



DR LAW UPDATE
**JUDGES' SUMMER
CONFERENCE
(JULY 15-17, 2013)**

JUDGE BILLY BELL

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- (B) THERE IS NO DEFINITE TERM OF INCARCERATION FOR CIVIL CONTEMPT, ONLY UNTIL THE PARTY COMPLIES WITH THE ORDER; WHEREAS, PUNISHMENT FOR CRIMINAL CONTEMPT INVOLVES A DEFINITE TERM OF INCARCERATION. 51
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1. Ruberti v. Ruberti, 2013 WL 203528, Alabama Court of Civil Appeals, January 18, 2013

(A) THE SUBSTANCE OF AN AWARD TAKES PRECEDENCE OVER THE LABEL PUT ON IT. WHEN CONSTRUING A JUDGMENT, THE ACCA WILL ADOPT A MEANING THAT ASSURES ITS VALIDITY.

(B) POSTMINORITY SUPPORT FOR A DISABLED CHILD IS ALSO CALCULATED PURSUANT TO RULE 32, A.R.J.A.

(C) THE FILINGS OF CS-41s AND A CS-42 ARE EXCUSED ON APPEAL IF THE RECORD CLEARLY ESTABLISHES THAT THE CHILD SUPPORT AWARD COMPLIED WITH RULE 32.

(D) IF THERE IS NO RECORD ON APPEAL, THE ACCA WILL CONCLUSIVELY PRESUME THAT THE TRIAL COURT'S JUDGMENT IS SUPPORTED BY THE EVIDENCE.

(E) ATTORNEY'S FEES ARE NOT AWARDABLE IN A CONTEMPT CASE IF NO FINDING OF CONTEMPT IS MADE; BUT ARE AWARDABLE IN A MODIFICATION CASE.

The parties were divorced in 1994. In 2011, a little over a month before the parties' daughter reached the age of majority, the mother filed a petition to modify the divorce judgment, requesting that the father pay post-minority support for the daughter, who the parties stipulated was mentally and physically disabled. The parties agreed to present evidence to the Court without a record being made. The trial court entered a judgment ordering the father to pay \$455 per month as "living expense assistance." In addition, the trial court ordered the father to pay the attorney for the mother the sum of \$2,789.08 for attorney's fees incurred in the case. The father filed a timely postjudgment motion which was granted in part and denied in part, and the father appealed to the ACCA.

The father first argued on appeal that the trial court erred in awarding the mother "living expense assistance," arguing that the law of Alabama does not recognize such an award, except for periodic alimony. The mother had

petitioned only for postminority support for their adult disabled daughter, pursuant to Ex parte Brewington, 445 So.2d 294 (Ala. 1983). The ACCA could not determine why the trial court labeled its award "living expense assistance." Even so, the ACCA indicated that "The substance of the award takes precedence over the form or label," citing Kenchel v. Kenchel, 440 So.2d 567 (Ala. Civ. App. 1983). The ACCA also stated that "The labels provided in a judgment are not controlling on the question of the true nature of the obligation," citing Anderson v. Anderson, 686 So.2d 320 (Ala. Civ. App. 1996).

In finding that postminority support for the parties' disabled daughter would include monetary payments made to cover the living expenses of the disabled adult child, the ACCA concluded that the trial court intended to, and did, award the mother postminority support under Brewington, supra.

The father next argued that the award was not made pursuant to Rule 32, ARJA. Even though the ACCA stated that Rule 32(E) specifically provides that CS-41 and CS-42 forms "shall be filed in each action to establish or modify child support obligations and shall be of record . . .," the ACCA further stated that "this court has excused the filings of CS-41 and CS-42 forms in cases in which the evidence in the record clearly established that the child support award complied with the child support guidelines," citing Dunn v. Dunn, 891 So.2d 891 (Ala. Civ. App. 2004). In finding that the parties had stipulated that no record would be made of the proceedings, and that in such a case the appellate court is required to conclusively presume that the court's judgment is supported by the evidence, the ACCA rejected the father's arguments that the trial court failed to properly follow the Rule 32 guidelines.

The father further argued that the trial court erred in ordering him to pay the mother's attorney's fees. He contended that attorney's fees could not be awarded because the trial court had not made a finding of contempt. The ACCA agreed with the father that "A trial court cannot award an attorney's fee in a contempt action when no finding of contempt is made," citing Sosebee v. Sosebee, 896 So.2d 557 (Ala. Civ. App. 2004); but went on to further state that "it is well settled that a trial court may award an attorney fee in a modification proceeding," citing Beverly v. Beverly, 28 So.3d 1 (Ala. Civ. 2009). In finding that the judgment did not clearly state the basis for the attorney fee award, the ACCA noted that the parties had litigated only the issue of postminority support for the parties' adult disabled daughter. As a result, the ACCA construed the judgment as awarding a fee solely for the efforts of the mother's attorney in prosecuting the modification petition. The judgment of the trial court was affirmed.

2. Ex parte Landry, 2013 WL 203530, Alabama Court of Civil Appeals, January 18, 2013

(A) THE FILING OF A BANKRUPTCY PETITION DOES NOT OPERATE AS AN AUTOMATIC STAY OF (a) A CRIMINAL ACTION AGAINST THE DEBTOR; OR, (b) A CASE FOR THE ESTABLISHMENT OR MODIFICATION OF AN ORDER FOR DOMESTIC SUPPORT OBLIGATIONS.

(B) AS A RESULT, THE TRIAL COURT'S JUDGMENT FINDING THE FATHER IN CRIMINAL CONTEMPT, ORDERING HIM TO PAY COLLEGE SUPPORT, AND MODIFYING HIS CHILD SUPPORT FOR THE YOUNGER CHILDREN WAS NOT A VIOLATION OF THE AUTOMATIC STAY IN BANKRUPTCY.

(C) AN ORDER WHICH VIOLATES THE AUTOMATIC STAY IN BANKRUPTCY IS OTHERWISE VOID.

In 2011, the mother filed a complaint against the father alleging that he had been guilty of criminal contempt for his failure to notify the mother, her attorney and the trial court if and when he obtained a job; that he had accrued a child support arrearage since the previous order; that he should be ordered to pay college expenses for the parties' oldest child; that his child support for the parties' youngest children should be modified; and other relief. She later orally amended her complaint at trial to add a contempt claim against the father for his alleged willful refusal to respond to discovery as ordered.

During the course of the proceedings, the father asserted that the mother's complaint violated the automatic stay in effect in his pending bankruptcy case. The trial court was informed about the pending bankruptcy case, in which the father had apparently filed an adversary proceeding against the mother and her attorney for violating the automatic stay. Prior to trial, the parties informed the trial court that they had reached an agreement for the mother not to pursue certain claims pending the outcome of her motion to lift the automatic stay in bankruptcy, and the case proceeded to trial on other issues, including her claim for college educational support and her request for a modification of the father's child support obligation for the younger children.

The trial court entered a judgment after that trial, which was later amended,

in which the trial court awarded the mother college educational support for the parties' oldest child, modified the father's child support for the younger children, and also found the father in criminal contempt for failing to notify the trial court that he had obtained a job and also for failing to respond to the mother's discovery requests as ordered. The trial court reserved imposing punishment against the father on the contempt findings because of his pending bankruptcy proceeding, and further reserved all other issues regarding the mother's claim for a child support arrearage because of that bankruptcy. The father filed a notice of appeal, and later filed a petition for a writ of mandamus, asserting that the trial court's order was not final, because it did not dispose of all the issues presented in the case.

After what the ACCA described as "further procedural wrangling", the case was submitted for a decision. The ACCA concluded that the trial court did not enter a final judgment, because it failed to adjudicate the mother's child support arrearage claim. In reciting the well established rule that "an appeal will lie only from the final judgment which determines the issues before the court and ascertains and declares the rights of the parties involved," citing Owens v. Owens, 739 So.2d 511 (Ala. Civ. App. 1999), the ACCA treated the father's appeal as a petition for a writ of mandamus, which it stated "this court has discretion to treat an appeal as a petition for a writ of mandamus," citing Campton v. Miller, 19 So.3d 245 (Ala. Civ. App. 2009).

The father asserted that the trial court's judgment was void because it violated the automatic stay entered pursuant to 11 U.S.C. Sec. 362 at the time the father had filed his bankruptcy petition. The ACCA agreed with the father that "as a general rule, upon a debtor's filing a bankruptcy petition, 11 U.S.C. Sec. 362(a) operates to stay all actions or proceedings against the debtor that could impact the debtor's estate or the rights of the debtor's creditors." However, the ACCA went on to further note that "11 U.S.C. Sec. 362(b), however, provides certain exceptions to the broad reach of the automatic stay posed by Sec. 362(a)." The ACCA noted that the filing of a bankruptcy petition does not operate as a stay as to the commencement or continuation of a criminal action or proceeding against the debtor; nor as to the commencement or continuation of a civil action or proceeding for the establishment or modification of an order for domestic support obligations." As a result, the ACCA had to determine the nature of the proceedings against the father in the trial court. In noting that in her complaint and in her amended complaint, the mother had sought a finding of criminal contempt against the father, the ACCA determined that the trial court's finding of criminal contempt against the father did not violate the automatic stay that resulted from the filing by the father of a petition in bankruptcy. In also determining that the mother had sought to modify the father's child support obligation, both had an obligation to pay college educational support

for the oldest child and to modify the child support obligation of the father for the remaining children, the ACCA also found that the exception to the automatic stay applied to those claims as well. As to the college educational support, the ACCA stated that "Alabama law treats postminority educational support as a form of child support that may only be awarded through a timely filed action in a domestic-relations proceeding," citing Ex parte Bayliss, 550 So.2d 986 (Ala. 1989).

As a result, the ACCA held that "Therefore, the orders of the trial court awarding Bayliss support for Br.L. and modifying the father's child-support obligation for the parties' remaining minor children are not void as violating the bankruptcy stay."

It is interesting to note that the decision of the ACCA was not a decision on the merits of the orders entered by the trial court. The ACCA noted that "If any errors have been committed by the trial court in those regards, those errors would be correctible on appeal and cannot be reviewed via a petition for a writ of mandamus."

3. Ex parte Sheffield, 2013 WL 563331, Alabama Court of Civil Appeals, February 15, 2013

(A) AN ATTORNEY'S FAILURE TO ATTEND A SCHEDULED HEARING CAN CONSTITUTE AN ACT OF CONTEMPT, AND SUBJECT THE ATTORNEY TO SANCTIONS.

