# DR LAW UPDATE

# JUDGES' SUMMER CONFERENCE

# (JULY 14-16, 2014)

JUDGE BILLY BELL

SUBJECT AND CASE INDEX

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   (B) THE STANDARD TO BE APPLIED BY A TRIAL COURT IN A MODIFICATION OF A JOINT CUSTODY AWARD IS THE BEST INTEREST OF THE CHILD, NOT THE MCLENDON STANDARD.



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16. (A) IF THE ACTUAL HEALTH OR WELL-BEING OF A CHILD IS IN DANGER A COURT HAS THE AUTHORITY TO MAKE A TEMPORARY EX PARTE RULING REGARDNG CUSTODY OR VISITATION.

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OPPORTUNITY TO BE HEARD AS EXPEDITIOUSLY AS POSSIBLE AFTER ENTRY OF THE EX PARTE ORDER, EVEN AS SOON AS 72 HOURS AFTER NOTICE IS GIVEN, IF PRACTICABLE.

(C) IN A SPECIAL CONCURRING OPINION, JUDGE DONALDSON AGREES TO THE ISSUANCE OF THE WRIT OF MANDAMUS TO THE TRIAL COURT TO HOLD A HEARING, BUT QUESTIONS IF THE ACCA HAS THE AUTHORITY TO MANDATE A SPECIFIC TIME WITHIN WHICH A TRIAL COURT MUST HOLD A HEARING. RATHER, HE SAYS, ONLY THE ALABAMA SUPREME COURT AND/OR THE ALABAMA LEGISLATURE WOULD HAVE THE AUTHORITY TO MANDATE A SPECIFIC TIME WITHIN WHICH A TRIAL COURT MUST HOLD A HEARING.



17. (A) IF A JUDGMENT DOES NOT COMPLETELY ADJUDICATE ALL ISSUES PRESENTED IN CASE, IT IS NOT A FINAL JUDGMENT.

    (B) THE APPEAL OF A NON-FINAL JUDGMENT WILL BE DISMISSED.



18. (A) FINDING OF COMMON-LAW MARRIAGE IS REVERSED BECAUSE ACCA DID NOT FIND THE EVIDENCE "CLEAR AND CONVINCING."

    (B) CIRCUIT COURT HAD AUTHORITY TO ENTER AN ORDER FOR CUSTODY AND SUPPORT OF CHILD, EVEN WHEN A DETERMINATION OF PATERNITY OF CHILD HAS NOT BEEN REQUESTED.

    (C) CHILD SUPPORT FOR OTHER CHILDREN AND FOOD STAMPS ARE EXCLUDED FROM "GROSS WAGES" FOR CALCULATION OF CHILD SUPPORT UNDER RULE 32.

    (D) ACCA COULD NOT DETERMINE HOW CHILD SUPPORT HAD BEEN CALCULATED. NO CS-42 WAS PREPARED; AND THERE WAS NO EXPRESS FINDING MADE BY THE TRIAL COURT THAT A DEVIATION FROM RULE 32 SHOULD BE MADE, OR THAT INCOME WAS IMPUTED TO

1. (A) USE OF THE TWO-LIST METHOD TO DIVIDE PERSONAL PROPERTY MAKES THE DECREE NON-FINAL, UNTIL THE DIVISION OF PERSONAL PROPERTY IS ENTERED BY THE COURT BY SUPPLEMENTAL ORDER.

   (B) A PRENUPTIAL AGREEMENT THAT IS PLAIN AND FREE FROM AMBIGUITY MUST BE ENFORCED AS WRITTEN.

Yarbrough v. Yarbrough, 2014 WL 92575, Alabama Court of Civil Appeals, January 10, 2014

This is the second time this case had been before the ACCA on appeal. The wife had filed a complaint for divorce in 2010, and the husband had filed an answer and a counterclaim, asserting that the parties had entered into a prenuptial agreement which governed the distribution of the parties' property. In 2012, the trial court entered a judgment of divorce, which found, among other things, that the prenuptial agreement was valid and enforceable; and made certain divisions of the parties' property, purportedly pursuant to the prenuptial agreement. The Final Decree of Divorce utilized the "two-list method" for the division of personal property and household furnishings. The wife filed a postjudgment motion, which was granted in part and denied in part, and she appealed for the first time in 2012. However, the ACCA determined that "because there had been no final disposition of the personal property, as evidenced by the husband's motion requesting clarification regarding the wife's proposed list of property and the lack of an order addressing that motion, the wife's appeal was from a non-final judgment." As a result, the wife's appeal was dismissed.

The trial court subsequently entered an order denying the husband's motion for clarification and all other pending motions; and the wife again filed a notice of appeal to the ACCA. She argued on appeal that the trial court had erred in failing to give effect to the plain language of the prenuptial agreement, and in failing to equally divide all the items purchased or acquired during the marriage, as was required in the prenuptial agreement. The ACCA recited the applicable law that "The interpretation of a provision in an antenuptial agreement, like the interpretation of any provision in any contract, is a question of law for the trial court," citing Laney v. Laney, 833 So.2d 644 (Ala.Civ.App. 2002); and further 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).

In reviewing the prenuptial agreement executed by the parties, the ACCA noted that the parties had agreed that all real and personal property listed in Exhibit A would be the property of the wife; that all real and personal property listed in Exhibit B would be the property of the husband; and that the prenuptial agreement also included the following provision:

> "4. The parties agree that any and all real and personal property acquired during this marriage shall be jointly owned and shall be subject to equal to division in the event of divorce or legal separation."

The ACCA found that those items of real and personal property which had been acquired during the marriage were covered by the plain language of paragraph 4 cited above. As a result, the ACCA found that the trial court had erred in failing to equally distribute the assets of the parties that had been acquired during the marriage in accordance with that paragraph; and remanded the case to the trial court for further proceedings consistent with its opinion.

2. (A) THE ISSUE OF THE EXISTENCE OF A COMMON LAW-MARRIAGE IS A QUESTION OF FACT, WHICH DESERVES A FULL EVIDENTIARY HEARING.

   (B) A CLAIM OF PATERNITY BY A PRESUMED FATHER CANNOT BE CHALLENGED, ABSENT A COMPETING PRESUMPTION; BUT THE PRESUMPTION OF PATERNITY IN THIS CASE DEPENDED ON WHETHER OR N0T THE PARTIES HAD ESTABLISHED A COMMON-LAW MARRIAGE.

   (C) THE REQUIRED ELEMENTS OF A COMMON-LAW MARRIAGE ARE DISCUSSED.

Ex parte A.M.E., 2014 WL 92595, Alabama Court of Civil Appeals, January 10, 2014

A man filed a petition in the District Court seeking to establish his paternity of a child born in 2012. He alleged that the mother became pregnant during her relationship with him, and that the relationship ended before the birth of the child. He further alleged that the mother had told him that the baby did not survive; however, he learned later that the child had been born healthy, and he sought an order establishing his paternity of the child. In response, the mother filed a motion to dismiss in which she alleged that the man lacked standing to seek a paternity determination because, she stated, she was married to another man at the time of the child's birth by common law. In support of her motion to dismiss, she submitted her affidavit and an affidavit from her purported common-law husband. The man who filed the paternity action opposed the mother's motion to dismiss, arguing that whether a common-law marriage existed between those parties is a question of fact, and that the trial court should conduct an evidentiary hearing on that issue. The trial court entered an order denying the mother's motion to dismiss the paternity action, and ordered the parties to submit to paternity testing. The mother filed a purported postjudgment motion, which the Court did not rule on; and the mother timely filed her petition for a writ of mandamus to the ACCA.

The mother argued that the ACCA should issue a writ of mandamus directing the trial court to dismiss the paternity action, contending that the trial court lacked subject-matter jurisdiction over the action. The ACCA stated that the Alabama Uniform Parentage Act, Sec. 26-17-101, et seq., Code of Alabama

(1975) governed the action; and reviewed the rebuttable presumptions of a man's paternity under different circumstances.

Section 26-17-204(a)(1) of the AUPA specifies that "A man who is married to a child's mother at the time of the child's birth is the child's presumed father." The mother relied on that section, which also provides that "if a presumed father of a child 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," citing D.F.H. v. J.D.G., 125 So.3d 146 (Ala.Civ.App. 2013). The mother had submitted an affidavit by her purported common-law husband that he was persisting in his claim of paternity of the child; and that as a result, the man who filed the action lacked any standing to assert his paternity of the child.

The ACCA agreed with the man who filed the paternity action that "the issue whether a common-law marriage exists is a question of fact to be resolved by a trier of fact," citing Gray v. Bush, 835 So.2d 192 (Ala.Civ.App. 2001). The ACCA also recited the following concerning the requirements for the recognition of a common-law marriage in Alabama:

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

The ACCA found that the affidavits filed by the mother asserting that she was in a common-law marriage with her purported husband were not

sufficient in and of itself to warrant a dismissal of the case under these facts, stating that "Parents have a fundamental right to the care and custody of their children," citing E.H.G. v. E.R.G., 73 So.3d 614, 621 (Ala.Civ.App. 2010). As a result, the ACCA found that "the potential right of M.W.S. to establish his paternity, and, therefore, his right to parent the child, is not defeated absent a full evidentiary hearing on the question of fact concerning the mother's purported common-law marriage."

The ACCA denied the mother's petition for a writ of mandamus.

3. (A) AS A MATTER OF FIRST IMPRESSION, THE ACCA HOLDS THAT THE APPEAL OF A DIVORCE JUDGMENT, WHICH IS STILL PENDING, DOES NOT PRECLUDE THE TRIAL COURT FROM CONSIDERING WHETHER A MODIFICATION OF CUSTODY, CHILD SUPPORT OR ALIMONY IS WARRANTED, IF THE MODIFICATION PETITION IS FILED AS A NEW CASE, FILING FEES PAID, AND THE PETITION ALLEGES A MATERIAL CHANGE IN CIRCUMSTANCES HAS OCCURRED SINCE ENTRY OF THE DIVORCE JUDGMENT.

Terry v. Vandergrift, 2014 WL 92519, Alabama Court of Civil Appeals, January 10, 2014

This is the second time this case has been before the ACCA on appeal. In 2011, the wife filed a complaint for divorce against the husband, alleging a common-law marriage; and asking for custody of the parties' minor child. The trial court entered a default judgment in 2012, divorcing the parties, awarding the mother sole physical custody of the child, $10,000 in monthly periodic alimony, and $1,520 in monthly child support. After the resolution of "myriad postjudgment motions," the husband appealed. The ACCA affirmed the divorce judgment in a no-opinion order of affirmance issued on August 30, 2013. The husband filed a petition for writ of certiorari to the Supreme Court that was denied on December 13, 2013.

On October 31, 2012, the day after filing his first appeal with the ACCA, the husband filed a petition styled a "petition to modify the final judgment of divorce presently under appeal with the Court of Civil Appeals," in which he asserted that a material change in circumstances had occurred that warranted a change in custody and in his child-support and alimony obligations. The wife filed a motion to dismiss the modification petition for lack of jurisdiction, because an appeal of the divorce judgment was pending before the ACCA. The trial court set the modification petition and the motion to dismiss for hearing. The husband filed a motion to stay the proceedings, or in the alternative, a motion for an extension of time to file a motion for leave to proceed with the ACCA.

After a hearing, at which the trial court heard oral arguments from the parties' attorneys, the trial court entered an order denying the husband's motion for a stay and granting the wife's motion to dismiss. The husband

filed the second appeal on June 20, 2013, arguing that the trial court erred by dismissing the modification case instead of entering a stay of further proceedings, or placing the case on the administrative docket. He explained in his brief to the ACCA that it was imperative that the modification case be stayed, instead of dismissed, because relief may be awarded retroactively only to the date of the filing of the applicable petition to modify.

The ACCA first stated that "We note that, as a general rule, a trial court loses jurisdiction over a case that is pending on appeal," citing Landry v. Landry, 91 So.3d 88 (Ala.Civ.App. 2012). The ACCA, however, further stated that "It appears that the Alabama appellate courts have not addressed whether a trial court may consider a petition to modify based on alleged material change in circumstances while an appeal of the original divorce judgment is pending."

In finding that the courts of at least three other states had addressed the issue, and after reviewing those decisions from Mississippi, Connecticut, and Massachusetts, the ACCA held that "a petition to modify a divorce judgment based on a material change in circumstances is a 'collateral or new proceeding which is separate, but not entirely divorced, from the underlying judgment'," citing the Massachusetts case of Braun v. Braun, 68 Mass.App. Ct. at 852, 865 N.E. 2nd 814 (2007).

The ACCA further stated as follows:

> "Moreover, because " ' "while an appeal is pending, the trial court 'can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court, ' " ' " Landry, 91 So.39 at 89, a party seeking a modification of a divorce judgment should take care to notify the trial court that the petition to modify "aris[es] out of new facts materially and substantially different from those found in the divorce proceedings." Braun, 68 Mass.App.Ct. at 852, 865 N.E.2d at 819."

In finding that the husband's modification petition was filed as a new case, that a filing fee was paid, and that the modification petition was assigned a new case number, the ACCA further stated that "Although it appears that the purpose of the modification petition, in large part, is to argue the issues

raised in Joseph's previous appeal of the divorce judgment, which the trial court may not consider, the modification petition does reference a material change in Joseph's circumstances."

The ACCA concluded that "the previous appeal of the divorce judgment, which was still pending when Joseph filed the modification petition, does not preclude the trial court from considering whether a modification of custody, child support, or alimony is warranted." As a result, the ACCA reversed the judgment of the trial court in dismissing the modification action for lack of jurisdiction, and remanded the case to the trial court to conduct proceedings consistent with the opinion.

4. (A) IT IS REVERSIBLE ERROR FOR A TRIAL COURT TO FAIL TO HOLD A HEARING ON A PARTY'S POSTJUDGMENT MOTION IF ONE IS REQUESTED, UNLESS THE MOTION IS FOUND ON APPEAL TO HAVE "NO PROBABLE MERIT."

   (B) THE STANDARD TO BE APPLIED BY A TRIAL COURT IN A MODIFICATION OF A JOINT CUSTODY AWARD IS THE BEST INTEREST OF THE CHILD, NOT THE MCLENDON STANDARD.

