its order denying the father's motion to dismiss, and to enter a new order dismissing the mother's action.

25. (A) A TRIAL COURT CANNOT DIVIDE, NOR CONSIDER, RETIREMENT ACCOUNTS, UNLESS THE PARTIES HAVE BEEN MARRIED FOR AT LEAST TEN YEARS WHEN THE CASE IS FILED.

(B) GOOD RULE OF THUMB – "THINK A LOT, BUT SAY LITTLE."

Zha v. Xu, 2012 WL 4841342, Alabama Court of Civil Appeals, October, 12, 2012

The parties were married in China in 2002. The wife filed for divorce in 2011. The trial court entered a judgment divorcing the parties, awarding custody of their child to the mother and visitation to the father, and dividing the parties' marital property. The trial court also awarded child support, private school tuition, and rehabilitative alimony to be paid by the father. In addition, the trial court ordered that the husband pay an additional property settlement in the amount of $18,500.00 to the wife. The husband filed a postjudgment motion, which was denied, and he appealed.

On appeal, the only issue asserted by the husband is that the $18,500 additional property settlement had to have been the result of the trial court awarding the wife a portion of his retirement accounts; and that since the parties had been married for less than 10 years at the time the complaint for divorce was filed, such a division is prohibited by Sec. 30-2-51, Code of Alabama (1975).

However, the evidence presented at trial indicated that the husband had four retirement accounts that totaled over $123,000, and three non-retirement accounts worth a little over $6,000. While the trial court did not specifically award the wife any interest in the husband's retirement accounts, the trial court commented during the trial of the case:

> "The parties also have several accounts which are set out in Court Exhibit Number 5, that are today's balances on these Accounts. Some of these accounts are IRA accounts and since the parties have not been married for ten years, the Court might award a judgment rather than a division of the accounts itself. And so I am going to decide what will be fair in light of the totality of those accounts and the circumstances that I'll hear today." (Emphasis added.)

The trial judge also stated the following:

> "Now, I can consider the value of the retirement even though I might not be able to assign a portion of a retirement, but I can consider it in my otherwise break down."

The ACCA concluded, based upon those comments, that "it appears that the trial judge may have considered the husband's retirement accounts in the final distribution of property." As a result, the ACCA reversed the award of additional property settlement to the wife, and remanded the case to the trial court for the trial court to "adjust those awards so as to institute an equitable property division between the parties."

26. AN ORDER REQUIRING THE HUSBAND TO MAINTAIN MEDICAL INSURANCE ON THE WIFE UNTIL SHE COULD QUALIFY FOR MEDICARE WAS FOUND IN THIS CASE TO BE IN THE NATURE OF PERIODIC ALIMONY, AND TERMINATED ON HER REMARRIAGE, UNDER SEC. 30-2-55.

Peace v. Peace, 2012 WL 5077142, Alabama Court of Civil Appeals, October 19, 2012

The parties were divorced in 2004 by a judgment which included an obligation for the husband to pay periodic alimony to the Wife, and to also provide the wife with health insurance until such time as she could qualify for Medicare. In 2011, the former husband filed a petition alleging that the former wife had remarried, seeking to terminate his periodic alimony obligation and his obligation to provide the wife with health insurance coverage. The trial court determined that the obligation imposed on the husband to provide the former wife with health insurance coverage did not terminate upon her remarriage, because it did not specifically say so. Following a denial of his postjudgment motion, the former husband appealed.

On appeal, the ACCA stated that "Although this court has never explicitly held that the provision of health-insurance coverage constitute spousal support in the nature of periodic alimony, we have previously recognized that the provision of health-insurance coverage may constitute periodic alimony," citing Robinson v. Robinson, 795 So.2d 729 (Ala.Civ.App. 2001). The ACCA concluded that in the present case "the award to the former wife of health-insurance coverage constituted spousal support in the nature of periodic alimony because the award was intended to compensate the former wife for a routine living expense and thereby to equalize the apparent disparity in the parties' incomes, not to award her property," citing Smith v. Smith, 959 So.2d 1146 (Ala.Civ.App. 2006).

In finding that it was undisputed that the wife had remarried, the ACCA found that the obligation imposed on the former husband to provide health insurance for the former wife terminated pursuant to Sec. 30-2-55, *Code of Alabama* (1975). With regard to the trial court's determination that the provision requiring the husband to carry the health insurance for the wife did not specifically say that it was to terminate upon the former wife's remarriage and cohabitation, the ACCA stated that "An award of periodic alimony need not expressly specify, however, that the obligation ceases upon the death or remarriage of the recipient spouse because the term 'periodic alimony' by definition means

a payment to a spouse that will cease upon death, remarriage, or cohabitation," citing Wheeler v. Wheeler, 831 So.2d 629 (Ala.Civ.App. 2002).

The former husband also contended that the award of a portion of his pension benefits to the wife constituted periodic alimony, citing Rose v. Rose, 70 So.3d 429 (Ala.Civ.App. 2011). The ACCA found, however, that that argument was not presented to the trial court and could not be raised for the first time on appeal.

27. (A) THE MOTHER'S INTERFERENCE WITH THE FATHER'S RELATIONSHIP WITH THE CHILD WAS FOUND SUFFICIENT TO MODIFY CUSTODY TO A JOINT CUSTODY ARRANGEMENT.

(B) THE TRIAL COURT'S REFUSAL TO INCLUDE THE MEDICAL INSURANCE PREMIUM PAID BY THE FATHER'S WIFE TO COVER THE CHILD, AND THEREFORE NOT MODIFY HIS CHILD SUPPORT OBLIGATION, WAS AFFIRMED UNDER THE "BLIND HOG THEORY" OF JURISPRUDENCE.