(B) HOWEVER, SUCH A VIOLATION IS GENERALLY CONSIDERED A CONSTRUCTIVE CONTEMPT, NOT A DIRECT CONTEMPT, AND THE PROCEDURE SET OUT IN RULE 70A(a)(c), ARCP, MUST BE FOLLOWED BEFORE THE ATTORNEY CAN BE FOUND TO BE IN CONTEMPT.

An attorney failed to appear at a scheduled hearing before the trial court, and filed a motion to withdraw as counsel for his client after the time set for the scheduled hearing. Thereafter, the trial court entered a judgment finding the attorney in contempt for his failure to appear at a scheduled hearing, fined him \$100 and costs of court, and stated that he could purge himself of contempt upon payment of those sums. The attorney filed a motion to set aside the contempt judgment, arguing that the trial court had not complied with Rule 70A, ARCP, and that he had not been given an opportunity to be heard. He requested a hearing on his motion. However, the trial court denied his motion to set aside the contempt judgment. The attorney filed a timely notice of appeal.

On appeal, the attorney argued that the trial court erred by finding him in contempt. The ACCA found that the trial court did not specifically state whether the attorney was found guilty of civil or criminal contempt, and discussed the differences between those two types of contempt. After reviewing the record and the judgment, the ACCA concluded that the trial court had found the attorney guilty of criminal contempt. Next, the ACCA determined that the trial court's judgment did not state whether it had found the attorney guilty of direct contempt or constructive contempt indicating that "Such a determination is important because the procedure for finding a party in direct contempt is different from the procedure required before a party can be found guilty of constructive contempt," citing Dreading v. Dreading, 84 So.3d 935 (Ala. Civ. App. 2011). In reviewing Rule 70A(a)(2), the ACCA distinguished the definition of direct contempt versus a constructive contempt; and further discussed the procedure for finding a party guilty of either direct or constructive contempt, as set out in Rule 70A(b) and (c), ARCP. The procedure required for the disposition of a

constructive contempt is set out in 70A(c), ARCP, and requires the proceeding to be initiated by the filing of a petition seeking a finding of contempt; the issuance by the clerk of process in accordance with the ARCP; and notification to the person against whom the petition is directed of the time and place for the hearing on the petition and that failure to appear at the hearing may result in the issuance of a writ of arrest pursuant to Rule 70A(b) to compel the presence of the alleged contemnor.

In finding that there was no indication in the record that the contempt proceeding was initiated by the filing of a petition, or that the clerk issued process in accordance with the ARCP, or that a hearing was conducted, the ACCA concluded that the trial court must have found the attorney in direct contempt. However, the ACCA found that the Alabama Court of Civil Appeals has previously held that "an attorney's failure to appear at a scheduled hearing is constructive, not direct, contempt" citing Quick v. State, 699 So.2d 1300 (Ala. Crim. App. 1997).

The ACCA held that "The failure of an attorney to appear at a duly scheduled hearing or trial can constitute an act of contempt and subject the attorney to sanctions," citing Ex parte Baker, 623 So.2d 304 (Ala. Civ. App. 1993). The ACCA agreed with the reasoning of the Court of Criminal Appeals that "an attorney's failure to appear at a scheduled hearing generally subjects that attorney to a finding of constructive contempt, not direct contempt." In finding that the procedure set forth in Rule 70A(a) and (c) should have been followed before the trial court found the attorney in contempt, the judgment of the trial court finding the attorney in contempt was reversed, and the case was remanded to the trial court for further proceedings, if any, that may be initiated.

4. V.L. v. T.T.L., 2013 WL 765592, Alabama Court of Civil Appeals, March 1, 2013

(A) UNDER SEC. 12-15-117(a), IF A JUVENILE COURT FINDS A CHILD TO BE DEPENDENT, EITHER EXPRESSLY OR IMPLICITLY, THE JUVENILE COURT HAS CONTINUING JURISDICTION OVER THAT CHILD UNTIL THE CHILD IS 21 YEARS OF AGE, OR THE JUVENILE COURT TERMINATES ITS JURISDICTION OVER THE CASE BEFORE THE CHILD REACHES 21 YEARS OF AGE.

(B) "A FINDING OF DEPENDENCY" MAY BE IMPLICIT IF (a) THE EVIDENCE SUPPORTS A FINDING OF DEPENDENCY; AND (b) THE TRIAL COURT HAS MADE A DISPOSITION CONSISTENT WITH A FINDING OF DEPENDENCY.

In 2009 the children's former stepfather filed petitions in the juvenile court alleging that the children were dependent and requesting an award of custody of the children to him. He specifically alleged facts in support of his allegations, including that the child's mother had a history of alcohol and drug abuse; that she maintained no steady employment; that the children had lived in numerous locations while in her custody; that she had voluntarily given the children to DHR; that she lived with a man to whom she was not married; that she has a history of domestic violence; and that she maintained a lifestyle which was detrimental to the welfare of the minor children. The juvenile court awarded custody of the children to the former stepfather on a pendente lite basis; and after a final hearing, the juvenile court awarded custody of the children to the former stepfather and awarded the mother standard visitation. In those judgments, the juvenile court did not specifically find the children to be dependent.

In 2011, the mother filed petitions in the juvenile court in which she requested a modification of the previous custody judgments, and further objected to the relocation by the stepfather with the children. The juvenile court entered an order in which it stated that it lacked subject-matter jurisdiction to hear those claims, and transferred the cases to the circuit court. Thereafter, the circuit court entered a judgment allowing the former stepfather to relocate with the children, denied the mother's request for a custody modification, and modified the mother's visitation schedule. The mother filed a postjudgment motion, which was denied by operation of law, and she filed her notice of appeal.

On appeal, the mother argued that the juvenile court's judgments entered in 2010 were entered without subject-matter jurisdiction and were therefore void. She argued that the juvenile court did not explicitly find the children to be dependent in 2010, and as a result it lacked jurisdiction to make any custodial orders regarding the children. However, the ACCA found that the juvenile court had made an implicit finding of dependency as to each child, stating that "This court has held that when the evidence in the record supports a finding of dependency and when the trial court has made a disposition consistent with a finding of dependency, in the interest of judicial economy, this court may hold that a finding of dependency is implicit in the trial court's judgment," quoting from J.P. v. S.S., 989 So.2d 591 (Ala. Civ. App. 2008). The ACCA concluded that the juvenile court had implicitly found the children dependent and that it, therefore, had jurisdiction to enter the 2010 judgments awarding custody to the former stepfather.

However, even though the mother made no additional arguments on appeal, the ACCA stated that "we have noticed, ex mero motu, a jurisdictional defect that requires us to dismiss this appeal." The ACCA found that "because the juvenile court had implicitly adjudicated the children dependent in its May 27, 2010, judgments, 'Sec. 12-15-117(a) [Ala. Code 1975,] afforded the juvenile court continuing jurisdiction over the child[ren] until the child[ren] attain the age of 21 or until the juvenile court terminated its jurisdiction over the case[s] involving the child[ren] before the child[ren]'s attainment of the age of 21,'" citing J.W. v. C.B., 68 So.3d 878 (Ala. Civ. App. 2011). In finding that the children had not attained the age of 21 and the juvenile court had not terminated jurisdiction over the cases involving the children, the ACCA found that the circuit court did not have subject-matter jurisdiction over the mother's petitions for custody and objecting to the relocation of the children. As a result, the ACCA found that the orders of the circuit court were void, and dismissed the appeal, stating that "A void judgment will not support an appeal." The case was remanded to the circuit court with instructions to vacate its void judgment and orders, and further ordering that "All matters pertaining to the custody of the children should be heard by the juvenile court unless and until the exceptions set forth in Sec. 12-15-117(a), Ala. Code 1975, are met."

5. Patterson v. Askew, 2013 WL 856645, Alabama Court of Civil Appeals, March 8, 2013

(A) A COURT MAY NOT AWARD COLLEGE EXPENSES TO BE PAID BY A PARENT UNLESS THERE IS SUFFICIENT EVIDENCE THAT THE CHILD IS COMMITTED TO, OR HAS AN APTITUDE FOR, THE REQUESTED EDUCATION.

(B) EVIDENCE THAT THE CHILD HAD BEEN IN A COMMUNITY COLLEGE FOR FOUR SEMESTERS, HAD A GPA OF 1.5 OUT OF 4.0, AND HAD "DROPPED SOME CLASSES" WAS FOUND NOT TO BE SUFFICIENT.

The trial court entered a judgment in 2012 which required the father to pay college educational expenses for the parties' son for up to four years, or until the son reached 23 years of age, so long as he maintained a "C" average as a full-time student. The father filed a postjudgment motion which was denied, and he appealed. On appeal, the father asserted several grounds, including an argument that the child did not demonstrate the requisite aptitude for a college education.

In reviewing the evidence, the ACCA found that the child had been enrolled in two community colleges, had a 1.5 GPA on a 4.0 scale; and that he had "dropped some classes," which required the son's willingness to accept a grade of zero in the classes. There was no other reason in the record, valid or otherwise, as to why the son had dropped the classes. The ACCA determined that the evidence before the trial court revealed that after four semesters of undergraduate studies, the parties' son "had failed to demonstrate a commitment to, and an aptitude for, a college education." The ACCA stated that "unless a trial court receives evidence indicating that a student is committed to, and has an aptitude for, the requested education, it may not award postminority educational support because the student's commitment to, and aptitude for, the requested education is a primary consideration," citing Ex parte Bayliss, 550 So.2d 986 (Ala. 1989). The ACCA also found that the fact that the circuit court had conditioned the father's payment of college educational expenses for the son on the son's ability to maintain a "C" average did not alter its conclusion, stating that "in this case Sara failed to provide sufficient evidence to the circuit court that could indicate that Joshua had a commitment to, and an aptitude for, a college education. Therefore, the circuit court's September 18, 2012, judgment is plainly and palpably wrong and we reverse the judgment."

6. J.D.A. v. A.B.A., 2013 WL 1016191, Alabama Court of Civil Appeals, March 15, 2013

(A) IT IS NOT REVERSIBLE ERROR FOR THE COURT NOT TO STATE THE GROUNDS FOR ENTRY OF A DIVORCE, IF THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE GROUNDS PROPOUNDED BY THE PARTIES.

(B) GOOD DISCUSSION OF FACTORS TRIAL COURT IS TO CONSIDER IN DIVIDING MARITAL PROPERTY AND IN DETERMINING A PARTY'S NEED FOR ALIMONY.

(C) THE AMOUNT OF ALIMONY WAS FOUND INEQUITABLE, AS BEING TOO HIGH, BECAUSE THE WIFE'S PROFESSED EXPENSES WERE BASED ON HER "WANTS", NOT HER NEEDS; AND THE AWARD DID NOT LEAVE THE HUSBAND WITH SUFFICIENT INCOME FOR HIS OWN BASIC NEEDS AND EXPENSES.