Weiss v. Nave, 2014 WL 563608, Alabama Court of Civil Appeals, February 14, 2014

The parties were divorced in 2000, and were awarded joint custody of their three minor children. In 2004, the divorce judgment was modified by awarding the father legal and physical custody of the oldest child, and ordering the mother to pay child support to the father. In 2009, the judgment was further modified by awarding the mother primary physical custody of the middle child, and by ordering the father to pay child support to the mother for that child. In 2010, the mother filed a petition to modify requesting that she be awarded the legal and physical custody of the parties' youngest child, that she be awarded child support for the youngest child, and that the father's child support obligation for the middle child be modified. After a trial, the trial court entered a judgment denying the mother's petition for modification of custody, denying her request for postminority educational support for the middle child, and denying all other requested relief. She filed a postjudment motion in which she requested oral argument. However, the trial court did not set a hearing, and the motion was denied by operation of law. The mother then filed her notice of appeal.

On appeal, the mother argued first that the trial court erred by failing to hold a hearing on her postjudgment motion. She also argued that the trial court erred by applying the custody modification standard set forth in Ex parte McLendon, 455 So.2d 863 (Ala. 1984), because the parties were exercising joint custody of their youngest child. She further argued that the trial court erred by declining to award college educational support for the middle child, and other points on appeal. However, the ACCA found that her first argument was dispositive of the issues on appeal, stating as follows:

> " '[g]enerally a movant who requests a hearing on his or her postjudgment motion is entitled to such a hearing. Rule 59(g), Ala.R.Civ.P.; Flagstar Enters. v. Foster, 779 So.2d 1220, 1221 (Ala. 2000). A trial court's failure to conduct a hearing is error. Flagstar Enters., 779 So.2d at 1221.'"

The ACCA did indicate that there is an exception to that general rule, stating that "on appeal, . . . if an appellate court determines that there is no probable merit to the motion, it may affirm based on the harmless error rule," citing Palmer v. Hall, 680 So. 307 (Ala.Civ.App. 1996). The ACCA noted that the Alabama Supreme Court had stated, regarding harmless error, as follows:

> "'Harmless error occurs, within the context of a Rule 59(g) motion, where there is either no probable merit in the grounds asserted in the motion, or where the appellate court resolves the issues presented therein, as a matter of law, adversely to the movant, by application of the same objective standard of review as that applied in the trial court.'"

In reviewing the mother's postjudgment motion, which raised the same basic issues as were raised in her appeal, the ACCA concluded that at least one of those arguments had probable merit. The ACCA noted that the parties shared joint legal and physical custody of their youngest child, and as a result, "the best-interests standard for custody modification set forth in Ex parte Couch, 521 So.2d 987 (Ala. 1988), not the McLendon standard, applied to the mother's petition to modify custody of B.N." In finding that the trial court had stated in its judgment that it had applied the McLendon standard when deciding whether to modify custody of the youngest child, the ACCA found that "That error probably prejudiced the substantial rights of the mother. Hence, the trial court committed reversible error by not holding a hearing on the mother's postjudgment motion."

As a result, the ACCA reversed the trial court's judgment, and remanded the case to the trial court to hold a hearing on the mother's postjudgment motion. The ACCA did note, however, that as a result of the decision of the Alabama Supreme Court in Ex parte Christopher, 2013 WL 5506613 [Ms. 1120387, Oct. 4, 2013] ___ So.3d ___ (Ala. 2013), the mother had no claim

for an award of college educational expenses for the middle child, and the trial court did not have to consider that issue further on remand.

5. (A) THE STANDARD REQUIRED FOR A MODIFICATION OF ALIMONY IS DISCUSSED.

   (B) AN INCREASE IN LIVING EXPENSES ALONE, WITHOUT ADDITIONAL JUSTIFICATION, DOES NOT CONSTITUTE A MATERIAL CHANGE IN CIRCUMSTANCES TO WARRANT A MODIFICATION OF ALIMONY.

   (C) AN AWARD OF ALIMONY THAT WAS BASED ON THE PARTIES' AGREEMENT SHOULD BE MODIFIED ONLY FOR CLEAR AND CONVINCING REASONS, AFTER A THOROUGH INVESTIGATION.

Blount v. Blount, 2014 WL 658380, Alabama Court of Civil Appeals, February 21, 2014 [Opinion withdrawn and substituted on rehearing – May 16, 2014]

The parties were divorced in 1990, by agreement, in which the former husband agreed to pay the former wife $500 per month in periodic alimony. In 2012, the former wife filed a petition for modification, seeking an increase in the monthly periodic alimony award. A trial was held, following which the trial court entered a judgment in which it found that there had not been a material change in circumstances and denied the former wife's request for a modification of alimony. She then filed a timely appeal to the ACCA.

On appeal, the former wife argued that the trial court exceeded its discretion by failing to modify her award of periodic alimony, and by failing to award her an attorney's fee. The ACCA discussed the standard to be applied to a modification of alimony, stating as follows:

> "At trial, the party seeking to modify a trial court's judgment regarding alimony must make a showing that, since the trial court's previous judgment, there has been a 'material change in the circumstances of the parties.' Posey [v. Posey], 634 So.2d [571,] 572 [ (Ala. Civ. App. 1994) ] (citing Garthright v Garthright, 456 So.2d 825 (Ala.Civ.App. 1984) )." '"Thus, the moving party must show a material change in the financial needs of the payee spouse and in the financial ability of the payor spouse to respond to those needs."' Sosebee v. Sosebee 896 So.2d 557, 560 (Ala.Civ.App. 2004) (quoting Glover v. Glover, 730 So.2d 218, 220 (Ala.Civ.App. 1998))."

The ACCA reviewed the evidence, which indicated that the former wife was was 50 years old at the time of the divorce, and is now 72 years old. At the time of the divorce, she worked as a receptionist earning approximately $14,000 per year. She testified that she is no longer qualified to hold a secretarial position because of her lack of necessary computer skills. She indicated that since 2001, she has been working as a substitute teacher, a childcare worker, and teaching ballroom dancing. Her taxable income was less than $16,000, which included the alimony paid by the former husband; however, she testified that she also received $8,766 per year in Social Security benefits that were not included in her total income in her tax return because those benefits are not taxed. She claimed expenses from her ballroom dancing instructor job, which she conceded were the expenses of her dance partner, and not hers. The evidence also indicated that she had made contributions to her IRA of $29,919 in 2010 and $25,727 in 2011.

The former wife also testified that she suffered from various health problems, including irritable bowel syndrome, insomnia, vertigo, lumbar scoliosis, arthritis, osteoporosis, and sciatic-nerve issues. She introduced a list of her actual expenses, and testified that she could not afford a computer, a cellular telephone, or cable television; and that her home was in need of significant repairs, including repair for termite damage, that she could not afford. She testified that her total monthly expenses for basic needs and repairs was $3,295 per month, and asked the trial court to increase her monthly alimony from $500 to $1,500 per month.

The former husband testified that he is retired from NASA, and that he receives civil service retirement benefits. His 2012 tax return indicated that his total income was $75,135. He testified that his monthly expenses were $4,925, which included gifts for the parties' children and grandchildren. He also testified that he had an IRA worth approximately $280,000, an investment account worth $153,000, a Merrill Lynch account worth $101,000, an Edward Jones account worth $98,000 and an additional Edward Jones account worth $32,000. He testified that he has two bank accounts which totaled over $75,000, and that he had investments in silver and gold worth over $206,000. The former husband is 76 years of age, and testified that he also has health problems, including acid reflux, low thyroid, diabetes, past open-heart surgery, and that he had been diagnosed with non-Hodgkin's lymphoma.

The ACCA found that there was evidence in the record indicating that the former husband's financial ability to support the former wife had increased, because his income had increased since the divorce. However, the ACCA found that "There was no evidence, however, of a material change in the needs of the former wife."

The ACCA also stated that a trial court may also consider the fact that the divorce judgment was based upon an agreement between the parties, and further stated that "Such a [judgment] should be modified only for clear and sufficient reasons after a thorough investigation," citing Stewart v. Stewart, 536 So.2d 91 (Ala.Civ.App. 1988).

In affirming the trial court's judgment, the ACCA stated that "The trial court, was in a unique position to observe the witnesses and to evaluate their demeanor;" and affirmed the trial court's finding that there had not been a material change in circumstance which warranted a modification of the periodic alimony award in the parties' 1990 divorce judgment.

Judge Moore wrote a dissenting opinion, joined in by Judge Thompson, in which he reviewed the evidence presented, and concluded that the "evidence showed, without dispute, that the former wife needs additional financial support in order to even approximate the standard of living she enjoyed during the parties' marriage," and that the "undisputed evidence further shows that the former husband has the ability to meet that increased financial need without undue hardship." Judge Moore and Judge Thompson concluded, as a result, that the trial court erred in denying the former wife's petition, and dissented from the majority opinion.

6. (A) "INTEGRATED BARGAIN" FOR PAYMENT OF ALIMONY.

   (B) THE ACCA OVERRULES THE CASES THAT HAD "ALLOWED" THE PAYING PARTY TO PAY ALIMONY INTO AN ATTORNEY'S TRUST ACCOUNT, PENDING A FINAL ORDER.

   (C) INTERESTING OPINION WRITTEN BY JUDGE MOORE, CONCURRING IN PART AND DISSENTING IN PART.

   (D) THE ACCA APPLIES THE AGE-OLD "BLIND HOG DOCTRINE" IN THE CASE.

Henderson v. Mogren, 2014 WL 783525, Alabama Court of Civil Appeals, February 28, 2014

The parties were married in 1992 and divorced in 2006, based on their agreement, which provided, in part, that the husband would pay the wife $1,200 per month as alimony for a period of 72 months, which was expressly designated as "part of an integrated bargain between the parties and cannot be modified by the Court without the consent of both parties;" and required the husband to purchase a term life insurance policy on his life in the face amount of $350,000 with the wife designated as the sole and irrevocable beneficiary and owner of the policy, and the parties' children to be named as the successor beneficiaries on the policy. In 2010, the wife filed a contempt action against the husband, alleging that he had failed to pay the alimony and had failed to acquire the term life insurance policy as required. The parties resolved that case by agreement, which required the husband to pay the former wife $900 per month for a period of 78 months and $652.08 on the first day of the 79th month; and to obtain a term life insurance policy on his life within 30 days in the amount of $150,000 naming the wife as the beneficiary and their adult children as successor beneficiaries.

The trial court entered a judgment incorporating the parties' modification agreement in 2010. In 2011, the former wife remarried, and the husband stopped paying alimony to her; and instead began paying the monthly amount of $900 into his attorney's trust account. He did not purchase a term life insurance policy as had been ordered. In 2011, he filed a petition for modification requesting a termination of his alimony obligation. The wife

filed an answer and a counter-petition for contempt against the husband for his failure to pay the alimony and to purchase the term life insurance policy as ordered. Thereafter, the husband purchased a term life insurance policy in the amount of $150,000, and named the wife as the sole beneficiary, but failed to name the parties' children as successor beneficiaries.

After a trial, the trial court entered a judgment which determined that the alimony provision of the divorce judgment was actually an award of alimony in gross; determined the alimony arrearage owed by the husband; ordered him to pay the wife's attorney's fees; and held the husband in contempt for failing to pay the alimony to the wife, and for failing to follow the orders regarding the purchase of the term life insurance policy. The husband filed a postjudgment motion, which was denied, and he filed a timely appeal. On appeal, the husband asserted that the trial court had erred by determining that the award of alimony in the divorce judgment was an award of alimony in gross; by denying his request to terminate his alimony obligation; by holding him in contempt; and by ordering him to pay the wife's attorney's fees.

The ACCA first addressed the issue of alimony, indicating that the parties' dispute regarding alimony "centers on whether Henderson's alimony obligation terminated upon Mogren's remarriage." The ACCA concluded that the trial court's determination that the alimony award in the divorce judgment was an award of alimony in gross was error; but did not conclude that the trial court erred by denying his request to terminate his alimony obligation.

The ACCA concluded that "Neither the parties nor the circuit court is correct. The parties agreed to an award of a fixed amount, and that award included elements of both periodic alimony and alimony in gross." As a result, the ACCA indicated that it had to determine the nature of the agreement the parties entered into, and whether or not the alimony obligation was modifiable upon the wife's remarriage. In doing so, the ACCA reviewed the basic law concerning an integrated bargain, stating as follows:

> "In the 'integrated bargain' category of agreement, the amount of alimony to be paid for support and maintenance has been established by the parties by taking into account the property settlement features of the agreement. In other words, '"integrated

> bargain agreements" [provide] for both support and division of property, but with the entire provision for one spouse being in consideration for the entire provision for the other, so that the support and property terms are inseparable.' 61 A.L.R.3d 520, 529. Alimony payments thus established may not thereafter be modified by the court without the consent of both parties."

The ACCA concluded that the settlement agreement, and the subsequent modification agreement, each "expressly provides that it is an integrated bargain; therefore, Henderson's alimony obligation cannot be modified without the consent of the parties." As a result, the ACCA concluded that the trial court had erred by concluding that the award at issue was an award of alimony in gross, but applied the age-old "blind hog doctrine" by not finding the trial court in error in refusing to terminate the husband's obligation to pay that amount upon the wife's remarriage, stating the doctrine to be as follows:

> "'[T]his Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. Ex parte Ryals, 773 So.2d 1011 (Ala. 2000), citing Ex parte Wiginton, 743 So.2d 1071 (Ala. 1999), and Smith v. Equifax Servs., Inc., 537 So.2d 463 (Ala. 1988).'"

Regarding the husband's issues on appeal concerning contempt for failing to pay alimony and to purchase the term life insurance policy as ordered, the ACCA first addressed the trial court's finding of the husband in contempt for failure to pay alimony. In noting that the husband continued to make his alimony payments into his attorney's trust account once the wife remarried, in reliance on the ACCA's holding in Sanders v. Burgard, 715 So.2d 808 (Ala.Civ.App. 1998), in which the ACCA indicated that "a payor spouse's paying alimony into an escrow account until a trial court could determine he or she was no longer obligated to pay alimony was an appropriate option for a payor spouse who had a good-faith belief that the recipient spouse had committed any of the acts justifying termination of the payor spouse's obligation under Sec. 30-2-55."

The ACCA also reviewed a later decision it had made in the case of Scott v. Scott, 38 So.3d 79 (Ala.Civ.App. 2009), in which it had considered a situation similar to the situation in this case. The ACCA indicated that in the Scott case, it did not endorse the "clear direction" it had provided in the Sanders case; instead, it "outlined a 'better procedure': for the payor spouse to file a motion in conjunction with or subsequent to filing the petition to modify, requesting that the trial court conduct an expedited pendente lite hearing to determine whether the payor spouse may place periodic-alimony payments into escrow"." The ACCA stated that the language it had used in Sanders and Scott is "both vague and perhaps conflicting," and excused the husband's attempt to follow the direction of the ACCA expressed in Sanders, in lieu of the better procedure outlined in the Scott opinion.