K.T.D. v. K.W.P., 2012 WL 5458549, Alabama Court of Civil Appeals, November 9, 2012

The parties were the parents of a child born in 2007, when the mother was 16 years old and the father was 21 years old. The trial court entered an order that same year that adjudicated the father as the biological father of the child, awarded sole custody of the child to the mother, awarded the father visitation with the child, and ordered the father to pay child support. Neither party was ordered to provide medical insurance for the child, but were required to equally share the costs of any uninsured or noncovered medical expenses for the child. In 2010, the mother filed a petition to modify the 2007 judgment asking for various relief, including a reduction in the father's visitation rights. The father filed an answer and a counterclaim, seeking sole custody of the child, or in the alternative, an award of joint custody. In addition, he sought an order requiring him to maintain health insurance on the child, and a corresponding modification of his child support obligation. Following an ore tenus hearing, the trial court entered a judgment modifying the 2007 judgment by awarding the parties joint legal and joint physical custody of the child, finding that the McLendon burden of proof had been satisfied, and that a material change in circumstances had occurred because of the conduct of the mother in interfering with the relationship between the child and the father. The parties both filed postjudgment motions, and the trial court entered an order amending its judgment; however, the mother appealed, and the father timely filed a cross-appeal.

On appeal, the mother argued that the trial court had erred by concluding that the father had met his burden of proof pursuant to Ex parte McLendon, 455 So.2d 863 (Ala. 1984). The ACCA recited the long history of animosity and hostility between the parents and their respective families, including the father having been convicted of assault and harassing communications. The record also revealed an almost

complete inability of the parents to effectively communicate with each other about the child, including the mother's refusal to communicate with the father at all about the child, and other facts which clearly demonstrated her inflexibility in dealings with the father and his family about the child. She took the position that since she had sole custody of the child, the father could not take the child more than 60 miles away from his home, that he could not take the child to the doctor, and that the father had no rights to the child except to visit the child at the designated dates and times. The mother also arbitrarily changed certain of his visitation rights unilaterally, and testified that she expects to be able to talk to the child every day when the child is with the father, but does not allow the father to talk to the child when the child is with the mother. Needless to say, the facts set out in the opinion clearly demonstrate a serious dysfunction in the relationship between the parents, to which the child was exposed.

The ACCA affirmed the trial court's modification to a joint custody arrangement, finding that the father had met the burden of proof set forth in Ex parte McLendon, supra. The ACCA found that there was sufficient evidence in the record to support the trial court's conclusion that the mother had attempted to interfere with the child's relationship with the father, even stating that the parties' four-year-old child had attempted to reason with the mother during her displays of unreasonable behavior. The ACCA stated that it did not believe that the evidence rose to the level of supporting a finding of "parental alienation," but stated that "this court has recognized that a custodial parent's attempts to interfere with a noncustodial parent's relationship with a child should be considered in determining whether custody of the child should be modified," citing Sankey v. Sankey, 961 So.2d 896 (Ala.Civ.App. 2007).

The mother contended that she had not interfered with the father's relationship with the child because she had always allowed the father to exercise the specific rights of visitation awarded to the father, and that the father himself had testified that he had a good relationship with the child. Even though the ACCA agreed with the mother's contention that custody should not be modified because of a refusal to allow extra or supplemental visitation to the other parent, and further stating that "visitation disputes alone will not support a judgment modifying custody," citing Foster v. Carden, 515 So.2d 1258 (Ala.Civ.App. 1987), the ACCA further stated that:

> "However, the facts of this case present a more serious problem than a visitation dispute. The trial court could have

> concluded that the mother had engaged in behavior designed to frustrate and thwart the father's relationship with the child."

The ACCA affirmed the trial court's modification ordering a joint custody arrangement between these parents.

On appeal, the father contended that the trial court erred by failing to modify his child support obligation by including the health insurance premium paid by his present wife for the coverage on the child in the calculation of child support. The ACCA noted that Rule 32(B)(7)(a), Alabama Rules of Judicial Administration, provides, in part, as follows:

> "Medical support in the form of health-insurance coverage and/or cash medical support shall be ordered provided that health-insurance coverage is available to either parent at a reasonable cost and/or cash medical support is considered reasonable in cost."

In reviewing the evidence, the ACCA found that the premium paid by the father's present wife was 17% of his gross income per month, and was therefore not a reasonable cost to warrant inclusion in the calculation of child support. Even though the trial court had not made findings of fact on that issue, the ACCA applied the well settled "Blind Hog Theory" of jurisprudence in stating that "a judgment that is correct for any reason may be affirmed on appeal, even if the trial court does not expressly rely on that reason in reaching its judgment or if it cites an incorrect reason," citing Boykin v. Magnolia Bay, Inc., 570 So.2d 639 (Ala. 1990).

The father had contended that the trial court committed error by not holding a hearing on his postjudgment motion raising those issues. However, the ACCA concluded that the evidence supported the trial court's denial of the father's claim seeking to modify child support, and therefore, it could not conclude that there was probable merit to the father's postjudgment motion on that issue. As a result, the trial court's failure to conduct a hearing on his motion was harmless error.

28. (A) ONE OF THE PARTIES MUST BE DOMICILED IN ALABAMA TO VEST AN ALABAMA COURT WITH SUBJECT-MATTER JURISDICTION TO DIVORCE THE PARTIES.

(B) SUBJECT-MATTER JURISDICTION MAY NOT BE CONFERRED ON THE COURT BY CONSENT OR AGREEMENT OF THE PARTIES.

Orban v. Orban, 2012 WL 5696786, Alabama Court of Civil Appeals, November 16, 2012

The parties were married in 1996. The husband was in the military and was transferred to Enterprise, Alabama, being stationed at Fort Rucker. In 2009, the husband was transferred to Fort Campbell, Kentucky, and he moved to the State of Tennessee at that time. The mother and the parties' two children moved in 2010 to the State of Florida. The husband filed a complaint for divorce in the Alabama court more than six months after he had been transferred to Fort Campbell, and almost six weeks after the wife and the children had moved to Florida, alleging in his complaint that both of the parties were "bona fide resident citizens of the State of Alabama." The wife filed a motion to dismiss alleging that the trial court lacked personal jurisdiction over her and further lacked subject-matter jurisdiction over the divorce action, because neither of the parties were residents of the State of Alabama.