(D) AN EMPLOYER'S CONTRIBUTIONS TO A RETIREMENT PLAN ARE GENERALLY NOT CONSIDERED INCOME TO THE RECIPIENT.

(E) IN MAKING AN AWARD OF PERIODIC ALIMONY, A COURT HAS DISCRETION, BUT IS NOT REQUIRED, TO CONSIDER BONUSES, AND MUST CONSIDER A NUMBER OF FACTORS, SUCH AS WHETHER THE BONUSES ARE REGULAR AND CONSISTENT AND WOULD THEREFORE PROVIDE BOTH THE PAYOR AND PAYEE WITH CERTAINTY IN FINANCIAL PLANNING.

(F) AN AWARD OF COLLEGE EXPENSES WAS FOUND PREMATURE, BECAUSE IT WAS MADE BEFORE THE CHILD HAD REACHED, OR NEARLY REACHED, HIGH SCHOOL GRADUATION, AND BEFORE ALL RELEVANT FACTORS HAD BEEN PRESENTED AND CONSIDERED BY THE COURT.

(G) IF AN "ADDITIONAL AWARD FOR CHILD SUPPORT" IS MADE PURSUANT TO RULE 32(C)(4), ARJA, THE COURT MUST STATE THE REASONS FOR SUCH AN AWARD.

The parties were married in 1987. The wife worked while the husband went to medical school. The wife stopped working when the husband started making sufficient income in his medical practice. At trial, the testimony indicated that both parties accused the other of drinking excessively; and that the husband admitted to having two affairs during the marriage. The wife was 43 years old, and the husband was 48 years of age, the parties' three children were 19, 16, and 12 years old. Following a trial, the court entered a judgment divorcing the parties without making any factual findings and without specifying a ground for divorce. The trial court awarded the parties joint legal custody and the wife sole physical custody of the two remaining minor children; ordered the husband to pay \$3,900 per month in child support, to maintain the 529 Plan accounts for all three children, and to pay all three children's college tuition and other college educational expenses; ordered the husband to pay all costs associated with the automobiles of the parties' daughters; divided the marital property; ordered the husband to pay the wife \$10,000 per month as periodic alimony; and to further pay the sum of \$40,000 as a portion of the wife's attorney fees, court costs and litigation expenses. The husband appealed.

On appeal, the husband argued first that the trial court's property division and periodic alimony award were made by the court without considering all of the relevant factors, and were inequitable. There is a good discussion on page 10 of the Opinion which sets out the factors which a trial court should consider in dividing marital property and in determining a party's need for alimony. After an in-depth review of the property award, and the evidence which had been presented to the trial court, the ACCA found that the amount of periodic alimony ordered to be paid by the husband was inequitable. The wife's financial expert testified to a record of what the family had spent for the previous 26 months, divided that number by 26, and represented that figure as the monthly expenses, in order to illustrate the standard of living that the wife had enjoyed during the marriage. However, the wife's expert acknowledged that that compilation was not a budget, and further testimony indicated that some of the expenses claimed were not recurring or necessary expenses, including \$420 per month included as repair and maintenance, which was actually based upon a lump sum figure that the family had made to renovate their 85-year-old marital home. The wife also included a veterinarian expense of \$100 per month even though she acknowledged that she did not want, and was not taking the family's pets; included a \$300 per month line item for the husband's life

insurance premiums, which she admitted he would be paying after the divorce; and included \$500 per month for yard care and household help, when the wife lived in a town home which was substantially smaller than the marital home and had a small yard. The wife's expert admitted that the family's spending history was not an accurate compilation of her need for support.

The husband's financial expert testified as to the husband's income, and further testified to what he referred to as a "Monte Carlo Simulation", which was an analytical formula that financial planners used to determine if a client will "outlive his money." The financial expert for the husband stated that the husband could pay the amount of alimony, child support, and other financial obligations that the wife had requested he be ordered to pay, if the husband "peeled off" four, five, or six percent of his assets every year, but, he further testified, the husband would also have to work until the age of 94 or 95. The ACCA concluded that the amount of periodic alimony awarded to the wife was inequitable, and reversed that award and remanded the issue of periodic alimony and the division of marital property to the trial court to reconsider.

The ACCA further stated, with regard to the husband's income that "Employer contributions to retirement plans are not generally considered 'income' to the recipient, even for purposes of child-support determinations, which are governed by an expansive definition of 'gross income'," citing In re Marriage of Mugge, 66 P.3d 207 (Colo. Ct. App. 2003). In addition, the ACCA dealt with the issue of bonuses and stated that a trial court has the discretion, but is not required, to consider bonuses as part of a party's income. The ACCA indicated that it had found only one Alabama case, Reaves v. Reaves, 883 So.2d 693 (Ala. Civ. App. 2003) that included a payor's bonus in income for the purpose of determining a periodic-alimony obligation, and indicated that "that case did not hold that such inclusion was required." The ACCA further stated that "We interpret Reaves to mean that, whether to include bonuses in a spouse's income for purposes of determining periodic alimony is discretionary with the trial court. The exercise of that discretion will naturally depend upon a number of factors, including whether the bonuses are regular and consistent, and, therefore, can provide both the payor spouse and the recipient spouse with certainty in financial planning." The ACCA stated that the wife's estimation of the amount of periodic alimony that was required to guarantee her the same standard of living that she had enjoyed during the marriage ignored "the impact that an award of periodic alimony would have on the financial condition of the husband and his . . . ability to maintain the parties' former marital lifestyle for himself," citing Shewbart v. Shewbart, 64 So.3d 1080 (Ala. Civ. App. 2010).

The husband also contended that the trial court erred in ordering him to pay college educational expenses for all of the parties' three children. The ACCA agreed as to the younger children, stating that "it would have been premature and improper to have ordered the husband to be responsible for paying postminority educational support for the two minor children 'before those children had reached or nearly reached graduation from high school and before all of the relevant factors had been presented and considered by the court,'" citing Berryhill v. Reeves, 705 So.2d 505 (Ala. Civ. App. 1997). As a result, the ACCA reversed the trial court's award of college educational expenses for the parties' two minor children.

In addition, the ACCA reversed the trial court's order requiring the husband to pay for the automobile insurance for the parties' minor daughter. Even though such an award is authorized pursuant to Rule 32(C)(4), ARJA , as additional awards for child support, the ACCA indicated that the trial court was required to comply with that rule in making such an award, which includes a requirement that the court "states its reasons for making such additional awards."

7. Henderson v. Henderson, 2013 WL 1165387, Alabama Court of Civil Appeals March 22, 2013

(A) THE TRIAL COURT WAS REVERSED FOR NOT HOLDING A HEARING, AS REQUESTED, ON A PARTY'S POSTJUDGMENT MOTION.

(B) THE TEST FOR WHETHER THE DENIAL OF A HEARING IS "HARMLESS ERROR" IS WHETHER THE FAILURE TO HOLD A HEARING "PROBABLY INJURIOUSLY AFFECTED THAT PARTY'S SUBSTANTIAL RIGHTS."

In 2010, the husband filed a complaint for divorce. The trial court entered a standing pendente lite order that required the parties to continue paying their monthly expenses as they had before the divorce complaint was filed, or based on a pro rata share of the parties' incomes. Thereafter, the husband filed a petition for contempt alleging that the wife had failed to pay her portion of the parties' monthly expenses as ordered. The wife filed an answer and counterclaim also seeking a divorce.

The testimony at trial indicated that the parties were married in 2006. The husband testified that he and the wife had been having marital problems and that they separated in 2010. He testified that the day prior to the separation he woke up to a note from the wife indicating that she was going out of town that day. He received a call on the same day from a coworker who told him that she had seen the wife holding a man's hand at a festival in Memphis. Thereafter, he packed up the wife's belongings and moved them towards the front door of the marital residence. The husband testified that the wife had told him that she had been holding the man's hand because she said "men had been harassing her on the streets." The man was one of the wife's coworkers and a friend. Initially he had not thought that the wife was having an affair with the man, and only thought that the two had studied together. However, he believed that the wife had had an affair with the man after finding the parties' joint cell phone bills, which indicated that the wife and the man had exchanged over 300 text messages per month and numerous phone calls.

The wife testified that the parties had been having marital problems for a long period of time, and that the problems were due to the husband's jealousy issues and sexual issues between the parties. She testified that she had not had an affair with the other man, that she had not held his hand at the festival, and that he was only her friend and study partner. She also

testified that she was unaware that he would be in Memphis at the same time as she was, and that she had just randomly bumped into him in a Memphis restaurant. The trial court entered a judgment divorcing the parties, dividing the marital property, and ordering the wife to pay the husband \$23,265 as her pro rata share of the marital expenses incurred during the pendency of the divorce action. The wife filed a postjudgment motion and requested a hearing. However, the wife's postjudgment motion was denied by operation of law, and the wife appealed.

On appeal, she raised three issues, including whether the trial court committed reversible error by failing to hold a hearing on her postjudgment motion. The ACCA found that the decision on that issue pretermitted the discussion on the other issues. The ACCA found that the wife had filed a timely postjudgment motion, and had requested a hearing; but that the trial court had failed to conduct a hearing on that motion, and the motion was denied by operation of law pursuant to Rule 59.1, ARCP. The ACCA agreed with the wife that the failure of the trial court to hold a hearing on her postjudgment motion was error. However, the ACCA then stated that "The issue becomes whether such error was reversible error, stating that 'Under Rule 45, Ala. R. App. P., the failure to grant a hearing on a motion for new trial pursuant to Rule 55(g) is reversible error only if it 'probably injuriously affected substantial rights of the parties,'" citing Kitchens v. Maye, 623 So.2d 1082 (Ala. 1993). In reviewing the wife's postjudgment motion and the evidence presented to the trial court, the ACCA found that there was no testimony or evidence presented indicating the amount of the husband's income, upon which the trial court could have based a determination of the wife's pro rata share of the marital expenses; and further found that the judgment did not credit her for paying a certain household bill despite her undisputed testimony that she had done so. As a result, the ACCA concluded that "the trial court's failure to hold a hearing on the wife's postjudgment motion probably injuriously affected the wife's substantial rights."

The ACCA reversed the denial of the wife's postjudgment motion by operation of law, and remanded the case to the trial court to conduct a hearing on the issues raised in the wife's motion.

8. Leverett v. Leverett, 2013 WL 1165375, Alabama Court of Civil Appeals, March 22, 2013

(A) WHERE NEITHER PARTY HAS FILED A COMPLAINT SEEKING A LEGAL SEPARATION PRIOR TO THE ENTRY OF A JUDGMENT OF DIVORCE, THERE IS NO STATUTORY BASIS FOR GRANTING A LEGAL SEPARATION.