The ACCA expressly overruled those portions of Sanders and Scott that had recommended placing disputed payments of alimony into an escrow account, stating that "As of the date of this opinion, a payor spouse who unilaterally elects to place his or her monthly alimony payments into an escrow account in violation of a valid court order requiring such payments to be made to the recipient spouse will subject himself or herself to a finding of contempt. To be clear, nothing in today's opinion should be interpreted as limiting of a trial court's ability to modify its own orders." By overruling Scott and Sanders, the ACCA made it clear that "unless a trial court modifies its existing order, a payor spouse is obligated to comply with the terms of the existing order."

With regard to the husband's claims of error by the trial court finding him in contempt for failure to purchase a term life insurance policy, the ACCA found no error in that decision, indicating that the undisputed evidence was clear that the husband had failed to comply with the orders regarding the purchase of the term life insurance policy, and the naming the parties' children as successor beneficiaries.

With regard to the husband's claim that the trial court erred in ordering him to pay the wife's attorney's fees, the ACCA found no error in that regard, citing Sec. 30-2-54, of the Code of Alabama (1975), 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."

Judge Thompson wrote an opinion, concurring in part and dissenting in part in which he concurred with that part of the main opinion that overruled Scott and Sanders; but did not agree with the majority opinion holding the trial court in error for finding the husband in contempt for his failure to pay alimony under the facts of this case. Otherwise, he concurred with the remainder of the majority opinion.

Judge Moore wrote an interesting opinion, in which he concurred in part, concurred in the result in part, and dissented in part. He agreed with the majority opinion that the trial court had erred in determining the husband's obligation to be alimony in gross, stating that "Among other things, to be characterized as alimony in gross, an award must be payable out of the present estate of the paying spouse as it exists at the time the obligation arises," citing Ex parte Hager, 289 So.2d 743 (1974). Judge Moore indicated that the undisputed facts showed that at the time of the parties' divorce and at the time of the modification agreement and order, the husband did not have a sufficient estate to fund the payment of the alimony obligation, and as a result, it could not be alimony in gross.

He disagreed with the main opinion that concluded that the alimony obligation was neither one for periodic alimony nor one for alimony in gross, but rather a nonmodifiable integrated bargain, indicating that "the facts bear out that they did not make such an agreement." Judge Moore indicated that the undisputed evidence was that the parties had practically no property of any value when they agreed to the payment of periodic alimony in the original divorce, and that the property division was not even considered, or was "relatively inconsequential value" when the periodic alimony was negotiated and agreed upon. As a result, Judge Moore opined that the parties' agreement for the payment of alimony by the husband "did not constitute an integrated bargain and the award of periodic alimony remained subject to modification." Judge Moore then stated that the trial court should have terminated the husband's periodic alimony obligation as a result of the undisputed evidence that the wife had remarried.

He concurred with the main opinion that the finding of the husband in contempt for failing to pay periodic alimony should be reversed, based upon the husband's reasonable reliance on Sanders in making the decision to pay the alimony into his attorney's trust account.

Judge Moore also concurred that Sanders and Scott should be overruled, stating that "This court had no authority to create any mechanism by which a payor spouse could be relieved of his or her duty to comply with an existing and valid court order requiring direct payments of periodic alimony to a recipient spouse." Judge Moore went one step further, and indicated that he expressed no opinion as to whether or not a trial court had the power to enter any pendente lite orders suspending the payment of periodic alimony while a petition to terminate periodic alimony is pending. He did state that "I still maintain that a payor spouse should be able to obtain reimbursement of any periodic-alimony payments made after the recipient spouse remarries or begins cohabitating with a member of the opposite sex and that Sec. 30-2-55 has been misconstrued as providing otherwise."

7. (A) STANDARD TO APPLY FOR A MODIFICATION OF CHILD SUPPORT WHICH HAD BEEN ESTABLISHED BY A DEVIATION FROM RULE 32.

   (B) THE TRIAL COURT WAS REVERSED FOR LEAVING VISITATION UP TO THE DISCRETION OF 18-YEAR OLD AND 14-YEAR-OLD CHILDREN.

   (C) A COURT CAN PLACE RESTRICTIONS ON VISITATION SO LONG AS THEY ARE "NARROWLY TAILORED" TO ADDRESS THE COURT'S CONCERNS REGARDING THE BEST INTEREST OF THE CHILDREN.

Milligan v. Milligan, 2014 WL 783504, Alabama Court of Civil Appeals, February 28, 2014

The parties were divorced in 2009 by agreement, which awarded the parties joint custody of their children; ordered the father to pay child support after the marital home was sold; and allowed the father to claim the parties' two oldest children as income tax exemptions. In 2011, the State of Alabama on behalf of the mother filed a petition to modify the father's child support obligation. In addition, the mother, through private counsel, filed an amended petition to request a change in custody. After a trial, the trial court entered a judgment which found that there had been a substantial change in circumstances since entry of the final decree in that the mother and the father no longer lived with the children in the marital residence (which was the reason that the father had not been required to pay child support until the home was sold), and ordered the father to pay child support to the mother, awarded the mother the right to claim all three of the parties' children on her income taxes, and ordered that the minor daughters would not be required to attend the physical custody periods with the father "due to their age, activities, and school-related commitments." The father's postjudgment motion was denied, and he filed his appeal.

On appeal, the father first argued that the trial court erred in modifying his child support obligation. The evidence indicated that when the parties divorced, they continued to live together with the children in the marital home; and that based upon those circumstances, the parties had agreed that the father would continue making the mortgage payment on the marital

home, and that no child support would be paid unless and until the marital home was sold. Their agreement to do so deviated from the requirements of Rule 32, ARJA. The ACCA stated that when a trial court ratifies an agreement to deviate from Rule 32 "that agreement may be modified upon a showing of a substantial and continuing material change from the circumstances that had resulted in the initial deviation." The ACCA also set forth factors that a trial judge should consider in determining whether or not a change of circumstances had occurred, including "a material change in the needs, conditions, and circumstances of the child," citing Duke v. Duke, 872 So.2d 153 (Ala.Civ.App. 2003). In noting that the trial court had specifically found that a material change in circumstances had occurred because the parties and the children had moved out of the marital home, the ACCA agreed with the trial court and affirmed the trial court's modification of child support.

With regard to the trial court's order allowing the 18-year-old and 14-year-old daughters to decide if they wanted to visit with the father, the ACCA first noted that "the trial court has broad discretion when determining visitation rights and that its judgment must be affirmed unless it is unsupported by the evidence," citing Watson v. Watson, 555 So.2d 1115 (Ala.Civ.App. 1989). However, the ACCA found that the evidence indicated only that the older daughter did not want to stay overnight with the father and miss her activities. The ACCA concluded, however, that "the trial court could have ameliorated that concern by placing specific restrictions on the father's visitation with E.M. instead of leaving visitation completely to her discretion," citing Lee v. Lee, 49 So.3d 211 (Ala.Civ.App. 2010). The ACCA did note, however, that "the trial court is free to place restrictions on one or both of the daughters' visitation so long as they are narrowly tailored to address any concerns regarding their best interests.

8. (A) THE ACCA LOOKS TO THE SUBSTANCE OF, RATHER THAN THE LABEL PUT ON, A CUSTODY AWARD TO DETERMINE THE APPROPRIATE STANDARD TO APPLY IN A MODIFICATION CASE.

   (B) EVEN THOUGH THE FATHER WAS DESIGNATED AS THE CHILDREN'S "PRIMARY PHYSICAL CUSTODIAN," THE SUBSTANCE OF THE CUSTODY AWARD WAS DETERMINED BY THE ACCA TO ACTUALLY BE JOINT CUSTODY.

   (C) THE BEST INTEREST STANDARD, NOT THE MCLENDON STANDARD, APPLIES TO A MODIFICATION OF JOINT CUSTODY.

   (D) THE CHANGE OF CUSTODY OF THE PARTIES' OLDEST CHILD WAS AFFIRMED ON APPEAL, BUT THE CHANGE OF CUSTODY OF THE TWO YOUNGEST CHILDREN WAS REVERSED.

   (E) JOINT CUSTODY IS THE "PREFERRED METHOD OF RAISING CHILDREN OF DIVORCED PARENTS IN THIS STATE."

E.F.B. v. L.S.T., 2014 WL 783499, Alabama Court of Civil Appeals, February 28, 2014

The mother filed a petition for modification in 2012 seeking a modification of custody of the parties' three children. The trial court entered a judgment awarding the mother primary physical custody of the children, specifically finding that the mother had met the modification standard set forth in Ex parte McLendon, 455 So.2d 863 (Ala. 1989). The father's postjudgment motion was denied by the trial court in an order which also noted that the best-interest standard, rather than the McLendon standard, applied in the case, and that the mother had also met that standard. The father then filed his notice of appeal.

The parties had three children, who were ages 15, 12 and 10 at the time of trial. When the parties divorced, the mother received primary physical custody of all three children; but the divorce judgment was later modified in 2010, by agreement of the parties, to give the parties joint physical custody of the children, although the judgment "labeled" the father as the primary physical custodian. After the modification order was entered, the relationship between the oldest child of the parties and the father began

deteriorating, mainly because of the child's behavior. The father ultimately relented and let the oldest child move to the mother's house and live with her. The parties' blamed each other for the problems in the father's relationship with the oldest child, with the father contending that the mother's lack of discipline allowed the oldest child to run to the mother every time he tried to enforce rules. The child testified that she wanted to live with the mother.

On appeal, the father first argued that the trial court erred in awarding custody of the children to the mother. The ACCA had to determine first the appropriate modification standard to be applied in the case. Unfortunately, neither party introduced the original divorce judgment or the modified divorce judgment into the record, but both parties contended that the modified judgment awarded the parties joint physical custody, with the parties' exercising approximately the same amount of time caring for the children. The father argued, however, that the modified judgment designated him as the primary physical custodian, and that the modification standard set out in Ex parte McLendon applied, rather than the best-interest standard, pursuant to Ex parte Couch, 521 So.2d 987 (Ala. 1988) which would apply to a modification of a joint physical custody arrangement. In reviewing the substance of the custody arrangement under the modified judgment in this case, the ACCA concluded that it was actually a joint physical custody arrangement, and that "the fact that the modified judgment designated the father as the primary physical custodian does not alter the true nature of the custody arrangement." As a result, the "best-interest standard" applied to the modification of that arrangement.

In determining whether or not a material change of circumstances had occurred since entry of the prior custody judgment that would impact the welfare of a child, the ACCA noted that the record indicated that the relationship between the oldest child and the father had seriously deteriorated to the point that the father stated in anger that he "felt like shooting M.B. and, even months later at trial, testified that he could no longer co-parent M.B. with the mother under the joint-custody arrangement." The ACCA affirmed the trial court's change of custody of M.B., the oldest child, to the mother, stating that "In Pullum v. Webb, 669 So.2d 925 (Ala.Civ.App. 1995), this court described an erosion of the parent-child relationship as a material change of circumstances."

However, the ACCA concluded that the trial court did not have sufficient evidence of a material change of circumstances to warrant modification of custody of the two younger children. The ACCA noted that the evidence presented at trial indicated that the parties had experienced difficulties in cooperating with each other with regard to the two younger children, but stated that "An alleged lack of cooperation . . . is generally an insufficient basis on which to modify custody," citing S.L.L. v. L.S., 47 So.3d 1271 (Ala.Civ.App. 2010).

The trial court had indicated in its ruling on the father's postjudgment motion that it had decided to change custody of the two younger children in order to keep the children together in the same custody arrangement. The ACCA stated that "Although Alabama law generally encourages trial courts not to separate siblings, see A.B. v. J.B. 40 So.3d 723 (Ala.Civ.App. 2009), the law more specifically requires a trial court to assess the best interests of each child individually when determining the custody arrangement that best suits the interests of each child."

The ACCA found that "In this case, an individualized assessment shows that no material change of circumstances has occurred with regard to A.B. and H.B. that would warrant a change in their custody arrangement. The fact that they will now live differently than their older sibling does not, in and of itself, warrant upheaval of their beneficial custody situation. Additionally, by legislative decision, joint custody is the preferred method of raising children of divorced parents in this state. See Ala. Code 1975, Sec. 30-3-150."

As a result, the Alabama Court of Civil Appeals reversed the trial court's order modifying custody of the two youngest children.

9. (A) PREJUDICE ON THE PART OF A JUDGE IS NOT PRESUMED, EVEN WHEN A LITIGANT'S LAWYER RUNS AGAINST AND BEATS THE TRIAL JUDGE IN AN ELECTION DURING THE PENDENCY OF THE CASE.

   (B) ADVERSE RULINGS ARE NOT BY THEMSELVES SUFFICIENT TO ESTABLISH BIAS AND PREJUDICE.

Baldwin v. Baldwin, 2014 WL 783496, Alabama Court of Civil Appeals, February 28, 2014

In 2010, the wife filed a complaint for divorce against the husband, and the case was assigned to the trial judge. After an initial hearing, the trial judge entered a judgment divorcing the parties, but reserving jurisdiction as to the remaining issues. After several continuances, a trial date was set, but before the trial took place, the trial judge was defeated in a primary election by the wife's lawyer, who effectively won the judgeship due to lack of a candidate in the opposing party. After his primary victory, the wife's lawyer continued to represent her in the proceeding, and presented evidence on behalf of the wife at the first part of the trial, which could not be concluded at that time. The trial was later rescheduled. However, the wife's lawyer filed a motion to withdraw as her attorney, indicating that she had notified him that she had terminated his services. New counsel appeared for the wife, and the case was tried, following which the trial judge entered a final judgment.

The wife filed a motion to alter, amend, or vacate the final judgment in which she specifically requested a new trial, asserting that the trial judge had displayed "some animus" towards her former counsel, and that he had withdrawn from representing her because of that animus. The wife also asserted rulings which had been made by the trial judge in refusing to hear from the parties' child at a hearing, had denied two motions filed by her to appoint a guardian ad litem, and had also denied two motions filed by the wife requesting to reopen her case after she had rested. She maintained that the final judgment was "so atrociously one-sided in favor of the husband that it was evident that [the trial judge] had some reserved personal issues against the wife."

Before the trial judge could rule on that motion, her term expired and the wife's former lawyer succeeded her on the bench. The former counsel filed a notice of recusal, and a new judge was appointed by the Chief Justice to the case. The new judge scheduled a hearing on the wife's postjudgment motion; but before any hearing could take place, the new judge entered an order vacating the final judgment and effectively ordering a new trial, appointing a guardian ad litem, and other orders providing for the temporary custody of the parties' minor child and restraining the parties from disposing of their assets.