Following a hearing, the trial court entered an order stating that the parties had submitted to the jurisdiction of the trial court, had agreed that venue was proper in the trial court, and that the parties had withdrawn their respective motions addressed to jurisdictional issues. The wife thereafter filed an answer and a counterclaim for divorce in the trial court. Following an ore tenus proceeding, the trial court entered a judgment divorcing the parties, dividing their property, and addressing child-custody and support issues. The trial court denied the wife's postjudgment motion, and she appealed.

On appeal, the ACCA was unable to conclude with certainty that the trial court had subject matter jurisdiction to divorce the parties, because there was no transcript of the hearing held before the trial court on the mother's motion to dismiss. The ACCA reviewed the requirement for an Alabama court to exercise subject-matter jurisdiction to divorce a couple, stating as follows:

> "If one party is a resident of Alabama, then an Alabama court has jurisdiction over the marital res. Sachs v. Sachs, 278 Ala.

464, 179 So.2d 46 (1965). If both parties are nonresidents, an Alabama court has no jurisdiction. Winston v. Winston, 279 Ala. 534, 188 So.2d 264 (1966). Further, nonresident parties cannot stipulate that an Alabama court may assume jurisdiction over the case. Winston, supra."

The ACCA further stated that for purposes of subject-matter jurisdiction in a divorce action, "residency means domicile," citing Livermore v. Livermore, 822 So.2d 437 (Ala.Civ.App. 2001). However, the ACCA found that "it is not clear that either party was domiciled in the State of Alabama at the time that the husband filed a complaint for a divorce on March 17, 2010; and stated the following requirements to establish domicile:

> "Alabama decisions hold that domicile requires two elements: (1) one's physical presence in the chosen place of residence, and (2) an accompanying intent to remain there, either permanently or for an indefinite length of time. [Rabren v. Mudd, 285 Ala.531, 535, 234 So.2d 549, 553 (1970)]; Basiouny v. Basiouny, 445 So.2d 916, 919 (Ala.Civ.App. 1984). It has been said that 'domicile' is that place to which, whenever one is absent, he or she has an intent to return. State ex rel. Rabren v. Baxter, 46 Ala. App. 134, 138, 239 So.2d 206, 209 (Civ.App. 1970). When a party physically resides in one location, '"[t]he intention to return [to another location] is usually of controlling importance in the determination of the whole question [of domicile]."' Andrews v. Andrews, 697 So.2d 54, 56 (Ala.Civ.App. 1997) (quoting Jacobs v. Ryals, 401 So.2d 776, 778 (Ala. 1981)).
>
> "Furthermore, the burden is on the party who lives at a particular place to prove that he or she does not intend to remain there for an indefinite length of time, or that he or she has a present intention to return to some previous place of residence. In this regard, our Supreme Court has stated that '"[t]he fact that a person lives at a particular place creates a prima facie presumption that such place is his domicile."' Andrews, 697 So.2d at 56 (quoting Nora v. Nora, 494 So.2d 16, 18 (Ala. 1986); see also 25 Am. Jur. 2d Domicil[e] Sec. 56 (1996) (proof that a party resides elsewhere rebuts any presumption of continued domicile and places burden of proof upon the party denying the charge.)"

In finding that there was no evidence presented to rebut the prima facie presumption that the father was domiciled in Tennessee and the mother was domiciled in Florida, and noting that "Alabama courts have no jurisdiction over the marital status of parties if neither is domiciled in Alabama, and such jurisdiction cannot be conferred on the courts, even with the parties' consent," citing Winston v. Winston, 279 Ala. 534 (1966), the ACCA remanded the case back to the trial court with instructions to conduct a hearing and to receive evidence regarding the domicile of each party on the date that the case was filed by the husband; and further instructed the trial court to also consider whether it had subject-matter jurisdiction to enter an initial custody award pursuant to the UCCJEA, or to enter an initial child support award pursuant to UIFSA.

29. SECTION 30-3-5 THREE YEAR VENUE STATUE IS APPLIED IN A SPLIT CUSTODY SITUATION TO REQUIRE CLAIMS OF THE PARTIES' CHILDREN TO BE HEARD IN TWO DIFFERENT CIRCUITS.

Ex parte Brandon, 2012 WL 5974851, Supreme Court of Alabama, November 30, 2012

The parties were divorced in Tuscaloosa County Circuit Court in 2009, by an agreement which provided for a split-custody arrangement, with the mother being awarded primary physical custody of the parties' two daughters, and the father being awarded primary physical custody of the parties' minor son. Thereafter, the father and the son moved to Pickens County, Alabama. In 2012, the mother filed an action in the Tuscaloosa County Circuit Court for emergency relief to enforce her right to summer visitation with the parties' son, to hold the father in contempt for violating visitation orders regarding the son, and to modify college expense provisions of the agreement regarding the daughters. The father answered, filed a counterpetition seeking to hold the mother in contempt, seeking clarification of certain orders for the parties' older daughter, and moved to transfer all issues in the mother's petition that related to the minor son to the Pickens County Circuit Court. His request was based on Sec. 30-3-5, Code of Alabama (1975). The trial court denied his motion, and after the Court of Civil Appeals denied the father's petition for write of mandamus, he filed for a writ of mandamus in the Supreme Court of Alabama.

The father contends that he, as the minor son's custodial parent, pursuant to Sec. 30-3-5, is awarded the clear, legal right to choose the venue for adjudication of the mother's claims involving the son. The mother did not dispute that the father satisfied the requirements of that Code section; but maintained that the Code section did not apply in this case, because the action she filed in the Tuscaloosa Circuit Court also pled claims regarding the parties' daughters, for which venue was proper in that court. She contended that because it would be improper to transfer the entire case filed by her, the claims involving the minor son should remain in the Tuscaloosa County Circuit Court. The Supreme Court summarized the provisions of Sec. 30-3-5 as follows:

> "Section 30-3-5 provides that venue for an action seeking modification, interpretation, or enforcement of an order involving a child is proper either in the circuit court that issues the order or in the circuit court of the county where the

> custodial parent and the child have resided for at least three years before the filing of the action. Section 30-3-5 further provides that if the custodial parent and child satisfy the residence requirement, then the custodial parent can select the venue."