The parties had previously been married and divorced, and remarried in 1993. In 2011, the wife filed for divorce, and the husband filed an answer and counterclaim also seeking a divorce. An agreement was reached at mediation, and the parties submitted their settlement documents, which the trial court adopted and incorporated into a judgment of divorce. Part of the provisions provided for the wife to be designated as the husband's irrevocable spousal beneficiary for the sole purpose of obtaining health insurance benefits through the husband's military medical benefits, with the husband agreeing to pay the sum of \$39 per month towards those costs, subject to all military rules, guidelines, exemptions, limitations and regulations with regard to the remarriage of the wife and/or the retirement of the husband.

Thereafter, the wife filed a postjudgment motion to alter, amend or vacate the judgment in part pursuant to Rule 59(e), ARCP. She alleged that after the entry of the divorce judgment, the husband notified the provider of his military health insurance benefits of the divorce, which caused her health insurance benefits to be terminated, contrary to the provisions of the parties' agreement. She alleged that the clear intent of the parties in making the agreement was that there would be no interruption in the wife's health care coverage, which was important because she was currently disabled and completely dependent upon her current health benefit as a spouse. The husband responded that he had tried to make arrangements for the wife to continue her military health insurance benefits, but that the wife did not cooperate and had failed to take the necessary steps to continue her benefits. The trial court held a hearing, at which the parties' attorneys made statements regarding their positions on the case, but no testimony was taken and no documents were admitted into evidence. The trial court entered an order which amended the prior Decree entered by the court divorcing the parties, converting it into a Decree of Legal Separation. The husband appealed, asserting on appeal that the trial court had exceeded its discretion in substituting a judgment of legal separation for the previously entered judgment of absolute divorce.

The ACCA discussed the legal basis for entering a judgment of legal separation in place of a judgment of absolute divorce, citing Lockridge v. Lockridge, 77 So.3d 148 (Ala. Civ. App. 2011). However, the ACCA noted that the court in Lockridge was presented with a completely different situation, in that one of the parties had asked for a legal separation in the case. In finding that neither of the parties in this case had filed a complaint seeking a legal separation, as required by Sec. 30-2-40(c), Code of Alabama (1975), the ACCA held that "In the absence of a complaint from at least one of the parties requesting a legal separation, there was no legal basis for the trial court to frustrate the intent of the parties to be divorced, simply to accommodate the wife's desire to maintain military health-care benefits." The ACCA held that "where neither party has filed a complaint seeking a legal separation prior to the entry of a judgment of divorce, there is no statutory basis for granting that relief," and reversed the order of the trial court granting the parties a legal separation.

Judge Moore, in a special concurring opinion, agreed with the reversal for different reasons. Judge Moore concluded "that the trial court's judgment of legal separation was not supported by the evidence and is due to be reversed," based upon the fact that the wife had failed to present any evidence to support the judgment of legal separation requested by her.

9. Dubose v. Dubose, 2013 WL 1165371, Alabama Court of Civil Appeals, March 22, 2013, (opinion withdrawn and substituted June 7, 2013)

(A) A FINAL DECREE OF DIVORCE CANNOT BE ENTERED BY CONSENT, OR ONLY UPON THE PARTIES' STIPULATION THAT A DIVORCE CAN BE ENTERED. SUFFICIENT TESTIMONY AND EVIDENCE MUST BE PRESENTED TO PROVE A GROUND FOR DIVORCE.

(B) IF SUFFICIENT TESTIMONY IS NOT SUBMITTED TO SUPPORT A GROUND FOR DIVORCE, THE COURT DOES NOT HAVE JURISDICTION TO ENTER A FINAL DECREE OF DIVORCE, OR TO ENTER ANY OTHER FINAL ORDERS, SUCH AS PROPERTY DIVISION, ALIMONY, OR CHILD SUPPORT.

The trial court entered a judgment, in three parts, the first of which divorced the parties in 2009; the second of which divided the marital property in 2010; and the third and last of which determined the husband's child support obligation in 2012. The husband appealed, contending that the 2009 order divorcing the parties violated Alabama law, because it was based only on the stipulation of the parties "without any proof of the grounds for the divorce ever being presented or considered" by the trial court. Specifically, he contended that that order violated Sec. 30-2-3, Code of Alabama (1975), which "forbids divorce by consent."

The record indicated that the wife filed for a divorce in 2008, alleging incompatibility of temperament. During the pendency of the case, the trial court entered certain pendente lite orders. The husband is a former circuit judge, and a special judge was appointed to preside over the case. A special master was appointed to inventory and value the marital property. Discovery was propounded, but, as the trial court noted in an order dated July 9, 2009, discovery issues "plagued this case from the getgo and continue to this date."

The 2009 order divorcing the parties was entered by the trial court after a telephone conference between the trial court and the parties' attorneys, following which the parties' attorneys filed stipulations agreeing to the court granting a divorce in the case. Neither stipulation stated a ground for divorce, nor was any testimony or other evidence presented concerning a ground for divorce. The husband relied on Sec. 30-2-3 as the basis for his assertion that the trial court could not properly enter a divorce judgment

only on the parties' stipulations. That statute provides:

"No judgment can be entered on the confession of the parties, or either of them, or if it appear that adultery was committed by either, with the consent of the other, for the purpose of obtaining a divorce, or where both parties have committed adultery, or where there has been a condonation of adultery by the admission of the offending party to conjugal embraces after knowledge of the commission of the crime, or when the husband knew of or connived at the adultery of the wife."

The ACCA quoted Professors Davis and McCurley in their treatise on divorce entitled Alabama Divorce, Alimony and Child Custody Hornbook (4th ed. 2005) as follows:

"The statutory ground for divorce of incompatibility does not sanction consensual divorce, since this would be contrary to the intent of the Alabama statute forbidding divorce by consent."

In finding that there was no indication in the record that the trial court had heard any evidence regarding grounds for divorce when it entered the 2009 order divorcing the parties, the ACCA stated that "we have no choice but to conclude that the August 4, 2009, order divorcing the parties was based only on the parties' stipulations and not on any evidence indicating that the parties were incompatible or that there had been an irretrievable breakdown of the marriage. Accordingly, the judgment of divorce 'was without statutory authority and thus without the jurisdiction of the court,'" citing Johns v. Johns, 217 So.2d 514 (Civ. 1973).

In addition, the ACCA further stated that "However, as our supreme court explained 'this Court having determined that there was no authority in the court to grant a divorce, there can be no award of alimony nor a property settlement due to dissolution of the marriage,'" citing Mason v. Mason, 160 So.2d 881 (1964).

The judgment of the trial court was reversed, the application overruled, and the case remanded in an opinion dated March 22, 2013. That opinion was withdrawn and another substituted in its place on June 7, 2013. The opinions were materially the same, with the latter adding instructions for the trial court to conduct an evidentiary hearing on the issue of the grounds for divorce and to enter a judgment encompassing all the issues in this matter.

10. Dunn v. Dunn, 2013 WL 1364089, Alabama Court of Civil Appeals, April 5, 2013

(A) THE TRIAL COURT WAS REVERSED FOR REFUSING TO ALLOW AN EVIDENTIARY HEARING ON THE WIFE'S MOTION TO ALTER, AMEND OR VACATE A DIVORCE JUDGMENT.

(B) EVEN THOUGH THE WIFE DID NOT ATTACH AN AFFIDAVIT OR SUPPORTING EXHIBITS TO HER MOTION, THE WIFE'S VERIFIED MOTION, WHICH CONTAINED SPECIFIC FACTS, WAS TAKEN BY THE ACCA AS AN AFFIDAVIT, AND WAS FOUND SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING TO BE HELD.

The parties were married in 2005 and had no children. In 2011, the wife filed a complaint for divorce. When the case was called for trial, the wife appeared pro se, and the husband was represented by an attorney. The parties entered into a settlement agreement, which was incorporated into a judgment of divorce. The judgment divorced the parties, awarded the marital residence to the husband, awarded a 1999 automobile to the wife; and provided that each party would retain the personal property that was in his or her possession. In 2012, the wife, then represented by an attorney, filed a verified motion to alter, amend, or vacate the divorce judgment, or in the alternative, for a new trial. A hearing was held on that motion, but the trial court would not allow anything other than the arguments of the parties' attorneys. Following that hearing, the trial court denied the wife's postjudgment motion without stating its reasons. The wife filed an appeal.

On appeal, she asserted that the trial court exceeded its discretion by denying her postjudgment motion without taking testimony at the postjudgment hearing. She had complained that at the time she agreed to the settlement with the husband, she suffered from various medical problems, was unable to afford an attorney, and was intimidated and coerced by the husband and his attorney. The ACCA stated that "Generally, allegations of fraud, duress, or coercion, if proven, may be grounds to set aside a divorce judgment," citing Barganier v. Barganier, 669 So.2d 933 (Ala. Civ. App. 1995); and further stated "However, 'an agreement reached in settlement or litigation is as binding on the parties as any other contract Moreover, there is a strong policy of law favoring compromises and settlements of litigation, especially in suits involving families, since the honor and peace of the family is often at stake,'" citing Porter v. Porter, 441 So.2d 921 (Ala. Civ. App. 1983).

The ACCA, in reviewing the transcript of the hearing, found that the trial judge did not allow the wife's attorney to elicit any testimony on the wife's behalf, and that the entire proceeding consisted only of arguments of counsel, which are not considered evidence. The wife's attorney requested to present testimony under oath, but was denied the opportunity to do so by the trial court, after opposition from the husband's attorney. The ACCA reviewed several cases which involved similar issues. The ACCA found those prior cases, however, to be different from this case because "the wife in this case failed to attach supporting exhibits to her filings."

However, in reviewing the wife's motion, which was verified, the ACCA held that "We treat the wife's verified postjudgment motion, which contained factual specificity regarding the wife's alleged reason for proceeding pro se at the trial, her alleged medical problems, and the alleged abusive relationship with the husband that, she said, resulted in her feeling coerced by the husband and his attorney, as an affidavit. Furthermore, she specified the amount and the type of property she brought to the marriage." As a result, the ACCA concluded that the trial court had erred by failing to conduct an evidentiary hearing on the wife's postjudgment motion; and reversed the order denying the wife's postjudgment motion, and remanded the case back to the trial court with instructions to conduct an evidentiary hearing.

