Huntsville Bar Association, Inc.

Case Law Update

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I. CHILD CUSTODY

FAMILY LAW: Child Custody--Modification. The parties were divorced in November 2015. The mother was awarded sole physical custody of the parties' two sons, who were then ages 2 and 16 months. Thereafter, the father filed two petitions seeking to enforce his visitation, asserting that the mother was unwilling to adjust his visitation to accommodate his changing work schedule. In September 2020, the court entered an order based on the agreement of the parties which awarded the father visitation on an alternating schedule of Wednesday evening until Friday morning of one week and Thursday evening until Monday morning the following week. The September 2020 judgment required the parties to work together to preserve the father's visitation to the extent possible if his work schedule changed. In April 2021, the father filed a petition for contempt and modification alleging that the mother had changed the children's school and as a result, their grades were "greatly affected." The mother filed a counterclaim alleging that the father had spent less time with the children than he was afforded pursuant to the September 2020 judgment and that, as a result, his child-support obligation should be increased. She also sought to hold the father in contempt for failing to pay child support and failing to provide health insurance. After a trial at which the mother appeared pro se, the trial court entered an order awarding the father sole physical custody of the children, ordering the mother to pay $675 per month in child support and denying all other claims. After the mother retained counsel and filed a postjudgment motion, the trial court amended its order and awarded the mother a judgment for child support arrearage in the amount of $2,400. The mother appealed. **Reversed.** Pursuant to the standard set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984), the father was required to show that a material change in circumstances occurred since the last custody judgment was entered, that the children's best interests would be materially promoted by a change of custody, and that the benefits of a change in custody would more than offset the inherently disruptive effect resulting from that change. In this case, the father testified that he lives in Trenton, Georgia. He works third shift but his schedule changes occasionally and in those instances, the mother refused to adjust his visitation. The parties had a meeting spot to exchange the children but the father claimed that the mother was habitually late. The mother changed the children's school attendant to her purchase of a house. Thereafter, the parties agreed that the children would attend school based on the father's residence and they did so for a few weeks. However, the mother disenrolled them and put them into the school that they had originally attended after she sold her house. The children and the mother were living approximately 20 minutes away from the father. "As to the issues of changing residences and schools, we note that the father presented no evidence regarding the children's grades, socialization, or home life that would support a

conclusion that the children had been negatively impacted by those changes, that such changes were likely to continue, or that, in light of those changes, the children's best interests would by materially promoted by a change in custody to him." The court further pointed to established precedent which states that visitation disputes alone are not a basis for a change of custody. The judgment of the trial court is due to be reversed. ***Robinson v. Robinson,*** 31 ALW (2210291); 09/30/2022; DeKalb Cty.; Edwards: Thompson, Moore, Hanson and Fridy concur; 17 pages. [ATTY: Appt: William Colley, Ft. Payne; Apee: Chad Hopper, Centre]

CUSTODY MODIFICATION: The parties divorced in March 2021. The parties' agreement awarded sole physical custody of the parties' 8-year old daughter to the mother and awarded the mother the marital residence. In August 2021, the trial court permitted the mother to move, over the father's objection, to Georgia from Montgomery to live with her new husband. The same month, the mother filed a petition for rule nisi claiming the father was in contempt for failing to sign a quit claim deed to her for his interest in the marital residence and that she had lost money paying the mortgage while unable to sell it. The father answered and sought to have the divorce judgment set aside because the mother acted fraudulently and entered into the agreement in bad faith. The father also filed a petition to modify custody and a contempt claim against the mother for her failure to pay a loan that was used to pay off her credit card debt. After an evidentiary hearing, the trial court denied the father's motion to set aside the divorce judgment. The father subsequently signed the quit claim deed. After a trial on the merits of the parties' remaining claims, the trial court entered an order modifying the divorce judgment on May 20, 2022. It awarded joint legal and physical custody to the parties, with the mother having physical custody of the child during the school year and the father having physical custody during the entire summer, fall, and spring breaks. Each parent was awarded visitation during the other's custodial time. The judgment vacated the previous child support order, and ordered that no child support be paid. The mother was found in contempt and also ordered to reimburse $8,049.53 to the father for payments he made on the PNC loan, and ordered her to pay the husband attorney fees in the amount of $6,120.The mother appealed. **Affirmed in part, reversed in part, remanded with instructions.** 1) The mother first argues that the trial court erred in failing to order the father to reimburse her for mortgage payments made before he signed the quit claim deed. The appellate court noted that she did not request such reimbursement in her petition, and that the father signed the quit claim deed prior to a trial on the merits of the mother's petitioner, thereby possibly purging himself of any contempt. Because of these facts, and the challenges to the divorce judgment's validity, the appellate court found that the trial court did not abuse its discretion in finding that sanctions against the father were not warranted. 2) The mother argues that the trial court erred by finding her in contempt for failure to make the PNC loan payments because the loan was in the father's name and the divorce judgment ordered the parties to pay their own debts. The divorce judgment stated that each party was to pay debts "that they have personally incurred." There was significant evidence to suggest that the loan was taken to pay off credit card expenses incurred solely by the mother. Finding that the mother was therefore responsible for paying the PNC debt was a reasonable interpretation by the trial court. 3) The mother argues the trial court abused its discretion in modifying custody of the minor daughter. The trial court found that the mother was "poisoning the relationship" between the daughter and father, and that the father's relationship with the child was interfered with. These issues, coupled with the

mother's move to Georgia with the child, were not in the child's best interests. The appellate court upheld the trial court's modification of custody, noting that "the benefit of allowing the child more time with her father would more than offset any disruptive effect of the change" particularly considering that "the modification would not result in any change to the child's residential placement during the school year". 4) Lastly, the mother argues the trial court erred by terminating the father's child support obligation. The mother argued that the court failed to make the findings required by Rule 32, Ala. R. Jud. Admin. to deviate from the child support guidelines. The appellate court agreed and reversed the judgment, remanding it to the trial court with instructions to comply with Rule 32, Ala. R. Jud. Admin. ***Crenshaw v. Crenshaw,*** 32 ALW (CL-2022-0916); Montgomery Cty.; 06/09/2023; Friday; Thompson, Edwards, Moore, and Hanson concur. [ATTY: Appt: Jameria Moore, Birmingham; Apee: Tamika Miller, Montgomery].

FAMILY LAW: Paternity-- Child Custody--Visitation. CIVIL PROCEDURE: Jurisdiction--Transfer. According to the father, the mother was living in Parrish, Alabama with her mother when he met her. She then moved into his residence in Haleyville, where, at the time of trial, he had been living for 4 years. The mother and father dated for approximately 9 months. The mother was pregnant and returned to live with her mother in Parrish. The mother disputed this evidence, testifying that she had only lived with the father for 1 month. For the first 3 months following the child's birth, the mother allowed the father to visit with the child at his residence; thereafter, she insisted that he only visit with the child at her mother's residence. At one point, the father was denied all visitation for 4 months. He said it was because of an argument between the parties; the mother testified that it was of his own choosing. Eventually, the father was allowed to have visitation for full weekends. The father claimed that any additional requests for visitation were denied. The father did not pay child support. He was earning $13 per house working 48 hours per week. The mother moved to Cleveland, Alabama to live with her fiancé. The mother had only been employed for a week at her job with a home-health company earning $10.50 per hour. The child attends day care at the cost of $125 per week. The father filed a paternity petition on August 31, 2020 in the Winston Juvenile Court. Upon motion of the mother, the case was transferred to the Walker Juvenile Court. Thereafter, the Walker Juvenile Court entered an order concluding that the case was actually a custody dispute and it transferred the case to the Walker Circuit Court ("the trial court"). After a trial, the trial court entered an order awarding the father the sole legal and sole physical custody of the child. The mother was awarded "reasonable and liberal parenting time" as the parties can agree but at a minimum, the mother had the right to visit with the child on the first weekend of every month, during spring and fall breaks from school in odd-numbered years, alternating weeks in the summer and during certain specified holidays. After her postjudgment motion was denied, the mother appealed. **Affirmed in part; reversed in part.** (1) The mother argued that the trial court lacked jurisdiction to consider the father's paternity petition. Pursuant to the Alabama Juvenile Justice Act ("the Act"), §12-15-101 et seq., Ala. Code 1975, a juvenile court has original jurisdiction over "[p]roceedings to establish parentage of a child" §12-15-115(a)(6). Therefore, the Winston Juvenile Court had jurisdiction to consider the father's paternity action. Venue of paternity actions is governed by §26-17-605, Ala. Code 1975, a part of the Alabama Uniform Parentage Act ("the AUPA"). It provides, in pertinent party, that a paternity action may be filed in the county where the child resides or the county where the defendant resides. Because the mother and the child resided in Walker County, the case was properly transferred to the Walker Juvenile Court. Although juvenile courts have original jurisdiction over paternity actions pursuant to the Act, they do not have exclusive jurisdiction. Rather, §26-17-104, Ala. Code 1975 specifically states that "[a] circuit or district court of this state..shall have original jurisdiction to adjudicate

parentage pursuant to [the AUPA} and may determine issues of custody, support and visitation incidental to a determination of parentage." Although the Walker Juvenile Court had original jurisdiction, the mother did not object to the transfer of the case to the trial court. Moreover, the trial court had jurisdiction to consider the issues raised by the father. Accordingly, the mother's argument with regard to that transfer has been waived. (2) In its custody order, the trial court noted that the mother "has a pattern of marrying or dating individuals, getting pregnant, and having a child...[The mother] does not see a problem moving in which different men based on her happiness." The mother argued that the trial court's findings regarding her romantic relationships warrant reversal because she claims that there was no evidence indicating that her conduct had any detrimental effect on the child. "We note, however, that contrary to the mother's argument, the trial court's judgment is not based on any alleged misconduct by the mother but, rather, on the mother's lack of stability, which is among those factors a trial court may consider in making an initial award of custody." The mother also pointed to the father's lack of parenting experience and his failure to pay child support. However, the father had taken a parenting class and his time with the child had been expanded. Moreover, while he did not pay child support, he testified that he provided a number of items for the child. The court further pointed out that the father had held the same employment and lived in the same residence for 4 years prior to trial "thereby demonstrating that [he] could offer the child stability." (2) The mother next challenged the trial court's visitation award, arguing that it will be impossible to stay bonded with the child based on the time afforded to her. The trial court specifically encouraged the parties to agree to liberal visitation for the mother but then "entered a specific minimum schedule that does not guarantee the liberal visitation intended by the trial court." In addition, the references to school breaks in the schedule "show that the schedule was not designed for a two-year-old child with no educational responsibilities..." This portion of the trial court's judgment is due to be reversed. ***Gurganus v. Clay,*** 31 ALW (2210466); 09/16/2022; Walker Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 25 pages. [ATTY: Appt: Ralph Strawn, Gadsden; Apee: R. Cole Christopher, Haleyville]

FAMILY LAW: Dependency—Paternity—Modification. In September 2014, the father filed a petition in the juvenile court alleging that the parties' child was dependent and requesting an award of custody to him ("the .01 action"). On November 20, 2014, the juvenile court entered a judgment adjudicating the father's paternity and awarding the parties the joint legal and physical custody of the child. On August 29, 2015, the father filed a verified emergency petition seeking pendente lite custody. A handwritten case number bearing the number of the .01 action appears on the petition but the electronic filing stamp lists a new case number with a "CS" designation ("the CS action"). On September 10, 2015, the juvenile court entered an order granting pendente lite custody to the mother and awarding the father visitation. Thereafter, the juvenile court entered a judgment in the .01 action adopting an agreement of the parties wherein the mother was awarded "primary physical custody" of the child and the parties were awarded joint legal custody. Notwithstanding these designations, the parties were awarded nearly equal time with the child. In April 2018, the mother filed a petition seeking sole legal and sole physical custody of the child ("the .02 action). She also requested child support. In September 2018, the juvenile court entered an order in the .02 action maintaining its award of sole physical custody to the mother, modifying the parenting plan and declining to award child support because "both parents are custodial parents and neither parent is a non-custodial parent." In June 2022, the father filed a petition for rule nisi, alleging that the mother was not permitting him to exercise his custodial periods ("the .03 action). The mother filed a motion to dismiss the .03 action, asserting that the father had failed to sufficiently invoke the juvenile court's dependency jurisdiction in the .01 action and that, as a result, the juvenile court lacked subject-matter jurisdiction over the .01 action and all previous actions between the parties. The mother also filed a motion to set aside the judgment in the .01 actionpursuant to Rule 60(b)(4), Ala. R. Civ. P. The juvenile court denied the motion to dismiss in the .03 action. The mother filed a petition for the writ of mandamus. **Petition denied.** The mother argued that because the juvenile court never adjudicated the child to be dependent in the .01 action, it lacked jurisdiction to adjudicate the child's custody in the .01 action and all subsequent actions. However, even though the juvenile court made no finding of dependency in the final order entered in the .01 action, it did adjudicate the father's paternity. Section 12-15-115(a)(6), Ala. Code 1975 states that a juvenile court shall exercise original jurisdiction over all paternity actions. Moreover, § 12-15-115(a)(7), Ala. Code 1975 allows a juvenile court to exercise jurisdiction over any proceedings to establish, modify or enforce support , visitation or custody when it has previously established paternity. "Because the father's petition in the .03 action seeks to enforce the juvenile court's judgments regarding custody and visitation related to the child, whose parentage the juvenile court had previously established, the juvenile court has subject-matter jurisdiction over the father's petition in the .03 action..." The petition for the writ of mandamus is due to be denied. ***Ex parte F.G. (P.C. v. F.G.)***, 32

ALW (CL-2023-0009); 03/17/2023; Jefferson Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 12 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Modification. CIVIL PROCEDURE: Juvenile Court-Jurisdiction. In 2013, the Child Support Division of the Montgomery Juvenile Court ("the juvenile court") entered a judgment incorporating an agreement of the parties and requiring the father to pay child support. In September 2018, the father filed a petition in circuit court to obtain sole physical custody of the parties' child based on the mother's alleged sudden relocation of the child. The father was awarded pendente lite custody of the child but thereafter, the mother filed a motion requesting that the pendente lite order be vacated. She explained that she had previously been granted custody by the juvenile court and contended that the juvenile court retained exclusive continuing jurisdiction to modify that award. The circuit court denied the mother's motion to dismiss the case and on June 3, 2021, the circuit court entered a final judgment in which it purported to award sole legal and sole physical custody of the child to the mother. The father appealed. **Appeal dismissed.** The Court determined, *ex mero motu*, that the circuit court lacked subject-matter jurisdiction to adjudicate this case. The 2013 judgment ordered the father to pay child support to the mother pursuant to an agreement of the parties. Therefore, the 2013 judgment constituted an implicit award of custody to the mother and an implicit finding of paternity. Pursuant to §12-15-115(a)(7), Ala. Code 1975, a juvenile court retains original jurisdiction to modify or enforce a support, custody or visitation order when the juvenile court has previously established parentage. "Under current law, the circuit court has no jurisdiction over the father's action seeking to modify the paternity and child-custody judgment entered by a juvenile court." The orders of the circuit court are void and the appeal from that void judgment is due to be dismissed. ***J.N.S. v. A.H.***, 31 ALW (2210273); 10/21/2022; Montgomery Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 8 pages. [ATTY: Appt: Alyssa Hawkins, Montgomery; Apee: Norman Hurst, Jr., Montgomery]

FAMILY LAW: Child Custody--Modification. The child was born in 2009. The mother abused prescriptions drugs for 10 years of her life, including a period of time before the child was born. The Alabama Department of Human Resources (DHR) implemented a safety plan pursuant to which the child was placed in the custody of the paternal grandparents from the time that he was a year old. In 2012, the juvenile court declared the child to be dependent and awarded custody to the paternal grandparents; the mother was permitted to have supervised visitation. In 2014, the mother was arrested on a drug charge and the next year, she entered into a drug-recovery program. She also completed a one-year drug-court program and has reportedly been sober since May 15, 2015. In August 2018, the mother filed a "petition for return of custody". Her visitation with the child was made unsupervised and amplified based on pendente lite agreements in that action. In March 2021, the juvenile court conducted a hearing after which it entered an order stating that "[t]he parties will endeavor to work out a solution for return of custody with liberal visitation in the paternal grandparents/custodians as the [c]ourt recognizes their significant role in the rearing of the child." In December 2021, the juvenile court entered an order granting custody to the mother with the paternal grandparents having visitation every other weekend. After his postjudgment motion was denied by operation of law, the paternal grandfather appealed. **Reversed.** Pursuant to *Ex parte McLendon*, 455 So.2d 863 (Ala. 1984), the mother had to demonstrate that a proposed change in custody would materially promote the child's welfare and best interests such that the benefits of the requested change would more than offset the "inherently disruptive effects caused by uprooting the child." Moreover, she had to prove her fitness to have custody as well as the existence of a material change in circumstances. Here, the juvenile court held that "the child is no longer dependent and custody shall be returned to the mother." "That wording indicates that the juvenile court erroneously considered this case to be a resumption of the previous dependency action." The juvenile court erred by failing to apply the *McLendon* standard and accordingly, its judgment is due to be reversed. ***C.T. v. E.R.***, 31 ALW (2210345); 09/30/2022; Cullman Cty.; Hanson; Thompson, Moore, Edwards and Fridy concur; 9 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Dependency. CIVIL PROCEDURE: Pleadings. The father and the mother were married in 2004 and divorced in 2010. Pursuant to the divorce judgment, the mother and the father were awarded the joint legal custody of their two children. The father was awarded sole physical custody and the mother's visitation was to be supervised by the maternal great-grandmother. In May 2011, the father filed a modification petition alleging that the mother's visitation with the children should be suspended because the mother continued to suffer from substance-abuse issues. In November 2013, the maternal great-grandparents filed a motion to intervene in the father's custody-modification action. The record does not indicate that this motion was granted. On January 28, 2015, the trial court entered a judgment indicating that it was adopting an agreement of the mother, the father and the maternal great-grandparents dated November 19, 2013 pursuant to which custody of the children was awarded to the maternal great-grandparents and the mother and the father were required to pay child support. On May 10, 2022, the father filed a motion pursuant to Rule 60(b)(4), Ala. R. Civ. P. seeking relief from the January 28, 2015 judgment. In that motion, the father argued that the trial court should have construed the allegations contained in the maternal great-grandparents' motion to intervene as allegations of dependency and transferred the case to the juvenile court. After a hearing, the trial court denied the father's motion. He appealed. **Affirmed.** The court noted the statutory authority cited by the father which establishes that the juvenile court has exclusive jurisdiction over dependency matters. § 12-15-114(a), Ala. Code 1975. However, the law is well-settled that the substance of a pleading will determine if it alleges the dependency of a child so as to invoke the exclusive jurisdiction of the juvenile court. *A.M. v. A.K.*, 321 So.3d 1278, 1281 (Ala. Civ. App. 2020). "In other words, we must determine if the maternal great-grandparents asserted facts indicating or implying that the children were dependent within the meaning of § 12-15-102(8), Ala. Code 1975)." In their motion, the maternal great-grandparents alleged that the mother was unemployed and could not provide a stable home. Although the father was employed, the maternal great-grandparents contended that he lived in another county and could not ensure that the children would attend school. "Significantly, the maternal great-grandparents did not allege that the children were not being cared for or supervised." Although the allegations regarding the mother are a closer case, the allegations regarding the father, if true, would not support a finding of dependency. "Simply, the allegations made by the maternal great-grandparents at the time they filed their motion to intervene do not imply that the children were dependent; rather, they, at best, speculate that the children might become dependent in the future." The motion to intervene filed by the maternal great-grandparents did not initiate a *de facto* dependency action sufficient to divest the trial court of jurisdiction. "It is not the role of a circuit court or an appellate court , when it reviews factual allegations in a pleading filed by a nonparty in a custody-modification action initiated by a parent, to recast the non-party's pleading in a manner so as to

convert a parent's custody-modification action into a dependency action that negates the choice of parents to agree to a remedy for a simple dispute about their children." The judgment of the trial court is due to be affirmed. ***Shanklin v. Shanklin and Rowe,*** 32 ALW (CL-2022-0751); 03/10/2023; Walker Cty.; Thompson; Hanson and Fridy concur; Moore and Edwards concur in the result, without opinions, 16 pages. [ATTY: Appt: Jacquelyn Wesson, Warrior; Apee: Pro se]