The Supreme Court found that the "language in Section 30-3-5 is clear and unambiguous. The legislature unequivocally stated that the custodial parent 'shall be able to choose the particular venue' with regard to claims involving the child" and stating that "The word 'shall' is clear and unambiguous and is imperative and mandatory," citing Ex parte Prudential Ins. Co. of America, 721 So.2d 1135 (Ala. 1998); and further stating that "This Court is bound by the words used by the legislature in the statute." As a result, the Supreme Court of Alabama granted the father's writ of mandamus, and ordered the Circuit Court of Tuscaloosa County to transfer all claims related to the parties' minor son to the Circuit Court of Pickens County.

In a special concurring opinion, Justice Shaw indicated that the mother's argument that the transfer of issues regarding the parties' minor son was not in the interest of efficient judicial administration, "the Code section contemplate compliance, 'notwithstanding any law to the contrary,' thus requiring compliance, notwithstanding the aspirational nature of the general legal principles of efficiency advanced by the mother."

Justice Murdock dissented finding that the result of the majority opinion would be a severance of the claims presented in the mother's petition, and that "No such right is expressed in the statute. Nowhere in Sec. 30-3-5 is there any mention of the concept of severance."

30. (A) TRIAL COURT'S FAILURE TO HOLD A HEARING ON A POST-JUDGMENT MOTION WAS FOUND TO BE REVERSIBLE ERROR, WHERE THE MOTION WAS FOUND ON APPEAL TO HAVE "PROBABLE MERIT."

(B) THE SUBSTANCE OF AN AWARD TAKES PRECEDENCE OVER THE LABEL OR FORM PUT ON IT.

(C) AN ORDER TO PAY A STUDENT LOAN DEBT FOR THE OTHER SPOUSE WAS FOUND TO BE, IN SUBSTANCE, A PROPERTY SETTLEMENT, NOT SUBJECT TO MODIFICATION OR TERMINATION ON REMARRIAGE.

McCreless v. Valentin, 2012 WL 5974622, Alabama Court of Civil Appeals, November 30, 2012

The parties were divorced in 2005, based upon a settlement agreement they had entered into to resolve the issues in their case. The divorce judgment did not include a specific award of spousal support to either party. The agreement required the husband to pay the sum of $300 per month on the wife's student loan, with the requirement to do so being contained within a paragraph regarding the payment of "debts." Thereafter, the divorce judgment was modified three times, with one of the modifications referring to the $300 per month payment as being "court-ordered spousal support." None of the modification orders were appealed by either party. In 2009, another modification was entered which specifically noted that the husband's obligation to pay the wife's student loan award was not subject to modification, because it was a "property settlement and not periodic alimony." Again, neither party appealed that order. In 2011, the wife filed a fourth petition for modification, to which the husband answered and filed a cross-claim. The 2011 modification order entered by the trial court modified the husband's child support obligation, after imputing income to the wife; found the husband's obligation to pay on the wife's student loan had terminated when she remarried in February, 2007; and found that the trial court's 2009 modification order that had "reclassified" the payment on the wife's student loan was "of no force and effect." The wife filed a postjudgment motion, which was denied by the trial court without a hearing, and she filed an appeal.

On appeal, the wife contended that the trial court erred in its refusal to grant her a hearing on her postjudgment motion regarding the calculation of the husband's child support, and on the termination of his

obligation to pay towards her student loan. She argued that Rule 59(g), A.R.C.P., requires that the circuit court hold a hearing to allow her an opportunity to be heard before it ruled on her postjudgment motion.

The ACCA stated the issue to be as follows:

> "We agree with McCreless that the denial of her postjudgment motion without a hearing was error. The question becomes whether the error is reversible error. Therefore, we must determine whether there exists probable merit to McCreless's arguments or whether this court can resolve the issues adversely to McCreless as a matter of law."

In finding that there was contradictory evidence regarding the wife's income upon which the trial court had based the imputation of income to her, the ACCA stated, however, that "Under Rule 32(B)(5), Ala. R. Jud. Admin., a trial court must impute income to a parent and calculate his or her child-support obligation based upon that parent's potential income if 'the court finds that [the] parent is voluntarily unemployed or underemployed.'" Mitchell v. Mitchell, 723 So.2d 1267, 1269 (Ala.Civ.App. 1998). Citing Winfrey v. Winfrey, 602 So.2d 904 (Ala.Civ.App. 1992), the Court of Civil Appeals stated that "The key word here is 'voluntary.' However, the ACCA stated that "Our de novo review of the record on appeal reveals conflicting evidence that cannot support an imputation of income to McCreless. As a threshold matter, the record does not include evidence indicating that McCreless was voluntarily underemployed. Furthermore, although there is some conflicting evidence regarding her probable earning level based on her recent work history, there is no evidence as to her employment potential, her education, her occupational qualifications, or the prevailing job opportunities and earning levels in her community. See Winfrey, 602 So.2d at 905."

As a result, the ACCA found that the trial court's failure to grant a hearing on the wife's postjudgment motion regarding the imputation of income to her due to voluntary underemployment was not harmless error, and reversed and remanded the case back to the trial court to hold a hearing on her motion on that issue. Also finding conflicting documentary evidence on the issue of the trial court's computation of her work-related childcare expenses, the ACCA also reversed and remanded that issue to the trial court to hold a hearing.

Finally, the wife argued that the circuit court erred in determining that the husband's obligation to pay on her student loan was periodic

alimony was error. The ACCA agreed with her, stating that "We conclude, as a matter of law, that the $300-a-month-student-loan award in the divorce judgment was a property settlement that was not subject to modification after the passage of 30 days." The ACCA noted that even though the divorce judgment clearly listed the payment of the student loan within a provision headed as payment of "debts," it further stated that the court will look to the substance of an award, which takes precedence over the form or label put on it, citing Hartsfield v. Hartsfield, 384 So.2d 1097 (Ala.Civ.App. 1980).

The ACCA further concluded that the payment of the student loan provision was, in substance, a property award, in that the time of payment and the amount of payment was certain, and that the right to the payment was vested. The ACCA reversed the judgment of the circuit court insofar as it declared the husband's obligation to pay the wife's student loan to be periodic alimony, and therefore terminated when she remarried.