11. White v. White, 2013 WL 1490607, Alabama Court of Civil Appeals, April 12, 2013

(A) A "DIRECT CONTEMPT" IS "DISORDERLY OR INSOLENT BEHAVIOR OR OTHER MISCONDUCT COMMITTED IN OPEN COURT IN THE PRESENCE OF THE JUDGE THAT DISTURBS THE COURT'S BUSINESS, WHERE ALL OF THE ESSENTIAL ELEMENTS OF THE MISCONDUCT OCCUR IN THE PRESENCE OF THE COURT AND ARE ACTUALLY OBSERVED BY THE COURT."

(B) THE REQUIREMENTS FOR A COURT TO FOLLOW TO PUNISH A PARTY FOR DIRECT CONTEMPT UNDER RULE 70A, ARCP, ARE DISCUSSED.

The parties were married in 2007. In 2011, the wife filed a complaint seeking a divorce and a division of the marital assets and debts, and an award of attorney fees. There were no children of the marriage. The next week, she filed a PFA action against the husband, and obtained an ex parte PFA order removing the husband from the marital residence and ordering that he stay away from the marital residence and the wife's place of employment. The case was set for trial, but during trial, the husband informed the court that he became ill, and an ambulance was called to transport the husband to the hospital. The trial judge entered an order that required the husband to immediately return to court if he were released from the hospital that same day, and if not, that the trial would resume the following week. The trial resumed, at which time the husband appeared pro se.

There was no transcript of the divorce proceedings. The trial judge entered a judgment divorcing the parties, ordering that the PFA order remain in effect, and divided the marital assets and debts. That same day, on June 15, 2012, the trial court entered a contempt judgment also against the husband, which held the husband in direct contempt for his behavior during the two trial settings, including a finding that the husband had every intention of coming to the trial to defame the trial judge, to demand the trial judge's recusal, and to delay the proceedings for as long as possible. The order also indicated that the husband refused to sit down during the trial, and refused to participate in the trial of the matter, including leaving the witness stand and stomping out of court, refusing to answer questions during one trial session. The contempt judgment sentenced the husband to

imprisonment for 10 days, which was five days for each of the two trial occasions during which he was found to have committed direct contempt. The husband appealed on three issues.

On appeal, the ACCA found that the husband's arguments on the first two issues were not well taken, because of the lack of a transcript of the ore tenus evidence presented at trial, or a statement of the evidence presented at trial, pursuant to Rule 10(d), Ala. R. App. P. However, the ACCA did find that the trial court had committed error in entering the contempt judgment against the husband for his behavior in court. Rule 70A(a)(2)(A), ARCP, defines "direct contempt" as follows:

"disorderly or insolvent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court's business, where all the essential elements of the misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court's dignity and authority before the public."

The ACCA discussed the requirements which a trial court must follow in dealing with direct contempt, stating that "Upon its finding of direct contempt, a court must immediately notify the contemnor of its finding and prepare, sign, and enter an order that includes a description of the conduct observed. See Rule 70A(b)(1). The contemnor must have a reasonable opportunity to present evidence that would excuse or mitigate his or her behavior. See Rule 70A(b)(2). Furthermore, a court must pronounce its sentence either immediately or within seven days of the completion of the proceeding out of which the contempt arose. See Rule 70A(b)(3).

The ACCA found that the trial judge had entered its contempt judgment on June 15, 2012, which in part found the husband in direct contempt for his behavior at the January 25, 2012, trial proceeding. In finding that the record on appeal did not support a determination that the trial court had notified the husband of its finding of contempt immediately, or within seven days of January 25, 2012, the ACCA found that the trial court had not followed the requirements of Rule 70A, ARCP, and reversed the contempt judgment insofar as it held the husband in direct contempt for his behavior at the January 25, 2012, proceeding, and remanded the case to the trial court with instruction to vacate that portion of its contempt judgment.

12. D.F.H. v. J.D.G. and D.A.G., 2013 WL 1694455, Alabama Court of Civil Appeals, April 19, 2013

(A) IF A "PRESUMED FATHER" UNDER THE AUPA PERSISTS IN HIS CLAIM TO BE THE CHILD'S FATHER, NO ONE CAN CHALLENGE THAT CLAIM, INCLUDING THE CHILD'S MOTHER AND/OR BIOLOGICAL FATHER.

(B) A "PRESUMED FATHER" DOES NOT WAIVE HIS RIGHT TO PERSIST IN THAT CLAIM BY REQUESTING DNA PATERNITY TESTING TO BE DONE.

(C) THERE IS NO REQUIREMENT THAT, IN PERSISTING IN THE CLAIM TO BE A CHILD'S FATHER, THE PRESUMED FATHER BELIEVE OR HAVE EVIDENCE DEMONSTRATING THAT HE IS IN FACT THE CHILD'S BIOLOGICAL FATHER.

The parties were married in 1996, and a child was born to them in 2008. The husband filed a complaint seeking a divorce, alleging that the wife had informed him that he was not the biological father of the child. He sought a divorce on the grounds of adultery, and requested, among other things, that the trial court order DNA paternity testing. The trial court entered that order for DNA paternity testing, and after conducting a pendente lite hearing, the trial court entered a pendente lite order pertaining to the financial and custody issues during the pendency of the divorce case. In that order, the trial court specifically found that, although DNA testing had revealed that the husband was not the biological father of the child, the husband was "persisting in his status as the legal father, and, therefore under Sec. 26-17-607, Ala. Code 1975, he remains the only legal father of this child." The mother filed a motion to reconsider that portion of the order, arguing that the husband had lost his right to persist in his claim to be the child's father by requesting DNA testing to determine the paternity of the child. The trial court denied that motion, concluding that the request by the husband for DNA paternity testing was not inconsistent with persisting in his status as the child's legal father, noting that the paternity test also served as evidence on the issue of the wife's adultery.

Thereafter, a man filed a motion seeking to intervene in the divorce case alleging that he was the biological father of the child born to the parties during their marriage, and seeking an adjudication of his paternity. The court denied his motion to intervene, again determining that the husband

persisted in his status as the child's legal father and that, therefore, under Sec. 26-17-607, no other person could seek to disprove the husband's paternity of the child. Thereafter, the court-appointed guardian ad litem for the child filed a motion asking for the trial court to suspend the husband's visitation, after the child had told the guardian ad litem about bathing with and sleeping naked with the husband. Based upon that conversation, the guardian ad litem believed that an investigation should be made. The trial court conducted an emergency hearing, and entered a temporary order suspending the husband's visitation, pending investigation by DHR and another child-services agency.

Thereafter, the man who alleged he was the child's biological father filed a motion asking the trial court to reconsider its earlier order denying his motion to intervene. The trial court denied that motion, and the man filed a notice of appeal, arguing that the trial court had erred in denying his motion to intervene, and that the trial court had violated his right to due process in entering an order which prohibited the parties and him from discussing with the child the concerns raised by the guardian ad litem which formed the basis of the DHR investigation. He contended that the trial court could not enjoin him because he was a nonparty to the divorce action.

The ACCA found that the trial court's order prohibiting the parties and the man from discussing with the child the concerns raised by the guardian ad litem was an interlocutory order, was temporary in nature, and would not support an appeal. However, the ACCA found that that order could constitute an injunction, which could be challenged on appeal. However, in finding that the man had filed his appeal of that injunction more than 14 days after the entry of the injunction, the ACCA concluded that it lacked jurisdiction over the appeal of that portion of the order, and dismissed that part of his appeal.

However, the ACCA did determine that the man had standing to appeal the order of the trial court denying his motion to intervene, finding that "an order denying a motion to intervene is sufficiently final to support an appeal," citing Jim Parker Bldg. Co. v. G&S Glass & Supply Co., 69 So.3d 124 (Ala. 2011). In finding that the man had timely appealed the trial court's denial of his motion to intervene, the ACCA ruled that it had jurisdiction to decide that issue.

The ACCA discussed the provisions of the Alabama Uniform Parentage Act ("AUPA"), Sec. 26-17-101 et seq., Code of Alabama (1975), which govern the issues in dispute in this case. The ACCA stated that "Under the AUPA, a man is the presumed father of a child born during his marriage to the child's mother. Sec. 26-17-204(a)(1), Ala. Code 1975. Under Sec. 26-17-607(a) of the AUPA, a presumed father "may bring an action to disprove paternity

at any time.” However, “if the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity.” Sec. 26-17-607(a).

Even though the ACCA agreed with the man that “a biological father does have a right to intervene in a custody action involving a child he claims to have fathered,” citing R.D.B. v. A.C., 27 So.3d 1283 (Ala. Civ. App. 2009), the ACCA also stated that “However, although such a man has a right to intervene, . . . the pivotal issue of the biological father’s standing to actually prove his paternity . . . turns on whether the legal father persists in his presumption of paternity.” On appeal, the man argued that the husband had failed to persist in his status of the legal father of the child by requesting DNA paternity testing in his divorce complaint. However, the ACCA concluded that “However, the record does not support a determination that the husband sought to disprove his own paternity of the child. As the trial court noted in its July 18, 2012, order, a request for a DNA test to determine paternity is not necessarily inconsistent with maintaining a claim asserting one’s status as the child’s legal father. Rather, such a test can be requested in the hopes that it confirms the existence of a biological relationship between the man and the child. Another reason for requesting a paternity test would be to ensure an accurate medical history for the child. Also, and as the trial court noted, it appears to be relevant in this case because the results of the DNA paternity testing can be used as evidence on the issue of a wife’s adultery, a finding of which can affect issues such as property division and alimony in a divorce action. See Keating v. Keating, 2013 WL 856665, Alabama Court of Civil Appeals, March 8, 2013.

In addition, the man contended that the husband had waived his right to persist in his status as the child’s father by the husband’s admission or acknowledgement that he was not the biological father of the child. However, the ACCA disagreed, stating “However, there is no requirement that, in persisting in a claim as the legal or presumed father of a child, one must believe or have evidence demonstrating that he is the biological father of the child.”

The ACCA also discussed and noted the policy considerations identified by the Alabama Supreme Court that “the obvious objectives of the Alabama Uniform Parentage Act . . . are to provide for the psychological stability and general welfare of the child and to afford legitimacy to children whenever possible.” The ACCA ruled that the man had not demonstrated that the trial court erred in denying his motion to intervene, and affirmed that portion of the trial court’s order.

13. Kreitzberg v. Kreitzberg, 2013 WL 1694463, Alabama Court of Civil Appeals, April 19, 2013

(A) A PARTY CAN BE FOUND IN CONTEMPT FOR VIOLATING AN ORDER TO PAY ALIMONY, EVEN THOUGH THE AMOUNT OF THE ALIMONY ORDERED WAS FOUND EXCESSIVE ON APPEAL.

(B) IF A SUPERSEDEAS BOND IS NOT REQUESTED, SET AND DEPOSITED, THERE IS NOT A STAY OF THE ORDERS ENTERED.