The husband filed a motion to set aside that order on the basis that it had been entered without conducting a hearing, and without considering the evidence that had been presented in the trial. That motion was denied. However, the new judge held a hearing the next day, during which he acknowledged that he had not seen a record of the trial conducted by the former trial judge, and had only reviewed the materials in the clerk's record. He informed counsel that the main reason he had granted the motion was that the wife's postjudgment motion was soon to be denied by operation of law, and the trial court would therefore have lost jurisdiction over the case at that time. The husband filed a timely notice of appeal.

On appeal, the husband made various arguments as to why the new judge erred in granting the wife a new trial. However, the ACCA determined that one of those arguments supported the disposition of the case on appeal. The ACCA noted that in her postjudgment motion, the wife essentially alleged that the final divorce judgment was a result of the bias of the former trial judge; but that she had not presented any evidence whatsoever to support her accusations of bias. The ACCA stated that "The burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice," citing Ex parte Melof, 553 So.2d 554 (Ala. 1989); and further stated that "A mere accusation of bias that is unsupported by substantial fact does not require the disqualification of a judge," citing Ex parte Melof, supra; and that "Prejudice on the part of a judge is not presumed," citing Hartman v. Board of Trustees of the University of Alabama, 436 So.2d 837 (Ala. 1983), and other cases.

In reviewing the record and determining that the wife had not produced any evidence whatsoever to support her accusation of bias on behalf of the former trial judge, except for adverse rulings that had been cited by the wife

as evidence of that bias, the ACCA stated that "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice," citing Hartman, supra.

The ACCA agreed with the husband that the new judge had committed error in granting the wife's postjudgment motion and vacating the prior divorce judgment; and remanded the case to the new judge to vacate that order and to conduct further proceedings as are consistent with this opinion.

10.(A) IMPUTATION OF INCOME IF PARTY FOUND UNDEREMPLOYED UNDER RULE 32.

(B) CREDIT FOR CHILD SUPPORT PAID FOR OTHER CHILDREN IN A CHILD SUPPORT MODIFICATION CASE REQUIRES THAT THE CHILD SUPPORT BE PAID PURSUANT TO ANOTHER ORDER OF CHILD SUPPORT.

(C) FAILURE TO PAY THE FILING FEE UPON FILING OF A COUNTER-CLAIM DID NOT DIVEST THE TRIAL COURT OF JURISDICTION.

(D) AWARD OF ATTORNEY'S FEES IS ALLOWED IN A CONTEMPT ACTION, EVEN WITHOUT PROOF OF REASONABLENESS OF THAT FEE.

Hudson v. Hudson, 2014 WL 783535, Alabama Court of Civil Appeals, February 28, 2014

In 2011, the father filed a petition to modify his child support obligation and to terminate his alimony obligation, asserting that he had become unable to work due to a disability and that two of the parties' three children had reached the age of majority. The mother filed an answer pro se, and then filed an amended answer with counterclaims through counsel, alleging that the father had violated various provisions of earlier judgments. After a final hearing, the trial court entered a judgment which eliminated the father's child support obligation for the two oldest children who had reached the age of majority; determined that the father was voluntarily underemployed and imputed an income of $4,000 per month to him; ordered him to pay $662 per month to support the parties' remaining minor child; denied his petition to modify his alimony obligation of $100 per month to the mother; and entered other orders, including finding the father in contempt for failing to pay the children's health care expenses and for failing to pay expenses related to the former marital residence. The father filed a postjudgment motion which was denied after a hearing; and the father appealed.

The father first argued on appeal that the trial court had erred in imputing income to him for child support purposes, because an administrative law judge had determined that he was disabled and awarded him Social Security benefits in the amount of $710 per month. The father contended that the trial court was required to give Full Faith and Credit pursuant to the United States Constitution. However, the ACCA found that the father had failed to

explain how the Full Faith and Credit Clause applied to a determination of a federal agency, and how application of that provision prevented the trial court from imputing income to him. As a result, that argument was found to be waived.

The father also argued that the imputation of income will adversely affect his eligibility for Social Security disability benefits, because he can only earn the amount of $1,039 per month, without suffering a reduction in the amount of his benefits. However, the ACCA also found that the father had failed to present the court with any legal authority to support that proposition, and that argument was also waived.

The father also argued that the trial court imputed income to him of $4,000 a month in spite of his presentation of undisputed evidence of his disability and a complete lack of evidence regarding his earning potential. The ACCA stated that "In cases of voluntary underemployment, the amount of income to be imputed to the parent is a question of fact to be decided based on the evidence presented to the trial court," citing G.B. v. J.H., 915 So.2d 570 (Ala.Civ.App. 2005). The father had testified during trial that three doctors had diagnosed him with bipolar disorder, which, although he was in therapy, prevented him from working. He had previously worked as the chief officer of a nonprofit corporation. In its judgment, the trial court noted that the father "presents as a currently unsuccessful, self-employed entrepreneur who had fallen on difficult times, and now suffers from debilitating depression and mental stress, which renders him too fragile to be gainfully employed."

The ACCA noted, however, that the trial court obviously did not find that assertion to be true, because it had described the father in the judgment as a "voluntary underemployed, self-pitying malingerer." The trial court also stated that it had concluded in an earlier case that the father was voluntarily underemployed and was capable of earning $4,000 per month; and further found that there was no material change in circumstances that had occurred since that earlier order entered in 2000 to alter that conclusion. The ACCA affirmed the trial court, based upon the trial court's opportunity to observe the father and having heard the testimony, including that the father had continued to work sporadically for his nonprofit organization, had authored multiple books, had traveled to the Philippines in December, 2012, to help a friend, and that the nonprofit organization which he founded continued to

pay his mortgage and utility expenses, as well as providing the father with two credit cards in the name of the nonprofit organization. The ACCA stated that "From the totality of the evidence, the trial court could have inferred that the bipolar disorder did not prevent the father from earning income as he could before the diagnosis." In finding that the father's income tax return showed that he earned over $50,000 in 2009 from speaking and self-employment activities, the ACCA found that the trial court had sufficient evidence to impute the sum of $4,000 per month to the father for child support calculation purposes.

The father also contended that the trial court failed to follow the provisions of Rule 32, ARJA, by failing to give him credit for child support which he pays for three other minor children, one son by his second wife, and two daughters by a paramour. He testified that he pays child support of $250 per month for the two daughters by his paramour. The ACCA cited Rule 32(B)(6), ARJA, which provides that a credit shall be deducted for child support actually being paid by a parent pursuant to an order for child support for other children. However, the ACCA noted, by its plain language, that provision requires a court in a child support modification case to deduct child support paid for other children only if paid pursuant to another child support order. In finding that the father failed to present any evidence indicating that the child support was paid pursuant to a child support order, the ACCA affirmed the trial court on that issue as well.

The father next argued that the trial court erred when it refused to terminate his obligation to pay $100 per month to the mother as periodic alimony, arguing that he is unable to pay that obligation. The ACCA stated the general rule that "The obligation to pay periodic alimony may be modified when there has been a material change in the financial or economic needs of the payee spouse and the ability of the payor spouse to respond to those needs," citing McKenzie v. McKenzie, 568 So.2d 819 (Ala.Civ.App. 1990). However, the ACCA noted that the burden of proof is upon the moving party in that situation, that the decision to modify periodic alimony is within the discretion of the trial court, and will not be set aside on appeal unless a palpable abuse of discretion is shown. In reviewing the evidence, and determining that the trial court had concluded that the father retained the ability to earn sufficient income to pay the periodic alimony, the ACCA affirmed the trial court's decision on that issue.

The father next argued that the trial court failed to acquire jurisdiction over the mother's counterclaims, because she had failed to pay the filing fee required by Sec. 12-19-71(a), Code of Alabama (1975). In noting that the mother apparently failed to pay a filing fee when she filed her counterclaims, and that the trial court had ordered the mother to pay the necessary fee by a particular date, or her counterclaims would be dismissed, the ACCA determined that the record contained no further mention of the filing fees, and the father had failed to raise the issue before the trial court. The ACCA determined that the requirement that a counterclaim plaintiff pay a filing fee in support of a counterclaim was not jurisdictional; and stated that "the failure to pay a filing fee does not divest the trial court of jurisdiction over a counterclaim," citing Espinoza v. Rudolph, 46 So.3d 403 (Ala. 2010). Since the father did not raise the issue of nonpayment of the filing fee to the trial court, the ACCA stated that the father had waived that issue, and that it could not be raised for the first time on appeal, since it was a nonjurisdictional issue.

The father also argued that the trial court had erred in finding him in contempt because he had proved that he lacked the ability to pay those amounts. However, the ACCA noted that the father had failed to establish that his expenses ever exceeded $48,000 annually, which the trial court had found his ability to pay to be, and denied that issue on appeal.

With regard to the award of attorney's fees, the ACCA cited Sec. 30-2-54, which authorizes a trial court to award attorney's fees in a domestic relations action when a finding of contempt has been made. The father had also argued that the mother's lawyer failed to testify as to the fee she was seeking and that no evidence was presented to establish the reasonableness of those fees. However, the ACCA found that the mother's lawyer had submitted an itemized statement of her time to the trial court, and that even though the mother's lawyer indicated that the statement did not reflect the total amount of time she had spent on behalf of the mother, the ACCA affirmed the award of attorney's fee stating that "Because the trial court is presumed to have knowledge as to the reasonableness of attorney's fees and because it had sufficient information before it on which to base an award of fees, we cannot conclude that it exceeded its discretion in ordering the father to pay the mother's attorney's fees.

11. (A) AFTER A TRIAL COURT HAS DENIED A MOTION FILED PURSUANT TO RULE 60(b), ARCP, THAT COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN A SUCCESSIVE POSTJUDGMENT MOTION TO RECONSIDER OR OTHERWISE REVIEW ITS ORDER DENYING THE MOTION.

    (B) THE FILING OF SUCH A SUCCESSIVE POSTJUDGMENT MOTION DOES NOT TOLL THE TIME BY WHICH AN APPEAL MUST BE FILED.

Clanton v. Barksdale, 2014 WL 917276, Alabama Court of Civil Appeals, March 7, 2014

In 2012, the father filed a petition seeking to modify the visitation and child support provisions of a divorce judgment between he and the mother. The mother did not respond, and the father sought and received an entry of default, and an interlocutory default judgment modifying the mother's visitation. The child support issue was set for a hearing, at which the mother failed to appear. The trial court entered a default judgment setting a new child support obligation for the mother based upon the testimony presented. The mother then filed what she labeled a "Limited Appearance to Challenge Service of Process," in which she alleged that the default judgment was void because she had not been properly served. After a hearing, the trial court entered an order denying that motion.

The mother thereafter filed a motion purporting to be a Rule 59(e), ARCP, motion, asserting that the testimony presented at the child support hearing regarding her income and hours of employment was incorrect. The mother supported that postjudgment motion with an affidavit stating her income and the number of hours she worked. The trial court entered an order denying the second postjudgment motion on the basis that it had been untimely filed. The mother then filed a motion identical to the second postjudgment motion in all respects except for one, in which she relied on Rule 60(b), ARCP, but did not specify the ground upon which she based her request for relief. After a hearing, the trial court denied the third postjudgment motion, and the mother filed notice of appeal.

Even though neither party had raised the issue of the jurisdiction of the ACCA over the appeal, the ACCA first addressed that issue, indicating that "However, because jurisdictional matters are of such magnitude, this Court

is permitted to notice a lack of jurisdiction ex mero motu," citing Reeves v. State, 882 So.2d 872 (Ala.Civ.App. 2003).

In reviewing the postjudgment motions filed by the mother, the ACCA found that the mother's first postjudgment motion was in fact a Rule 55(c) motion seeking to have the default judgment set aside. When that was denied, instead of filing an appeal, the mother attempted to get the trial court to reconsider the default judgment by filing her second postjudgment motion, which she had styled as a Rule 59 motion. The ACCA concluded, however, that since that second postjudgment motion was filed more than 30 days after entry of the default judgment, it could not be construed as a Rule 59 motion, but was instead a Rule 60(b) motion. When the trial court denied the mother's second postjudgment motion, the mother failed to appeal; and instead, filed a third postjudgment motion seeking the same relief on the same grounds she had asserted in the second postjudgment motion. The ACCA quoted from the Alabama Supreme Court opinion in Ex parte Keith, 771 So.2d 1018 (Ala. 1998), as follows: "[a]fter a trial court has denied a postjudgment motion pursuant to Rule 60(b) that court does not have jurisdiction to entertain a successive postjudgment motion to 'reconsider' or otherwise review its order denying the Rule 60(b) motion."

In finding that the mother's third postjudgment motion merely reiterated the same grounds that were asserted in her second motion, the ACCA concluded that the third motion "was nothing more than a request that the trial court reconsider its ruling on the second postjudgment motion." As a result, the filing of the third postjudgment motion "did not toll the time for the mother to file an appeal from the denial of the second postjudgment motion," citing Williams v. Williams, 70 So.3d 332 (Ala.Civ.App. 2009).

As a result, the ACCA concluded that the mother's notice of appeal was filed more than 42 days after the denial of the second postjudgment motion, was therefore untimely, and dismissed the mother's appeal.

12. (A) THE REVISED GRANDPARENT VISITATION ACT, SEC. 30-3-4.1, WHICH WAS SIGNED BY THE GOVERNOR ONE DAY AFTER THE EX PARTE E.R.G., DECISION, AND WHICH BECAME EFFECTIVE ON SEPTEMBER 1, 2011, HAS NOT YET BEEN CHALLENGED, AND IS STILL IN EFFECT.

    (B) THE TRIAL COURT WAS REVERSED FOR DISMISSING THE GRANDPARENTS' PETITION.

Tripp v. Owens, 2014 WL 982862, Alabama Court of Civil Appeals, March 14, 2014

The grandparents appealed from a judgment dismissing their petition against the mother seeking visitation rights with their grandchildren. The grandparents filed their petition, alleging that while the parents' divorce action was pending, their son had died in an automobile accident, and that the mother had failed to allow them to have regular, unsupervised contact and visitation with their grandchild. They sought an order from the trial court granting them visitation with their grandchild. The trial court thereafter entered a judgment dismissing the grandparents' petition stating that "the Alabama Grandparent Visitation Act was declared unconstitutional pursuant to Ex parte E.R.G. and D.W.G., 73 So.3d 634 (Ala. 2011)." The grandparents filed a motion to vacate the dismissal asserting that the Grandparent Visitation Act had been amended, had been signed by the Governor one day after the E.R.G. decision was rendered, and that the new Act had become effective on September 1, 2011, prior to the filing of their petition. The trial court entered an order denying their motion to vacate, and the grandparents timely appealed.