31. (A) IN A RELOCATION ACT CASE, THERE IS AN INITIAL REBUTTABLE PRESUMPTION THAT THE PROPOSED MOVE OF THE PRINCIPAL RESIDENCE OF A CHILD IS NOT IN THE CHILD'S BEST INTEREST.

(B) IF THAT PRESUMPTION IS REBUTTED BY THE PARTY SEEKING TO MOVE, THE BURDEN OF PROOF THEN SHIFTS TO THE PARENT OBJECTING TO THE MOVE TO PROVE THAT THE PROPOSED MOVE IS NOT IN THE CHILD'S BEST INTEREST.

Terry v. Terry, 2012 WL 6062574, Alabama Court of Civil Appeals, December 7, 2012

The parties were never married, and the paternity of their child was established by court order, with the parties being awarded joint legal custody of the child, and the mother being awarded primary physical custody, subject to the father's visitation. In 2011, the mother, who was a nurse, married a man who had just graduated from medical school, and who was being assigned to a residency program in Charleston, South Carolina. The mother properly notified the father of her intention to move from Alabama to South Carolina with the child. The notice complied with the requirements of the Alabama Parent-Child Relationship Protection Act, Sec. 30-3-160 et seq., Code of Alabama (1975). The father filed a timely objection to the proposed move to enjoin the move, and also requested a modification of custody. The mother filed a counterclaim requesting that the father's visitation schedule be modified to the trial court's standard out-of-state visitation schedule. The child was permitted to move to South Carolina with the mother during the pendency of the case. After a final hearing, the trial court denied the mother's request to move with the child to South Carolina, but did not modify custody to the father, indicating that the court assumed that the mother would be returning to Alabama with the child. The mother appealed, arguing that the trial court had improperly applied the evidence to the law of Alabama.

On appeal, the ACCA reviewed the evidence presented at trial, and disagreed with the trial court, who had found that the mother had failed to meet her burden of proving that the move to South Carolina was in the child's best interest. Sec. 30-3-169.4 of the Act provides for a rebuttable presumption that a change of principal residence of the child is not in the best interest of the child, and further provides that "The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party."

In reviewing the evidence, and finding that it was similar to the case of Clements v. Clements, 906 So.2d 952 (Ala.Civ.App. 2005), the ACCA concluded that "the mother presented sufficient evidence to support that the relocation was in the child's best interest. Therefore, pursuant to Sec. 30-3-169.4, the burden shifted to the father to demonstrate that the relocation was not in the child's best interest." The ACCA pointed out that the evidence presented at trial was that the father is still single and frequently travels out of state for work; in addition, he is in a serious relationship with a woman who lives out of state. The ACCA also noted that "there is no evidence indicating that the child has suffered any adverse effects from the move to South Carolina." Based upon the evidence presented, the ACCA stated that "we conclude that, after the mother demonstrated that relocating the child to Charleston with the mother was in the child's best interest, the father did not meet his burden of demonstrating that the move was not in the child's best interest. Thus, the evidence does not support the trial court's judgment, and the trial court abused its discretion in refusing to allow the mother to relocate to South Carolina with the child."

Based on that finding, the ACCA reversed the judgment of the trial court, and remanded the case to the trial court for entry of a judgment consistent with its opinion.

32. (A) THE TRIAL COURT WAS REVERSED FOR NOT PROPERLY CALCULATING CHILD SUPPORT IN A "SPLIT-CUSTODY AWARD."

(B) THE FAILURE TO AWARD COLLEGE EXPENSES IS NOT ERROR WHEN NO EVIDENCE IS PRESENTED ABOUT THE CHILD'S ANTICIPATED COLLEGE EXPENSES.

(C) HOWEVER, A TRIAL COURT SHOULD RESERVE JURISDICTION TO AWARD COLLEGE EXPENSES IN THE FUTURE IF THE CHILD IS APPROACHING THE AGE OF MAJORITY, AND THE REQUEST FOR COLLEGE EXPENSES IS DENIED.

Nail v. Jeter, 2012 WL 6062583, Alabama Court of Civil Appeals, December 7, 2012

The opinion of the ACCA on September 21, 2012, was withdrawn, and a substituted opinion entered. The parties were divorced in 2010, with the father being awarded primary physical custody of the parties' two children, and the mother being ordered to pay child support. In 2011, the mother filed a petition to modify, seeking primary physical custody of the children, college expenses for the parties' son, and alleging that the father was in contempt of court for violating certain court orders. The father answered and filed a counterpetition, which is not involved in the opinion. Following a final hearing, the trial court entered a judgment in which it transferred primary physical custody of the parties' son to the mother, declined to transfer custody of the parties' daughter to the mother, and modified the mother's child support obligation. The mother filed a postjudgment motion, which was denied after a hearing, and she filed an appeal. On appeal, the mother asserted six issues for review.

The mother first contended that the trial court erred by failing to compel the father to produce his cell phone records. However, the evidence indicated that the mother's attorney had failed to subpoena his cell phone records. As a result, the ACCA found that the trial court did not err, because the mother's attorney "failed to follow the proper procedure by filing a third-party subpoena." The mother also contended that the trial court erred by not finding the father in contempt of court for failing to comply with the property division orders in the divorce decree. However, the ACCA agreed with the trial court that the mother had failed to provide sufficient evidence to hold the father in contempt of court, noting that "The mother's testimony regarding the division of personal property consisted of exactly three questions and answers. She said that she had never told the father to keep her personal property, that she had asked for her personal property, and that the

father had never communicated with her about the personal property." The mother next asserted that the trial court erred by not awarding her primary custody of both children. However, the ACCA determined that the trial court did not exceed its discretion by refusing to do so, finding that "its judgment could be reasonably supported by the evidence presented by the father."

The mother also asserted that the trial court had erred by failing to properly modify her child support obligation. The record on appeal contained the necessary CS-41 Income Affidavits for both parties, a CS-42 Child Support Guideline worksheet, but the CS-42 Child Support Guideline worksheet only listed the parties' daughter as the child for whom child support was being paid. In finding that the trial court had ordered a "split-custody award," and further finding that the trial court had failed to calculate the child support which the father was obligated to pay to the mother for the parties' son, the trial court's computation of the parties' child support obligation was reversed, and was remanded to the trial court to enter judgment in accordance with Rule 32(B)(9), A.R.J.A.