(C) "CIVIL CONTEMPT" IS DEFINED IN RULE 70A, ARCP.

(D) ATTORNEY'S FEES MAY BE AWARDED UNDER SEC. 30-2-54 IN ACTIONS FOR DIVORCE, OR FOR THE RECOVERY OF ALIMONY, MAINTENANCE OR SUPPORT IN WHICH A JUDGMENT OF DIVORCE HAS BEEN ISSUED OR IS PENDING, AND A CONTEMPT OF COURT CITATION HAS BEEN MADE BY THE COURT AGAINST EITHER PARTY.

The ACCA withdrew an earlier opinion and entered a substituted opinion for it. These consolidated appeals were taken from judgments of the circuit court dividing the marital property of the parties, and reevaluating the husband's alimony obligation on remand as instructed by the ACCA in its first appeal, as well as a judgment of the trial court finding the husband to be in civil contempt for his failure to pay the wife any amount of alimony during the pendency of the original appeal.

During the pendency of the original appeal, the wife had filed a petition for contempt, alleging that the husband had failed to pay alimony as required in the trial court's original divorce judgment. She requested that the husband be held in contempt, and also be responsible for paying the attorney fee she had incurred in filing that action. The husband filed a motion in which he requested, among other things, that the contempt action be stayed until the ACCA issued a ruling on the husband's pending appeal. The wife opposed that motion, and the motion was denied by the trial court. Thereafter, the ACCA released its original opinion on appeal, which reversed the trial court's divorce judgment insofar as it had awarded the wife \$2,500 in monthly periodic alimony and had divided the parties' marital property. The case was

remanded to the trial court with instructions to reconsider those issues.

Thereafter, the husband filed a motion to dismiss the wife's contempt petition, arguing that he could not be found in contempt for failing to follow a judgment that had been reversed on appeal. After a hearing, the trial court entered an order finding the husband to be in contempt, calculating his alimony arrearage after reducing his periodic alimony obligation on remand, and awarding the wife an \$8,500 attorney's fee. The husband filed a postjudgment motion, which was granted in part, and the trial court ordered the wife's attorney to provide documentation to establish a reasonable attorney fee award. After her attorney filed an affidavit, the trial court affirmed its previous award of an \$8,500 attorney's fee to the wife. The husband appealed.

On appeal, the husband argued that the trial court lacked the authority to consider the wife's motion to hold him in contempt for his failure to pay the \$2,500 per month in alimony, pending the appeal of the divorce judgment. However, the ACCA noted that the husband had failed to secure a supersedeas bond while his appeal was pending. The record reflected that he had requested a supersedeas bond, but that the trial court had denied that request. He thereafter failed to request a supersedeas bond pursuant to Rule 8 of the Alabama Rules of Appellate Procedure. As a result, the ACCA concluded that "Because he had not secured a supersedeas bond, the husband was required to pay the \$2,500 monthly alimony payment to the wife during the pendency of the appeal," citing Ryan v. Ryan, 104 So.2d 700 (1958); and as a result "His failure to do so was, as determined by the trial court, willful contempt."

The husband also contended that the trial court did not have the authority to hear the wife's contempt petition during the pendency of the appeal of the case. However, the ACCA disagreed, stating that "It is also well settled that a party may file a petition for contempt during the pendency of an appeal because by filing a petition for contempt a party initiates a 'separate and independent proceeding' from the underlying action that is being appealed," citing Wilcoxon v. Wilcoxon, 907 So.2d 447 (Ala. Civ. App. 2005).

The husband was found by the trial court to be guilty of civil contempt. The ACCA discussed the definition of "civil contempt", citing Stamm v. Stamm, 922 So.2d 920 (Ala. Civ. App. 2004), as follows:

"Rule 70A, Ala. R. Civ. P., has governed contempt proceedings in civil actions since July 11, 1994. Rule 70A (a)(2)(D) defines 'civil contempt' as a 'willful, continuing failure or refusal of any person to comply

with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with."

The ACCA stated that "Moreover, in order to hold a party in contempt under Rule 70A(a)(2)(D), the trial court must find that the party willfully failed or refused to comply with a court order," citing T.L.D. v. C.G., 849 So.2d 200 (Ala. Civ. App. 2002). The ACCA concluded that the evidence supported the trial court's finding that the husband had willfully failed to pay the wife alimony as ordered in the trial court's original divorce judgment during the pendency of the appeal.

Lastly, the husband argued that the trial court erred in awarding the wife an \$8,500 attorney's fee, asserting that the amount ordered was inequitable and improper. However, the ACCA cited Sec. 30-2-54, Code of Alabama, which provides as follows:

"In all actions for divorce or for the recovery of alimony, maintenance, or support in which a judgment of divorce has been issued or is pending and a contempt of court citation has been made by the court against either party, the court may, of its discretion, upon application therefor, award a reasonable sum as fees or compensation of the attorney or attorneys representing both parties."

The ACCA found that the evidence supported the award of attorney's fees, and affirmed the judgments of the trial court on all issues.

14. Smith v. Cahill, 2013 WL 1694475, Alabama Court of Civil Appeals, April 19, 2013

(A) IF A MARITAL ASSET IS NOT DISPOSED OF IN A DIVORCE DECREE, IT REMAINS OWNED JOINTLY BY THE PARTIES, REGARDLESS OF WHETHER THE ASSET WAS HELD IN THE INDIVIDUAL OR JOINT NAMES OF THE PARTIES.

(B) IF A POSTJUDGMENT CASE IS FILED MORE THAN 30 DAYS AFTER ENTRY OF THE DECREE, THE TRIAL COURT CANNOT ALTER THE JOINT OWNERSHIP OF THE MARITAL ASSET, AND CAN ONLY AWARD EACH PARTY HIS OR HER ONE-HALF INTEREST IN THAT ASSET.

(C) DISSENTING OPINION DIFFERENTIATES THE FACTS OF THIS CASE, IN WHICH THE MARITAL ASSET WAS HELD IN THE INDIVIDUAL NAME OF THE HUSBAND, FROM A CASE WHERE THE ASSET NOT DISPOSED OF IN THE DIVORCE DECREE WAS HELD IN THE JOINT NAMES OF THE PARTIES.

This is the second time these parties have been before the ACCA. They married in 1986 and divorced in 1993. During the marriage, they used marital funds to purchase a poultry farm, which was operated pursuant to an agreement with Gold Kist. Under the terms of that agreement, Gold Kist assigned value to an equity account in the former husband's name, based upon the profits of Gold Kist. The 1993 divorce judgment, which incorporated the parties' agreement, awarded the former husband the tangible assets of the poultry farm, but did not dispose of the equity account with Gold Kist. In 2004, Gold Kist converted to a corporation, and issued shares of stock to the former husband based upon the balance held in the equity account, which he later sold and deposited the proceeds in a brokerage account. In 2009, the wife filed a postjudgment action against the former husband alleging that the equity account had been marital property when the parties divorced, that the former husband had not revealed the existence of the equity account before the parties agreed on the division of marital property, that the divorce judgment had not disposed of the equity account, and that she, therefore, owned a share of the equity account and the funds attributable to the equity account. The former husband asserted that the equity account had never been marital property because it was titled in only his name, and was therefore his separate

property when the parties divorced. In addition, the former wife sued the former husband for fraudulent suppression and conversion.

Following a bench trial, the trial court entered a judgment, which the wife appealed. On appeal, the ACCA reversed the trial court's judgment, finding that the equity account was marital property when the parties divorced, despite the fact that it was titled in only the former husband's name; that the divorce judgment had not disposed of the equity account; and that, as a result, the case was remanded to the trial court.

After the case was remanded to the trial court, the former wife amended her complaint claiming an interest in not only the equity account and the sale proceeds therefrom, but also alleging that the divorce judgment had not disposed of the "good will" of the poultry farm, claiming that she was entitled to a determination of the value of her share of the good will and a judgment awarding her that share of the good will from the poultry farm. The former wife also attempted to amend her complaint to state a fraudulent-transfer claim not only against the former husband, but also against his present wife. However, she did not obtain leave of the trial court to file that amendment, and the trial court entered an order disallowing the amendment.

The trial court entered a judgment in favor of the former husband as to the former wife's claim to an interest in the equity account and to the good will of the poultry farm, and entered judgment in favor of the husband on the former wife's fraudulent suppression claim and conversion claim. The wife appealed.

On appeal, the wife made several arguments. The first of which was that the trial court erred in declining to award her a share of the equity account, the funds attributable to the sale of the equity account, and the good will of the poultry farm. The ACCA agreed stating that "When a specific asset of the parties to a divorce action is not disposed of by the decree, the parties are left in the same position relative to that asset as they were in prior to the decree," citing Ex parte Davis, 495 So.2d 672 (Ala. 1986). The ACCA found that the divorce judgment did not dispose of either the equity account or the good will; that the majority of the ACCA had already held that the equity account was a marital asset in the first appeal, because the poultry farm had been purchased during the marriage using marital funds; and also held in this case that the good will of the poultry farm, which was an intangible asset of the poultry farm, was also an asset when the parties divorced for the same reason. Because the divorce judgment did not dispose of either the equity account or the good will of the poultry farm, the ACCA held that "the former husband and the former wife continued to jointly

own the equity account and the good will after the entry of the divorce judgment.”

The ACCA then went on to state the authority of a trial court with regard to such a jointly owned marital asset which is not disposed of in a divorce decree stating as follows:

“When a divorce judgment does not dispose of a jointly owned asset, such as the equity account and the good will in the present case, and more than 30 days have elapsed since the entry of the divorce judgment, a trial court has jurisdiction to award each of the parties his or her ownership interest in that jointly owned asset; however, the trial court does not have jurisdiction to alter the ownership interest of either party in that jointly owned asset because that would constitute a modification of the property division in the divorce judgment more than 30 days after the entry of the divorce judgment, which the trial court is prohibited from doing. See Ex parte Davis, 495 So.2d 672, 674 (Ala. Civ.App. 1986).”

Since the present case was filed more than 30 days after the entry of the divorce judgment, the ACCA held that “the trial court had jurisdiction to award each party his or her ownership interest in the jointly owned equity account, the funds attributable to the equity account and the good will; however, the trial court did not have jurisdiction to alter the ownership interest of either party.” As a result, the ACCA reversed the judgment of the trial court with regard to those marital assets which were not disposed of in the divorce judgment, and remanded the case to the trial court with instructions to determine the monetary value of those assets based on the evidence already introduced, and to award each of the parties one-half of the monetary value of those assets.

In addition, the ACCA reversed the trial court’s judgment in favor of the husband on the conversion claim finding that “the undisputed evidence established the former wife’s conversion claim.”