The grandparents argued on appeal that the trial court erred in dismissing their petition, because the new Act had not yet been adjudicated to be unconstitutional, and that the trial court had erred in dismissing the case without giving them an opportunity to present evidence proving that visitation would serve the best interest of the child, thereby rebutting the statutory presumption in favor of the mother. The ACCA agreed with the grandparents, and concluded that the trial court had erred and misapplied the holding in Ex parte E.R.G., and that the revised Grandparent Visitation Act, which amended Sec. 30-3-4.1, had not been declared unconstitutional in that opinion.

The ACCA reversed and remanded the case with instructions to the trial court to vacate the dismissal of the grandparents' petition, and to allow the grandparents the opportunity to prove the visitation would serve the best interest of the child through an evidentiary hearing, "unless the constitutionality of the new Act is duly challenged and the new Act is ruled unconstitutional in accordance with the ordinary rules of civil procedure and applicable Alabama statutes."

13. (A) THERE WAS NO EVIDENCE THAT THE DOMESTIC VIOLENCE COMMITTED BY THE MOTHER AGAINST THE FATHER HAD ANY EFFECT ON THE CHILDREN. AS A RESULT, THE AWARD OF CUSTODY TO THE MOTHER WAS AFFIRMED ON APPEAL, NOTWITHSTANDING THE PRIMA FACIE PRESUMPTION AGAINST THAT PLACEMENT THAT AROSE PURSUANT TO SEC. 30-3-131.

    (B) SSI BENEFITS CANNOT BE COUNTED AS INCOME IN A RULE 32 CHILD SUPPORT CALCULATION.

Adams v. Adams, 2014 WL 108977, Alabama Court of Civil Appeals, March 21, 2014

The wife brought an action for divorce against the husband; and the husband filed an answer and counterclaim, with both parties seeking custody of their children. After a brief hearing, the trial court entered a judgment which awarded the parties joint legal custody of their children, with primary physical custody of the children placed with the wife; ordering the wife to enroll the children in counseling; awarding child support to be paid by the father; dividing the parties' marital property; and reserving jurisdiction to award periodic alimony in the future. The husband filed a postjudgment motion, challenging the trial court's award of custody, the inclusion of his disability benefits in the calculation of child support, the trial court's decision to only reserve the issue of periodic alimony rather than award it to him, and the property division ordered by the trial court. The husband's motion was denied, and he appealed, raising each of those issues.

The husband first contended that the trial court erred in awarding primary physical custody of the parties' children to the wife, asserting that the wife had committed acts of domestic violence against him, which gave rise to a presumption that an award of custody to the wife would not be in the best interests of the children, pursuant to Sec. 30-3-131. The ACCA reviewed the testimony presented at trial, which included the admission by the mother that she had attempted to assault the husband "on only one occasion during the marriage," and that she had been convicted of domestic violence against him. Even so, the ACCA concluded that "The wife's testimony and the husband's testimony, taken together, do not reveal that any domestic violence on the wife's part had any effect upon the children, and the lack of such evidence tends to counsel deference in favor of the trial court's

judgment in favor of the wife," citing Enzor v. Enzor, 98 So.3d 15 (Ala.Civ.App. 2011).

The ACCA also noted that the older child had expressed a custodial preference in the mother's favor, which it stated was "a factor that is entitled to much weight," citing Enzor, supra; and the fact that there was a half-sibling of the parties' children in the home with the wife, who should not be "perfunctorily separated" by a custody judgment, citing A.B. v. J.B., 40 So.3d 723 (Ala.Civ.App. 2009). As a result, the ACCA concluded that "the placement of the parties' children in the primary physical custody of the wife was within the trial court's wide discretion, notwithstanding any prima facie statutory presumption against such a placement that arose under Sec. 30-3-131."

The ACCA did agree with the father, however, that his Supplemental Security Income (SSI) payments were excluded from his gross income for the purpose of calculating child support, pursuant to Rule 32(B)(2), ARJA; reversed the trial court's judgment as to the father's child support obligation; and remanded that issue to the trial court to establish his child support obligation by "reference to the guidelines as pertinent to the husband's 'actual gross income [he] has the ability to earn'," citing Herboso v. Herboso, 881 So.2d 454 (Ala.Civ.App. 2003).

The father also asserted on appeal alleged error on the part of the trial court in not awarding him alimony and in the trial court's division of the parties' marital property. However, the ACCA affirmed the trial court's judgment on those issues.

14. (A) IN A PATERNITY ACTION BETWEEN UNMARRIED PARENTS, THE COURT MAY NOT CHANGE THE CHILD'S SURNAME TO THAT OF THE FATHER, ABSENT THE MOTHER'S CONSENT, UNLESS THE COURT FINDS SUBSTANTIAL EVIDENCE DEMONSTRATING THAT GOOD CAUSE EXISTS TO CHANGE THE CHILD'S SURNAME.

    (B) THE BURDEN OF PROOF IS ON THE FATHER IN THAT SITUATION.

J.M.V. v. J.K.H. 2014 WL 1098983, Alabama Court of Civil Appeals, March 21, 2014

In 2012, the father filed a petition seeking to establish paternity of the child, to correct the child's birth certificate to list him as the child's father, to change the child's surname, to establish custody of and visitation with the child, and to establish child support. The mother answered; and after a trial, the trial court entered a judgment, which, among other things, declared the father to be the legal father of the child, changed the child's surname to that of the father, awarded the mother custody of the child, and awarded the father visitation. Both parties filed postjudgment motions, and the mother then filed a notice of appeal. Following her doing so, the trial court denied both postjudgment motions, and stayed enforcement of its judgment changing the surname of the child, pending resolution of the appeal.

The only issue raised by the mother on appeal was that the trial court had erred in changing the child's surname to that of the father. The mother is an officer in the United States Air Force, and the father is an enlisted member of the Air Force. The parties were never married, met through their employment, and began a sexual relationship which resulted in the mother's becoming pregnant with the child. Thereafter, the parties' relationship deteriorated. The parties testified that the father had wanted to be present for the birth of the child, but that the mother had opposed his being present out of concern that their military careers could be adversely affected, since she was an officer and he was an enlisted man. They stopped speaking to each other about a month before the child was born, and the father was not notified when the mother went to the hospital to give birth to the child. The mother did not list the name of the father on the child's birth certificate, and she gave the child her surname. It was undisputed that the mother had been the primary caregiver for the child since the child's birth, and that the father had visited with and supported the child during the first two and a half

years of its life. However, the parties became embroiled in a visitation dispute in 2012, and the case was then filed by the father.

The mother testified that she was opposed to changing the child's name, because the child knew his current full name; that changing the name would be very confusing to the child; that all the child's records listed his surname as that of the mother; and that she believed that the name change might be harmful to the child and create confusion about his identity. However, the trial court in the judgment stated that it did not see that the name change would have any detrimental effect, nor do any harm to the child, and that it was not against the child's best interest to order that his name be changed to that of the father. The trial court also stated that it decided to change the surname of the child, in part, because the mother had denied the father an opportunity to be present at the birth of the child so that he could have been listed on the child's birth certificate and possibly could have named the child. However, the ACCA noted that "even if the father had been present at the birth of the child, the father did not have any right to be listed on the birth certificate," citing Sec. 22-9A-7(f), Code of Alabama (1975). Because the mother was not married to the father at the time she gave birth to the child, the Alabama Office of Vital Statistics would not have been permitted to put any information about the father on the child's birth certificate based "merely on his attendance at the child's birth."

The ACCA also stated that the trial court was mistaken as to the possibility that the father could have named the child at his birth, citing common law. The ACCA stated that "Under the common law, a child born of an unmarried woman customarily would bear her surname, see Buckley v. State, 19 Ala.App. 508, 98 So. 362 (1923), and a putative father had no right to name a child born out of wedlock, see Barabas v.Rogers, 868 S.W.2d 283, 285-87 (Tenn.Ct.App. 1993)." The ACCA stated that "Alabama generally follows the common law of England," referencing Sec. 1-3-1, and noting that there was not an Alabama statute which altered the common-law rule.

The ACCA found that the current version of the Uniform Parentage Act ("AUPA") was adopted in 2008, and does now permit a court adjudicating paternity to change the name of a child "only upon petition of a party and for good cause shown," referencing Sec. 26-17-636(e) of the Code of Alabama (1975). The ACCA indicated, however, that the courts of Alabama had not defined "good cause" as specifically mentioned in that Code section,

but did note that the Alabama legitimation statute, Sec. 26-11-3, does provide that the name of a child may be changed only if it is in the best interest of the child. As a result, the ACCA construed those two statutes in pari materia, and held that "under Alabama law a court adjudicating paternity may change the name of the child only if it is in the best interest of the child."

In reviewing the evidence presented at trial, the ACCA found that the father had offered no reason why he wanted the child's surname changed; and merely testified that he did not think that the name change would upset or harm the child. However, the ACCA stated that "As we read Sec. 26-17-636(e), a parent petitioning to change the name of the child must present evidence showing that the change would benefit the child in some positive manner," citing the Tennessee case of Barabas v. Rogers, 868 S.W.2d 283 (Tenn.Ct.App. 1993).

The ACCA concluded that "The record does not contain substantial evidence demonstrating that good cause existed to change the child's surname;" reversed the judgment of the trial court and remanded the case for entry of a judgment denying the father's request to change the child's surname.

15. (A) A CONTEMPT MOTION FILED AFTER ENTRY OF A FINAL JUDGMENT IS AN INDEPENDENT PROCEEDING THAT REQUIRES PAYMENT OF A FILING FEE.

(B) PROOF OF ADULTERY REQUIRES SUFFICIENTLY STRONG EVIDENCE.

(C) THE CONFESSION OF A SPOUSE ALONE IS INSUFFICIENT TO SUPPORT ENTRY OF A DIVORCE ON THE GROUND OF ADULTERY.

(D) THE DEFENSE OF RECRIMINATION IS NO LONGER APPLICABLE IN ALABAMA AFTER ADOPTION OF THE GROUND FOR DIVORCE OF INCOMPATIBILITY OF TEMPERAMENT.

(E) A TRIAL COURT HAS BROAD DISCRETION IN DETERMINING WHAT IS SEPARATE PROPERTY UNDER SEC. 30-2-51.

(F) THE CONDUCT OF A PARTY IS A FACTOR FOR A TRIAL COURT TO CONSIDER IN DIVIDING THE MARITAL ESTATE.

(G) THE AWARD OF 18% OF THE MARITAL PROPERTY TO THE HUSBAND, WHEN CONSIDERED WITH THE DEBTS AND SUPPORT HE WAS ORDERED TO PAY, WAS FOUND TO BE INEQUITABLE, EVEN IN SPITE OF HIS ADULTERY.

(H) THE TRIAL COURT WAS REVERSED FOR VESTING TOTAL DISCRETION IN THE PARTIES' 16-YEAR-OLD SON TO WHETHER HE WOULD VISIT WITH THE FATHER.

(I) THE CHILD SUPPORT AWARD WILL BE REVERSED IF THE ACCA CANNOT DETERMINE FROM THE RECORD HOW IT WAS CALCULATED.

(J) THE ACCA CONCLUDED THAT THE FATHER HAD NOT CHALLENGED THE AUTHORITY OF THE TRIAL COURT TO AWARD COLLEGE EXPENSES. AS A RESULT, THE ACCA DETERMINED THAT THE EX PARTE CHRISTOPHER DECISION, OVERRULING BAYLISS, WAS NOT APPLICABLE, AND THE ISSUE COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Morgan v. Morgan, 2014 WL 1508693, Alabama Court of Civil Appeals, April 18, 2014

The parties were married in 1984. The wife filed for divorce in 2010, alleging that the parties were incompatible and that the husband had committed adultery. The parties had three minor children when the case was filed. A standing pendente lite order was entered, following which another pendente lite order was entered requiring the husband to pay alimony, child support, health insurance, and the house and automobile payments. The husband filed an answer and a counterclaim for divorce, alleging that the parties were incompatible and that the wife had committed adultery. He also claimed that the wife had committed certain torts, and asked for compensatory and punitive damages. Thereafter, the wife filed several motions seeking to have the husband held in contempt for not paying the amounts ordered, pendente lite.

During the trial of the case, evidence was presented that the husband had moved to Georgia for work; that he had met his girlfriend through an Internet dating site, that they began dating, and that he and his girlfriend began living together in Georgia in 2010. The girlfriend's social-media site contained several references to her relationship with the husband, including a photograph of what she described as "the ring," and referenced an upcoming wedding. In addition, the girlfriend testified that, although she and the husband were not yet married, she had legally changed her last name to Morgan. Evidence was also provided that the husband and the girlfriend had traveled together to a beach resort and had photographs of themselves taken on the beach, depicting what appeared to be their wedding, including pictures of them wearing wedding rings. The husband denied that he and the girlfriend were engaged, or had conducted any type of ceremony while at the beach resort; and stated that the pictures were taken for fun, and that the photographer had lent them the rings. The wife also testified that the husband had physically abused her several times during the marriage. However, the husband testified that he had only acted in self-defense in response to the wife's physical attacks on him.

After the conclusion of the trial, the trial court entered an order which found the husband in contempt, ordered him to be taken into custody, and finding that he owed $107,000, with a "purger" set at $40,000, which was reduced later that same day to $36,091. Thereafter, the trial court purported to

enter a final order which granted the parties a divorce based upon incompatibility and the husband's adultery; awarded the wife physical custody of the youngest son; awarded the husband visitation at the discretion of the son; ordered the husband to pay child support and periodic alimony; divided the marital estate, including awarding the wife the marital residence and ordering the husband to pay the balance on the mortgage; finding the husband in contempt; and ordering that the husband pay the wife's attorney's fees. However, the trial court failed to address the wife's claim seeking college educational support for the parties' daughter. Both parties filed what purported to be postjudgment motions, following a hearing on which the trial court entered an order specifying the parties' respective obligations to pay college expenses for their daughter and addressing the remaining issues between the parties. As a result, that order was then determined to be a final judgment in the case, following which the husband filed a timely notice of appeal.