The mother contended that the trial court had also erred by failing to award college educational expenses for the parties' son, who was an excellent student, and had testified that he desired to attend the University of Alabama, and major in business. However, it was undisputed that the son had not applied to, nor been accepted to the University of Alabama, or to any other institution. In addition, the mother's attorney failed to present evidence to the trial court indicating the anticipated college expenses for the son's education. As a result, the ACCA affirmed the trial court's denial of the mother's request for the payment of college expenses for their son.

However, the mother also argued that the trial court erred by failing to reserve jurisdiction over the issue of college expenses for the son, and the ACCA agreed, finding that "When a child is nearing the age of majority, a trial court should reserve jurisdiction to consider the issue of postminority educational support." In admitting that "We recognize that this court has provided little guidance to the trial courts concerning whether or when to reserve jurisdiction over the issue of postminority educational support," the ACCA stated as follows:

> "In situations where a child is approaching 19 years of age, a trial court should reserve the issue so that its jurisdiction to consider awarding postminority educational support will not

be lost before the parent seeking the support on the child's behalf is able to present appropriate evidence."

33. (A) THE ESTRANGEMENT OF A PARENT AND THE CHILD IS NOT ALONE SUFFICIENT TO PRECLUDE AN AWARD OF COLLEGE EXPENSES.

(B) THE AWARD OF COLLEGE EXPENSES TO BE PAID BY THE FATHER IS REVERSED BECAUSE THE TRIAL COURT: (1) FAILED TO ADDRESS CERTAIN SOURCES OF FUNDING WHICH THE EVIDENCE INDICATED HAD BEEN AVAILABLE TO PAY THOSE EXPENSES, INCLUDING A SCHOLARSHIP, PELL GRANT, AND THE CHILD'S INCOME FROM A PART-TIME JOB; AND (2) FAILED TO INCLUDE ALL OF THE BAYLISS CASE LIMITATIONS, SPECIFICALLY IT FAILED TO REQUIRE THAT THE CHILD BE A FULL-TIME STUDENT; AND (3) FAILED TO INDICATE IF THE FATHER'S CHILD SUPPORT PAYMENTS THAT HE MADE AFTER THE CHILD REACHED THE AGE OF MAJORITY WERE TO BE APPLIED TO HIS COLLEGE EXPENSE OBLIGATION.

(C) AS A RESULT, THE ACCA COULD NOT DETERMINE IF THE JUDGMENT SUBJECTED THE FATHER TO "UNDUE HARDSHIP" AS HE ALLEGED, AND THE CASE WAS REVERSED AND REMANDED.

Howell v. Dantone, 2012 WL 6062584, Alabama Court of Civil Appeals, December 7, 2012

The parties were divorced twice, once in 1994, and again in 1995, after the trial court found that they had reconciled after the first divorce. They had one child. In 2009, the mother filed a petition requesting that the trial court order the father pay towards their daughter's college expenses. At that time, the daughter had completed her freshman year in college, had maintained a 4.0 GPA, and planned to major in biology and become a nurse. The mother testified to the expenses that had been incurred for the child's freshman year, which included a Pell grant, a student loan, a scholarship, the daughter's income from a part-time job, and contributions from the mother and a maternal aunt. She did introduce invoices for the cost, exclusive of textbooks, for the first semester of the daughter's sophomore year, which totaled $7,574.85. The mother was disabled and earned only a meager disability income, in addition to the father's child support.

The testimony indicated that the daughter had only visited the father one time since the divorce, when the child was four or five years old, and that the father had not seen the child for 15 years until the hearing in this case. There was disputed testimony as to whether or not the father refused to see or have any contact with the child, or whether the mother had interfered with his ability to do so. The father was presently unemployed, having been laid off from his work as a carpenter, and he

was living with his mother. He testified that he had not looked for other work, but had spent the five weeks after his layoff fixing up his mother's house.

Following a trial, the trial court ordered that the father and the mother equally share the child's expenses for tuition, books, board, food, transportation, and medical insurance, after applying any scholarships; and further ordered that the child was to maintain a "B" average in order to maintain the benefit of this postminority order. The father filed a postjudgment motion, which was set for hearing; however, the trial court failed to rule on the motion and it was denied by operation of law. The father then appealed.

The ACCA considered the father's arguments on appeal, which included that his estrangement from his daughter should preclude an award requiring him to pay for his daughter's college expenses, and that he did not have sufficient income or assets with which to pay for her college expenses, as had been ordered. He further argued on appeal that the trial court's judgment did not require that the daughter maintain full-time-student status. The ACCA disagreed with the father on the estrangement argument, stating that "In light of the holding in Bayliss that a trial court is not required to consider 'the child's relationship to her parents and responsiveness to parental advice and guidance," it is clear that the estrangement between the father and the daughter is not alone sufficient to 'preclude the daughter . . . from having the opportunity to obtain a college education,'" citing Payne v. Williams, 678 So.2d 1118 (Ala.Civ.App. 1996).

In regard to the father's claims that he lacked sufficient income or assets with which to be able to pay the child's college expenses, the ACCA found that, although the evidence indicated that the daughter was receiving a scholarship, the daughter had stated that she had only applied for scholarships, not that she had received any scholarships. In addition, the ACCA found that the judgment did not make the father's obligation to pay towards the college expenses subject to the application of the Pell grant that the daughter testified she had been awarded, nor subject to the application of the daughter's student loan or income from her part-time job which "cast doubt" upon the extent of the father's financial obligation as set out in the judgment.

The ACCA further found that the trial court's judgment did not set all of the reasonable limitations on the father's obligation to pay for the daughter's college expenses, as required in Ex parte Bayliss, 550 So.2d 986 (Ala. 1989), which are as follows:

> "Following Bayliss, this court has held that the trial court must set reasonable limitations on the parent's responsibility for postminority education support, because a failure to do so may impose an undue hardship on the paying parent. These limitations include (1) limiting the support to a reasonable period, (2) requiring the child to maintain at least a 'C' average, and (3) requiring that the child be enrolled as a full-time student."