In a dissenting opinion written by Judge Donaldson, joined in by Judge Thompson, those judges distinguished the facts of this case with a case in which the marital asset not disposed in the divorce judgment was held and titled in the joint names of the parties. Those judges stated that “The former wife did not ‘own’ one-half of the equity account at the time of the divorce in 1993 because that asset was held in the name of the former

husband alone. This is not a case in which jointly owned property was not mentioned in a divorce judgment." In agreeing that the equity account was a marital asset subject to division as part of the original divorce proceedings, the dissenting judges stated that "It was within the sound discretion of the trial court to make an award of the equity account to the former husband, and that award cannot be disturbed on appeal based on the facts of this case." Even though the dissenting judges stated that a different result could have well been reached on the facts of the case, "the decision was for the trial court to make."

15. Ex parte Lacey, 2013 WL 1777726, Supreme Court of Alabama, April 26, 2013

(A) JUSTICE MURDOCK, JOINED BY CHIEF JUSTICE MOORE, DISSENTED FROM THE SUPREME COURT'S DENIAL OF CERTIORARI REVIEW IN A CASE IN WHICH THE ACCA HAD INTERPRETED A PROVISION IN A DIVORCE DECREE TO BE ALIMONY IN GROSS AND NONMODIFIABLE.

The Supreme Court of Alabama denied the petition for writ of certiorari without opinion. However, Justice Murdock, joined by Chief Justice Moore dissented with writing, stating initially that "I respectfully dissent from the denial of certiorari review in this case. I write briefly to explain my concerns." Justice Murdock first expressed that "it is well established that, because alimony in gross cannot be altered once ordered, a provision in a divorce judgment for alimony in gross should be 'unequivocally expressed' by, or 'necessarily' inferred from the language used," citing Brunner v. Ormsby, 10 So.3d 18 (Ala. Civ. App. 2008). Judge Murdock further stated that "The provision of the divorce judgment at issue here simply does not meet this standard."

Justice Murdock also went on to state that "a provision for monthly payments to continue for a period of eight years appears on its face to contemplate payments to be made from the ongoing earnings of the payor spouse, not some division of property already held in the estate of that spouse at the time of the divorce. Furthermore, the payments here were structured to end at the wife's death, a fact suggesting an intent to help rehabilitate or support the wife and inconsistent with a 'vested' transfer of property rights."

In stating that the ACCA had relied heavily on the fact that the obligation in this case was secured by life insurance and further secured by a security interest in certain property owned by the husband, Judge Murdock stated that "It is the intrinsic nature of the obligation, however, not the nature of that which secures its payment, to which we primarily should look in assessing the nature of the obligation. Moreover, life insurance commonly is prescribed in divorce judgments in which periodic alimony is awarded; I do not see the provision for it here as particularly remarkable in regard to the issue at hand."

In addition, Justice Murdock distinguished this case from the fact situation set out in Hager v. Hager, 299 So.2d 743 (1974); and in further finding that

the trial court in this case had held that it was the intent of the original divorce judgment to provide for periodic alimony, Justice Murdock stated that "Because I believe there is probable merit in that petition, I respectfully dissent from its denial."

16. Austin v. Austin, 2013 WL 856640, Alabama Court of Civil Appeals, May 10, 2013

(A) A CONTEMPT PETITION IS GOVERNED BY RULE 70A, ARCP, AND MAY BE FILED WITH A MODIFICATION CLAIM. IT DOES NOT HAVE TO BE FILED AS A SEPARATE ACTION AS WAS THE CASE PRIOR TO THE ADOPTION OF RULE 70A, ARCP.

(B) AN AMENDMENT TO A PLEADING FILED LESS THAN 42 DAYS FROM THE SCHEDULED TRIAL DATE CAN ONLY BE FILED WITH "LEAVE OF COURT." HOWEVER, FAILURE TO OBTAIN LEAVE DOES NOT NECESSARILY RENDER THE AMENDMENT, AND ANY ORDER ENTERED ON IT, VOID, IF THE APPELATE COURT FINDS THAT LEAVE TO AMEND WOULD HAVE BEEN GRANTED HAD IT BEEN SOUGHT.

(C) ANY AMENDMENT, HOWEVER, THAT ADDS A NEW OR ADDITIONAL CLAIM MUST BE PROPERLY SERVED ON THE OPPOSING PARTY. IF IT IS NOT PROPERLY SERVED, THE TRIAL COURT IS WITHOUT SUBJECT-MATTER JURISDICTION TO HEAR AND DECIDE ANY NEW OR ADDITIONAL CLAIMS PRESENTED IN THE AMENDMENT.

The opinion of the ACCA entered in this case on March 8, 2013, was withdrawn, and a new opinion substituted for it. The parties were divorced in 2004, based upon an agreement. In 2011, the mother, acting pro se, filed a petition seeking modification of the father's child support obligation. In 2013, the mother moved to have the matter set for trial, following which the trial court entered a scheduling order that set the case for trial on June 21, 2012. Notice of the entry of the scheduling order was sent to the mother; however, the record does not indicate that the notice was sent to the father who had yet to answer the mother's petition. On May 22, 2012, the mother, who had then retained an attorney, filed an amended petition again seeking modification of the father's child support obligation, but also alleging, in addition, that the father had not paid his child support as ordered, had not paid his half of the children's uninsured medical expenses; and sought past-due child support, interest, past-due uninsured medical expenses, and an attorney fee.

The mother's amended petition was filed less than 42 days before the trial

setting; however, the mother did not seek leave of court, as she was required to do by Rule 15(a), ARCP. The trial was held as scheduled. The father, who had never answered the mother's petition or amended petition, did not appear, and a default judgment was entered against him, with the trial court finding him in contempt, calculating the arrearages owed by him, increasing his child support obligation, and awarding an attorney's fee and payment of court costs to the mother. The trial court also ordered that the father could purge himself of contempt by paying \$7,900 plus interest, and entered an order of attachment ordering that he be placed in jail pending further order of the court. Thereafter, the father, who had been incarcerated pursuant to the order of attachment, filed a motion pursuant to Rule 55(c), ARCP, seeking vacation of the trial court's judgment and attachment order. The father amended his postjudgment motion three times. However, the trial court did not hold a hearing on the father's motions, and they were denied by operation of law. The father then filed notice of appeal.

On appeal, the father made several arguments. The first argument addressed by the ACCA was that the trial court lacked subject-matter jurisdiction because the mother's amended petition coupled a modification action with a contempt action which the father argued was in violation of opinions of the Clerk of the Supreme Court entered in 1979 and 1980. While the ACCA noted that it appeared that the Opinion supported the father's contention, the ACCA also stated that "we note that both opinions predate the adoption of Rule 70A, ARCP, which now governs contempt proceedings arising out of civil actions," citing Ex parte Boykin, 656 So.2d 821 (Ala. Civ. App. 1994). The ACCA, however, found that the mother was permitted to join her modification claim and her contempt claim in the same action, stating as follows:

"Rule 70A expressly provides that contempt proceedings arising out of civil actions are instituted by the filing of a petition and that such a contempt proceeding is governed by the Alabama Rules of Civil Procedure. Rule 18, Ala. R. Civ. P., provides that a party may assert as many claims as he or she has against an individual in the same action. Thus, based on the application of Rule 70A and Rule 18, we cannot agree with the father that the mother was not permitted to join her modification claim and her contempt claim in the same action."

However, the ACCA did agree with the father that the mother's amended petition, which added her contempt claim, was not a proper amendment

under Rule 15(a), because the mother had filed the amendment less than 42 days before the first setting of the case for trial, and she had not obtained leave of court to do so, as required by Rule 15(a), ARCP. However, the ACCA also stated that the failure to obtain leave of court did not necessarily render the amendment, or any order entered on it, void, stating that "an untimely amended pleading served without judicial permission may be considered as properly introduced when leave to amend would have been granted had it been sought," citing Image Marketing, 884 So.2d at 826, quoting Hoover v. Blue Cross & Blue Shield of Alabama, 855 F.2d 1538 (11th Cir. 1988). The ACCA found that it was likely that the trial court in this case would have granted the mother leave to amend, and concluded that the mother's failure to seek leave to amend her petition did not benefit the father.

However, the ACCA did agree with the father in his argument that the mother's amended petition was not properly served upon him, as required by Rule 5(a), ARCP, which requires that "pleadings asserting new or additional claims for relief against parties in default for failure to appear shall be served upon them in the manner provided for service of summons in Rule 4, Ala. R. Civ. P.," citing Elliott v. Burch, 301 So.2d 557 (1974). The ACCA also stated that "Strict compliance regarding service of process is required," citing Aaron v. Aaron, 571 So.2d 1150 (Ala. Civ. App. 1990), and "failure of proper service under Rule 4, Ala. R. Civ. P., deprives a court of jurisdiction and renders a judgment by default void," citing Shaddix v. Shaddix, 603 So.2d 1096 (Ala. Civ. App. 1992). As a result, that portion of the judgment pertaining to the claims asserted in the mother's amended petition were reversed.

The ACCA did not agree with the father, however, that the whole judgment was void because he was not sent a copy of the trial court's scheduling order, finding that the father had failed to argue that point in his postjudgment motion or its amendments; and as a result, his failure to do so precluded review by the ACCA on that issue.

17. Holston v. Holston, 2013 WL 2130941, Alabama Court of Civil Appeals, May 17, 2013

(A) THE ANTENUPTIAL AGREEMENT OF THE PARTIES, WHICH WAS TO BE INTERPRETED ACCORDING TO THE LAW OF MISSISSIPPI, WAS FOUND TO BE ENFORCEABLE ACCORDING TO ITS PLAIN AND UNAMBIGUOUS TERMS.

(B) THE TRIAL COURT'S AWARD TO THE WIFE OF \$520,000.00 AS PROPERTY SETTLEMENT WAS FOUND TO VIOLATE THE TERMS OF THE ANTENUPTIAL AGREEMENT, AND WAS REVERSED.

The parties were married in 2001, and entered into an antenuptial agreement which, by its terms, was to be governed by the laws of Mississippi. The wife's net worth at the time was \$2,000 and the husband's net worth was 1.7 million dollars. After the marriage, the parties had two children; and the husband sold certain of his premarital assets, and purchased other assets. The parties filed joint federal and state income tax returns. In January, 2009, the wife filed a complaint for divorce, seeking custody of the parties' children, child support, periodic alimony, alimony in gross, an equitable division of the property acquired during the marriage, and an attorney's fee. The husband filed an answer which asserted that the wife was precluded by the antenuptial agreement from receiving periodic alimony, alimony in gross, or a division of the property that he had acquired in his sole name during the marriage. He also filed a counterclaim seeking a divorce and custody of the parties' sons.