II. CHILD SUPPORT

FAMILY LAW: Alimony--Child Support--Division of Property. APPEAL & ERROR: Waiver. The parties were divorced by a judgment entered on April 12, 2022. In that judgment, the wife was awarded sole physical custody of the parties' children and the husband was ordered to pay $1,348 per month in child support. In addition, the husband was ordered to provide health insurance coverage for the children and he was required to pay 71% of any noncovered medical expenses. The trial court divided the marital property and awarded the wife $1,000 per month in periodic alimony. The husband appealed. **Affirmed in part; reversed in part.** (1) The husband argued that the trial court erred in its determination of child support. However, a CS-42 form was completed by the trial court and it appears to comply with Rule 32, Ala. R. Jud. Admin. "We find no basis for the husband's argument that the trial court deviated from the child-support guidelines so as to require a written explanation for that deviation." (2) The husband contended that the trial court erred in its determination of his adjusted gross income. Rule 32 defines "adjusted gross income" as gross income less any preexisting child support or alimony obligations. Gross income includes income from any source. Moreover, overtime income can be included in the determination of a parent's gross income. In this case, evidence was adduced that as of June 11, 2021, the husband had a year-to-date gross income of $49,947.05. This amount included overtime, holiday pay and an annual bonus of $4,700. The trial court divided this amount by 5.36 to determine that the husband had earned $8,759 per month and it used this amount in calculating child support. The husband argued that his overtime should not have been included because it fluctuates. However, the "trial court could have determined that the overtime amounts represented on the husband's pay stub were representative of the husband's overtime earnings throughout the year." The court did agree with the husband that the trial court erred in its treatment of the husband's annual bonus. It determined that the bonus should have been deducted from the overall amount before the trial court divided that number by 5.36. The trial court should then have multiplied the monthly amount by 12 and then added the annual bonus back in before that total amount was divided by 12 to determine the husband's average monthly gross income. "That error results in a decrease in the parties' combined gross income from $12,334 to $11,849, of which 70%, not 71%, would be attributable to the husband." This portion of the trial court's judgment is due to be reversed and because the trial court based its division of uncovered medical expenses on that calculation, that portion of the judgment is also due to be reversed. (3) The trial court initially entered a final judgment on December 22, 2021 and in that judgment, it ordered the husband to pay $1,660 in child support. It amended that judgment on April 12, 2022 and lowered the child support to $1,348 per month. The husband argued that

he should be reimbursed for those overpayments as well as for any overpayment based on the inclusion of his annual bonus in his gross income. "We believe there may be some authority justifying the husband's position on both points; however, the husband has failed to cite that authority, in contravention of Rule 28(a)(10), Ala. R. App. P.." Accordingly, the court declined to specify in its remand instructions that the husband should be reimbursed for these overpayments. (4) With regard to the property division and the award of alimony, the wife was awarded the marital residence, a 2015 Toyota 4Runner and most of the contents of the marital residence. She was ordered to be responsible for the outstanding mortgage and the debt on the automobile. The trial court awarded her $1,000 per month in periodic alimony and a $5,500 attorney fee. The husband argued that the trial court did not properly consider the value of the marital residence because the only evidence regarding value was the testimony of the parties. However, he failed to cite any authority suggesting that the testimony of the parties alone was insufficient for the trial court to determine the value of the marital residence. The husband also argued that the wife was awarded $60,000 of assets in the marital residence. But no evidence was presented at trial regarding this purported value. Moreover, if the trial court accepted the values put forth at trial by the wife, she was awarded 51% of the marital assets and the husband was awarded 49%. "We cannot conclude that that distribution is inequitable; therefore, we affirm the trial court's division of the marital property." (5) Finally, the court considered the propriety of the trial court's award of alimony. In its amended judgment, the trial court made the express findings required by §30-2-57, Ala. Code 1975. The wife earned $43, 482 annually as compared to the husband's annual income of $99,282.95. The parties were married for 14 years. The husband asserted that the duration of his alimony obligation exceeded the length of the parties' marriage. However, he failed to assert this argument at the trial court level and as a result, it was not considered on appeal. As for the amount of alimony awarded, "the trial court could have determined that it would be equitable for the husband to contribute to [the wife's] support." ***Edwards v. Edwards,*** 31 ALW (CL-2022-0584); 12/02/2022; Escambia Cty.; Moore; Thompson, Hanson and Fridy concur; Edwards concurs in the result, without opinion, 16 pages. [ATTY: Appt: Jonathan Morris, Montgomery; Apee: William Stokes, Jr., Brewton]

FAMILY LAW: Child Support—Contempt. APPEAL & ERROR: Preservation of Error. The parties were divorced in March 2018. Pursuant to an agreement which was incorporated into the divorce judgment, the parties were awarded the joint legal and joint physical custody of their minor child. No child support was awarded to either party but the father was required to pay the first $3,000 of the minor child's uncovered medical/dental expenses each year and any amount over that was to be divided equally. A similar provision was included with regard to the minor child's extracurricular expenses. The parties were each responsible for 50% of all school expenses. The divorce judgment also contained some "Standard Parenting Clauses" utilized by the judges in that judicial circuit. In June 2020, the mother filed a petition to modify the custody of the minor child and to hold the father in contempt of court. The father filed a counterclaim seeking to hold the mother in contempt and for a modification requiring each party to be equally responsible for the minor child's extracurricular expenses. After a trial, the trial court entered a judgment in which it awarded the mother "primary" physical custody of the minor child. The father was required to pay $985 in child support and 70% of all extracurricular, athletic and school related expenses. The trial court held the father in contempt for purported violations of the Standard Parenting Clauses. For each finding of contempt, the father was sentenced to five days imprisonment and "placed on unsupervised probation for a period of two (2) years." The father filed a postjudgment motion and thereafter, the trial court entered an amended final judgment which reinstated the award of joint physical custody to the parties. The father's child support obligation remained at $985 per month. The trial court vacated and rescinded some of the contempt findings contained in the original judgment but denied the father's challenge to others. Both parties appealed. **Affirmed in part; reversed in part.** The evidence adduced at trial revealed that the parties continued to reside together for 2 months after the divorce judgment was final. In September 2018, the parties resumed a sexual relationship. The mother contended that said relationship ended in November 2018; according to the father, it lasted until February 2019. The mother alleged that the father continued to send her sexually explicit text messages even after their sexual relationship ended. From August 2019 to December 2019, the mother had to temporarily relocate to Texas to complete a program to become a nurse anesthetist. The father refused to exercise the mother's custodial periods during her absence so the mother's sister took care of the child during those periods. The mother returned to Alabama and continued her training at a hospital in Huntsville. The mother was not employed at the time of trial. She began dating a physician and wanted to enroll the child in private school. (1) On appeal, the father challenged the trial court's award of child support. Specifically, he asserted that the trial court erred by including the monthly child-care costs that were incurred by the mother while she was completing a nursing-extension program in its child support calculation. Even if a deviation from child support is found to be warranted, a trial court must first determine the basic child-support obligation owed by following Rule 32, Ala. R. Jud. Admin in order to determine the extent of the deviation. Thereafter, it must enter a written finding, supported by the evidence, that the application of the

guidelines would be unjust or inequitable. Rule 32 was amended in 2019 to allow for a deviation from the guidelines when a parent incurs child-care costs that are associated with a parent's training or education necessary to obtain a job. Rule 32(A)(1), Ala. R. Jud. Admin. Here, the trial court calculated the father's child support obligation five different ways. Four of those five calculations included the work-related (not school-related) child-care costs incurred by the mother while she was a full-time student. But the mother was not employed at the time of the final hearing. Therefore, the trial court's child support calculation is due to be reversed. (2) The father next argued that the trial court erred by requiring him to pay 70% of the child's extracurricular-activity and school-related expenses in addition to paying the full amount of child support. A trial court has discretion to award child support outside the guidelines; however, in so doing, the court must state its reasons for ordering these additional amounts. Rule 32(C)(4), Ala. R. Jud. Admin. In this case, "there was no evidence presented at trial about school-related expenses because the child was not in school at the time of trial and because the mother testified at trial that if the child were to attend private school in the future that she would be paying for the child's tuition." Moreover, although the parties' original settlement agreement provided that the father would be responsible for up to $3,000 per year in uncovered medical/dental services and extracurricular activity fees each year, that agreement was entered into with an understanding that neither party would owe a child support obligation to the other. "Because the trial court failed to state its reasons in its final judgment or in its amended final judgment for making these additional awards and the parties did not have any subsequent agreement requiring the father to pay that amount, we must reverse the portion of the trial court's judgment that requires the father to pay 70% of the child's extracurricular-activity expenses and school-related expenses." (3) Finally, the father challenged the trial court's findings of contempt. The court first looked to whether the trial court held the father in criminal or civil contempt of court given that it did not specify. Contempt proceedings are governed by Rule 70A, Ala. R. Civ. P. "A finding of civil contempt seeks to compel compliance with a court's order; a criminal-contempt determination is designed to punish a contemnor for disobedience of a court's order." (citation omitted). In this case, the trial court did not seek future compliance with its orders but rather stated that it was imposing "punishment" for his failure to comply. "Thus, the contempt finding in the trial court's judgment found the father to be in criminal contempt." (4) The trial court found the father to be in criminal contempt for unilaterally changing the pick-up location of the child. The father asserted that the provisions of the divorce judgment in this regard did not constitute an "order of reasonable specificity" and that the trial court's finding was not supported by the evidence. Both of those arguments were waived on appeal. The former because it was not properly preserved and the latter because it was not supported by proper authority. (5) With regard to the father's argument that the evidence was insufficient to support a finding that he had harassed the mother, after the divorce was finalized, the father sent sexually explicit text messages to the mother. After the parties' post-divorce sexual relationship ended, the father continued sending such messages. "Based on the

text messages admitted into evidence, the father was not respecting the mother's privacy, which could support the trial court's finding that the father had harassed the mother." (6) The Standard Parenting Clauses contained in the divorce judgment required each party to provide the other with "reasonable telephone access" to the child when the child was in his or her care. The father asserted that this was not an order of reasonable specificity. "Black's Law Dictionary defines 'reasonable' in pertinent part as 'Fair, proper, or moderate under the circumstances; sensible.' Reasonable,Black's Law Dictionary 11th ed. 2019)." Here, evidence was adduced that the father cut off all telephone access from March 20. 2020 through April 8 2020. "{R]easonable telephone access is certainly not a 'total lack of' telephone access." This finding of contempt is due to be affirmed. (7) The father challenged that portion of the trial court's judgment placing him on unsupervised probation for a period of two years. The mother alleged that the father failed to preserve that issue for appellate review. However, that issue is jurisdictional and may be raised at any time. Pursuant to § 12-11-30(5), Ala. Code 1975, the sanctions for criminal contempt are limited to a maximum fine of $100 and imprisonment not to exceed 5 days. Here, the father was sentenced to 5 days imprisonment for each act of contempt and placed on unsupervised probation for two years. However, in *L.S. v. A.S.*, 272 So.3d 169 (Ala. Civ. App. 2018), the court held that a 2-year unsupervised probationary period as punishment for an act of criminal contempt was beyond the trial court's jurisdiction. "Our holding is not to be understood as a prohibition against the suspension of sentences in actions of criminal contempt. We merely conclude that a period of probation cannot be imposed as part of such a sentence." *Id.* at 184. This portion of the trial court's judgment is due to be reversed. (8) Finally, the court addressed the mother's cross-appeal wherein she argued that the trial court erred by amending its original order and awarding the parties joint physical custody of the child. However, the final judgment and the amended final judgment contain no specific findings of fact with regard to the custody modification. Therefore, the mother was required to file a postjudgment motion challenging the sufficiency of evidence with regard to this issue. She failed to do so and therefore, this issue was not preserved for appellate review. ***Shook v. Shook,*** 32 ALW (2210161; 2210206); 04/28/2023; Madison Cty.; Hanson; Thompson, Moore, Edwards and Fridy concur; 53 pages. [ATTY: Appt: Joan-Marie Sullivan, Huntsville; Apee: Catherine Garland, Huntsville]

FAMILY LAW: Contempt—Child Support. CIVIL PROCEDURE: Filing fee-Counterclaim—Jurisdiction. The parties were married in 1997 and had one child who was born on March 31, 1999. Pursuant to a 2002 divorce judgment which incorporated an agreement of the parties, the parties were each required to pay one-half of the child's postsecondary education expenses. The agreement further stated that if either party violated the agreement, the violating party would be responsible for the payment of costs, including attorney fees, made necessary by the violation. In 2020, the father filed a petition seeking to modify his obligation to pay the child's post-secondary education expenses. As a basis therefore, the father asserted that he had retired and had suffered a concomitant diminution in income. He also claimed that he had been precluded from obtaining statements indicating the costs that the child had incurred. The mother filed an answer and counterclaim in which she sought a finding of contempt against the father for failing to reimburse her for several of the child's postsecondary-education expenses. After a final hearing, the trial court entered an order denying the father's petition to modify, holding the father in contempt for failing to pay postsecondary-educational expenses, awarding the mother a judgment in the amount of $16,324.62 in unreimbursed expenses and awarding the mother $4,500 in attorney fees. After the parties' postjudgment motions were denied by operation of law, the father appealed. **Affirmed in part; reversed in part.** (1) The father argued that the trial court's order with regard to the relief afforded to the mother is void because she failed to pay a filing fee when she filed her counterclaim. However, the failure to pay a filing fee does not divest a trial court of jurisdiction over a counterclaim. In such cases, the trial court may stay the action until a filing fee is paid. The trial court in this case had jurisdiction to adjudicate the mother's counterclaim. (2) The father also challenged the trial court's award of an attorney fee to the mother. Based on the provision of the parties' agreement and given the trial court's determination of contempt against the father, the trial court did not abuse its discretion by awarding the mother attorney fees. (3) Lastly, the father challenged the trial court's award of $16,324.62 to the mother for unreimbursed postsecondary-education expenses as being unsupported by the record. He cited *Camacho v. Camacho,* 280 So.3d 1077, 1080 (Ala. Civ. App. 2019), in whch the court reversed a judgment for child support and alimony arrearage because it could not determine how the trial court calculated the past-due amounts. The same is true in this case. "We cannot determine which expenses the trial court determined fell within the scope of the reimbursable postsecondary-education expenses." Accordingly, the case is due to be remanded to permit the trial court to articulate the figures it used to determine the father's arrearage. ***Stewart v. Sutton,*** 32 ALW (CL-2022-0818); 03/31/2023; Elmore Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 13 pages. [ATTY: Appt: Melissa Lee Isaak, Montgomery; Apee: Carol Carter, Prattville]

FAMILY LAW: Child Custody—Child Support. On January 15, 2019, R.N.P. ("the mother") filed an action in the Baldwin County juvenile court seeking to adjudicate the paternity of her child, and seeking an award of custody and child support. S.W.W. ("the father") shortly thereafter filed his own action seeking the same relief. The actions were consolidated and all future pleadings were filed in the mother's case action number. The father filed a motion seeking visitation with the child, alleging that the mother had begun withholding the child from him. After taking testimony, the juvenile court entered a pendente lite order granting the parties joint legal and joint physical custody on an alternating-weekly basis. The pendente lite order also provided instructions regarding dispensing the child's ADHD medication, restricted the parties' use of alcohol around the child, and prohibited overnight guests a parent was romantically involved with while that parent had physical custody of the child. After a trial, the juvenile court entered a judgment adjudicating the father's paternity, awarding the parties joint legal and joint physical custody, and denying each party's request for an award of child support. Both parties filed postjudgment motions. After a hearing on those motions, the juvenile court entered an order stating that the motions were granted in part and denied in part, and directed the father's attorney to prepare a proposed order. However, the postjudgment order indicating the modifications to the original judgment was not entered before the time period allowed by ARCP Rule 59.1, and is therefore void. The mother timely appealed to the Baldwin County Circuit Court, and the circuit court transferred the appeal to the Court of Civil Appeals due to the presence of an adequate record pursuant to ARJP Rule 28(D). **Affirmed in part; reversed in part.** 1) The mother first argued that the juvenile court erred by failing to award her sole physical custody of the minor child. No prior order existed awarding custody of the child, and in an initial custody determination, neither party possesses a presumption in his or her favor. The "best interests of the child" standard applies. Testimony at trial indicated that the parties had shared custody of the child for two years prior to the mother's filing of her petition without much issue, and that the arrangement had been beneficial for the child. Any minor disagreements the parties had were resolved by the pendente lite order, and the parties agreed at trial that the joint physical custody schedule put in place at that time was workable. The appellate court noted that it was clear from the record that both parents loved the child and had generally encouraged the other parent's relationship with the child. The Court of Civil Appeals held that the evidence supported the juvenile court's award of joint legal and joint physical custody. 2) The mother next argued that the juvenile court erred by failing to award child support, and by doing so, impermissibly deviated from the Rule 32 Guidelines. The appellate court noted that application of the child support guidelines is mandatory. The parties failed to submit the required child support forms as ordered by the juvenile court, but both testified regarding his or her respective income. Lacking the required child support forms is not necessarily reversible error if the appellate court is able to

discern the method by which the trial court determined the award of child support. While both parties testified regarding their past income, the mother admitted she had not filed tax returns for two years, and the father had not filed for the past year. The juvenile court found that both parties made approximately equal income. This finding coupled with the award of joint custody can constitute a permissible deviation from the child support guidelines. The mother argued that the juvenile court did not make specific determinations about the parties' incomes which was necessary because she argued the father was voluntarily underemployed. Based on the juvenile court's order, it is not possible to discern whether income was imputed to the father, or at what amount if so. Because the Court of Civil Appeals could not determine whether income was imputed to the father, and therefore to what extent, if any, the juvenile court deviated from the child support guidelines, the Court reversed the judgment as it pertained to child support and remanded the issue to the juvenile court. 3) The mother lastly argued that the juvenile court erred in failing to award her retroactive child support. A request for retroactive support was not included in the mother's petition, but was tried by the implied consent of the parties. At trial, the mother requested retroactive child support back to the filing of her petition in January 2019, yet on appeal requested it back to 2014 when the parties separated. Therefore, any possible error by the juvenile court in failing to award retroactive support between 2014 and 2019 would be invited error. However, the Court of Civil Appeals held that because the issue of the child support award was remanded, the juvenile court could reconsider the issue of retroactive support to the date of the filing of the mother's petition on remand as well. ***R.N.P. v. S.W.W.***, 32 ALW (CL-2022-1291); 8/25/23; Baldwin Cty.; Thompson;Moore, Hanson, and Friday concur; Edwards concurs in the result, without writing; 25 pages. [ATTY: Not listed-confidential].