Finally, the ACCA determined that the trial court's judgment did not address the undisputed evidence that the father had made child support payments for seven months after the daughter had reached the age of majority, nor did it indicate whether the trial court had allocated those payments to the father's college expense obligation. As a result, the ACCA reversed the trial court's judgment, stating that "this court is unable to determine whether the judgment subjects the father to undue hardship," citing Taylor v. Taylor, 991 So.2d 228 (Ala.Civ.App. 2008), and remanded the case to the trial court with instructions to address the deficiencies discussed in its opinion and to clarify the judgment.

34. (A) GOOD DISCUSSIION OF DIFFERENCES BETWEEN PERIODIC ALIMONY AND AN AWARD OF ALIMONY IN GROSS.

(B) WHEN THE JUDGMENT DOES NOT SPECIFY WHICH KIND OF ALIMONY IT IS, THE ACCA WILL LOOK TO THE (1) SOURCE OF THE PAYMENT – IF IT IS FROM CURRENT EARNINGS, IT IS PERIODIC ALIMONY, AND IF IT IS FROM THE ESTATE OR PROPERTY OF THE PAYING PARTY, IT IS ALIMONY IN GROSS; AND (2) THE PURPOSE OF THE PAYMENT.

(C) A CONDITION IN THE AWARD TERMINATING THE PAYMENT OBLIGATION ON THE DEATH OF THE PAYEE-SPOUSE DOES NOT, IN AND OF ITSELF; INDICATE THAT IT IS PERIODIC ALIMONY.

(D) THE ACCA FOUND THE PROVISION IN THIS CASE TO BE ALIMONY IN GROSS, AND THEREFORE DID NOT TERMINATE ON THE REMARRIAGE OF THE WIFE, NOR WAS IT MODIFIABLE.

Lacey v. Lacey, 2012 WL 6554385, Alabama Court of Civil Appeals, December 14, 2012

The parties were divorced in 2007 on an uncontested basis, in which the husband agreed to pay to the wife certain monies for a total of 96 months, which payments were to terminate prior to the 96 payments "only upon her death." In addition, the total payment of $240,000 was to be secured by a mortgage or other security interest in real and/or personal property sufficient to cover any remaining balance due to be paid by the husband. In 2008, the husband filed a petition to modify the divorce decree, alleging that the paragraph in question constituted an award of rehabilitative alimony, which terminated as a result of the wife's remarriage. Following an ore tenus hearing, at which the facts were stipulated to the trial court, including that the wife had remarried, and that the husband had stopped making the payments upon her remarriage, the trial court entered an order finding the provision to be for the payment of periodic alimony, and granted the husband's request that the obligation be terminated. The wife filed a postjudgment motion, which was denied, and she appealed.

The wife argued on appeal that the trial court had erred in interpreting the provision of the divorce decree to be an award of periodic alimony, rather than alimony in gross, which would have been nonmodifiable. The ACCA discussed in detail the differences between periodic alimony and alimony in gross. In this case, the divorce judgment did not indicate whether the award was periodic alimony or an award of alimony

in gross. The ACCA stated that in that situation "Our supreme court has held that when the award is unspecified, 'the source of the payment and the purpose are of prime importance'," citing Hager v. Hager, 293 Ala. 47 (1974).

The ACCA went in detail in discussing the analysis of the source of a payment, stating that "It is well established that the source of a payment of periodic alimony is the current earnings of the support-paying spouse," citing Hager, supra; and further stating that "In contrast, the payment source of an alimony-in-gross obligation is the estate of the parties or of the payor-spouse, and alimony in gross may be awarded when the division of jointly owned assets is not feasible or practical," citing Hager, supra. In finding that the award in this case was not payable out of the current earnings of the husband, and further finding that the award specified that it was to be secured by a mortgage on the property of the husband's business, the ACCA determined that the source of the obligation is the current estate of the husband, and that the requirement that the obligation was to be secured by a lien on his property "indicates that the purpose of the award in paragraph 14 of the divorce judgment was to compensate the wife for her interest in the husband's business."

The ACCA also found that the "time and amount of payment is certain," finding that the divorce judgment ordered the payment of a total of $240,000, paid in 96 equal monthly installments. The husband had argued on appeal that the award was not vested because the wife's right to payment ended at her death. However, the ACCA found that such a provision did not affect the determination, stating that "Rather, the supreme court stated that 'we have no case which holds that the unmodifiable character of alimony in gross is changed by a clause that terminates the installments in case of the payee-spouse's death'," citing Hager, supra.

In determining that the nature of the award could be inferred from its language, the ACCA stated that "Although the award terminates at the wife's death, that fact alone does not mean that the right is not vested. Further, all other characteristics of the award indicate that it is one for alimony in gross. The award is not payable from the husband's current earnings. Rather, that obligation is secured by a mortgage on the property of the husband's estate, it survives the death of the husband and is secured by life insurance, and the amount in timing of the payments are certain." As a result, the ACCA concluded that the trial court had erred in determining that the provision was an award of

periodic alimony, reversed the trial court's judgment, and remanded the case for entry of a judgment in compliance with the opinion.

35. (A) IS THE BAYLISS CASE DECISION CONSTITUTIONAL? A CONSTITUTIONAL CHALLENGE TO BAYLISS IS DENIED IN THIS CASE, PRIMARILY BECAUSE THE ACCA IS BOUND TO FOLLOW THE DECISIONS OF THE ALABAMA SUPREME COURT.

(B) INTERESTING SPECIALLY CONCURRING OPINIONS AND EVEN STATEMENTS MADE IN THE MAJORITY OPINION INDICATE THAT THE ACCA FEELS THAT THE LEGISLATURE, AND NOT THE COURTS, SHOULD MAKE ANY LAW TO REQUIRE DIVORCED PARENTS TO CONTRIBUTE INVOLUNTARILY TOWARDS THEIR ADULT CHILDREN'S COLLEGE EXPENSES; AND THAT A COURT DOING SO VIOLATES THE SEPARATION-OF-POWERS DOCTRINE, AND IS THEREFORE UNCONSTITUTIONAL. ONE SPECIALLY CONCURRING OPINION URGES THE ALABAMA SURPREME COURT TO REVISIT THE BAYLISS DECISION, AND OVERRULE IT AS BEING AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION-OF-POWERS DOCTRINE.