Thereafter, the wife filed another motion for contempt against the husband, alleging that he had failed to comply with the trial court's first judgment and the second judgment which were collectively referred to as the final judgment. The trial court entered an order setting that motion for a hearing; and following the hearing, again found the husband in contempt, and ordered that he be incarcerated until he paid a particular amount to purge himself of that finding of contempt. The husband filed a petition for writ of mandamus with the ACCA asking it to direct the trial court to vacate the finding of contempt made following entry of the final judgment. The two appeals were consolidated by the ACCA.

The husband raised a number of arguments on appeal. The first issue addressed by the ACCA on appeal was the husband's argument that the trial court lacked jurisdiction to enter the last contempt order, because the wife had failed to pay a filing fee when she did so, and the contempt motion was not assigned a new case number. The ACCA cited the longstanding law that "A motion or petition seeking the imposition of sanctions based on a finding of contempt initiates an independent proceeding that requires the payment of a filing fee," citing Opinion of the Clerk No. 25, 381 So.2d 58 (Ala. 1980), and Wilcoxen v. Wilcoxen, 907 So.2d 447 (Ala.Civ.App. 2005). As a result, the ACCA determined that the trial court did not have subject-matter jurisdiction of the wife's last motion for contempt; that the contempt order was therefore void; and dismissed that appeal with instructions to the trial

court to vacate all orders stemming from the filing of the wife's last motion for contempt.

The ACCA rejected the husband's argument that the trial court did not have sufficient evidence to find that he had committed adultery, reciting the evidence required for a finding of adultery to be as follows:

> "'While it is difficult and somewhat rare to prove adultery by direct means, the charge of adultery in a divorce case may be proven by circumstantial evidence which creates more than a mere suspicion.' Billington v. Billington, 531 So.2d 924, 924 (Ala.Civ.App. 1988). Proof to support the charge of adultery 'must be sufficiently strong to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference.' Bolden v. Bolden, 354 So.2d 275, 276 (Ala.Civ.App. 1978)."

The ACCA concluded that the evidence supported a finding of adultery on the part of the husband. The ACCA rejected the husband's argument that the evidence was sufficient to support a finding of adultery by the wife. However, the ACCA found from the record that the only evidence which had been presented by the husband on the wife's alleged adultery was a purported admission which she had made to him, which he admitted had been recanted the same day. The ACCA recited the law that "The testimony of one spouse as to the other spouse's confession of adultery is, alone, insufficient to warrant a divorce on the grounds of adultery," citing Yates v. Yates, 676 So.2d 365 (Ala.Civ.App. 1996); and that "It is clear under our decisions that confessions of a party in a divorce suit must be corroborated," citing Watson v. Watson, 178 So.2d 819 (1965).

An interesting point that was decided by the ACCA was that the doctrine of "recrimination", which had prevented parties from divorcing if each party could establish grounds for divorce against the other, was no longer applicable in Alabama, because the Alabama Legislature had adopted the ground of divorce of incompatibility, citing Cooper v. Cooper, 331 So.2d 689 (Ala.Civ.App. 1976).

The husband also argued that the trial court exceeded its discretion in its division of the marital property and in the awards of alimony and attorney

fees. The ACCA reviewed the division which had been made, including the trial court's failure to include certain property which the wife had asserted was her separate property because it had been inherited by her, and had not been regularly used for the common benefit of the parties. The ACCA stated that "The trial judge is granted broad discretion in determining whether property purchased before the parties' marriage or received by gift or inheritance was used 'regularly for the common benefit of the parties during the marriage'," referring to Sec. 30-2-51, Code of Alabama (1975). In addition, the ACCA noted that "A trial court is free to consider the conduct of the parties regarding the cause of the divorce in its division of the marital property," citing Martin v. Martin, 85 So.3d 414 (Ala.Civ.App. 2011).

In finding, however, that the marital residence was the only substantial marital asset owned by the parties, and that it was awarded to the wife, with the husband being ordered to pay the mortgage on it; and finding that the husband was awarded approximately 18% of the value of the marital assets, was ordered to pay the mortgage payment on the marital residence and the monthly payment on the daughter's Lexus automobile, and $3,500 per month in periodic alimony, the ACCA concluded that the property division in the case was inequitable, even in light of the husband's adultery. As a result, the ACCA reversed the judgment and remanded the case to the trial court to reconsider the issues of property division and the alimony award. The ACCA did note that the record supported the trial court's determination that the husband's testimony was not credible.

The husband also argued on appeal that the trial court exceeded its discretion by awarding the wife $10,750 as an attorney's fee. The ACCA also reversed that reward, since it had reversed the property division and alimony award, and remanded that issue for reconsideration by the trial court as well.

The ACCA did agree with the husband that the trial court erred in allowing the parties' 16-year-old son to have total discretion over whether he visited with his father. The ACCA stated that "we hold that the trial court erred in vesting total discretion regarding a noncustodial parent's visitation in one person, and, in this case, that person is a child who cannot be expected to comprehend the legal, social, financial, or emotional implications of maintaining or of severing his relationship with his father," citing Moore v. Moore, 331 So.2d 741 (Civ. 1976).

The ACCA reversed the trial court's child support award indicating that "This court is unable to determine from the record the manner in which the trial court determined the amount of the parties' gross incomes," and further stated that "this court cannot affirm a child-support order if it has to guess at what facts the trial court found in order to enter the support order it entered," citing Willis v. Willis, 45 So.3d 347 (Ala.Civ.App. 2010). The ACCA also reversed the trial court's order requiring the husband to purchase a vehicle for the parties' son when he turned 16, because the father had done the same thing for the parties' other two children.

The trial court had ordered each party to pay certain college expenses for the parties' daughter. The ACCA noted the recent development in the law of Alabama concerning postminority support based upon the opinion of the Alabama Supreme Court in Ex parte Christopher, 2013 WL 5506613, ____ So.3d ____ (Ala. 2013). In Christopher, the Alabama Supreme Court overruled the Bayliss case and held that "the child-custody statute does not authorize a court in a divorce action to require a noncustodial parent to pay educational support for children over the age of 19." The ACCA concluded that even though the Alabama Supreme Court had applied its decision in Christopher prospectively as well as to cases then on appeal, the ACCA found that the husband had failed to properly raise that issue before the trial court, and that the husband could not raise the trial court's lack of authority to award college educational expenses on appeal.

The ACCA stated that "Based on the issues framed within the trial court, parties determine what facts should be discovered, decide what evidence should be presented and the manner of its presentation, and decide whether to resolve all or a portion of the dispute without a trial. Confidence in the judicial system is promoted when issues are required to be fully developed and presented to the tribunal conducting the litigation process and determining the facts and the application of law to those facts. Accordingly, we interpret the instruction from the supreme court to apply Christopher in cases still on appeal to those instances in which the issue concerning the trial court's authority to grant such support was properly raised in the trial court."

But, in finding that the husband had argued before the trial court that the judgment ordering him to pay his daughter's college educational expenses created an undue burden on him, and because the ACCA had reversed the

issues of property division and alimony award, the ACCA also reversed the award of college expenses for reconsideration on remand by the trial court.

Judge Thomas wrote a separate opinion, concurring in part and concurring in the result in part, stating that she concurred only in the result in the reversal of the trial court's award of college educational expenses. Judge Thomas stated that the opinion of the Alabama Supreme Court in Christopher stated that "Further, this decision also applies to current cases where no financial postminority-support order has been entered or where an appeal from a postminority-support order is still pending." Judge Thomas stated that "The above language plainly states that the holding in Christopher is applicable to any case in which an appeal of a postminority-support order was pending at the time that decision was released;" and further stated that "I further believe that, because we are compelled by Christopher to reverse the award of postminority-support, we need not address the husband's argument that the postminority-support award constitutes an undue burden."

16. (A) IF THE ACTUAL HEALTH OR WELL-BEING OF A CHILD IS IN DANGER A COURT HAS THE AUTHORITY TO MAKE A TEMPORARY EX PARTE RULING REGARDNG CUSTODY OR VISITATION.

    (B) HOWEVER, DUE PROCESS REQUIRES THAT THE PARENT DEPRIVED OF CUSTODY OR VISITATION MUST BE GIVEN NOTICE AND AN OPPORTUNITY TO BE HEARD AS EXPEDITIOUSLY AS POSSIBLE AFTER ENTRY OF THE EX PARTE ORDER, EVEN AS SOON AS 72 HOURS AFTER NOTICE IS GIVEN, IF PRACTICABLE.

    (C) IN A SPECIAL CONCURRING OPINION, JUDGE DONALDSON AGREES TO THE ISSUANCE OF THE WRIT OF MANDAMUS TO THE TRIAL COURT TO HOLD A HEARING, BUT QUESTIONS IF THE ACCA HAS THE AUTHORITY TO MANDATE A SPECIFIC TIME WITHIN WHICH A TRIAL COURT MUST HOLD A HEARING. RATHER, HE SAYS, ONLY THE ALABAMA SUPREME COURT AND/OR THE ALABAMA LEGISLATURE WOULD HAVE THE AUTHORITY TO MANDATE A SPECIFIC TIME WITHIN WHICH A TRIAL COURT MUST HOLD A HEARING.

Ex parte C.T., 2014 WL 1646436, Alabama Court of Civil Appeals, April 25, 2014

The parties were divorced in 2013 by a judgment which awarded the parties joint legal custody of their child, awarded the mother sole physical custody, and awarded the father liberal visitation rights. In 2014, the mother filed a petition for modification and a verified emergency ex parte petition to suspend the father's visitation, alleging that he had physically and sexually abused the child. The trial court entered an ex parte order suspending his visitation that same day, and entered an order setting a review hearing in approximately 17 days. The father filed an answer, and a counterclaim seeking to hold the mother in contempt and for modification of custody. At the review hearing, the judge assigned to the case determined that the child had been interviewed by a child protection agency for which his wife served as a director, and that the interviewer was a personal friend. As a result, he recused from the case.

The father then filed a motion requesting a "72-hour hearing," relying upon former Code Sec. 12-15-153. The action was reassigned to another circuit judge, who denied the father's motion for a hearing, and set a final hearing

in the case approximately four months later. The father sought reconsideration of the denial of his motion for a hearing, which was denied, and the father filed a petition for a writ of mandamus with the ACCA.

In his petition, the father seeks an order compelling the trial court to hold a hearing on the mother's motion to suspend his visitation, arguing that the ex parte order cannot be maintained indefinitely without allowing him proper notice, a hearing, and an opportunity to be heard on the matter. He further argued that a hearing should be held within 72 hours after a parent receives notice of an ex parte order affecting his or her rights to the custody of his or her child. He relied on the case of Ex parte Couey, 110 So.3d, at 381, in which the ACCA stated that:

> "[a]lthough [Ala. Code 1975,] Sec. 12-15-308(a)[,] applies only in dependency actions, we believe it to be instructive in nonjuvenile custody cases as well because the serious nature of removing a child from the custody of a parent without giving that parent notice and an opportunity to be heard is the same whether in the context of a juvenile proceeding or a nonjuvenile proceeding. The requirement in dependency cases that a hearing be conducted within 72 hours of a child's removal from the custody of his or her parent supports a conclusion that, even when it is necessary to remove a child from his or her parent's custody without first giving the parent notice or an opportunity to be heard, that parent should be given notice or an opportunity to be heard as expeditiously as possible – certainly sooner than 10 weeks after a child has been removed from the parent's custody.
>
> "_____
>
> "We acknowledge that there may be circumstances in which it would be impossible for a circuit court to schedule a hearing within 72 hours of entering an ex parte custody order, although mere difficulty in scheduling such a hearing would not excuse a delay. We cannot overemphasize that a hearing should be conducted as close to within 72 hours as possible after an ex parte custody order has been entered."

The mother and the trial court answered the father's petition, asserting that the holding in Ex parte Couey was not applicable in the case. The mother asserted that Ex parte Couey was not applicable because the father was not the custodial parent, and only had visitation rights. The trial court stated in its response that since this was a domestic relations case, and not a juvenile case, the 72-hour-hearing requirement set out in the Alabama Juvenile Justice Act was not applicable; and further asserting that since Rule 65(b), ARCP, provided that a temporary restraining order in a domestic relations case did not expire automatically within 10 days, a trial court was permitted to set a hearing on the father's motion at a later date.

However, the ACCA did not agree with either the mother or the trial court, indicating that it had stated before:

> "[o]rdinarily a parent's right to custody (or visitation) of his minor child cannot be cut off except after due notice to the parent and an opportunity to be heard. To allow such would be to deprive the parent of his legal rights due process of law. Ex parte White, 245 Ala. [212,] 215, 16 So.2d [500,] 503 [1944]. However, due process does not require that in every case the determination of the parent's rights must precede any interference therein. Ex parte White, 245 Ala. 212, 16 So.2d 500. In situations where it appears that the actual health and physical well being of the child are in danger, the court has authority to make a temporary ruling concerning custody (or visitation) until a final determination can be made. Ex parte White, 245 Ala. 212, 16 So.2d 500; Thorne v.Thorne, 344 So.2d 165 (Ala.Civ.App. 1977)."

The ACCA further stated that "The public policy of this state is to 'encourag[e] interaction between noncustodial parents and their children," citing Pratt v. Pratt, 56 So.3d 638 (Ala.Civ.App. 2010); and further stating that "Although an award of sole custody to one parent favors that parent, we cannot agree that the noncustodial parent's right to visitation is somehow less deserving of due-process protections because it is not labeled 'custody.'"

In reaffirming that a trial court may enter ex parte orders regarding custody and visitation of a child, where it appears that the actual health and physical well-being of the child are in danger, the ACCA also stated that the right of a trial court to do so is "limited by the requirement that 'an adequate remedy be available by which the parent may afterward have his or her rights

presented to a proper tribunal,'" citing Ex parte White, 245 Ala. 212 (1944). The ACCA went on to further state that "One hallmark of an adequate remedy is its timely availability," citing Barry v. Barchi, 443 U.S. 55 (1979). The ACCA reaffirmed the due process requirement which applies even in a domestic relations case, stating as follows:

> "This court has recently held that a parent must 'be given notice and an opportunity to be heard as expeditiously as possible' after the entry of an ex parte custody order, even as soon as 72 hours after notice is given, when practicable. Ex parte Couey, 110 So.3d at 381 and n.2. This requirement applies even in a domestic-relations action, we explained 'because the serious nature of removing a child from the custody of a parent without giving that parent notice and an opportunity to be heard is the same whether in the context of a juvenile proceeding or a nonjuvenile proceeding." Id.

The ACCA further stated that "We expressly extend the due-process protections afforded a parent whose custodial rights are impacted by an ex parte order to parents whose visitation rights are impacted by such orders." As a result, the ACCA granted the father's petition for a writ of mandamus, and ordered the trial court to immediately set a hearing on the suspension of his visitation rights.