APPEAL & ERROR: Final Judgment. FAMILY LAW: Child Support. This is an original divorce action involving custody of the parties' four children. A hearing was held at which the wife testified she had moved from Alabama to Illinois after the parties separated to be close to her parents for support. She testified that her intent was to move back to Alabama with the children when she could afford to do so. After that hearing, the trial court entered an order divorcing the parties and making awards of custody ("the April 7, 2022 order"). Pursuant to that order, the trial court awarded physical custody of the three oldest children to the husband and of the youngest child to the wife. The court stated that upon the wife's return to Alabama, physical custody of the children would become joint (of the three older children immediately, and of the youngest upon reaching the age of two), with the parties exchanging the children on an alternating weekly basis. The trial court also stated that it would reserve ruling on child support until the wife returned to Alabama because the wife was currently unemployed; however the trial court did outline how said child support should be calculated at the appropriate time. In June 2022, the wife filed a motion stating that she had moved back to Alabama and in that motion, she requested physical custody of the oldest three children. The trial court entered an order on June 21, 2022, providing that custody of the children be awarded as indicated in its April 7, 2022 order inasmuch as the wife had returned to the state. There were no additional submissions from the parties or court orders regarding child support after the April 7, 2022 order. The wife appealed. **Appeal dismissed.** "An appeal ordinarily lies only from a final judgment. An order is generally not final unless it disposes of all claims or the rights or liabilities of all parties." *Tomlinson v. Tomlinson*, 816 So. 2d 57, 58 (Ala. Civ. App. 2001) (internal citations omitted)(emphasis in original). The April 7, 2022 order is nonfinal because it reserved the issues of child custody and child support for the future action of the wife to move back to the state. The June 21, 2022 order resolved the claims regarding custody of the children, however the determination of child support remained pending. Alabama's appellate courts have held that a judgment is nonfinal when it reserves ruling on the issue of child support. *See Reid v. Reid*, 844 So. 2d 1212 (Ala. Civ. App. 2002); *Wilson v. Glasheen*, 801 So. 2d 848 (Ala. Civ. App. 2001). Therefore, there is no final judgment in this case, and the appeal is dismissed as having been taken from a nonfinal judgment. ***Clayton v. Clayton***, 32 ALW (CL-2022-0840); 05/26/2023; Lowndes Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 7 pages. [ATTY: Appt: Larry R. Raby, Montgomery; Apee: Jim. T. Norman III,Prattville]

APPEAL & ERROR: Final Judgment--Mandamus. FAMILY LAW: Juvenile Court—Appeal—Child Support. The parties are the unmarried parents of two children. Beginning in 2015, the Bessemer Division of the Jefferson Juvenile Court ("the juvenile court") entered a series of judgments regarding the custody of the parties' children. In 2021, the juvenile court entered an order awarding custody to the father. In June 2022, the mother filed a petition requesting a modification of that custody order ("the .03 action"). On October 31, 2022, the juvenile court entered an order in the .03 action providing that custody would be returned to the mother at the end of the current school semester inasmuch as "the court frowns on changing schools when the semester is so close to being over." That order did not address child support or visitation. On November 14, 2022, the father appealed the juvenile court's judgment to the circuit court. Although the circuit court entered an order stating that the appeal should have been filed in the Court of Civil Appeals, the case remained in the circuit court and it was assigned case number CV-22-61. Thereafter, the circuit court ruled upon several motions filed by the father, including an order restraining the mother from relocating with the minor children to Baldwin County. On February 15, 2023, the mother filed a motion to dismiss the father's appeal in the circuit court; that motion was denied. The circuit court reasoned that it was not known if a transcript of the juvenile court proceedings was available and therefore, it had jurisdiction for a trial de novo. The mother filed a petition for the writ of mandamus. **Writ of mandamus granted.** The mother argued that the juvenile court's judgment was a nonfinal judgment. Although this argument was not contained in the motion to dismiss filed by the mother in the circuit court, it is a jurisdictional issue which can be raised at any time. An order is not final unless it disposes of all issues. Here, the record indicates that the mother sought "emergency custody" in the juvenile court as well as the suspension of the father's visitation. The October 31, 2022 order does not specify whether the juvenile court intended for the mother to have only sole physical custody of the children or sole legal and sole physical custody. Moreover, it did not determine the parties' respective child support obligations. "A trial court's failure to determine an amount of child support owed by a party does...render a judgment nonfinal." *Ex parte Williams*, 185 So.3d 1106, 1119 (Ala. Civ. App. 2015). The fact that a party does not seek an award of child support does not render a judgment omitting such an obligation final. The judgment of the juvenile court did not dispose of all the rights and liabilities of the parties and therefore, was not a final judgment. The father filed his notice of appeal to the circuit court pursuant to Rule 28(B), Ala. R. Juv. P.; however, pursuant to said rule, an appeal can only be taken from a final order. "Because the juvenile court's judgment was non-final, the circuit court did not acquire jurisdiction over the father's appeal." The circuit court erred by denying the mother's motion to dismiss the father's appeal and the writ of mandamus is issued directing the circuit court to enter an order granting that motion. Moreover, all orders entered by the circuit court are void because they were entered

without jurisdiction. ***Ex parte K.B.L. (K.B.L. v. R.M.M.)***, 32 ALW (CL-2023-0125); 05/05/2023; Jefferson Cty.; Moore; Edwards, Hanson and Fridy concur; Thompson concurs in the result, without opinion; 12 pages. [ATTY: Pet: Alyson Hood, Birmingham; Resp: Samantha Rush, Columbiana]

III. VISITATION

CIVIL PROCEDURE: Postjudgment Motion. FAMILY LAW: Visitation. In November 2019, the mother filed a petition in the Montgomery Circuit Court ("the trial court") for a determination of paternity and custody of the child. The father filed an answer in which he acknowledged that he was the father of the child and a counterclaim seeking joint legal custody and visitation. After a trial, the trial court entered a judgment on October 2021 adjudicating the father to be the legal father of the child, awarding the parties joint legal custody, determining the mother to be the sole physical custodian and affording the father scheduled visitation. The father was required to pay $766 per month as child support and $10,000 in past-due child support. With regard to the visitation awarded, the trial court ordered that if Dr. Kale Kirkland determined that the father's visitation with the child needed to be supervised, Dr. Kirkland was authorized to "change" the visitation schedule. The mother filed a postjudgment motion. Said motion contained a request for a hearing. While that motion was pending and in response to a motion filed by the father, the trial judge recused herself. The mother's postjudgment motion was denied by operation of law. She appealed. **Reversed.** Rule 59(g), Ala. R. Civ. P. provides that a postjudgment motion shall not be ruled upon until the parties have had an opportunity to be heard thereon. If a party requests a hearing on a postjudgment motion, a trial court must grant that request. However, although a trial court commits error if it fails to grant a requested hearing, said error is harmless unless there is probable merit to the grounds asserted in the motion or where the appellate court resolves the issues presented therein as a matter of law. In this case, the trial court erred by failing to hold a hearing on the mother's postjudgment motion as she requested. The court then had to determine if said error was harmless. As part of her postjudgment motion, the mother asserted that the trial court erred by authorizing Dr. Kirkland to alter the father's visitation schedule and determine if said visitation should be supervised. The father agreed with the mother that the trial court erred in this regard. A trial court is not authorized to delegate its duty to fashion a visitation schedule which is tailored to the best interests of a child to a third party. Such is the case here. Because the mother's postjudgment motion had merit, the denial of that motion without a hearing cannot be considered harmless. The judgment of the trial court is due to be reversed and the case remanded to the trial court for it to conduct a hearing on the issues raised in the mother's postjudgment motion. ***Ellis v. Duncan,*** 32 ALW (CL-2022-0510); 02/03/2023; Montgomery Cty.; Thompson; Moore, Edwards and Fridy concur; Hanson recuses himself; 7 pages. [ATTY: Not listed-confidential]

APPEAL & ERROR: Mandamus. FAMILY LAW: Grandparent Visitation. CIVIL PROCEDURE: Dismissal--Standing. In November 2018, the Lee Juvenile Court entered judgments finding two children dependent. Those cases were assigned JU-18-296.01 and JU-18-297.01. At the time that these dependency judgments were issued, the father of the children was deceased. Custody of the children was awarded to the paternal aunt, V.G., and the mother was awarded certain visitation rights. In June 2022, the maternal grandparents filed actions for grandparent visitation with the children. Those actions were assigned case numbers JU-18-296.02 and JU-18-297.02. In those petitions, the maternal grandparents alleged that the mother was incarcerated and that the paternal aunt had unreasonably restricted their visitation with the minor children. The aunt filed a motion to dismiss the maternal grandparents' actions, arguing that although the petitions asserted claims under the Grandparent Visitation Act ("the GVA") § 3-3-4.2, Ala. Code 1975, the maternal grandparents' claims were not authorized under that statute. The juvenile court denied the aunt's motion to dismiss and she filed a petition for a writ of mandamus. **Writ of mandamus denied.** Generally, the denial of a motion to dismiss is not reviewable by a petition for a writ of mandamus because an adequate remedy exists by way of an appeal. The aunt failed to delineate any of the narrow exceptions to this general rule that would apply in this case. Instead, the aunt relied upon *Ex parte S.H.*, 321 So.3d 1 (Ala. Civ. App. 2019), wherein the court held that a trial court improperly granted grandparents pendente lite visitation because the GVA did not provide a cause of action by which a grandparent can assert a claim for visitation against a nonparent custodian of a child. Relying on *Ex parte S.H.*, the aunt contends that the maternal grandparents lack standing to assert a claim for visitation. However, the court distinguished between the concept of "standing" and that of the failure to state a cause of action. Here, the aunt is actually arguing that the maternal grandparents have no cause of action. "We make no determination with regard to the aunt's argument. Instead, we conclude that *Ex parte S.H.*, supra, does not provide authority allowing this court to review the aunt's petitions." It noted that in *Ex parte S.H.*, the court's analysis was not solely confined to whether the trial court erred by denying a motion to dismiss. Rather, the court also considered the propriety of an award of pendente lite grandparent visitation. "We hold that because the aunt has an adequate remedy by appeal, her petitions for a writ of mandamus are due to be denied." ***Ex parte V.G., (K.S. and A.S. v. V.G.),*** 32 ALW (CL-2022-0993; CL-2023-0994); Lee Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 9 pages. [ATTY: Not listed-confidential]

CIVIL PROCEDURE: Summary Judgment. FAMILY LAW: Grandparent Visitation. APPEAL & ERROR: Final Judgment. The paternal grandfather filed a petition seeking to be awarded visitation with his one-year old grandson. Both the mother and the father were served with the petition. The mother filed a motion for summary judgment which was granted by the circuit court. After his postjudgment motion was denied, the paternal grandfather appealed. **Affirmed.** (1) The court first considered whether the circuit court's entry of a summary judgment was a final judgment. A final judgment is one that effectively disposes of all claims of all of the parties. In *Moore v. Prudential Residential Services, Ltd. Partnership*, 849 So.2d 914, 927 (Ala. 2002), the Supreme Court held that a judgment was not final because the trial court erroneously entered summary judgment for a defendant who had not filed for said relief. Here, the trial court entered summary judgment based on the mother's motion but the father never filed a motion seeking same. "However, *Moore* and [*Ingenuity International, LLC v.*] *Smith,* [Ms. SC-2022-0501, June 16, 2023 ___ So.3d __ (Ala. 2023)] do not hold that a trial court may never enter summary judgment for a nonmoving party, those cases hold only that a summary judgment would be improper if the trial court fails to provide the opposing party notice and an opportunity to be heard before entering the summary judgment." In this case, the father executed an affidavit which was filed by the mother in support of her motion. In that affidavit, the father set forth facts which were relevant to a determination as to whether the paternal grandfather should be granted visitation. The paternal grandfather was given an opportunity to respond. Therefore, his due process rights were not violated and the summary judgment constitutes a final judgment. (2) The paternal grandfather challenged the entry of the summary judgment. In her motion, the mother argued that the paternal grandfather could not present clear and convincing evidence demonstrating that visitation was in the child's best interests, as required by § 30-3-4.2, Ala. Code 1975. Moreover, she asserted that the paternal grandfather could not demonstrate that he was "willing to cooperate with the parent or parents if visitation with the child is allowed ." § 30-3-4.2(e)(3), Ala. Code 1975. In her affidavit, the mother claimed that the paternal grandfather had sent some disparaging text messages about her to the father, that he was disrespectful to her and he had been uncooperative when she tried to coordinate visitation with the father in the past, which was required to be supervised by the paternal grandfather. The mother further contended that the paternal grandfather could not demonstrate that the child would be harmed if he did not have contact with the paternal grandfather. § 30-3-4.2(e)(2), Ala. Code 1975. The paternal grandfather did not refute the assertions contained in the affidavits of the mother and the father and did not demonstrate that there is a genuine issue of material fact. Accordingly, the trial court's summary judgment is due to be affirmed. ***McAdams v. McAdams***, 32 ALW (CL-2023-0110); 09/23/2023; Mobile Cty,; Moore; Thompson and Hanson concur; Fridy concurs in part and concurs in the result,

with opinion; Edwards concurs in the result, without opinion; 20 pages. [ATTY: Appt: Scott Hunter, Pt. Clear; Apee: Carson Nicolson, Mobile]

FAMILY LAW: Dependency--Visitation. In October 2020, the Madison County Department of Human Resources ("DHR") filed a dependency action regarding the minor child who is the subject of this appeal. Thereafter, the juvenile court entered an order declaring the child to be dependent and ordering DHR to provide protective supervision over the child. No custodial award was contained in that order but DHR was granted the discretion to determine the child's physical placement. A permanency hearing took place in February 2021 after which the juvenile court entered an order again declaring the child to be dependent. The February 2021 permanency order did not award physical or legal custody to DHR or any third party. Said order approved as concurrent permanency plans "return to parent" and "permanency relative placement." In July 2021, the juvenile court entered a permanency order which mirrored the provisions of the February 2021 order but required DHR to provide reunification services to the father and to the mother. In October 2021, the juvenile court entered an order placing physical custody of the child with the paternal grandmother. Another order was entered in February 2022 which adopted "permanent relative placement" as the sole permanency plan. Custody remained vested in the paternal grandmother; the order did not address reunification services. A trial was held on February 15, 2022 and on March 14, 2022, the juvenile court entered a judgment awarding permanent custody of the child to the paternal grandmother and the paternal grandfather. The mother was awarded visitation "as arranged by" the paternal grandparents under the supervision of the maternal grandmother. The visitation provision also stated that the mother was entitled to exercise "not less than 2 hours of visitation" each month as agreed upon by the parties. In the event that that parties were unable to agree, the mother was afforded visitation under the supervision of two named professional supervisory services at her expense. Those visitations were to take place on the first Saturday of the month from 1:00 p.m. to 3:00 p.m. The mother appealed. **Affirmed in part; reversed in part.** The trial transcript in this action consists only of 79 pages. A DHR-caseworker assigned to this case testified that the mother had tested positive on drug screens during the pendency of this action, including a positive marijuana test just a few days before the final hearing and the mother had failed to take a drug screen the day before trial. The caseworker stated that the mother's visitation with the child was inconsistent and that she had not been "as in tune with the child as she should have been." A January 2022 psychological evaluation revealed that the mother suffered from severe depression, anxiety, PTSD and panic disorder. That assessment was delayed because the mother had an outstanding bill at the mental-health care facility where the initial assessment was scheduled. The DHR caseworker explained that she had yet to schedule a medication assessment for the mother but offered no explanation for that delay. The mother testified that the child had been removed from her care when the mother was 17 years old. The mother had secured employment at a day-care facility a month before trial. The child had been returned to her custody in February 2021 under DHR

supervision but was placed back into the home of the paternal grandmother in August 2021 when the mother became overwhelmed by the demands of caring for the child. The mother admitted that she was not ready to assume custody of the child. (1) The mother challenged the juvenile court's award of custody to the paternal grandparents on the sole contention that DHR failed to make reasonable efforts to rehabilitate her. "Whether efforts at reunification have been reasonable and whether those efforts have failed or succeeded are questions of fact for the juvenile court to determine." In making that determination, the juvenile court must consider the parental conduct or circumstances that led to the child's removal and then assess the efforts and progress that the parent has made in overcoming those problems. Here, the child was initially removed from the mother's custody after the mother tested positive for marijuana. Although DHR restored custody to the mother for a short time thereafter, the mother returned the child to DHR after having difficulty caring for the child. The mother admitted that she had not fully participated in the services offered by DHR and she had no stable residence at the time of trial. "Based on our review of the record, the evidence indicates that, despite DHR's previous efforts and a period of nearly 18 months, the mother was not rehabilitated sufficiently to assume custody of the child." That portion of the juvenile court's judgment awarding custody of the child to the paternal grandparents is due to be affirmed. (2) The mother also challenged the juvenile court's award of visitation. The juvenile court's visitation provision affords the paternal grandparents "almost total control" over when and where the mother may visit with the child. Although the juvenile court's judgment states that if the parties cannot agree, the mother may exercise visitation at a visitation center at her own expense, that provision is "illusory." "[T]he requirement that the mother, who is an indigent 19-year old, pay for visitation at a visitation center in order to secure the minimal amount of visitation that she has been afforded creates a situation that is untenable." Moreover, said conditions are overly restrictive especially in light of the fact that DHR found it suitable to return the child to the care of the mother during the pendency of this action, thereby signaling that the mother did not pose a particular danger to the child. This portion of the trial court's judgment is due to be reversed. ***A.E. v. Madison County Department of Human Resources,*** 32 ALW (CL-2022-0644); 1/13/2023; Madison Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 21 pages. [ATTY: Not listed-confidential]

IV. PRENUPTIAL AGREEMENTS

Court of Civil Appeals refuses to apply equitable doctrines to nullify prenuptial agreement.