(C) THE TRIAL COURT'S CONSIDERATION OF THE MOTHER'S REMARRIAGE, HER CONTRIBUTING $100,000 TO THE PURCHASE OF A NEW HOME BOUGHT BY HER AND HER PRESENT HUSBAND, AND HER RESULTING FINANCIAL ARRANGEMENT WITH HER NEW HUSBAND WAS NOT ERROR, WHERE THERE WAS NO EVIDENCE PRESENTED, NOR CONSIDERED BY THE TRIAL COURT, OF THE NEW HUSBAND'S ASSETS OR INCOME.

Christopher v. Christopher, 2012 WL 6634435, Alabama Court of Civil Appeals, December 21, 2012

The parties were divorced in 2010, and at that time had one adult child and two minor children. In 2011, four days before one of the minor children's 19th birthday, the father filed a petition requesting that the mother be ordered to pay a portion of the son's postminority educational expenses. The mother filed an answer in which she asserted that she was not financially able to do so, and also asserted that the application of the decision in Ex parte Bayliss, 550 So.2d 986 (Ala. 1989) was unconstitutional. She served a copy of her answer on the Attorney General of Alabama. After trial, the trial court entered a judgment requiring her to pay 25% of the son's college expenses. After her postjudgment motion was denied, she appealed.

On appeal, she asserted six issues, four of which dealt with her claims that the decision in Ex parte Bayliss, supra, was unconstitutional. She also asserted that the trial court erred in considering her remarriage to her current husband in ordering her to pay towards her son's college

expenses, and that the trial court erred in ordering her to pay college expenses for the son because the requirement to do so resulted in an undue hardship for her.

The ACCA first addressed the mother's claim that the court erred in considering her remarriage. However, the ACCA noted that the evidence presented at trial did not include any evidence of her new husband's assets or income; and that the evidence consisted solely of the mother's testimony that she and her new husband were buying a new home to which she was making a $100,000 down payment, and that she and her new husband would thereafter share equally in the payment of the mortgage payment. The ACCA did not find error, stating that "The trial court evidently considered that evidence to determine whether, under the economic arrangement of her remarriage to which the mother had testified, the mother, and not the mother and her new husband, could afford, without undue hardship, to pay a portion of C.C.'s college-education expenses."

The ACCA's consideration of the constitutional issues was more troubling, with the ACCA stating that "[T]his court is bound by the decisions of our supreme court. Ala. Code 1975, Sec. 12-3-16. We are not at liberty to overrule or modify those decisions." Thompson v. Wasdin, 655 So.2d 1058 (Ala.Civ.App. 1995). TenEyck, 885 So.2d at 158. "Thus, we cannot conclude that requiring divorced parents to pay postmiority educational support violates their rights to equal protection."

The mother's argument that the Bayliss case decision violated the separation-of-powers doctrine appeared to be the most troubling for the ACCA, with the ACCA stating that "Perhaps if we were deciding the case for the first time, we would agree with the mother that only the legislature can authorize postminority educational support and that Sec. 30-3-1 does not do so, but, as noted previously, 'this court is bound by the decisions of our supreme court'," citing TenEyck, 885 So.2d 146, at page 158 (Ala.Civ.App. 2003).

The ACCA also found that the trial court did not err in not finding that the mother's obligation to pay college expenses would work an undue hardship on her, in light of her testimony that she was awarded $100,000 in the divorce judgment and that she was using all of it as a down payment on a new house with her new husband stating that "The trial court could have determined that the mother could have used some of those funds to offset her postminority-educational-support obligation instead of paying the entire amount down on the new house."

The opinion of the trial court was affirmed on appeal.

Judge Bryan wrote a specially concurring opinion, which was joined in by Judge Thomas, in which he agreed with the main opinion and with the sentiments expressed by Judge Thomas in her own special writing. Judge Bryan quoted at length from a concurring in part and dissenting in part opinion of Chief Justice Moore in Ex parte Tabor, 840 So.2d 115 (Ala. 2002), and noted "my agreement with the following reasoning and sentiments expressed" in that special writing by Chief Justice Moore. Judge Bryan also expressed the obligation of the ACCA to follow the decisions of the Alabama Supreme Court; but further stated that "However, I, like Judge Thomas, urge the supreme court to take this opportunity to reconsider its decision in Bayliss."

In her specially concurring opinion, which was joined in by Judge Bryan, Judge Thomas also agreed with the main opinion that the judgment of the trial court was due to be affirmed "because whether we agree or disagree, this court is bound by the decisions of our supreme court." However, she went on to state that "Yet, the opportunity to overrule Ex parte Bayliss, 550 So.2d 896 (Ala. 1989), has arrived, and I write to specifically urge our supreme court to consider the separation-of-powers argument advanced by Carolyn Sue Christopher ('the mother'). I am concerned that the decision in Ex parte Bayliss, violates the doctrine of the separation of powers because the decision encroached on the core function of our legislature, the power to make laws." In noting that the mother had preserved her constitutional arguments for appellate review at every stage of litigation, Judge Thomas urged the Alabama Supreme Court to consider "whether the decision in Ex parte Bayliss was an improper exercise of the rights and responsibilities reserved for our legislature by the Alabama Constitution. In my view, the Court improperly overreached and usurped the power granted to our legislature, ..." Judge Thomas concluded by stating that "In my opinion, a requirement for divorced parents to pay postminority educational support must have its genesis in the legislative branch, not the judicial branch."

Presiding Judge Thompson, concurring in the result only, in which Judge Pittman concurred, stating that "Because the legislature has not acted on the holding in Bayliss in more than two decades, I believe that it has acquiesced to that holding," citing Hexcel Decatur, Inc. v. Vickers, 908 So.2d 237 (Ala. 2005), and the cases cited therein.