At trial, the parties stipulated that the antenuptial agreement was valid, and the trial court stated that it would enforce the agreement. The trial court entered a judgment which awarded each party the property that he or she had owned before the marriage or had inherited; awarded the husband the business entities he had acquired or formed during the marriage, awarded the wife \$95,500 for her interest in the marital residence and \$520,000 as a "property settlement;" awarded each party half of certain stock in investment accounts which had been accumulated in the joint names of the parties during the marriage; and ordered the parties to divide their furniture and household furnishings acquired during the marriage using the two-list method. The husband appealed, but the appeal was dismissed because it had been taken from a nonfinal order, as a result of the parties' failure to complete the division of their furniture and household furnishings. Thereafter, the trial court entered a final judgment which completed the

division of the parties' furniture and household furnishings, as ordered, and leaving all other provisions of the first judgment of divorce in effect. The husband filed a notice of appeal.

On appeal, the husband asserted one issue, which was whether the trial court had violated the antenuptial agreement in awarding the wife the property settlement of \$520,000. The ACCA examined Mississippi law regarding antenuptial agreements, which is substantially the same as Alabama law, in that "an antenuptial contract is as enforceable as any other contract. Accordingly, the same rules of interpretation apply," citing Doster v. Doster, 853 So.2d 147 (Miss. Ct. App. 2003).

In finding that the antenuptial agreement signed by the parties was plain and unambiguous, the ACCA found that it was due to be enforced, stating that "An agreement that by its terms is plain and free from ambiguity must be enforced as written," citing Jones v. Jones, 722 So.2d 768 (Ala. Civ. App. 1998). The wife had contended on appeal that the antenuptial agreement failed to address the division of property acquired with jointly earned funds during the marriage. The ACCA found that the appellate courts of Mississippi and Alabama had not addressed that issue, but found that the Court of Appeals of Tennessee had recently determined that "the filing of a joint tax return does not, ipso facto, result in transmutation of separate property into marital," citing Estate of Hunt v. Hunt, 389 S.W. 3d 755 (Tenn. Ct. App. 2012). The ACCA stated that it would adopt the reasoning of the Tennessee Court of Appeals in that case, and "conclude that the parties' filing of joint-income tax returns during the marriage did not convert the husband's separate property into marital property."

The wife next contended that the terms of the antenuptial agreement were ambiguous and that the trial court had determined that sections of the antenuptial agreement pertained only to property owned at the time of marriage, and not to later acquired property. However, the ACCA reviewed the applicable terms of the antenuptial agreement, and clearly found that the agreement pertained to assets owned at the time of the contemplated marriage, or acquired during their marriage. The wife next argued that property acquired during the marriage and used for the common benefit of the parties became "marital property" subject to equitable division. The ACCA found that Alabama law was substantially identical to Mississippi law on that issue, but found that the antenuptial agreement controlled and that "The parties' antenuptial agreement provides no method by which those properties separately acquired by the husband during the marriage could become marital property."

Finally, the wife argued that although she agreed to waive her right to any

form of alimony in the antenuptial agreement, she did not relinquish her right to an equitable division of the property acquired during the marriage. She insisted that the antenuptial agreement did not prohibit the trial court from awarding her the property settlement of \$520,000. However, in reviewing the different types of alimony which were awardable under Mississippi law allowed for an award of lump sum alimony, which the ACCA found to be "functionally identical to alimony in gross as known to Alabama practitioners, and Mississippi cases used the terms "lump sum alimony" and "alimony in gross" interchangeably, citing McDonald v. McDonald, 683 So.2d 929 (Miss. 1996), and other cases. After reviewing Mississippi cases on lump sum alimony, the ACCA held that "the wife, by relinquishing her right to receive 'lump-sum alimony' in section F of the antenuptial agreement, did, in fact, relinquish the right to a division of the property acquired during the marriage. The Alabama trial court had no authority to disregard the antenuptial agreement and to ameliorate, via the mechanism of a 'property settlement,' any perceived harshness resulting from the wife's waiver of 'alimony in any form' because, under Mississippi law, lump-sum alimony is the functional equivalent of a property settlement." As a result, the ACCA found that the trial court erred as a matter of law in awarding the wife any property settlement, much less a property settlement of \$520,000, which the ACCA stated amounted to 37.5% of the husband's separate property acquired during the marriage, citing Richardson v. Richardson, 912 So.2d 1079 (Miss. Ct. App. 2005).

The ACCA reversed the judgment of the trial court awarding the wife property settlement of \$520,000, and remanded the case to the trial court with instructions to enter a judgment that conformed to its opinion.

18. Kyle v. Kyle, 2013 WL 2130952, Alabama Court of Civil Appeals, May 17, 2013

(A) CIVIL CONTEMPT IS USED TO "COERCE" COMPLIANCE IN A COURT ORDER; WHEREAS, CRIMINAL CONTEMPT IS USED TO PUNISH FOR NON-COMPLIANCE.

(B) THERE IS NO DEFINITE TERM OF INCARCERATION FOR CIVIL CONTEMPT, ONLY UNTIL THE PARTY COMPLIES WITH THE ORDER; WHEREAS, PUNISHMENT FOR CRIMINAL CONTEMPT INVOLVES A DEFINITE TERM OF INCARCERATION.

(C) A COURT DOES NOT ACQUIRE SUBJECT-MATTER JURISDICTION TO HEAR A CONTEMPT PETITION AFTER ENTRY OF A FINAL JUDGMENT UNLESS A NEW ACTION IS FILED AND COURT COSTS PAID OR WAIVED, IF APPROPRIATE.

The parties were married in 1980. In 2009, the husband filed a complaint for divorce, and the wife filed an answer and a counterclaim for divorce. The trial court entered a pendente lite order pursuant to the parties' agreement for each of them to pay certain household bills and expenses. Both parties filed emergency pendente lite motions thereafter, with the husband filing a motion for contempt against the wife, as well, contending that she had failed to pay the mortgage payment on the parties' marital home as required in the pendente lite order. Following a trial, the trial court entered an order finding the wife to be in contempt of court for violating the trial court's previous orders, finding that she had committed 12 separate violations, and sentenced her to one day in jail for each of those violations, with five days to be served, and the remaining seven days to be suspended. The wife was taken into custody, and her motion to reconsider the contempt order was denied by the trial court.

Thereafter, the trial court entered a final judgment of divorce, which included orders that the wife pay the arrearage owing on the mortgage payments within 45 days, awarded the real estate to the husband, and ordered the wife to pay the husband \$18,000 in attorney fees. The husband filed a postjudgment motion requesting the trial court to clarify the divorce judgment; and the wife also filed a postjudgment motion asserting that the trial court had failed to take into account the husband's adulterous affair, and that the division of the marital property was inequitable.

Following entry of the final judgment, the husband filed an emergency motion for contempt in which he contended that the wife had failed to make the monthly mortgage payments as ordered, and that the house was to be sold at foreclosure, unless payment was made. The trial court set the parties' postjudgment motions and the emergency motion for contempt for hearing, entering a rule nisi order that commanded both parties to appear and show cause why the motion for contempt should not be granted. The wife did not appear at that hearing, and on the same day, the trial court entered an order citing the wife for civil contempt and directing that she be incarcerated. In response to the second contempt order, the wife filed a motion to reconsider, or in the alternative for a new trial, asserting that she had not been provided adequate notice of that contempt proceeding, contending that she had been in California on the date the trial court entered the order and had been unable to return to Alabama in time for the hearing. The trial court entered an order denying her motion, and the wife filed notice of appeal.

The ACCA first noted what it called "the unique procedural history of this appeal," noting that the wife's counsel undertook efforts to obtain a trial transcript, but the court reporter was unavailable to prepare it; that during the pendency of the appeal, the wife's original attorney died; and that during the appeal, the husband had also died. On appeal, the wife first contended that the trial court's final judgment of divorce did not equitably distribute the marital estate. However, the ACCA did not find that the record supported the wife's contention that the trial court had relied, or even considered the wife's possible future inheritance, and affirmed the judgment of the trial court.

The wife also challenged the trial court's two orders finding her to be in civil contempt. The ACCA noted that Rule 70A(e)(2), ARCP, provides that:

"The court may order that a person who had been found to be in civil contempt be committed to the custody of the sheriff until that person purges himself or herself of the contempt by complying with the court's writ, subpoena, process, order, rule, or command."

In addition, the ACCA noted that, concerning civil contempt, it had previously held that:

"The failure to perform an act required by the court for the benefit of an opposing party constitutes civil

contempt.’ Carter v. State ex rel. Bullock County, 393 So.2d 1368, 1370 (Ala. 1981).” J.K.L.B. Farms, LLC v. Phillips, 975 So.2d 1001, 1012 (Ala. Civ. App. 2007). Furthermore, “[t]he purpose of a civil contempt proceeding is to effectuate compliance with court orders and not to punish the contemnor.’ Watts v. Watts, 706 So.2d 749,751 (Ala. Civ. App. 1997).” Hall v. Hall, 892 So.2d 958, 962 (Ala. Civ. App. 2004).”

The ACCA found that the trial court had cited the wife for civil contempt, yet had imposed a sanction of multiple days of incarceration, without bond, in jail. The ACCA found that the sanction of incarceration imposed on the wife “was not designed to effectuate compliance with the trial court’s pendente lite order. The wife was not committed to the custody of the sheriff in an effort to coerce her into making payments on the mortgage. Instead, the ordered incarceration appears to have been imposed to punish the wife for her purported noncompliance with the pendente lite order. Such a sanction is not permitted under a finding of civil contempt pursuant to Rule 70A.” As a result, the ACCA held that the trial court had abused its discretion in imposing the first order of contempt, because the imposition of the five-day sentence of incarceration to be served was “in direct contravention of and outside the scope of punishment permitted by Rule 70A.” The ACCA vacated the trial court’s first contempt order.

Concerning the trial court’s second contempt order, the ACCA held that the trial court lacked subject-matter jurisdiction to hear that matter, because “It is well settled that the filing of any contempt motion relating to the failure to abide by the terms of a final divorce judgment requires the initiation of an independent proceeding.” Since the husband’s emergency motion for contempt was filed after the entry of the final judgment of divorce, the husband would have been required to file a new action for contempt of court, which would have been assigned a “.01” suffix by the clerk of the court, and “the husband should have paid the filing fee required by Sec. 12-19-70(a)(7), Ala. Code 1975. The ACCA found that because no filing fee was paid by the husband, the trial court lacked subject-matter jurisdiction to consider that emergency motion, and entered an order vacating that order as well, stating that any order entered without subject-matter jurisdiction is void.