FAMILY LAW: Antenuptial Agreement--Alimony--Adultery. The parties were married for 18 years prior to their separation. Both had been married previously; the husband had custody of his two children from his prior marriage and the parties had two children together. The parties entered into a prenuptial agreement pursuant to which they each waived alimony, attorney fees, any right to a property settlement, and "the right to obtain a Qualified Domestic Relations Order...with respect to any qualified retirement plan in which the other is a participant." According to the prenuptial agreement, all jointly held property acquired after the marriage was due to be divided equally. Both parties were represented by counsel at the time that they signed the prenuptial agreement and an exhibit was attached describing the parties' assets. After the divorce was filed, the husband filed a motion for a partial summary judgment regarding the enforceability of the prenuptial agreement. In opposition to that motion, the wife argued that the enforcement of the prenuptial agreement would result in unjust enrichment to the husband, that the husband came to the action with unclean hands because she alleged that he had committed adultery and that the husband was estopped from enforcing the prenuptial agreement because he had told her that he would always take care of her. At an evidentiary hearing on that motion, evidence was adduced that the husband was a plant manager earning approximately $80,000 and the wife worked as a dental hygienist at the time that they signed the prenuptial agreement. Soon after they married, the parties agreed that the wife would be a stay-at-home mother. In April 2021, the trial court granted a partial summary judgment determining that the prenuptial agreement was valid and enforceable. At the trial of the divorce action a few months later, the wife contended that the husband had committed adultery with a coworker. Both the husband and the coworker denied such a relationship other than kissing and hugging. The wife submitted a video showing the coworker and the husband together in different vehicles. In one clip, the coworker was sitting on the husband's lap. The marital residence had a fair market value of $700,000 and the mortgage balance was $29,000. Six years before the divorce trial, the husband went to work as a division manager for a poultry company, earning more than $550,000 annually. The trial court entered a judgment in which it ordered the parties to sell the marital residence and to divide the proceeds equally. The wife appealed and the husband cross-appealed. **Affirmed in part; reversed in part.** (1) The wife first challenged the trial court's grant of the motion for partial summary judgment. She argued that the intention of the prenuptial agreement was to "shield her family's assets"

and therefore, it was unenforceable under the circumstances of this case. The purpose of an agreement must be derived from the text and not from extrinsic sources. An agreement that is not ambiguous must be enforced as written. "The parties' prenuptial agreement itself includes no indication that its purpose was solely to protect the wife's family's assets." The wife does not assert that the agreement is ambiguous that would warrant an examination of factors outside the four corners of the document. (2) The wife next argued that the husband was estopped from enforcing the agreement. The elements of estoppel include: (a) conduct amounting to a representation or a concealment of material facts; (b) the party engaged in the conduct must have knowledge of the facts or there must be evidence that such knowledge can be imputed to him or her; (c) the other party must not have known the truth at the time the conduct took place or when it was acted upon; (d) the conduct must be performed with the intention that the other party act upon it; (e) the other party must have relied on the conduct and (f) the other party must act on the conduct in such a manner as to change his or her position for the worse. Moreover, a "material fact" in the context of promissory estoppel must be "of a definite and substantial character." (citation omitted). In this case, the trial court held that even if the husband had promised the wife that he would always take care of her, that statement was not a promise of a "definite and substantial character" so as to satisfy the requirement of the concealment of "material facts". The court agreed, noting that the decision for the wife to leave her job, which happened after the parties married, had no bearing on the parties' decision to enter into the prenuptial agreement. It agreed with the trial court that the husband was not estopped from enforcing the prenuptial agreement. Turning to the clean-hands doctrine, the court noted that this equitable doctrine "prevent[s] a party from asserting his...rights under the law when that party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.'" (citation omitted). Evidence indicating that a husband or wife may have engaged in adultery does not render a prenuptial agreement void or constitute a defense to enforcement of the agreement." *Hubbard v. Bentley,* 17 So.3d 652, 654 (Ala. Civ. App. 2008). Even if sufficient evidence was presented to establish that the husband committed adultery, as a matter of law such conduct would not preclude enforcement of the prenuptial agreement. (4) The elements of a claim of unjust enrichment include: (a) that the defendant knowingly accepted and retained a benefit, (b)provided by another, (c) who has a reasonable expectation of compensation. In this case, the wife failed to demonstrate that she had a reasonable expectation of compensation regarding the husband's forbearance from enforcing the prenuptial agreement in exchange for her staying home with the children. (5) The wife next argued that even if the prenuptial agreement was enforceable, the husband's retirement accounts were still subject to division. In one section of the agreement, each party waived his or her right to any retirement account held in the other party's name which existed at the time of marriage.

In another section, that same waiver was included but it related to retirement accounts that existed at the time of divorce. The wife claimed that these two provisions created an ambiguity. However, an ambiguity only exists if the agreement is susceptible to more than one meaning. The court determined that no ambiguity existed with regard to the prenuptial agreement. (6) The wife asserted that the divorce should have been granted on the ground of adultery rather than on the ground of incompatibility. "A trial judge does not have to grant a divorce on the grounds of adultery or to divide the property in light of one party's adultery unless the failure to do so would be palpably wrong in lights of extensive evidence of adultery." (citation omitted). Here, the trial court implicitly held that insufficient evidence of adultery was presented. (7) In his cross-appeal, the husband argued that the trial court erred by requiring him to provide COBRA health-insurance coverage to the wife for one year. The court has previously held that a trial court's award of health-insurance coverage constitutes spousal support. Moreover, a provision for health insurance coverage is modifiable. Accordingly, the trial court's requirement that the husband provide health-insurance coverage for the wife runs afoul of the prenuptial agreement wherein the parties each waived his or her right to spousal support. This portion of the trial court's judgment is due to be reversed. ***Ayers v. Ayers,*** 31 ALW (2210318; 2210376); 11/10/2022; Cullman Cty., Fridy; Thompson, Moore, Edwards and Hanson concur; 32 pages. [ATTY: Appt: Robert Crocker, Cullman; Apee: Charles Dunn, Birmingham]

V. PROTECTION FROM ABUSE

FAMILY LAW: Protection from Abuse. In September 2021, H.S. filed a petition for protection from abuse("PFA") using a form petition. On said form petition, H.S. named W.T. as the defendant and checked the box indicating that she and W.T. "has or had a dating relationship." She also attached a police report to her petition in which W.T. was identified as her ex-boyfriend. However, in the "Protection from Abuse (PFA) Cover Sheet," H.S. described her relationship with W.T. as "ex-friend." On other forms, H.S. was required to check a box to indicate that the plaintiff and defendant were in a dating relationship. On one of those forms, H.S. drew a separate box, checked it and wrote: "We never dated. Friends." On the other form, she checked the box for "Current or Former Dating Relationship" but crossed out the word "Dating". The trial court entered an *ex parte* PFA order. After a trial, the trial court entered a final PFA order. W.T. filed a postjudgment motion in which he challenged the PFA order based on the insufficiency of evidence that he and W.T. had been in a "dating relationship." After that postjudgment motion was denied, W.T. appealed. **Reversed.** No transcript was made of the trial. However, the trial court approved a Rule 10(d), Ala. R. App. P. statement of the evidence in which it recited testimony from H.S. that she and W.T. had been intimate on three occasions but she testified that she had never been in a dating relationship with W.T.. W.T. did not testify. Section 30-5-2(3) defines "dating relationship" as "[a] relationship or former relationship of a romantic or intimate nature characterized by the expectation of affectionate or sexual involvement by either party." According to the Rule 10(d) statement of the evidence, no evidence was presented that either W.T. or H.S. had any expectation of affection or sexual involvement from the other." Based on the statement of evidence, the judgment of the trial court is due to be reversed. ***W.T. v. H.S.***, 31 ALW (2210492); 09/16/2022; Lee Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 6 pages. [ATTY: Appt: Eric Funderburk, Phenix City; Apee: Pro se]

FAMILY LAW: Protection from Abuse. On May 16, 2023, the wife filed a petition for protection-from-abuse ("PFA action"). The husband was served the next day and the PFA action was assigned to Judge Chris Comer. Judge Comer entered an ex parte protection-from-abuse order on May 16, 2023 and set the case for hearing on May 30, 2023. On May 24, 2023, the wife filed a divorce action and a request that the PFA action and the divorce action be consolidated. The divorce action was assigned to Judge Alan Mann. Judge Comer granted the motion to consolidate and transferred the case to Judge Mann. In that same order, Judge Comer canceled the May 30, 2023 PFA hearing. The husband filed a motion to reconsider, arguing that pursuant to § 30-5-6 (a), Ala. Code 1975, he was entitled to a hearing within 10 days after service of the PFA petition. Thereafter, on May 26, 2023, the husband filed a petition for the writ of mandamus. **Writ of mandamus granted.** Section 30-5-6(a) requires that a hearing be held within 10 days of the perfection of service or upon the request of the defendant. "If the defendant has not been served, a final hearing may be continued to allow for service to be perfected." Pursuant to the statute, a temporary order may be entered by the trial court but said temporary order is only effective "until the final hearing date." Subsection (c) of that statute reads: "If a final hearing... is continued, the court may make or extend temporary ex parte protection orders under subsection (b) as it deems reasonably necessary." The court noted that although it may appear that a final hearing on a PFA petition may be continued indefinitely under that subsection, "we do not believe that the statute grants such discretion to a trial court. Instead, we read § 30-5-6(c) to permit a trial court to extend the effectiveness of an ex parte PFA order only when the final hearing on the PFA petition is continued for ...failure of service on the defendant." Any other interpretation would run afoul of a defendant's due process rights. The petition for the writ of mandamus is due to be granted and the trial court directed to set a final hearing on the wife's PFA petition on or before Thursday, June 1, 2023. ***Ex parte C.C. (H.C. v. C.C.)***, 32 ALW (CL-2023-0368); 05/31/2023; Madison Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 8 pages. [ATTY: Pet. Stephen Williams, Huntsville; Resp. Nora Hickman, Huntsville]

VI. PATERNITY

FAMILY LAW: Paternity. In February 2022, C.L.R. ("the former husband") filed a complaint to establish his paternity of a child born during his marriage to the mother. In that complaint, the former husband alleged under oath that he and the mother had been married from September 29, 2014 to January 29, 2015. According to the former husband, the child was conceived by the parties thereafter and was born on April 28, 2021. At the time that the child was born, the mother was married to R.M. ("the current husband") who was listed on the child's birth certificate as the father. The mother apparently informed the former husband that he was actually the biological father of the child when the child was approximately 7 months old. Since that time, the former husband has provided support for the child and visited with her. The mother filed an answer and thereafter, she submitted an affidavit of her current husband wherein he stated that he had married the mother 11 days prior to the birth of the child, that he had executed an affidavit of paternity, that he had taken the child into his home and that he wanted to persist in his presumption of paternity. The former husband sought to amend his complaint. In his motion, the former husband agreed that the current husband was a presumed father of the child but that he was also a presumed father by virtue of having established a father-child relationship with the child, having held the child out as his own and having provided financial support. The former husband suggested that the juvenile court should resolve the conflicting presumptions of paternity and adjudicate which of the two men is the legal father of the child. The juvenile court entered an order requiring the former husband to amend the complaint to add the current husband as a defendant. Once he was added as a party, the current husband filed an answer asserting his claim to the paternity of the child. The mother and the current husband filed a motion to set the case for trial, or in the alternative, to dismiss the case. A hearing on the motion to dismiss—which was treated as a motion for summary judgment—was conducted after which the juvenile court "dismissed" the case. The former husband appealed. **Reversed.** Pursuant to § 26-17-204(a)(1), "[a] man is presumed to be the father of a child if...(a) he and the mother of the child are married to each other and the child is born during the marriage." In this case, because the child was born 11 days after the mother married the current husband, the current husband is a presumed father of the child. According to § 26-17-607(a), Ala. Code 1975, "if the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity." However, when a child has two or more presumed fathers, § 26-17-607(a) does not apply. *Ex parte Kimbrell,* 180 So.3d 30 (Ala. Civ.App. 2015). In such instances, the trial court must determine which of the conflicting presumptions "is founded upon the weightier considerations of public policy and logic." § 26-17-607(b). "Admittedly, this court has not consistently followed the reasoning in *Ex parte Kimbrell*...but the weight of the authority provides that , in cases involving two or more presumed fathers, § 26-17-607(b) controls and not § 26-17-607(a)." The court then turned to whether sufficient

evidence was presented to show that the former husband is also a presumed father. Section 26-17-204(a)(5) provides that a man is a presumed father of a child if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child..and establishes a significant parental relationship with the child by providing emotional and financial support for the child..." Here, evidence was adduced indicating that the former husband had established such a relationship and it was not disputed by the mother or the current husband. "Thus, we hold that the juvenile court should have afforded the former husband an evidentiary hearing for the purposes of establishing his status as a presumed father of the child and, if successful, for litigating whether he or the current husband should be adjudicated the legal father of the child based on the factors set forth in § 26-17-607(b)." The judgment of the trial court is due to be reversed. ***C.L.R. v. M.B.M. and R.M.***, 32 ALW (CL-2022-1069); 03/10/2023; Marshall Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 21 pages. [ATTTY: Not listed-confidential]

FAMILY LAW: Paternity. This mandamus involves two petitions for writ of mandamus for two separate actions which are in the same procedural posture. Jordan Anderson filed an action in the Madison Circuit Court ("the circuit court") seeking an adjudication of the child she asserts that she had with Giovanni Guerrero, to whom she was never married. She also sought an award of sole legal and sole physical custody and an award of child support. Alexis Valentin also filed a paternity action in the circuit court seeking an adjudication of two children born to Celine Draper. Valentin sought joint legal and joint physical custody of the children. The circuit court entered orders in both cases on April 3, 2023, transferring the actions to juvenile court. In those identical orders, the circuit court stated: "While both the Circuit and the Juvenile court may adjudicate paternity, the Juvenile Court is the Court of original jurisdiction in Alabama for the establishment of paternity." Anderson and Valentin, who are represented by the same attorney, each filed a petition for a writ of mandamus. **Writs of mandamus granted.** Pursuant to § 12-15-115(a)(6), Ala. Code 1975, a juvenile court has original jurisdiction over proceedings to establish the parentage of a child pursuant to the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975. However, § 26-17-104, Ala. Code 1975, a part of the AUPA, also provides that "[a] circuit or district court of this state or any other court of this state, as provided by law, shall have original jurisdiction to adjudicate parentage pursuant to [the AUPA] and may determine issues of custody, support, and visitation incidental to a determination of parentage." Because the circuit court had jurisdiction over the actions filed by each petitioner to adjudicate paternity, it was not authorized to transfer those actions to the juvenile court. The petitions for a writ of mandamus are due to be granted. ***Ex parte Anderson (Anderson v. Guerrero)***, 32 ALW (CL-2023-0225; CL-2023-0226); 05/19/2023; Madison Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 6 pages. [ATTY: Pet: Stephen Williams, Huntsville; Resp: Pro se]

FAMILY LAW: Paternity--Constitutionality. APPEAL & ERROR: Waiver. The parties, M.T. ("the mother") and P.F.-T. ("the spouse") entered into a same-sex romantic relationship in 2008. They began living together in 2010 in North Carolina when the mother finished an overseas military deployment. The mother testified that she had been attempting to conceive a child before meeting the spouse. The mother and the spouse began looking for sperm banks and sperm donors but found them to be prohibitively expensive. The mother and the spouse invited a male acquaintance to move into their residence and impregnate the mother but those attempts were unsuccessful. Eventually, a friend of the mother, J.B., offered to assist and with the spouse's consent, the mother had sexual intercourse with J.B. and became pregnant. The spouse attended prenatal classes and doctor's appointments during the mother's pregnancy; however, the spouse's name was not placed on the child's birth certificate. The child was born in March 2013. The parties were married in the District of Columbia in July 2014 because that jurisdiction was one of few that allowed same-sex marriages at that time. After the child was born, the spouse stayed at home and provided care for the child. The spouse was listed as the child's guardian on school and medical records. In 2016, the parties and the child moved to Alabama and lived there until the parties separated in 2019. At that time, the spouse moved in with a man, B.W.M., and became pregnant with his child. Thereafter, the spouse exercised visitation with the child every other weekend. The mother was angry with the spouse because of her conduct with B.W.M. and she did not want the child to spend time with the spouse. In 2020, the mother began prohibiting the spouse from visiting with the child. In January 2021, the mother filed a divorce action to which the spouse filed a counterclaim seeking custody of the child. After a trial, the trial court entered a judgment divorcing the parties but denying the spouse's custody claim. The spouse appealed. **Affirmed.** The spouse challenged the trial court's refusal to grant her custody or visitation with the child and argued that the presumptions of paternity set forth in the Alabama Uniform Parentage Act ("the AUPA"), §26-17-101 et seq. , Ala. Code 1975 should extend to women same-sex marriages. Section 26-17-204(a)(5), Ala. Code 1975 states that a man is presumed to be the father of the child if, while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child and establishes a significant parental relationship with the child by providing financial and emotional support. The spouse acknowledges that this Code section does not apply to her but asserts that based on *Obergefell v. Hodges,* 576 U.S. 644 (2015), §26-17-204 is unconstitutional because it does not apply to women in same-sex marriages, However, the majority of the court determined that this issue was not preserved for appellate review. "To preserve a challenge to the constitutionality of a statute, an appellant must have specified to the trial court which statute he or she is challenging and have made specific arguments to the trial court explaining which constitutional rights the statute violates and how it violates them." The spouse failed to do so in this case. The dissent

asserted that this issue was preserved because the spouse argued in a brief to the trial court that pursuant to §26-17-206, Ala. Code 1975 which provides that "provisions of [the AUPA] relating to the determination of paternity apply to determinations of maternity", the trial court should apply §26-17-204 in a gender-neutral manner. However, the spouse did not make that argument on appeal. "In short, the dissent constructs an argument for the spouse that she does not make to this court, a practice in which this court is not permitted to engage." The judgment of the trial court is due to be affirmed. ***P.F.-T. v. M.T.***, 32 ALW (2210366); 1/13/2023; Montgomery Cty.; Per curiam; Moore, Edwards and Fridy concur; Thompson dissents, with opinion which Hanson joins, 22 pages. [ATTY: Appt: Allie Thompson, Huntsville; Apee: Royce Wadsworth, Montgomery]