Judge Donaldson wrote a special concurring opinion, in which he indicated that he fully concurred in the holdings of the main opinion, with the exception of the requirement that the due process hearing be held within 72 hours of notice to the parent deprived of custody or visitation. Judge Donaldson stated his views on the burden of proof for such a hearing, stating as follows:

> "The party seeking to continue the suspension of visitation after the entry of an ex parte order should bear the initial burden of presenting sufficient facts from which the trial judge could find that the health and welfare of the child would be adversely affected if visitation is restored. The party opposed to the order should have an opportunity to challenge the assertions. But the trial judge remains vested with the authority to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence," Rule 611(a), Ala.R.Evid., and

> must balance the interests of the parents and the child based on the circumstances presented."

Judge Donaldson questioned whether the ACCA had the authority to impose a specific period of time within which a hearing must be held on the trial court, indicating that his view is that only the Alabama Supreme Court and/or the Alabama Legislature has that authority. Otherwise, Judge Donaldson stated that "what constitutes an expeditious opportunity to be heard is within the discretion of the trial judge to determine without reference to the '72-hour' expectation of Ex parte Couey." He stated that there are situations in which visitation is suspended which would not have an immediate impact upon the noncustodial parent, and as a result, there "might be less urgency for the hearing to occur."

17. (A) IF A JUDGMENT DOES NOT COMPLETELY ADJUDICATE ALL ISSUES PRESENTED IN CASE, IT IS NOT A FINAL JUDGMENT.

(B) THE APPEAL OF A NON-FINAL JUDGMENT WILL BE DISMISSED.

Rutan v. Rutan, 2014 WL 1717084, Alabama Court of Civil Appeals, May 2, 2014

In 2010, the husband sued the wife for a divorce. While the parties were separated and that case was pending, the wife gave birth to a child in 2012. The wife contended that the husband was not the father of that child. Following a trial, the trial court entered a judgment which dissolved the parties' marriage, awarded the wife primary physical custody of a child born to the parties in 2007, awarded the husband visitation with that child, ordered him to pay child support for that child, and divided the parties' property. However, the judgment ordered the parties to submit to DNA testing regarding the child born in 2012, and retained jurisdiction of the issue of paternity of that child, indicating that it would hold further hearings necessary once the DNA results were received. Following the entry of that judgment, the husband filed a notice of appeal to the ACCA .

The wife argued that the judgment from which the husband had appealed was not a final judgment, and the ACCA agreed. The ACCA found that the reservation by the trial court of issues regarding the child born in 2012 for future consideration rendered the judgment non-final. The ACCA discussed the issues which still remained to be resolved, including whether or not the husband, as the presumed legal father of the child, persisted in his status as the presumed legal father of the child, or whether or not he was contesting his paternity of the child. If the husband was persisting in his status as the child's presumed father, the mother, nor any other person, could contest his paternity of the child, and the trial court would then have to make rulings concerning the custody, visitation, and support of the child. If he were not persisting in his status as the presumed legal father of the child, the trial court would still have to determine whether or not he was the father of that child, and if determined to be the father of the child, the trial court would have to make rulings on the custody, visitation, and support of the child.

In finding that the judgment from which the husband had appealed did not "completely adjudicate all matters in controversy between the parties and

because the trial court did not make it a final judgment pursuant to Rule 54(b), Ala.R.Civ.P., it is not a final judgment." As a result the ACCA dismissed the husband's appeal.

18. (A) FINDING OF COMMON-LAW MARRIAGE IS REVERSED BECAUSE ACCA DID NOT FIND THE EVIDENCE "CLEAR AND CONVINCING."

(B) CIRCUIT COURT HAD AUTHORITY TO ENTER AN ORDER FOR CUSTODY AND SUPPORT OF CHILD, EVEN WHEN A DETERMINATION OF PATERNITY OF CHILD HAS NOT BEEN REQUESTED.

(C) CHILD SUPPORT FOR OTHER CHILDREN AND FOOD STAMPS ARE EXCLUDED FROM "GROSS WAGES" FOR CALCULATION OF CHILD SUPPORT UNDER RULE 32.

(D) ACCA COULD NOT DETERMINE HOW CHILD SUPPORT HAD BEEN CALCULATED. NO CS-42 WAS PREPARED; AND THERE WAS NO EXPRESS FINDING MADE BY THE TRIAL COURT THAT A DEVIATION FROM RULE 32 SHOULD BE MADE, OR THAT INCOME WAS IMPUTED TO PARTIES. AS A RESULT, ACCA MUST REVERSE THE CHILD SUPPORT AWARD.

Burnette v. Tighe, 2014 WL 1851981, Alabama Court of Civil Appeals, May 9, 2014.

The mother filed a complaint in 2010 against the father, seeking custody of a child and child support. She asserted in her complaint that the defendant admitted to be the father of the child, that the original birth certificate listed him as the father of the child, and that he had signed an affidavit of paternity at the hospital after the birth of the child. She sought pendente lite relief, which was resolved by an agreement which awarded the parties joint legal custody of the child, awarded the mother primary physical custody, and awarded the father visitation with the child.

Thereafter, the father filed a new case, seeking a divorce from the mother, who he alleged was married to him by common law, and also seeking joint custody of the child and an equitable division of marital property. That case was assigned a new and separate case number. Both parties asked that those cases be consolidated, which was granted by the trial court. Following a trial, the trial court entered a final judgment which divorced the parties on the ground of incompatibility of temperament, awarded the parties joint legal custody of the child, awarded the father primary physical custody of the child subject to the mother's rights of visitation, and ordered the mother to pay child support. The mother filed a postjudgment motion, asserting

that there was new evidence that she could not submit earlier due to her lack of financial ability to pay for an expert witness and subpoena fees. She also asserted that it would be to the child's detriment to remain in the custody of the father, and further argued that the judgment was in error in finding that the parties were married. The trial court denied the mother's postjudgment motion, and she timely filed her notice of appeal to the ACCA.

On appeal, the mother first argued that the trial court erred by entering a judgment divorcing the parties. She argued that, because there was no evidence of a marriage, the trial court lacked subject-matter jurisdiction to divorce the parties. The ACCA recited the standard of review of a trial court's finding that a common-law marriage existed, stating:

> "'"Courts of this state closely scrutinize claims of common law marriage and require clear and convincing proof thereof." Baker v. Townsend, 484 So.2d 1097, 1098 (Ala.Civ.App. 1986), citing Walton v. Walton, 409 So.2d 858 (Ala.Civ.App 1982). A trial judge's findings of facts based on ore tenus evidence are presumed correct, and a judgment based on those findings will not be reversed unless they are found to be plainly and palpably wrong. Copeland v. Richardson, 551 So.2d 353, 354 (Ala. 1989). The trial court's judgment must be viewed in light of all the evidence and all logical inferences therefrom, and it "will be affirmed if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment." Adams v. Boan, 559 So.2d 1084, 1086 (Ala. 1990) (citation omitted).'
>
> "[Lofton v. Estate of Weaver,]611 So.2d [335] at 336 [(Ala. 1992)]. 'Clear and convincing evidence' is defined as "'[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to thecorrectness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.'"

In finding that the trial court had not made any specific finding of fact that the parties were common-law married, but finding that the trial court had proceeded to divorce the parties, the ACCA found that the trial court had made an implicit finding that the parties had entered into a common-law marriage. The ACCA then recited the requirements for recognition of a common-law marriage in Alabama, and reviewed the evidence presented at trial. The ACCA concluded that the trial court did not have clear and convincing evidence demonstrating that the parties had "a mutual agreement to enter into the marriage relationship or that there had been public recognition of their relationship as a marriage," and that "the evidence presented does not rise to the level required for finding that a common-law marriage existed." As a result, the ACCA reversed the trial court's judgment in implicitly determining that the parties were married by common law, and purporting to divorce the parties.

The mother next argued that if the trial court did not have jurisdiction to enter the divorce judgment, it also did not have jurisdiction to enter a custody order. The father argued that the trial court still had the authority to make a determination on the issue of the child's custody, notwithstanding whether the parties had been married. The ACCA noted that neither of the parties had filed a request for an adjudication of paternity before the trial court, and that the mother had admitted the father's paternity of the child in her pleadings. As a result, the ACCA determined that the custody action initially filed by the mother was "a custody dispute between the parties," over which the circuit court had jurisdiction to determine the matters presented.

The ACCA also based its decision that the circuit court had subject-matter jurisdiction over the custody dispute, citing Ex parte Lipscomb, 660 So.2d 986 (Ala. 1994), in which the Alabama Supreme Court stated as follows:

> "Ordinarily, the circuit court in a divorce action may award custody 'of the children of the marriage to either father or mother, as may seem right and proper,' [Ala. Code 1975,] Sec. 30-3-1; however, because the well-being of minor children is of paramount interest to the state, the circuit court also has jurisdiction to decide custody matters where nonparents are involved. Ex parte Handley, 460 So.2d 167 (Ala. 1984). The circuit court's jurisdiction to do so is derived from the principles of equity;

> where a child is physically present within the jurisdiction of a circuit court in this state, the Court has inherent authority to act to protect the welfare and best interests of the child. Handley. A party need not specifically invoke the circuit court's inherent jurisdiction; rather, any pleading showing on its face that the welfare of a child requires an order with respect to its custody and support is sufficient to invoke the jurisdiction of the circuit court to settle the matter. Handley. Once the circuit court's jurisdiction is thus invoked, any matter affecting a child may become the subject of its adjudication. Handley."

The ACCA concluded that "The language in Ex parte Lipscomb makes it clear that, in the present case, by virtue of both the custody action and the divorce action, principles of equity invoked the trial court's jurisdiction to make a determination of the child's custody."

The mother last argued on appeal that the trial court erred in awarding child support to the father. She first argued that the trial court did not have jurisdiction to enter an award of child support because the trial court had not adjudicated paternity. However, the ACCA noted that it had determined that the trial court had subject-matter jurisdiction to enter a custody order, and therefore it also had jurisdiction to address matters of child support, which are incidental to that award.

The mother argued in the alternative that the trial court's judgment ordering her to pay child support was not in compliance with Rule 32, as stated by the trial judge. The mother argued specifically that there was no evidence presented indicating that she was voluntarily unemployed, or that she was capable of being employed, and that food stamps and child support for her other children are not income for the calculation of child support pursuant to Rule 32. The ACCA did state that Rule 32(B)(2)(b), ARJA, excludes from the definition of "gross income" both the child support received for other children and food stamps The ACCA also noted that the only evidence in the record regarding the parties' incomes were an Affidavit of Substantial Hardship; that the record did not include a CS-42 form prepared by the trial court; that the judgment did not include a written finding that the trial court intended to deviate from the Rule 32 child support amount, or that the trial court was imputing income to either parent. As a result, the ACCA concluded that the

trial support award did not comply with Rule 32, and that because it could not determine from the record the basis for the amount of child support awarded by the trial court, it "must reverse that portion of the judgment setting the mother's child-support obligation and remand the cause to the trial court for the entry of a judgment that complies with Rule 32."

Presiding Judge Thompson wrote an opinion, concurring in part and concurring in the result in part, in which he stated that "I disagree entirely with the main opinion's reasoning with regard to its resolution of the trial court's subject-matter jurisdiction to consider the custody and child-support claims, and, therefore, I concur in the result as to that issue."

19. (A) A PROBATE COURT ONLY HAS JURISDICTON TO CHANGE THE NAME OF A MINOR CHILD AT THE TIME OF FILING OF A DECLARATION OF LEGITIMATION, OR SUBSEQUENT TO A DETERMINATION OF LEGITIMATION.

    (B) A CIRCUIT COURT HAS POWER TO CHANGE A MINOR CHILD'S NAME IN A CUSTODY DISPUTE.

    (C) SUBJECT-MATTER JURISDICTION CANNOT BE WAIVED BY THE PARTIES.

    (D) AN ORDER ENTERED BY A COURT WITHOUT SUBJECT-MATTER JURISDICTION IS VOID.

Russell v. Fuqua, 2014 WL 1874651, Supreme Court of Alabama, May 9, 2014

The Father filed a petition in the Probate Court asking that court to allow him to change the legal name of his daughter, so that the child's last name would be hyphenated with his name followed by the mother's last name. The mother opposed the petition, and appealed to the Supreme Court of Alabama from the probate court's order granting the relief requested by the father. The parties were married, but did not reside in the same home when the child was born. It is undisputed, however, that the father is the biological father of the child; that the mother provided the information for the child's birth certificate, and refused to provide the name of the child's father on the birth certificate, nor did she include the father's surname as part of the child's name. After the child's birth, the father filed a complaint in the circuit court seeking a divorce. The circuit court entered a judgment divorcing the parties, awarding the mother custody of the child, awarded the father visitation, and required him to pay child support. The divorce judgment also required the mother to add the father's name to the child's birth certificate as being the father of the child, and retained jurisdiction for the purpose of making such other and future orders for the support, custody and maintenance of the minor child as may be necessary, or as changed conditions require.

The mother prepared the documents necessary to add the father's name to the birth certificate, but he refused to sign the documents because he believes that he was agreeing that the child's legal name would remain the

name of the mother if he signed the documents. Thereafter, he filed his petition in the probate court to change the child's name. After an ore tenus hearing, the probate judge entered an order which granted that relief, concluding that the best interests of the child were served by the child's surname being "Russell-Fuqua," as requested by the father. The mother appealed to the Supreme Court of Alabama.

The Supreme Court of Alabama first addressed the issue of subject-matter jurisdiction, even though the parties had not raised that issue, stating that "such jurisdiction cannot be waived by the parties and may be raised by this court ex mero motu," citing Ex parte Smith, 438 So.2d 766 (Ala. 1983). The Supreme Court indicated that it was reviewing the issue of subject-matter jurisdiction de novo, citing Solomon v. Liberty Nat'l Life Ins. Co., 953 So.2d 1211 (Ala. 2006). In reviewing the jurisdiction of the probate court, the Supreme Court of Alabama stated as follows:

> "The jurisdiction of our probate courts 'is limited to the matters submitted to them by statute.'" AltaPointe Health Sys., Inc. v. Davis., 90 So.3d 139, 154 (Ala. 2012) (quoting Wallace v. State, 507 So.2d 466, 468 (Ala. 1987)). As the probate court acknowledges in its order, the legislature has given the probate courts jurisdiction over actions in which an adult requests a name change. See Ala. Code 1975, Sec. 12-13-1(b)(10). An adult name change is not at issue here."