VII. ALIMONY

FAMILY LAW: Division of Property--Alimony--Child Support. The parties were married in 2008 and separated in September 2020. They purchased the marital residence in 2010. At the time of trial, the marital residence had $16,000 in equity. The wife did not work during the marriage. After the parties separated, the husband withdrew $45,000 from his retirement account and blew it gambling. The husband acknowledged that he had a gambling addiction. For the first 10 months of 2020, the husband earned $112,886. The wife was earning approximately $30,000 annually. After a trial, the trial court ordered the husband to pay $907 per month in alimony and $350 per month for 36 months in rehabilitative alimony. The wife was awarded $10,000 in equity from the marital residence, $23,500 from the husband's retirement and various items of personal property. The husband appealed. **Affirmed in part; reversed in part.** (1) On appeal, the husband challenged the trial court's award of rehabilitative alimony and its division of property. In making such determinations, the trial court should consider such factors as the length of the marriage, the age and health of the parties, the future employment prospects of the parties, the source, value and type of property owned, the conduct of the parties with regard to the breakdown of the marriage and the standard of living to which the parties have become accustomed during the marriage. In this case, the trial court apparently determined that an award of rehabilitative alimony was justified given that the wife had been a stay-at-home mother for over 10 years. "Further, based upon the fact that the wife had been unemployed during the marriage, the trial court properly exercised its discretion by awarding the wife half the amount of funds that were in the husband's retirement account when the parties separated, which was $23,500." The court noted that the husband failed to cite any authority for his argument that because there was no money left in his retirement account, that he was entitled to a credit for that loss. This portion of the trial court's judgment is due to be affirmed. (2) With regard to the child support award, the trial court did not include a Child Support Guidelines form (Form CS-42) in the record. No such form is required in cases which are resolved by agreement as long as a "Child Support Guideline Notice of Compliance Form" is included in the record. However, this is the only exception. Otherwise, Form CS-42 and Child Support Obligation Income Statement/ Affidavit forms (CS-41s) must be filed. Because these forms were not included in this case and because it is impossible for the court to determine how the trial court arrived at the child support amount, this portion of the trial court's judgment is due to be reversed. ***Johnson v. Johnson,*** 31 ALW ; (2200984); 09/16/2022; Washington Cty.; Hanson; Thompson and Fridy concur; Moore and Edwards concur in the result, without opinions; 11 pages. [ATTY: James P. Newton, Butler; Apee: Bo Keahey, Grove Hill]

FAMILY LAW: Alimony--Attorney Fees--Child Support. The court's opinion of August 19, 2022 is withdrawn and the following is substituted therefor. The parties were married for almost 30 years. They had three children, the youngest of whom obtained the age of majority in October 2020, while the divorce action was pending. At the time of trial, the husband was 50 years old. For most of the marriage, the husband worked as a minister. In August 2017, the husband ended his ministry career and at the time of trial, he was working as a financial planner with Edward Jones. In February 2018, the husband became concerned that he had contracted a sexually transmitted disease as a result of numerous anonymous extramarital affairs. He confessed his adulterous conduct to the wife. At that time, the parties were living in Dothan but had planned to move to north Alabama. After discovering his affairs, the wife asked the husband to leave the marital residence and he relocated to north Alabama ahead of the family and lived with various relatives. In May 2018, the wife and the children moved into a house in Madison. The husband paid for the rent on said house. At the time that the husband left the ministry, he was earning $102,500. His employment with Edward Jones was largely based on commission. His initial salary was $70,000 but that salary decreased over a five-year period as his commission percentage increased. In 2019, his W-2 income was $74,955; in 2020, his gross income was $66,527. He also received VA disability benefits. While the case was pending, the husband received a lump sum payment of $24,293 from the VA. He admitted that he did not deposit that check for 10 months because he did not want the wife to be entitled to any of it. When the lease on the house in which the wife and the children were living expired in July 2020, the husband ceased depositing his paycheck into the parties' joint bank account and gave the children cash instead of providing support for the wife. The husband claimed that his monthly expenses were $5,769. The wife was 48 years old at the time of trial. She had been a stay-at-home mother for most of the parties' marriage. She suffers from significant hearing loss which impairs her ability to work. Shortly before the trial, the wife secured a job as a front-desk worker for a dentist. She works 36 hours per week at $16.50 per hour. Her monthly expenses are $4,457 per month. The trial court divided the marital assets, including a 401(k) account with a balance of $20,396 and a Roth IRA in the amount of $72,000. The divorce decree further awarded the wife a judgment for $4,438 in past-due child support and an attorney fee of $22,000. The trial court awarded the wife $2,500 per month in permanent periodic alimony and it required the husband to name the wife as beneficiary of a life insurance policy with a minimum death benefit of $600,000 for so long as he owes an alimony obligation. The husband appealed. **Affirmed in part; reversed in part.** (1) The court first considered the propriety of the $22,000 attorney fee award to the wife. Factors to be considered when making such an award include the financial circumstances of the parties, the parties' conduct, the results

of the litigation and the trial court's knowledge and experience as to the value of the services performed by the attorney. At a hearing on the husband's postjudgment motion, the trial court stated that the attorney-fee award was based on the wife's limited ability to earn income and the extensiveness of the litigation. Moreover the trial court properly considered the husband's conduct before and during the litigation. "Based on the foregoing evidence, we cannot conclude that the trial court exceeded its discretion and committed clear or palpable error by awarding the wife an attorney fee." (2) The husband next challenged the trial court's award of a $4,428 past-due child support obligation. The husband argued that the trial court erred by including the one-time back payment of VA disability that he received in 2019 but did not deposit until 2020 in its determination of his monthly gross income for 2020. "The evidence indicates that the husband did not disclose or deposit those funds until 2020; therefore, although the husband received the funds in 2019, by holding the funds and depositing them in 2020 the husband did not realize the funds as income until 2020." (3) Turning to the husband's challenge to the trial court's award of $2,500 per month in permanent periodic alimony, the husband claimed that the amount of the monthly award exceeded his ability to pay. He claimed that his monthly net income was $5,206 based on his 2020 year end pay stub from Edward Jones. However, the husband's estimation of his net monthly income does not include his receipt of his VA disability benefit. The court rejected the husband's argument that VA disability benefits cannot be considered when determining an alimony obligation. Such benefits can be considered for child support and alimony purposes as long as they are not paid in lieu of military-retirement benefits. Moreover, "[s]ufficient evidence was presented from which the trial court could have concluded that the husband is able to pay $2,500 in monthly periodic alimony to the wife." The evidence was conflicting with regard to the husband's income. In addition, some of the deductions from the husband's gross monthly income were not mandatory, but for the benefit of the parties' adult children, including payment of health insurance and contributions to a health savings account. Evidence was also presented that the husband gave large sums of money to the children and other relatives "from which the trial court could have inferred that some of the husband's anticipated monthly living expenses were overestimated or based on his desire to bestow benevolent gestures on the children and others." And, in addition, the conduct of the husband was a proper consideration for the amount of alimony awarded. The court further rejected the husband's argument that the alimony awarded was excessive because when added to the wife's monthly net income, it exceeded her monthly living expenses. The trial court properly considered the wife's limited career opportunities and work history due to her hearing disability and her support of the husband's ministry career. The court also rejected the husband's contention that the wife failed to present sufficient evidence regarding the standard of living maintained by the parties during the marriage, noting that "ample circumstantial evidence" concerning

the parties' disposable income was presented so as to allow the trial court to infer the standard of living of the parties during the marriage. (4) The court reversed that portion of the trial court's judgment requiring the husband to maintain a $600 life insurance policy to secure his alimony obligation. It noted that while alimony-in-gross obligations are chargeable against a decedent's estate, periodic alimony obligations are not because said obligations end upon the death of the payor spouse. "Although a trial court has discretion to award life insurance as a separate award for the benefit of the wife...it cannot order the payor spouse to maintain a life insurance policy to secure periodic alimony, which is an obligation that is terminable at death." In a footnote, the court addressed the potential implication of this decision on child support obligations, which also end upon the death of the obligor. It cited to prior precedent holding that a trial court's requirement that a parent maintain life insurance for the benefit of a minor child constituted child support. Additionally, the court pointed out that past-due child support payments and past-due alimony payments will support a claim against an estate. Although generally a reversal of an award of alimony or property division will generally necessitate reversal of the other award, in this case, the life insurance policy premium was only $40. As a result, the court held that the "nominal amount" of that premium would not "so greatly affect the other aspects of the trial court's judgment" that reversal of the entire judgment is necessary. The wife was granted a $4,000 attorney fee on appeal. ***Turney v. Turney,*** 31 ALW (2201007); 12/02/2022; Madison Cty.; Thompson; Hanson and Fridy concur; Moore and Edwards concur in the result, without opinions, 50 pages. [ATTY: Appt: Dinah P. Rhodes, Huntsville; Apee: Joan-Marie Sullivan, Huntsville]

FAMILY LAW: Alimony. APPEAL & ERROR: Mootness. The parties were married in 2006 and they have a 13-year old son. The wife had a child from a previous marriage who was adopted by the husband. The eldest child had reached the age of majority by the time a judgment was entered. The husband was employed as an accountant during the marriage and the wife was a preschool teacher. The parties separated in March 2019 and according to the husband, he was only allowed to visit the parties' children a few times. In December 2019, the trial court entered an order affording the husband overnight visits. The next day, the youngest child telephoned the husband and told him that the wife had said that the husband had something to tell the children so he explained the visitation order. Since that telephone call, the husband has not had any contact with the younger child. On June 25, 2021, the trial court entered an order awarding the parties the joint legal custody of the younger child; sole physical custody was vested in the wife. In that judgment, the trial court noted the strained relationship between the husband and the youngest child and it required that the husband and the child participate in reunification therapy prior to visitation taking place. The trial court awarded the wife periodic alimony and it divided the marital property. After the husband filed a postjudgment motion, the trial court amended its judgment to provide that the parties had to participate in reunification therapy for no longer than 6 months, at which time the husband would have standard visitation with the child. The husband appealed. **Appeal dismissed in part; reversed.** (1) The husband argued that the trial court erred in making its award of alimony because it did not make the express findings required by § 30-2-57, Ala. Code 1975. The wife agreed with the husband's argument and acknowledged that because awards of alimony and property division are interrelated, the judgment is due to be reversed. The court agreed with the parties' assessment. Accordingly, the portions of the trial court's judgment regarding alimony, property settlement and attorney fees are due to be reversed. (2) The father also challenged the trial court's requirement that he undergo reunification therapy prior to visiting with the child. However, that requirement only lasted for six months. Because that six-month requirement would have expired in April 2022, the wife argued that this issue was moot. The court also agreed with this argument and in so doing, held that it could no longer "grant effectual relief" to the husband. This portion of the husband's appeal is due to be dismissed. ***Cason v. Cason,*** 31 ALW (2210227); 12/16/2022; Shelby Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 8 pages. [ATTY: Appt: Jonathan Spann, Columbiana; Apee: Charles Dunn, Birmingham]

FAMILY LAW: Alimony—Property Division. The parties were married for 24 years. The wife was 52 years old and suffered from depression and bipolar disorder. In 2014, the wife had an episode of paranoia while traveling with the husband and told other customers at a convenience store in Texas that the husband was kidnapping her and her son. Law enforcement officers were contacted and the husband was almost arrested. The wife was hospitalized in 2019 after suffering another episode of paranoia. According to the husband, the wife stabbed him with a knife during this episode. The wife was hospitalized two times in 2020 for mental issues, including having suicidal ideations. The wife worked as a teacher's assistant and as a bank employee during the marriage. Her most recent employment was as a nanny but she was unemployed at the time of the divorce. She had applied for disability income but that claim had been denied. According to the wife, her earning capacity was between $10 and $15 per hour. The wife had no retirement funds. The husband worked for Mercedez Benz earning between $85,000 and $100,000 per year. His retirement account was valued at $257,259. The husband also received funds from a family trust. According to the wife, those funds were used to pay for the child's private school tuition and family vacations; the husband denied that any of the funds were used for the benefit of the marriage. The marital residence was valued by the wife at $145,690. However, evidence was disputed as to whether the marital residence needed substantial repairs. Pursuant to the trial court's final judgment, the wife was awarded the marital residence, a 2005 Toyota Camry and rehabilitative alimony in the amount of $1,500 for a period of 24 months. The husband was awarded a 2009 Lexus and his Mercedez-Benz 401(k) retirement account. After the wife's postjudgment motion was denied by operation of law, the wife appealed. **Reversed.** The wife argued that the property division and the alimony award are inequitable. Because these issues are so interrelated, they must be considered together on appeal. Here, the trial court made no findings of fact to support its property division and alimony award. Notably, the express findings required by §30-2-57, Ala. Code 1975 with regard to a trial court's determination as to whether to award periodic or rehabilitative alimony were not set forth. As a result, the court could not "properly review the alimony award in this case to discern whether it is equitable." This portion of the trial court's judgment is due to be reversed and moreover, the property division is also due to be reversed so that both the property division and the alimony award can be considered together. ***Friend v. Friend,*** 32 ALW (CL-2022-0952); 04/28/2023; Jefferson Cty.; Thompson; Edwards, Hanson and Fridy concur; Moore concurs in the result, without opinion; 12 pages. [ATTY: Appt: Marylee Abele, Mountain Brook; Apee: Pro se]

FAMILY LAW: Alimony. The parties were divorced in November 2022. The divorce judgment awarded the wife alimony. The husband appealed. **Reversed.** The trial court failed to make specific findings regarding the award of alimony as required by §30-2-57, Ala. Code 1975. Pursuant to that statute, a trial court is required to make specific findings regarding the factors set forth in that statute. As a result, the propriety of the alimony awarded cannot be reviewed on appeal. "Accordingly, we reverse the judgment as to the alimony award, and we remand the case to the trial court for it to enter a judgment that complies with §30-2-57. Moreover, because the alimony award and the division of marital property are interrelated, the trial court's judgment in that respect is also due to be reversed. ***Denton v. Denton,*** 32 ALW (CL-2023-0012); 08/25/2023; Calhoun Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 3 pages. [ATTY: Appt: Sheila Field, Anniston; Apee:Ronald Allen, Anniston]

FAMILY LAW: Alimony. The parties were divorced by a judgment dated January 18, 2023. The divorce judgment divided the marital property and awarded the wife periodic alimony in the amount of $500 each month. The husband filed a timely postjudgment motion and on March 7, 2023, the trial court entered an amended judgment which required the wife to refinance the marital home and release the husband from its debt. The husband appealed. **Reversed.** The husband argued that the trial court's award of alimony to the wife was due to be reversed because the trial court did not make the express findings required by § 30-2-57, Ala. Code 1975. Such findings include: whether the wife's estate is insufficient, whether the husband could afford to pay alimony and whether an award of alimony was equitable. The wife concedes that the husband's argument is correct. Accordingly, the judgment of the trial court is due to be reversed and the case remanded with instructions for the trial court to enter a new judgment that complies with § 30-2-57. Because the issues of alimony and property division are so intertwined, the trial court must reconsider both issues on remand. ***Desmond v. Desmond,*** 32 ALW (CL-2-23-0153); 09/08/2023; Baldwin Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 3 pages. [ATTY: Appt: Margaret Pace, Montrose; Apee: Braxton Lowe, Gulf Shores]

VIII. PROPERTY DIVISION

FAMILY LAW: Division of Property--Alimony. The parties were married for over 29 years at the time of their separation in October 2019. The husband was 60 years old; the wife was 54. At or near the time of the separation, the husband found his wife in a motel room, clad in lingerie. The wife claimed that she was staying at the motel to protect herself from her abusive husband. The husband denied any such abuse. According to the wife, the parties' minor children had also been abusing her and forced her to stay in a locked bedroom at the marital residence. The marital residence was purchased 31 years ago and the parties had lived there from the time of their marriage through their separation. The mortgage payments were paid from a joint checking account. According to the wife, she deposited her paycheck into the account. The husband claimed that she would withdraw those funds immediately after depositing them. The marital residence had a fair market value of $108,000 and an outstanding mortgage indebtedness of $25,000. During the trial, the wife stated that she would just give the equity in the marital residence to the parties' children. The husband worked as a law-enforcement officer and the wife worked as a nurse during the parties' marriage. The husband retired in 2018 and was receiving $2,000 per month in Social Security disability benefits. In addition, he had an IRA with a balance of $552,000. The husband testified that at some point during the marriage, the wife received a retirement payout from a local hospital when it closed. The amount of that payout was never specified. The wife was earning approximately $3,500 every two weeks as a traveling nurse at the time that the parties separated. However, the wife claimed that she had suffered a nervous breakdown in April 2019 and that her nursing license had been revoked as a result. Since March 2020, the wife was living with her fiancé who supports her financially. The parties had accumulated several vehicles during their marriage. The husband testified that for a decade prior to their separation, the wife had not contributed to any marital expenses. After a hearing, the trial court awarded the husband the marital residence, his IRA and all automobiles except for the wife's personal vehicle—a 2010 Chevrolet Camaro. The husband was awarded custody of the parties' minor children but the wife was not required to pay child support. The trial court refused to award the wife any alimony. The wife appealed. **Affirmed.** (1) The wife challenged the trial court's division of the marital property. The court pointed out that the wife had separated herself financially from the husband for 10 years prior to the separation. It further indicated that the evidence supported a conclusion that the wife had not directly contributed to the mortgage payment and that she disclaimed any interest in the equity in said property when she testified that she would give that money to the children. "Based on those determinations, the trial court could have exercised its discretion to determine that the wife should not be awarded any part of the

equity in the marital residence." With regard to the husband's IRA, the court can consider the source of the retirement benefits, any contribution made by the other spouse (financial or otherwise) to the accumulation of those benefits, any liabilities owed by the retiree, the age, health and future earning potential of the retiree spouse, the parties' fault in the breakdown of the marriage as well as any other equitable factor. Here, the husband's IRA and his Social Security disability benefits were his sole source of income. The trial court could have disbelieved that the wife was unable to work. The court further pointed out that the husband was not awarded any child support and therefore, his retirement benefits would be necessary to support the children until they reached the age of majority. The wife failed to adduce evidence regarding her nonfinancial contributions to the accumulation of the IRA benefits. The trial court did not abuse its discretion in its division of marital assets. (2) The wife next challenged the trial court's refusal to award her periodic alimony. However, the wife testified at trial that she was cohabitating with her fiancé. "Under Ala. Code 1975, §30-2-55, alimony is not payable when a former spouse is cohabitating with another adult individual in that type of relationship." The judgment of the trial court is due to be affirmed. Presiding Judge Thompson authored a dissent in which he noted that the wife was awarded less than 10% of the marital estate. "In my opinion, the trial court's failure to award the wife any part of the equity in the marital residence or the husband's retirement—the two largest assets in the marriage valued at approximately $635,000—resulted in an inequitable division of marital property." ***Anderson v. Anderson,*** 31 ALW (2200969); 12/09/2022; Lauderdale Cty.; Moore; Edwards, Hanson and Fridy concur; Thompson dissents, with opinion, 22 pages. [ATTY: Appt: Johnnie Woodruff, Florence; Apee: Jeff B. Austin, Florence]

The parties were married in September 1988. At the time of the divorce trial, they had been married 31 years. The husband was 61-years old and the wife was 58. The husband was employed by the United States Postal Service ("USPS") beginning seven years prior to the parties' marriage and through the date of divorce. He was earning $11,648 as the postmaster in Foley. Retirement for USPS employees is governed by the civil-service retirement system ("CSRS") and therefore, the husband will not be eligible to receive Social Security benefits upon his retirement. The CSRS offers spouses survivor benefits similar to those afforded through the military. Here, the husband's CSRS retirement pay would be reduced by approximately $600 if he was required to name the wife as beneficiary. After a trial, the trial court awarded the wife periodic alimony of $1,500 per month until the husband retires from USPS. Thereafter, the husband was required to pay $1,217 per month until the wife begins to receive her own Social Security benefits or reaches age 65, whichever occurs first. The wife was awarded 31% of the husband's USPS thrift-savings plan as of the date of the judgment and a share of his CSRS retirement benefits. Moreover, the trial court awarded the wife a survivor annuity under the CSRS to be calculated as follows: "the maximum possible survivor annuity under the CSRS time a fraction, the numerator of which is 370 and the denominator of which is the number of [the husband's] total months of service with the USPS at the time of his retirement." The case was reversed on initial appeal because the trial co urt failed to make the required findings of fact required by § 30-2-57, Ala. Code 1975. *Laurendine v. Laurendine,* 353 So.3d 1148 (Ala. Civ. App. 2021). On remand, the trial court complied with the appellate court's directive regarding the required findings but left the alimony and property awards unchanged. The husband appealed and the wife cross-appealed. **Reversed.** The husband argued that the designation of the wife as a beneficiary of his CSRS survivor benefit violates § 30-2-51, Ala. Code 1975 by potentially awarding her more than 50% of his retirement benefits. Section 30-2-51(b) provides that absent an agreement of the parties, a noncovered spouse can receive no more than 50% of the retirement benefits accumulated during the parties' marriage. Based on prior precedent, the court held that because the award of survivor benefits may result in an award of more than 50% of the husband's CSRS benefits to the wife, this portion of the trial court's judgment is due to be reversed. *See Wheeler v. Wheeler,* 831 So.2d 629 (Ala. Civ. App. 2002); *Capone v. Capone,* 962 So.2d 835 (Ala. Civ. App. 2006). Because this issue is intertwined with the trial court's alimony award, this portion of the trial court's judgment is also due to be reversed. (2) The marital residence had been in the husband's family for over 200 years. The trial court ordered that the residence be sold and the proceeds divided equally between the parties. The husband argued that although the trial court could consider the marital residence in its division of marital assets, it was not required to do so. He further contended that the wife could be awarded a portion of the equity in the marital residence which was built during the marriage but not in the land itself which was given to him prior to the

marriage. The court noted that the parties were married for over 30 years and that the marital residence was their largest asset. "Based on the record, we cannot say that the trial court abused its discretion in finding that the marital residence, including the land it sits on, was a marital asset subject to division." ***Laurendine v. Laurendine,*** 32 ALW (CL-2022-0592; CL-2022-0624); 09/15/2023; Baldwin Cty.; Fridy; Moore and Hanson concur; Thompson and Edwards concur in the result, without opinions; 14 pages. [ATTY: Appt: Margaret Pace, Montrose; Apee: Stephen Johnson, Fairhope]

FAMILY LAW: Contempt—Child Support—Modification of Property Division. CIVIL PROCEDURE: Unclean Hands Doctrine. The parties were divorced in 2017. Pursuant to an agreement which was incorporated into the decree of divorce, the mother was awarded the sole physical custody of the parties' three children and the father was required to pay $3,500 per month in child support. In addition, the parties agreed that the three 529 college accounts which had been established for the children would be used solely for the children's college educations. If any monies remained in the eldest child's 529 account at the time he graduated from college, that balance would be divided and deposited into the two younger children's 529 accounts. If a balance remained in the middle child's 529 account when he graduated from college, that balance would be deposited into the youngest child's 529 account. No provision was included in the parties' agreement with regard to the disposition of any remaining funds from the youngest child's 529 account. The parties also agreed to deposit $125,000 into a Merrill Lynch account to be used for the high school education of the children. In 2019, the mother filed a petition for rule nisi and a motion to modify the divorce judgment. She alleged that the father had failed to pay child support as ordered and that he failed to pay his portion of the children's uncovered medical expenses. The mother also requested that the divorce judgment be modified to allow her to supervise the accounts containing educational funds for the children and she requested an award of attorney fees. The father filed a motion in that action requesting a modification of custody and child support. After the mother filed an objection to the father's motion, the trial court directed the father to file a separate action to pursue the relief he sought in his motion. The father filed that separate action on April 21, 2020. After a trial, the trial court found the father in civil and criminal contempt for his willful failure to pay child support and his portion of the children's uncovered medical expenses. The trial court directed that the father be incarcerated for 45 days or, in the alternative, that he be released upon the payment of a cash bond in the amount of $25,000. With regard to the father's modification action, the trial court reduced his child support obligation to $1,000 per month but it denied his request for a retroactive application of that reduction based on its determination that the father had "come to court with unclean hands." The trial court entered a judgment for a child support arrearage in the amount of $65,000 plus interest. The trial court directed the father to transfer ownership of the 529 college accounts to the mother and it allowed the mother to administer all of the educational accounts for the children. The trial court determined that the father owed the mother $15,548.24 for unpaid medical expenses. Finally, it directed the father to pay $30,000 toward the mother's attorney's fees. After postjudgment motions filed by both parties were denied, the father appealed. **Affirmed in part; reversed in part.** (1) The father argued that the trial court's finding of civil contempt is due to be reversed because the trial court's order only speaks to criminal contempt. "Civil contempt" is a "willful, continuing failure or refusal of any person to

comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with." Rule 70(a)(2)(D), Ala. R. Civ. P.. The father admitted that he had unilaterally reduced and then later terminated his child support payments. The court rejected the father's argument that his actions constituted an error in judgment and were not willful inasmuch as he reduced his child support payments only after the parties' two eldest children had reached the age of majority. The court noted: "the father in this case is not an average layperson but, rather, is a practicing attorney..." Therefore, the trial court did not err by finding him in civil and criminal contempt. (2) The father argued that the trial court erred in requiring him to post a bond in the amount of $25,000 because the mother's contempt petition did not seek the imposition of same. Section 30-3-6, Ala. Code 1975 allows a court to issue an order requiring the obligor to post a bond for the enforcement of support "where request therefor is included in the petition or other pleading." At trial, the mother requested that a bond amount be set for the amount of the father's child-support arrearage. The father did not object to this request. Therefore, the trial court could have concluded that the issue was tried by the implied consent of the parties. (3) With regard to that portion of the trial court's order which directed him to transfer to the mother the ownership of the children's 529 accounts and the determination that the mother could administer those educational accounts, the father argued that these provisions amounted to an impermissible modification of the property division awarded in the divorce judgment. In resolving this issue, the court looked to case law from other jurisdictions. The court determined that because the parties specifically directed that the 529 funds would be used for the children's college educations, the administration of those plans was in the nature of child support and could be modified. However, the trial court could not modify ownership of those accounts. "This court acknowledges...that, because the terms of the parties' agreement and the divorce judgment are silent as to the ownership of any funds remaining in the accounts after all three children have graduated college...the owner of the 529 college accounts in the present case could, among other things, withdraw any remaining funds therein as a nonqualified withdrawal." Therefore, that portion of the trial court's judgment transferring ownership of the 529 college accounts from the father to the mother is due to be reversed. (4) The father also challenged the amount of the child support he was ordered to pay. Because the parties' combined gross monthly income exceeded the uppermost limit of the child support schedule, the father argued that the amount of child support must rationally relate to the reasonable needs of the child. In this case, most of the youngest child's educational costs were being paid by the high school educational fund. "From the testimony of the father indicating that he had provided the youngest child with a computer, a cellular telephone, dresses and other accessories, the trial court could have determined that the youngest child had enjoyed any elevated standard of living that required at least $1,000 per month, which amount, we note,

actually falls below the proportionate share of child support for the two older children." (5) The court turned to the father's argument that the trial court erred by refusing to allow him to present any evidence regarding any credits or set-offs to which he might have been entitled to reduce his child support arrearage. When the father attempted to elicit testimony from the mother about said payments, "the trial court indicated that caselaw did not allow for 'an offset for buying extra things for your children.'" The father requested that the trial court allow him to brief that issue and the trial court was amenable to that request. "There is no indication that the trial court prevented the father from presenting additional evidence thereafter regarding amounts for which he sought a credit, and the father failed to file a brief with regard to the issue before entry of the trial court's judgments in both actions." This argument does not merit reversal. (6) The trial court refused to make the reduction in the father's child support obligation retroactive to the filing of his modification petition because it determined that the father was guilty of unclean hands. The unclean hands doctrine applies to a modification of child support. Moreover, the trial court has discretion with regard to whether to make a modification of a parent's child support obligation retroactive to the date that the petition was filed. Because of the father's willful failure to pay his child support as ordered and based on evidence in the record from which the trial court could have concluded that the father's actions resulted in a delay of the final judgment, the trial court did not abuse its discretion in declining to retroactively reduce the father's child support obligation. ***Rasmussen v. Rasmussen,*** 32 ALW (2210311; 2210469); 02/03/2023; Jefferson Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 32 pages. [ATTY: Appt: Joan-Marie Sullivan, Huntsville; Apee: Pro se]

APPEAL & ERROR: Final Judgment. The parties were married in 2011 and they have twin children born in May 2012. The wife filed a divorce action in April 2019 to which the husband filed an answer and counterclaim. The trial court entered a pendente lite order awarding possession of the marital home to the wife; she was also awarded custody of the children. The pendente lite order required the parties to maintain the status quo with regard to asset preservation and financial matters. In June 2019, the husband filed a motion to show cause, asserting that the wife should be held in contempt because she had ceased depositing her paycheck into the parties' joint bank account and she had made several large withdrawals from that account. After a hearing, the trial court entered an order on April 1, 2021 divorcing the parties and setting the remaining issues for further hearing. The wife made an offer of judgment to the husband pursuant to Rule 68, Ala. R. Civ. P. Pursuant to that offer, the parties were to share the joint legal custody of the children, the wife was to be awarded sole physical custody and the husband was to be afforded visitation on alternating weekends during the school year, certain holidays and alternating weeks during the summer. On February 15, 2022, the wife filed a request for attorney's fees based on the husband's failure to accept the offer of judgment. The trial court received additional evidence on February 15, 2022. On March 23, 2022, the trial court entered an order awarding the parties joint legal custody of the children, awarding the wife sole physical custody, awarding the husband visitation every other weekend, on certain holidays and on alternating weeks during the summer, requiring the husband to pay $748.59 per month as child support, and dividing the marital property. In that regard, the trial court stated that "Representation that all personal property being divided and distributed. If not, that issue is reserved to this Court." After consideration of the father's postjudgment motion, the trial court amended its order on April 28, 2022 to grant the wife final-decision making authority with regard to issues concerning the children, providing additional holiday visitation to the father and addressing issues regarding the exchange of the children. The husband appealed. **Appeal dismissed.** An appeal will generally only lie from a final judgment. A judgment is final if it completely adjudicates all issues between the parties. At the trial of this action, the husband provided a list of 14 items that were in the wife's possession that he wanted to be awarded. The wife testified that all personal property items had been divided by the parties. The trial court's March 2022 order did not make a final award of the parties' personal property. Because no final judgment was entered in this case, the appeal is due to be dismissed. ***Lovering v. Lovering***, 32 ALW (CL-2022-0717); 04/07/2023; Elmore Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 6 pages. [ATTY: Appt: Walter James, Wetumpka; Apee: Clifford Cleveland, Prattville]

FAMILY LAW: Alimony--Division of Property--Child Support--Retirement. APPEAL & ERROR: Waiver. The parties were married in April 2008 and shortly thereafter, their son was born. The wife also had a child from a previous marriage who resided with the parties. The husband was employed with the United States Department of Homeland Security ("DHS") and the wife was a stay-at-home mother. The parties separated in September 2019. At the time of the separation, the parties were living in Puerto Rico, attendant to the husband's employment. The wife and the children moved in with the wife's mother in Enterprise. The husband was committed through his employment to remain in Puerto Rico through 2023. The wife removed $45,000 from the parties' joint bank account at the time that she relocated. The remaining $90,000 in that joint bank account was used to satisfy the parties' 2019 income tax liability, to pay for the living expenses of the wife and the children after the separation and to purchase a 2011 Toyota Venza for the wife. The wife filed for divorce in August 2020. After a hearing, the trial court entered a pendente lite order requiring the husband to pay $750 per month for support for the wife and $1,158 in child support. The husband was also required to pay for the child's private school tuition as well as the expenses for a property in Enterprise that he had owned prior to the parties' marriage which was being rented ("the Enterprise rental home"). On August 18, 2021, the trial court entered a judgment divorcing the parties in which it awarded the wife sole physical custody of the child. The husband was required to pay $1,156 in child support, plus up to $500 per month in private school tuition. The wife was awarded $750 per month in periodic alimony for 36 months. The trial court also divided the parties' personal property, bank accounts and vehicles. The husband was awarded the Enterprise rental house, subject to the payment of the outstanding indebtedness owed thereon. The wife filed a postjudgment motion after which the trial court granted a new trial as to the issue of the husband's Thrift Savings Plan ("the husband's TSP account"). At that new trial, the husband introduced into evidence an exhibit that included values for some of the marital property and debt obligations that had been awarded to the parties. Said exhibit was offered without objection. On March 9, 2022, the trial court entered a new judgment awarding the wife $65,000 from the husband's TSP account which had a value of $173,454 in September 2019; the remainder of the August 18, 2021 judgment remained unchanged. The wife appealed. **Affirmed in part; reversed in part.** (1) Throughout her brief, the wife challenged the husband's failure to provide adequate responses to her discovery requests. The husband filed objections to the information sought because of purported issues surrounding his security clearance with DHS. At the start of the trial, the trial court asked whether the parties wanted to proceed with trial even though all of the requested records may not have been produced. The wife's counsel stated: "We will go forward and just---." The trial court interrupted and stated that they would proceed with trial and address any evidentiary issues as they arose and counsel objected. The mother did not lodge any complaint

about the trial court's proposed course of action. On appeal, the wife made no legal argument with citation to authority regarding any error made by the trial court as to any discovery ruling or its decision to proceed with trial. "Under the circumstances, we will not consider whether the alleged March 9, 2022, judgment should be reversed based on the husband's alleged lack of responsiveness to the wife's discovery requests or based on the trial court's decision to proceed with trial in April 2021." (2) The wife challenged the trial court' s division of the husband's TSP account based on the value of said account in September 2019. She asserts that she was entitled to a share of the value of said account as of the date of the April 2021 initial trial or the January 2022 trial as to the division of that account. The division of retirement assets is governed by §30-2-51(b), Ala. Code 1975. The Alabama Comment to that Code section states: "The statute intentionally fails to define the term 'during the marriage,' leaving it to the court to decide based on the evidence and equitable considerations the appropriate starting and ending date of the marriage for all purposes under the statute." The wife failed to respond to the husband's argument regarding the language of the Alabama Comment. In a footnote, the court noted that there may be some "tension" between parts of the Alabama Comment and the plain language of § 30-2-51(b). However, the court determined that it need not address those discrepancies because the wife waived any argument that the trial court abused its discretion by dividing the husband's TSP account as of September 2019. (3) The wife next challenged the propriety of the trial court's division of marital property and its award of periodic alimony. At trial, the wife testified that she wanted alimony for a period of 3 or 4 years in order to enable her to "get on [her] feet." The husband agreed to the need and duration for such an alimony award. Although the trial court couched its award of alimony as "periodic", it appears that it may have been rehabilitative in nature. Section 30-2-57, Ala. Code 1975 requires a trial court to make express findings as to the establishment of the basis for an alimony award and as to the specific type of alimony awarded. Since this was not done in this case, this portion of the trial court's judgment is due to be reversed. Because the issues of alimony and the division of marital property are interrelated, that portion of the trial court's judgment with regard to the division of marital property is also due to be reversed. (4) Finally, the wife challenged the trial court's award of child support. The trial court may have used the income stated on the husband's CS-42 "Child-Support Guidelines" form that was prepared for the pendente lite hearing. However, based on testimony elicited at trial, it appears that the husband's income had increased since 2018. Moreover, the wife's current income was unclear and no CS-42 forms were submitted and it is impossible to determine the exact basis for the trial court's child-support award. Accordingly, this portion of the trial court's judgment is due to be reversed. ***Lopez v. Rodriguez,*** 32 ALW (2210320); 01/20/2023; Coffee Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 21 pages. [ATTY: Appt: Kerrie Ogden, Ozark; Apee: Christopher Kaminski, Enterprise]

FAMILY LAW: Property Division—Modification. CIVIL PROCEDURE: Settlement—Enforcement. The parties were divorced in 2011. At the time that the divorce judgment was entered, the marital residence had $46,000 in equity. Pursuant to the divorce judgment, the former wife had an option to purchase the former husband's interest in the marital residence by paying him $20,000 within 120 days. If the former wife did not exercise her option, the former husband was granted the option to purchase the former wife's interest in the marital residence within 30 days. If neither party exercised his or her option, the marital residence was to be listed for sale and the parties were to divide the net proceeds. Neither party exercised his or her option within the designated time periods. In 2014, the former husband filed a contempt petition and the trial court adopted an agreement of the parties whereby the former husband was to have the marital residence appraised and the marital residence was to be listed for sale ("the 2014 judgment"). In June 2022, the former husband filed a second contempt petition alleging that the former wife had violated the terms of both the divorce judgment and the 2014 judgment by refusing to place the marital residence for sale. The former wife filed a pro se answer indicating that she would be willing to pay the former husband $20,000 to purchase his interest in the marital residence. On the date of trial, the former wife reiterated her offer to pay the former husband $20,000 but indicated that she needed to secure a loan to refinance the property. Counsel for the former husband stated on the record that he would accept that offer if payment was made "by the end of the year." On December 6, 2022, the trial court entered a judgment requiring the former wife to close on the refinancing loan and pay the former husband $20,000 by December 31, 2022. The judgment further provided that if she failed to do so, the marital residence would be sold. On December 20, 2022, the former husband filed a motion in which he requested that the trial court enforce the 2014 judgment by ordering the sale of the marital residence and an equal division of the net proceeds. The trial court denied that motion. The former husband refused to execute the documents necessary for the former wife to refinance the loan. In an order dated January 3, 2023, the trial court directed the former husband to execute the necessary documents. On that same date, the former husband also filed a second postjudgment motion, asserting that the trial court did not have jurisdiction to modify the parties' property settlement. The trial court denied that motion and the former husband appealed. **Affirmed.** A trial court lacks jurisdiction in a contempt proceeding to modify a final property settlement, except to correct clerical errors. However, a trial court can enforce a contractual agreement entered into by the parties that modifies the terms of a prior property settlement. Here, the former wife offered at the time of trial to purchase the former husband's interest in the marital residence for $20,000 and the former husband agreed to accept that offer as long as the former wife paid that sum by December 31, 2022.