The Supreme Court also noted that the probate court had the authority to change the name of a child as part of a legitimation proceeding, pursuant to Sec. 12-13-1(b)(10), Code of Alabama (1975). However, the Supreme Court noted that this was not a case involving legitimation of the child, and as a result, that Code section did not apply. The Supreme Court did state that "Although Sec. 26-11-3(a) is an affirmative grant of subject-matter jurisdiction to the probate court when the circumstances described in that Code section are met, that section does nothing to deprive the circuit court of its general equity jurisdiction and, specifically, its jurisdiction over matters within the realm of custody disputes between two parents."

The Supreme Court cited part of a dissenting opinion written by Judge Crawley in Clark v. Clark, 682 So.2d 1051, (Ala.Civ.App. 1996), as follows:

> ". . . In light of the circuit court's general jurisdiction, described in Ala. Code 1975, Sec. 12-11-30, as well as its history as a court of equity jurisdiction, as provided for in Ala. Code 1975, Sec. 12-11-31, and its child custody jurisdiction under Ala. Code 1975, Sec. 30-3-1, I believe that in this case, the circuit court did have jurisdiction to decide upon the name change of the minor child. When the parents in this case were divorced in 1985, the circuit court attained jurisdiction over the minor child. When the father petitioned the circuit court to change the child's name back to Clark, she was ten, and the circuit court still had jurisdiction over her. The circuit court's jurisdiction over this minor child will continue until she reaches the age of majority. Because the child became a ward of the circuit court, the circuit court has the inherent power to protect her welfare. By acting to settle the dispute between the parents about their child's name, the circuit court simply acted with the appropriate goal of promoting the child's best interest. Since the change of a child's name is a matter affecting the child and within the realm of matters in respect to the custody of the child, that subject is encompassed in the circuit court's equity jurisdiction and within its jurisdiction under Sec. 30-3-11, [Ala. Code 1975]."

In a footnote to its opinion, the Supreme Court purports to overturn the opinion in Clark, supra, stating as follows:

> "The lead opinion in Clark, concurred in by only one judge other than its author, wrongly construed Sec. 26-11-3(a) as providing that the probate court has jurisdiction to the exclusion of the circuit court over petitions to change the names of minors. 682 So.2d at 1052. Such a reading of Sec. 26-11-3(a) would create a serious problem because Sec. 26-11-3 provides the probate court with authority only in the context of legitimation proceedings. Thus, a legitimate father would have no place to go to seek a change of name for his child."

As a result, the Supreme Court of Alabama held that the Probate Court lacked jurisdiction in the case, and as a result, its judgment was void,

citing Johnson v. Hetzel, 100 So.3d 1056 (Ala. 2012); and since a void judgment will not support an appeal, the Supreme Court vacated the judgment of the probate court and dismissed the appeal.

20. (A) A TRIAL COURT MAY RESTRICT A PARENT'S VISITATION AS MAY BE NECESSARY TO PROTECT A CHILD FROM CONDUCT, CONDITIONS, OR CIRCUMSTANCES SURROUNDING THEIR NONCUSTODIAL PARENT THAT ENDANGER THE CHILD'S HEALTH, SAFETY, OR WELL-BEING.

    (B) A DENIAL OF VISITATION BY THE TRIAL COURT FOR A NON-CUSTODIAL PARENT IN THIS CASE WAS AFFIRMED.

    (C) IN A CASE IN WHICH AN IN CAMERA INTERVIEW WITH A CHILD IS CONDUCTED BY THE TRIAL COURT, AND IS NOT TRANSCRIBED, THE ACCA WILL "PRESUME" ON APPEAL THAT THE EVIDENCE PRESENTED IN THAT IN CAMERA INTERVIEW SUPPORTS THE TRIAL COURT'S JUDGMENT.

M.B. v. L.B., 2014 WL 1978847, Alabama Court of Civil Appeals, May 16, 2014

The mother filed a complaint for divorce, in which she sought custody of the parties' three minor children, child support, a property division, and an alimony award. The father filed an answer and counterclaim, seeking joint legal custody of the two younger children, and primary physical custody of the parties' oldest child. He moved to stay the divorce action until the conclusion of a pending criminal investigation against him, and the circuit court granted that motion. Thereafter, the divorce case was transferred to the circuit court of another county, in which both of the parties and the children lived. That trial court entered an order which suspended the father's visitation with the two younger children, and later entered protection from abuse orders which prevented the father from attending the two younger children's sporting events, or otherwise contacting those children. Following an ore tenus hearing, the trial court entered a judgment which divorced the parties, awarded the mother sole custody of the two younger children, and denied the father any visitation with those two children. The trial court also ordered the father to pay college educational expenses for the parties' two younger children. The father filed a postjudgment motion, and the trial court entered an order which modified the divorce judgment in a manner which was not relevant to the issues on appeal. The father then filed a timely appeal.

The ACCA first noted that that part of the divorce judgment which ordered the father to pay college educational expenses for the two younger children

should be set aside, pursuant to Ex parte Christopher, 2013 WL 5506613 [Ms. 1120387, Oct. 4, 2013] ____ So.3d ____ (Ala. 2013). Both parties acknowledged that the Supreme Court of Alabama had made that decision applicable to cases then pending, and agreed that that part of the divorce judgment should be reversed.

The other issue raised by the father on appeal concerned the trial court's denial of his request for visitation with the parties' two younger children. The ACCA recited some of the evidence presented in the record, which included allegations of pornography depicting children on the parties' home computer; allegations that the parties' oldest child had engaged in a homosexual relationship with a foreign exchange student who resided in the parties' home; allegations that the parties' middle child had been molested and raped by the parties' oldest child; and the oldest child's eventual plea of guilty to a sexual abuse charge in both the original county and the county to which the divorce case was transferred, related to his abuse of the middle child. There was also an allegation that was made by the youngest child that the father had touched her inappropriately.

DHR had investigated that child's allegations and had determined the allegations were "not indicated." However, an expert who conducted a forensic evaluation of the child testified, as did the child's counselor, who recommended that the child not be required to visit with the father. A psychologist issued a report to the trial court, after evaluating the parties and the two younger children pursuant to an order of the trial court, which stated that neither child wanted to visit with the father, and that the youngest child had continued to maintain her allegation that the father had touched her inappropriately, even in spite of the DHR determination. The psychologist reported that he was concerned that the father failed to recognize that the youngest child was highly anxious, and further noted that the father "seemed more concerned about his own needs and rights to see her, but not understanding why she does not want to see him." The psychologist concluded that "he saw no reason why the younger children should be required to visit the father."

The trial court conducted an in camera interview with each of the three children; however, those interviews were not transcribed in the record. Both of the parties and the children's guardian ad litem had agreed to the in camera interviews of the children. The ACCA stated that "A trial court has

discretion in determining visitation, and this court will not reverse a visitation award "unless it is so contrary to the evidence presented as to amount to plain abuse of that discretion and is therefore contrary to the best interests of the child," citing Evans v. Evans, 668 So.2d 789 (Ala.Civ.App. 1995); and further stated that "In making that determination, the courts must consider the specific facts and circumstances of each case," citing DuBois v. Dubois, 714 So.2d 308 (Ala.Civ.App. 1998); Denney v. Forbus, 656 So.2d 1205 (Ala.Civ.App. 1995); and Sullivan v. Sullivan, 631 So.2d at 1029.

The father acknowledged that a noncustodial parent's visitation rights "may be restricted in order to protect children from conduct, conditions, or circumstances surrounding their noncustodial parent that endanger the children's health, safety, or well-being," citing Pratt v. Pratt, 56 So.3d 638 (Ala.Civ.App. 2010); but contended that the trial court erred in failing to award him visitation that could be restricted to protect the children's best interests, in that the trial court could have fashioned an award of supervised visitation with the children. However, the ACCA affirmed the trial court's denial of any visitation rights for the father, stating that "We have carefully reviewed the evidence in the record on appeal, and we cannot say that that evidence does not support the trial court's denial of visitation." The ACCA further noted that the trial court had interviewed the children in camera, and that those interviews were not transcribed, stating that, as a result, "this court must presume that the evidence the trial court received from the children supports its judgment denying the father visitation," citing Hughes v. Hughes, 685 So.2d 755 (Ala.Civ.App. 1996).

As a result, the ACCA reversed the trial court's award of college expenses to be paid by the father, but otherwise affirmed the trial court's rulings.

21. (A) THE EXEMPTION FROM THE APPLICATION OF THE PROVISIONS OF THE ALABAMA PARENT-CHILD RELATIONSHIP PROTECTION ACT FOR ACTIVE SERVICE MILITARY PERSONS WHO ARE BEING TRANSFERRED PURSUANT TO "NON-VOLUNTARY" ORDERS APPLIES EVEN IF THAT PARENT ENLIST IN THE MILITARY AFTER THE ENTRY OF THE CHILD CUSTODY ORDER.

    (B) A DEVIATION FROM RULE 32, ARJA, FOR EXTRAORDINARY TRANSPORATION EXPENSES INCURRED IN THE EXERCISE OF VISITATION IS LIMITED TO A SITUATION WHERE THOSE COSTS ARE BORNE "SUBSTANTIALLY BY ONE PARENT."

Irions v. Holt, 2014 WL 2535274, Alabama Court of Civil Appeals, June 6, 2014

The parties were divorced in 2006, and had two children. The divorce judgment awarded the parties joint legal custody, awarded the father sole physical custody, awarded the mother standard visitation, and ordered her to pay child support. That judgment was modified in 2012 to award the mother additional visitation, and to increase the amount of her child support obligation. The present action between the parties was filed in 2012, when the mother filed a petition for contempt and for modification of the divorce judgment, alleging that the father had allowed the children's health insurance coverage to lapse, and requested that she be allowed to carry the health insurance on the children, and that her monthly child support be recalculated accordingly. She then filed an amended petition in which she alleged that she had been notified by the father that he had enlisted in the active duty military service, and was soon to be relocated to the state of New York, and was taking the children with him. The mother asked the trial court to grant her temporary custody of the children pending a hearing, and that she be awarded sole physical custody of the children at final hearing. The father filed an answer and a counterclaim, asserting that the children's health insurance had lapsed when he was laid off, but was reinstated when he became employed by the United States Army. He also requested an upward modification of child support.

A temporary hearing was held, following which the trial court entered an order that the custody and visitation provisions then in effect would remain the same, and that the children were not to be permanently relocated,

pending a final hearing. Following that final hearing, the trial court entered a final judgment which provided that the father would retain sole physical custody of the children, and that he was permitted to relocate them to New York. The judgment included a visitation schedule for the mother, and allocated the transportation costs between the parties. The judgment also ordered that the mother's child support obligation was terminated, a deviation from Rule 32, based upon the increased visitation expense for the mother.

The mother filed a postjudgment motion, as did the father. The trial court entered an order granting the mother's postjudgment motion which required the father to notify her within 24 hours of learning that he would be deployed. The father's postjudgment motion, which requested that the trial court amend the visitation schedule and order the mother to pay child support, was denied. The mother filed a notice of appeal, and the father filed a cross-appeal.

In her appeal, the mother raised two issues. The first issue involved whether the Alabama Parent-Child Relationship Protection Act, Sec. 30-3-160 et seq., Code of Alabama (1975), is applicable to a custodial parent who joins the military after a child custody order is entered. The ACCA recited the exemption for active service military parents found in Sec. 30-3-162(a) of the Act, which provides as follows:

> "Except as provided in subsection (c) of Section 30-3-165, this article shall not apply to a person who is on active military service in the Armed Forces of the United States of America and is being transferred or relocated pursuant to a non-voluntary order from the government."

The mother argued that the father's voluntary entry into the active military service while already under a child custody order could not serve to defeat the rebuttable presumption against relocation found in Sec. 30-3-169.4 of the Act. The testimony presented at trial was that the father had enlisted in the United States Marine Corps Reserves while the parties were still married, and that he had been deployed shortly before the divorce action was initially filed. He left the Marine Reserves in 2006, and thereafter enlisted in the Alabama National Guard, serving as a recruiter. However, he was informed that his recruiter position would likely be eliminated due to a lack of funding, and after unsuccessfully applying for another recruiter position within

Alabama, he began to explore enlisting in the United States Army. He did enlist in active duty with the United States Army, and was given orders that he would be stationed at Ft. Drum in New York. The ACCA stated that "The mother is correct that there is no caselaw or statute in support of her argument. The mother is also correct that courts are required to give words in a statute their 'plain meaning.' "

The ACCA reviewed the language of Sec. 30-3-162, and found that "There is nothing included in the language of Sec. 30-3-162 to indicate that the legislature intended to place a timing requirement on parents who enlist in the armed forces for active duty. Had the legislature intended to include such a requirement, it most certainly could have. We find no reason to conclude, as urged by the mother, that the timing of the father's enlistment in the Army voids the exemption to the Act that is provided in Sec. 30-3-162. Therefore, we hold that the mother's argument is without merit."

The mother next argued that the trial court erred in denying her petition to award her sole physical custody of the children. She admitted that she had to meet the high burden of proof set forth in Ex parte McLendon, 455 So.2d 863 (Ala. 1984). In reviewing the evidence presented at trial, the ACCA concluded that the trial court had sufficient evidence on which to base its decision to not modify the prior judgment by awarding custody to the mother, and affirmed the judgment on that issue as well.

In his cross-appeal, the father argued that the trial court failed to comply with the provisions of Rule 32, ARJA, based upon what the trial court asserted were extraordinary costs of transportation for the mother in the visitation with the children. The ACCA cited Rule 32(A)(1), which provides, in pertinent part, as follows:

> "(1) Reasons for Deviating from the Guidelines. reasons for deviating from the guidelines may include, but are not limited to, the following:
>
> " . . . .
>
> "(b) Extraordinary costs of transportation for purposes of visitation borne substantially by one parent."

In reviewing the trial court's judgment, which included an award to the mother of four long-term visitation periods, including Christmas and summer break, and ordering the father to pay all transportation costs associated with those visits; and that the father was also ordered to pay one-half of the costs of transportation for the children for the short-term visits awarded to the mother, not to exceed $200 per visit, the ACCA found that the trial court had erred in deviating from the provisions of Rule 32 on that basis. The ACCA stated that "Although we recognize that the father voluntarily joined the active-duty military with the knowledge that he would likely be transferred, it does not appear from our reading of the trial court's judgment that the mother was required to 'substantially [bear]' the cost of visitation-related expenses." As a result, that provision of the trial court's judgment was reversed, and the case was remanded to the trial court for entry of a revised judgment that included an appropriate amount of child support for the benefit of the parties' children.