"Agreements made in open court or at pretrial conferences are binding whether such agreements are oral or written." Rule 47, Ala. R. App. P. The trial court acted within its discretion by accepting the parties' agreement and entering an order enforcing the same. The judgment of the trial court is due to be affirmed. ***Holden v. Holden,*** 32 ALW (CL-2-23-0085); Madison Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 13 pages. [ATTY: Appt: Marcus Helstowski, Huntsville; Apee: Pro se]

IX. CONTEMPT

Facts and Procedural History: In November 2021, Judge Samuel Pipes was conducting a criminal trial in which the defendant was represented by Chase Dearman. During a recess, Dearman was served with a subpoena. The subpoena was issued by Christine Hernandez, who was representing Dearman's former secretary who was facing criminal charges for allegedly stealing money from Dearman's law firm. The subpoena was served on Dearman by a process server, Eddie Stokley.

After being served, Dearman advised Judge Pipes that he had been served with a subpoena from Hernandez in front of all the jurors. Judge Pipes told the bailiff to locate and detain Stokley. After Stokley was brought to the courtroom, Judge Pipes told him that he was charging him "with contempt of court for interfering with a trial." Judge Pipes then gave the jury its instructions and they began deliberating.

Dearman moved for a mistrial, arguing that the jurors who had observed him being served might vote to convict his client based on the impression that he was a "shady lawyer." Judge Pipes delayed ruling. No verdict was reached and the next day, Dearman's client pleaded guilty to a lesser offense.

Judge Pipes took testimony from one juror who testified that he had seen Stokley in the hallway and that he appeared to be "nervously waiting to do something." However, he did not see Stokley hand anything to Dearman or even speak to him.

Ten days later, Judge Pipes issued a contempt citation charging Hernandez and Stokley with constructive criminal contempt. At a hearing, Hernandez explained that she had directed Stokley to serve Dearman "at the end of the trial." She did so because it was her understanding that Dearman was going to be difficult to serve. Stokley disputed Hernandez's testimony. Judge Pipes found both Hernandez and Stokley in contempt and fined them $100 and $25 respectively. Hernandez appealed.

Preservation of Issue: Constructive criminal contempt is defined as "[m]isconduct of any person that obstructs the administration of justice and that is committed either in the court's presence or so near thereto as to interrupt, disturb, or hinder its proceedings." Rule 33.1(b)(3)(a), Ala. R. Crim. P.. Hernandez argued that insufficient evidence was presented to meet this definition. The State countered by arguing that this issue was not preserved for appellate review. Hernandez did not raise this issue in a postjudgment motion or after Judge Pipes made his oral pronouncement. However, in her answer to the contempt citation, Hernandez specifically asserted that she had not engaged in any conduct that had "interrupted, disturbed, and hindered Dearman's client's trial" or otherwise "obstructed the administration of justice." At the contempt

hearing, Hernandez's counsel cited the juror's testimony and classified the serving incident as "no big deal." "Thus, Hernandez clearly argued during the contempt proceedings that there was no evidence to support a finding that she had committed constructive criminal contempt, which is the argument she has made on appeal." An appellant is required to raise an issue at the trial court level before it can be raised on appeal in order to give the trial court an opportunity to address that issue. Hernandez gave the trial court that opportunity. The fact that she did not reassert that argument after Judge Pipes rejected it does not constitute a waiver. The issue was preserved for appellate review.

Sufficiency of Evidence: The Court next turned to whether the service incident interfered with Dearman's client's trial so as to constitute an interruption, disturbance or hinderance of that proceeding. The State argued that because Dearman was served in the hallway where multiple jurors were congregated, said action could have caused those jurors to question why service was being made on Dearman and "any negative connotations from the incident" could have "parlay[ed] the jury's verdict." However, no evidence was presented that any juror actually saw the interaction. The only juror who testified acknowledged that he did not know what Stokley was doing. Although it may be a possibility that another juror saw what happened and understood its import, no evidence was adduced to support that conclusion. Based on the record on appeal, any finding in that regard would be based on mere speculation or conjecture. The Court further pointed out that the State's argument that this could have "parlay[ed] to the jury's verdict" is unpersuasive given that Dearman's client pleaded guilty and there was no jury verdict.

The State also argued that the service incident disrupted the trial proceedings and required Judge Pipes to address the incident prior to resuming trial. However, the only action that Judge Pipes took before resuming trial was to direct the bailiff to bring Stokley to his courtroom and to advise Stokley that he would be charged with contempt. Thereafter, Judge Pipes conducted the charge conference. "Thus, the only 'disruption' to the trial that resulted from the service incident was that the recess between closing arguments and the charge conference was extended for what appears to have been only a matter of a few minutes so that Judge Pipes could briefly address Stokley."

The Court noted that it was not foreclosing the possibility that a person might commit constructive criminal contempt by serving an attorney with a subpoena at the courthouse where the attorney is in the middle of trial. "However, if such circumstances exist, they exist only when there is some evidence indicating that service of the subpoena actually obstructed the administration of justice or interrupted, disturbed, or hindered the proceedings." The *potential* for such an obstruction or

interference is not enough. Accordingly, the judgment of the trial court is due to be reversed.

The case is styled: ***Hernandez v. State of Alabama,*** 31 ALW (CR-21-0253); 10/07/2022; Mobile Cty.; McCool; Windom, Kellum, Cole and Minor concur; 17 pages. [ATTY: Appt: Scott Hunter, Point Clear; Apee: Atty. Gen.]

FAMILY LAW: Contempt--Child Custody--Jurisdiction. JUVENILE LAW--Referee. APPEAL & ERROR: Record on Appeal--Mandamus. On April 18, 2022, T.K. ("the presumed father") filed a complaint seeking an adjudication of his paternity of R.L.T.K. ("the child"). In that complaint, the presumed father asserted that he had received the child into his home and held out the child as his natural child. The presumed father also sought an award of joint custody of the child. On that same date, the presumed father filed an emergency motion for custody alleging that the child's mother had indicated that she was relocating to Oregon and that she was mentally unstable and unfit to care for the child. On May 6, 2022, the juvenile court referee held a hearing and thereafter, the referee entered an order awarding the presumed father pendente lite custody of the child. The juvenile court judge ratified that order on the same day that it was entered. The mother was served on April 24, 2022 in Oregon. In May 2022, the mother filed a motion to dismiss the presumed father's complaint, alleging that she and the child were residents of Oregon and that they had been visiting Alabama in April 2022 until they returned to Oregon on April 16, 2022. After a hearing, the referee entered an order granting the motion to dismiss, finding that the Oregon was the home state of the child. The juvenile court judge ratified that order. The presumed father filed a motion for a rehearing of the referee's order pursuant to §12-15-106 (e) and §12-15-106(f), Ala. Code 1975. The juvenile court granted that motion. Before that hearing took place, the father filed a motion for a judicial conference between the juvenile court and the Oregon court pursuant to §30-3B-206, Ala. Code 1975, a part of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"). At the rehearing, the juvenile court did not receive any evidence nor did it ascertain whether the record of the hearing before the referee was adequate. The juvenile court never indicated that it had reviewed same. On July 23, 2022, the juvenile court entered an order concluding that it had subject-matter jurisdiction to proceed. In that order, the juvenile court enjoined the mother from leaving the state with the minor child. On July 27, 2022, the father filed an emergency motion seeking to hold the mother in contempt for violating the juvenile court's order mandating that the mother and the child remain in Alabama. The juvenile court granted that motion and awarded the father pendente lite custody. It also granted two motions for pickup orders filed by the father. The mother filed a motion to reconsider the July 23, 2022 order as well as a motion to set aside the pickup orders. Those motions were denied by the juvenile court on August 8, 2022. The mother filed a petition for the writ of mandamus on August 22, 2022. Apparently, a UCCJEA scheduling conference was scheduled for September 15, 2022. The juvenile court judge failed to attend that conference because of a scheduling conflict but the mother provided the court with a letter from the Oregon court outlining the testimony taken and indicating that the Oregon court considered the child's home state to be Oregon. The juvenile court judge scheduled another UCCJEA conference after which it entered an order concluding that Alabama was the child's home state. **Writ of**

mandamus granted in part and denied in part. (1) The mother challenged the trial court's finding of contempt because the juvenile court judge failed to hold an evidentiary hearing before making such a determination. Before a court can punish a party for constructive contempt, "the offending party should have notice of the character and nature of the charge and be given an opportunity to answer and defend himself." (citation omitted). However, the proper vehicle to challenge a contempt finding is an appeal and not a petition for the writ of mandamus. The court elected not to treat the mother's petition for mandamus regarding the contempt citation as an appeal because the mother was not sanctioned for her contempt. Therefore, any error committed by the juvenile court was harmless and did not probably injuriously affect the mother's substantial rights. (2) However, the mother did establish a clear legal right to a writ directing the juvenile court to vacate its pendente lite orders and to hold an evidentiary hearing on the issue of pendente lite custody. "[W]here a child is born out of wedlock, the mother, as long as she is not unfit, has a superior right to custody of the child." *B.E.B. v. H.M.*, 822 So.2d 429, 430 (Ala. Civ. App. 2001). Moreover, before making a pendente lite award of custody, a trial court must receive evidence that an award of pendente lite custody is in the best interest of the child. The juvenile court judge failed to conduct such an evidentiary hearing. As a result, the mother's due process rights were violated and the pick-up orders and pendente lite custody orders are due to be vacated. (3) The mother argued that the juvenile court judge failed to comply with §12-15-106(f) which requires a juvenile court judge to review the record of the proceedings in front of the referee before conducting a rehearing. However, after the UCCJEA hearings, the juvenile court judge entered an order concluding that "based on testimony and evidence adduced in Alabama" that the child had resided in this state from August 20, 2021 and April 16, 2021 which exceeds the 6-month period required to establish that Alabama is the child's home state under the UCCJEA. The juvenile court judge concluded that the trip to Oregon in April 2021 was a "mere temporary absence" from Alabama. The mother failed to provide the transcript of the referee's hearing or any documentary evidence provided to the juvenile court. "Without those transcripts and/or evidence, the mother cannot establish that the juvenile-court judge's conclusion that Alabama is the child's home state based on his residence here between August 20, 2021, and April 16, 2022, was incorrect and she has therefore not demonstrated a clear legal right to a writ of mandamus directing dismissal of the presumed father's action." ***Ex parte V.M. (T.K. v. V.M.)***, 31 ALW (CL-2022-0930); 12/02/2022; Jefferson Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 21 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Contempt--Protection from Abuse. CIVIL PROCEDURE: Jurisdiction--Filing Fee--Default Judgment. The mother and the father are unmarried parents of four children. In November 2018, the mother obtained a protection-from-abuse order, restraining the father from having any contact with her or her children ("the PFA judgment"). The PFA judgment also ordered the father to return all the children to the mother and directed the Baldwin County sheriff's office to assist the mother in securing the return of the children, if necessary. On February 28, 2020, the mother filed a document stating that she "wanted to press charges" against the father because he had not returned the children to her. The trial court treated the mother's handwritten letter as a motion for contempt. After a hearing, the trial court entered an order on March 10, 2020 finding the father in criminal contempt for violating the PFA judgment. The father was sentenced to 10 days in jail. A year later, on March 1, 2021, the trial court issued a writ for the father's arrest to serve the jail time ordered in the contempt judgment. On December 3, 2021, the father filed a motion pursuant to Rule 60(b)(4), Ala. R. Civ. P. seeking to set aside the contempt judgment and the writ of arrest. He argued that the trial court did not have jurisdiction to enter these orders because the mother had not paid a filing fees or commenced a new action. The trial court denied that motion on December 6, 2021. On January 8, 2021, the mother filed a separate action seeking custody of the parties' four children. At the time the custody petition was filed, the parties' children were ages 9, 7, 5 and 4. A custody hearing took place on July 19, 2021. The father did not appear. The mother testified that she had been physically abused and raped by the father during their relationship. She further claimed that the father had "released rats" into her home and had "run [her] over with a vehicle. On August 10, 2021, the trial court entered a judgment awarding the mother sole legal and sole physical custody of the parties' children ("the custody judgment"). Almost 4 months after the custody judgment was entered, the father filed a motion to set it aside pursuant to Rule 60(b)(1), Ala. R. Civ. P.. He claimed that the mother's oldest child (who was not his biological child) had been living with him for six years; the oldest child was 19 years old when the oldest child accepted service from a process server. The father claimed that the oldest child did not speak or read English well and did not understand the import of the document served. The trial court denied the father's Rule 60(b)(1) motion. The father appealed from the trial court's judgment refusing to set aside the contempt judgment and the custody judgment. **Reversed; affirmed.** (1) The father asserted that the mother's failure to pay a filing fee in the contempt action deprived the trial court of jurisdiction. Accordingly, he argued that the contempt judgment was void. The father cited several cases wherein the appellate court has held that judgments entered in contempt actions were void because the party seeking the contempt judgment had not paid a filing fee. However, the mother contended that a filing fee is not required when the finding of contempt is based on the violation of a PFA judgment. She cited to §30-5-15(g), Ala. Code 1975 which is part of

the Protection from Abuse Act ("the PFA Act), §30-5- et seq., Ala. Code 1975. That Code section states that "No court costs and fees shall be assessed for the filing and service of a petition for protection order, for the issuance or registration of a protection order, or for the issuance of a witness subpoena under this [PFA Act]." The Court held that a contempt action is a separate independent action which is distinct from the underlying action. Although §30-5-5(g) creates an exception for the payment of a filing fee in PFA cases, it does not contain that same exemption for the filing of a contempt action arising out of a PFA judgment. "Because the trial court lacked subject-matter jurisdiction over the contempt action, the contempt judgment is void; therefore it was error for the trial court to deny the father's Rule 60(b)(4) motion to set aside that judgment and the subsequent writ for his arrest arising from that judgment." (2) With regard to the trial court's denial of the father's motion to set aside the custody judgment, the father was required to show that he has a meritorious defense, that the mother will not be unfairly prejudiced if the default judgment is set aside and that the default judgment was not the result of the father's own culpable conduct. "There is sufficient evidence from which the trial court could have found that the father was grossly careless of his own affairs, and the trial court reasonably could have believed that the contentions the father made in his affidavit regarding why he had not responded to the complaint in the custody action were specious." The Court pointed out that there was evidence that the father had a history of ignoring court orders, as demonstrated by the PFA judgment and of failing to appear in court. This portion of the trial court's judgment is due to be affirmed. Judge Fridy authored a special concurrence which was joined by Presiding Judge Thompson and Judge Moore wherein he urged the legislature to consider whether a filing fee should be required when a petitioner seeks to enforce a PFA order. ***J.N.M.-R. v. M.D.L.-C.;*** 31 ALW ; (2210294; 2210304); 10/21/2022; Baldwin Cty.; Per curiam; (2210294—Edwards and Hanson concur; Fridy concurs specially, with opinion, which Thompson and Moore join); (2210304—Thompson, Moore, Edwards, Hanson and Fridy concur); 18 pages. [ATTY: Appt: James Coleman, Robertsdale; Apee: Margaret Pace, Montrose]

FAMILY LAW: Contempt—Visitation—Attorney Fees. EVIDENCE: Fifth Amendment Inference. APPEAL & ERROR: Waiver. In 2018, the trial court entered an order prohibiting the father from having any contact with the mother's husband, Brian Manderson. In May 2019, the mother secured an ex parte order restraining the father from attending any of the children's activities and requiring that his visitation be supervised. The trial court also entered a protection-from-abuse order which prohibited the father from being within 300 feet of the mother, the children, the mother and the children's residence, the mother's place of employment and the children's school. The father filed a petition for writ of mandamus regarding the ex parte order and the PFA order. The court granted that petition in part and directed the trial court to set aside the ex parte order and hold a hearing on the issue of visitation. *Ex parte Lester*, 297 So.3d 477 (Ala. Civ. App. 2019). The trial court held an evidentiary hearing in June 2020. By that time, the parties had filed several motions seeking to have the other held in contempt. The trial court stayed the trial on the mother's contempt allegations because the father had been charged with various crimes in Alabama and Georgia. The trial court entered a pendente lite order awarding the father supervised visitation. Even though the father's criminal charges were not resolved, a trial was held on December 10, 2020. Thereafter, the trial court entered an order on January 11, 2021 which found the father to be in contempt and assessed a $1,000 fine for each incident of contempt. The father was awarded unsupervised visitation. The father filed a purported postjudgment motion challenging the January 2021 order. In that motion, he asserted that the trial court had erred by assessing $2000 in fines for what he alleged was criminal contempt. The trial court entered an order on May 5, 2021 explaining that it had found the father in civil contempt and contending that it had a right to assess fines in conjunction with that finding. The father appealed and his appeal was assigned case number 2200734. However, that appeal was dismissed as having been taken from a nonfinal judgment because the father's counterclaim was not resolved. After the court issued a certificate of judgment, the father sought a final judgment from the trial court. The trial court held another hearing and in November 2021 it issued an order finding the father in civil contempt for two incidents, assessing a $1,000 civil fine for each incident, awarding the father unsupervised visitation, requiring the father to pay $8000 of the mother's attorney fees and ordering the father to pay $3,700 of the guardian ad litem's fees. The father appealed. **Affirmed in part; reversed in part.** The father asserted his Fifth Amendment privilege and did not testify at the evidentiary hearings. Manderson testified that in April 2019 he took the parties' youngest child to softball practice. The father followed Manderson from the softball field after Manderson dropped the youngest child off. The father then approached Manderson in the parking lot of a nearby store and tried to open the driver's side door. He then drove off. Manderson returned to the softball field and the father once again approached him and began screaming profanities. The father then tried to hit Manderson in his face.

Manderson filed criminal charges as a result of this incident. In October 2019, Manderson was driving with his 2-year old daughter in the truck with him when he noticed the father driving behind him. When the father tried to pass him, Manderson sped up and started driving 80 miles per hour. Manderson saw the father point a gun out of his truck window and he heard him fire three shots. The father was able to pass Manderson but he then stopped in the roadway. Later, the father and Manderson had to pass each other as they headed in different directions and the father's truck damaged the side mirror of Manderson's truck. The mother testified that the children were "petrified" of the father but she conceded that she did not think that the father would intentionally hurt the children. The younger child was 12 years old at the time of the June 2020 hearing. She indicated that she wanted more visitation with her father and she expressed some complaints about Manderson, including statements about his excessive alcohol consumption. The older child was 14 years old and echoed some of her sister's complaints. (1) The court first considered whether the father was held in criminal or civil contempt. Criminal contempt is meant to punish the contemnor while civil contempt is intended to compel compliance. However, a finding of contempt may have elements of both civil and criminal contempt and be treated as civil contempt. Here, the trial court specifically stated that the father was found to be in civil contempt and that it's purpose in imposing the $2,000 fine was to coerce future compliance with the provisions of the 2018 judgment. "[A] trial court may impose a monetary sanction based on a finding of civil contempt, either as a method of coercing future compliance with court orders or as a method of compensating the complainant for losses resulting from the contemptuous actions of the contemnor." Accordingly, the court held that the father was found to be held in civil contempt. (2) The father then challenged the sufficiency of the evidence. A finding of civil contempt must be supported by clear and convincing evidence. Manderson's accounts of what occurred satisfied that evidentiary burden. Moreover, the father's assertion of his Fifth Amendment privilege allowed the trial court to make an adverse inference. Rule 512A(a), Ala. R. Evid.. (3) As to the imposition of the $2,000 in fines, the assessment of same was not improper. "When imposing a fine for civil contempt as a method for coercing future compliance with a trial court's orders, however, a trial court must provide a method by which the contemnor may avoid the fine through such future compliance." A "flat, unconditional fine" is not appropriate. That is what was done here. This portion of the trial court's judgment is due to be reversed. (4) Because the father was found to be in civil contempt, the requirement that he pay attorney fees to the mother was proper. The father did not properly develop his argument regarding what evidence is required to support an award of attorney fees in a civil-contempt case. Therefore, that argument is waived. (5) The father argued that the mother should have been precluded from any relief because she was guilty of unclean hands. "The purpose of the clean hands doctrine is to prevent a party from asserting his, her or its rights under the law when

the party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.'" (citations omitted). The father argued that Manderson's consumption of alcohol while the children were present and his imposing corporal punishment violated the 2018 judgment. However, the father did not develop this argument sufficiently either. The court further noted that application of the clean hands doctrine is discretionary with the trial court. (6) In its final judgment, the trial court awarded the father visitation only on the second and fourth Saturdays of each month from 9:00 a.m. until 6:00 p.m.. Visitation rests with the discretion of the trial court but "a noncustodial parent should be given the opportunity to maintain a meaningful relationship with his or her child." The court noted that the visitation schedule allows the father to have unsupervised visitation for several hours at a time, which indicates that the trial court did not conclude that the father posed a danger to the children "In light of the award of unsupervised visitation, we cannot discern why the trial court modified the father's visitation to preclude overnight visitation and provide no extended summer or holiday visitation when no evidence indicated that overnight visitation posed a peculiar danger to the children." This portion of the trial court's judgment is due to be reversed. (7) Finally, the father challenged the requirement that he pay the guardian ad litem's fees. He asserted that the trial court should have conducted a hearing on the guardian ad litem's fee request. However, the guardian ad litem submitted itemized bills setting out the tasks she performed. This portion of the judgment is due to be affirmed. ***Lester v. Lester,*** 31 ALW (2210282); 12/22/2022; Lee Cty.; Edwards; Thompson, Hanson and Fridy concur; Moore concurs in the result, without opinion; 33 pages. [ATTY: Appt: Robert G. Poole, Auburn Aple. Zachary D. Alsobrook, Opelika]

FAMILY LAW: Contempt—Property Division—Modification. CIVIL PROCEDURE: Unclean Hands. This is the fifth time that this case has been on appeal. The trial court entered a divorce judgment in July 2015 but because that judgment did not address the former wife's contempt claim, the appeal from that judgment was dismissed as having been taken from a nonfinal judgment. *Curtis v. Curtis,* 210 So.3d 1120 (Ala. Civ. App. 2016). That judgment was made final after the trial court entered an order on January 6, 2017 that denied all unadjudicated claims. The former husband appealed and the former wife cross-appealed. The trial court stayed execution on that final judgment without requiring the former husband to file a supersedeas bond. As a result, the former wife's petition for the writ of mandamus was granted. *Ex parte Curtis,* 261 So.3d 372 (Ala. Civ. App. 2017). The appeal and the cross-appeal were affirmed without an opinion. Thereafter, each party filed a contempt petition against the other. On September 14, 2020, the trial court granted each party's contempt claim in part and denied it in part. After the former wife appealed, the trial court's judgments were affirmed in part and reversed in part. *Curtis v. Curtis,* [Ms. 2200282, Sept. 24, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021) ("*Curtis IV*"). The former wife filed a contempt petition on September 14, 2020, asserting that the former husband had failed to comply with certain provisions of the divorce judgment. Specifically, she claimed that the former husband had failed to pay the property settlement which awarded her $500,000 to be paid in monthly installments of $3,000, that the former husband had failed to maintain the life insurance policy of $500,000 with the children named as beneficiaries, that the former husband had refused to pay her $9,682 from an income tax refund intercept and that he had failed to execute Pledge Agreements to secure his obligations under the divorce judgment. Those pledge agreements required the former husband to deliver to her his stock certificates in certain businesses. At trial, the former husband conceded that he had failed to deliver the stock certificates but claimed that he had not done so because he was worried that the former wife would sell them to a third party. He also claimed that the former wife did not have clean hands because she failed to cooperate in listing the former marital residence for sale as required by the divorce judgment. The trial court entered a judgment ordering the former husband to file the pledge agreements and the stock certificates with the clerk of the trial court, denying the former wife's civil contempt claim and denying the former wife's request for an attorney fee. After her postjudgment motion was denied, the former wife appealed. **Reversed.** (1) In *Curtis IV,* the court affirmed the trial court's finding that the former wife did not have clean hands because she had failed to cooperate in listing the former marital residence. However, "[t]he misconduct which falls within the clean hands maxim must relate directly to the transaction concerning which complaint is made." *Powell v. Mobile Cab & Baggage Co.,* 263 Ala. 476, 480, 83 So.2d 191, 194 (1955). Because the former wife's refusal to cooperate in listing the former marital residence is not directly related to the former husband's refusal to deliver the stock certificates to her,

the clean-hands doctrine does not apply. (2) Although the issue of contempt is an issue to be decided by the trial court and will not be reversed absent a showing of abuse of discretion, "[w]hen, as in the present case, the undisputed evidence indicates that a party willfully violated a judgment, denying the other party's contempt claim based on that violation is not within the trial court's discretion." Accordingly, this portion of the trial court's judgment is due to be reversed. (3) The divorce judgment contained a provision which stated that if either party had to file a contempt proceeding and prevailed, the other party would be responsible for the other party's attorney's fees and costs. Such is the case here and the trial court erred by refusing to award the former wife an attorney's fee. (4) Finally, the trial court erred by ordering that the stock certificates be filed with the clerk of the court inasmuch as the divorce judgment provided that they were to be delivered to the former wife. In making this change, the trial court impermissibly modified a property division without the former wife's agreement. ***Curtis v. Curtis,*** 32 ALW (CL-2022-1235); 07/28/2023; Talladega Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 12 pages. [ATTY: Appt: Charles Dunn, Birmingham; Apee: Paige Yarbrough, Birmingham]

X. CIVIL PROCEDURE/EVIDENCE/APPEALS

EVIDENCE: Authenticity - Relevance - Closing Arguments. Eric Harrison was indicted on two counts of capital murder for shooting Brandon Lewis with a pistol from within a vehicle. Harrison was first tried in February 2020, but a mistrial was declared because the jury could not reach a unanimous verdict. Harrison was tried again in January 2022. On the day of the murder, Brandon Lewis was at an apartment complex with his brother, Brayon Lewis, and their cousin, Devin Patterson. Brandon was in his car parked on the street, and Brayon and Patterson were on the steps of one of the apartments. Brayon witnessed Harrison driving his car on the street in front of the apartment complex. Harrison's car bumped Brandon's car and drove away. Brandon got out of the car, and less than a minute later, Harrison drove back down the hill and stopped next to Brandon. Brayon testified that Harrison said "we didn't mean to hit your car" and then shots started firing. Brayon testified that Harrison was the first person to shoot, and then Patterson and another friend began shooting back at Harrison. Harrison sped away and Brandon later died at a hospital from gunshot wounds he received. At trial, the State introduced evidence of two videos taken from Harrison's Facebook page over Harrison's objection. During the charge conference, Harrison's counsel requested instruction on reckless manslaughter as a lesser-included offense of capital murder. The trial court denied this request, but did instruct the jury on the lesser-included offenses of intentional murder and felony murder. The jury found Harrison guilty of capital murder. Harrison appealed. **Affirmed.** 1) Harrison argues that the trial court erred by refusing to instruct the jury on reckless manslaughter as a lesser-included offense of capital murder. A defendant has a right to request a jury charge based on any material hypothesis that the evidence tends to establish, and where a reasonable theory supports the lesser-included offense, a trial court's refusal to give the charge is reversible error. Harrison argued that Brayon was not a credible witness, and therefore, the jury could have found that Harrison was not the first person to shoot and only returned fire in a reckless manner while taking fire from at least two others. However, the appellate court agreed with the trial court that if a person acted in self-defense and killed another, he would be guilty of no crime. In other words, Harrison's argument that he killed Brandon while returning gunfire from two others would have been better served in support of a self-defense instruction. Also, even if it is assumed that the trial court's refusal to give a reckless manslaughter instruction was error, it was harmless error because the jury was given charges on other lesser included offenses and the jury returned a verdict of the higher offense of capital murder. 2) Secondly, Harrison argues that the trial court's denial of his request to receive the jury summons list one day prior to trial conflicts with Alabama law and requires a new trial. The appellate court held that this claim was not preserved for appellate review because Harrison failed to renew this request before his second trial. 3) Next, Harrison argues that the trial court erred by admitting two videos from his Facebook page because the State did not authenticate the videos, they were not

relevant, and any relevancy was outweighed by the danger of unfair prejudice. To authenticate a video under the silent-witness theory, the State must typically prove each prong of the seven-prong test articulated in *Voudrie v. State*, 387 So. 2d 248 (Ala. Crim. App. 1980). As a matter of first impression, the Court of Criminal Appeals considered whether the *Voudrie* test must be satisfied in order to authenticate a video that the defendant is charged with making and posting on a social-media platform. The Court held that "[b]ecause the Alabama Supreme Court has indicated that the *Voudrie* test is not necessarily an inflexible, hard-and-fast standard that automatically applies to every video, and given the unique and ubiquitous nature of social-media videos, we hold that the failure to satisfy each and every element of the *Voudrie* test does not prevent the State from introducing such evidence." Also, there was not sufficient danger of unfair prejudice from the admission of the videos. The trial court did not exceed its discretion by admitting the two Facebook videos. 4) Lastly, Harrison argues that the trial court erred by overruling three objections he raised during the prosecutor's closing argument. Wide discretion is allowed to the trial court in regulating the arguments of counsel, and the Court of Criminal Appeals rejected each of Harrison's arguments regarding the objections during closing arguments. ***Harrison v. State of Alabama***, 32 ALW, (CR-21-0423); 08/18/23; Jefferson Cty.; McCool; Windom, Kellum, Cole, and Minor concur; 46 pages. [ATTY: Appt: Joseph Simonetti, Jr, Birmingham; Apee: Atty. Gen.]]

CIVIL PROCEDURE: Due Process-Hearing. The child was born on May 1, 2018. On June 5, 2019, the father filed a complaint requesting that he be adjudicated the legal father of the child and requesting an award of visitation with the child. He later amended his complaint to add a claim for custody of the child. The mother filed an amended counterclaim for custody of the child and child support. The case was set for trial on April 27, 2022. At the beginning of trial, the juvenile court directed the father to call his first witness. At that point, counsel for the father stated on the record that the parties were advised that they were limited to 2 ½ hours to present their case. Counsel for the father indicated that it would take 2 days to try the case. The juvenile court responded by stating that each party would have 2 ½ hours of trial time. During the direct testimony of the father, the juvenile court informed the father's counsel that he had exhausted his 2 ½ hours of allotted time and it advised counsel to ask one final question. Later, when the father's counsel attempted to cross-examine the mother's first witness, the juvenile court stated that all of the father's time had already been used but that he would "bend" the rule and allow 10 additional minutes of testimony. Thereafter, the father's cross-examination of all of the remainder of the mother's witnesses was limited to that 10-minute extension. After the hearing, the juvenile court entered a final judgment in which it awarded the mother sole physical custody of the child and the father was awarded "standard" visitation. The father filed a timely postjudgment motion in which he asserted, among other things, that he had been denied due process under the 14th Amendment by being constrained by the time limits established by the juvenile court. Included in that postjudgment motion were affidavits of several witnesses containing a recitation of evidence that he would have presented if he had been given more time. Those affidavits comprised approximately 200 pages of the record and the father attached over 1,000 pages of exhibits to his postjudgment motion. The father requested oral argument on his motion. While the father's postjudgment motion was pending, he filed a notice of appeal. That notice of appeal was held in abeyance pursuant to Rule 4(a)(5), Ala. R. App. P. pending the juvenile court's disposition of the postjudgment motion. The father's postjudgment motion was denied by operation of law, at which time the notice of appeal became effective. **Reversed.** If a party requests a hearing in a postjudgment motion, the trial court must grant that request. Although it is error not to hold a hearing, that error is harmless unless there is probable merit to the motion. The court cited *R.C. v. L.C.*, 923 So.2d 1109 (Ala. Civ. App. 2005) wherein a dependency judgment was reversed because the children's mother was limited in the time afforded to her to present her evidence. In *R.C.*, the court determined that no offer of proof had to be made because the juvenile court had insisted that it would allow no more time within which to try the case; therefore, any attempt by the mother to make an offer of proof would have been futile. In so doing, the court noted that Rule 402, Ala. R. Evid., allows a trial court to exclude cumulative evidence but that "a trial court is not empowered to exclude evidence simply because of impatience with the length of the trial." (citation omitted). Here, the court refused to express any opinion on whether the postjudgment motion is due to be granted. However, based on the precedent cited, it was not harmless error to deny that

postjudgment motion without first conducting a hearing on the father's postjudgment motion. The judgment of the juvenile court is due to be reversed. *J.C. v. K.E.*, 32 ALW (CL-2022-0702); 02/10/2023; Blount Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 12 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody. CIVIL PROCEDURE: Due Process. The mother and father were previously divorced and they were awarded joint legal custody of their child; the father was awarded visitation. On September 8, 2021, the mother filed a modification action, alleging that the father was not fit to exercise unsupervised visitation and seeking an award of sole custody. At that same time, the mother filed a verified motion for ex parte relief, requesting that the father's visitation be suspended. The trial court granted that request on September 11, 2021 and scheduled a hearing. However, that hearing was continued several times. Testimony was eventually taken at a hearing on May 25, 2022 but it was not concluded until a second day of testimony took place on August 4, 2022. Prior to the May 25, 2022 hearing, the trial court and counsel for the parties agreed that the purpose of the hearing was to address the suspension of the father's visitation pursuant to the September 11, 2021 ex parte order. Similarly, before the August 4, 2022 hearing began, the trial court clarified that the purpose of the hearing was "the final hearing on that [e]x [p]arte [m]otion." On October 18, 2022, the trial court entered a "Final Order" that established a visitation schedule for the father and denied all other requested relief. After her postjudgment motion was denied, the mother appealed. **Reversed.** On appeal, the mother asserted that her due process rights were violated when the trial court entered a final order after conducting a hearing on only the issue of whether to continue the ex parte order. She further asserted that because of this deprivation of due process, the trial court's October 18, 2022 judgment was void. However, based on prior precedent, the court held that because the parties had received notice of the claims involved, the case did not involve the want of due process such that it rendered the trial court's judgment void. Instead, the case is due to be reversed because the parties did not have an opportunity to fully litigate the merits of the action. ***Robinson v. Robinson,*** 32 ALW (CL-2022-1290); 09/08/2023; Etowah Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 18 pages. [ATTY: Appt: Shirley Millwood, Alexandria; Apee: John Floyd, Gadsden]

CIVIL PROCEDURE: Discovery. The parties were divorced in 2020. Pursuant to the divorce judgment, which adopted an agreement of the parties, the parties were awarded joint legal custody of their two children and the mother was awarded sole physical custody subject to the father's visitation. Thereafter, the father filed a petition to modify custody as well as a petition seeking to hold the mother in contempt ("the .01 action"). The trial court entered a judgment in the .01 action on January 12, 2021 in which it denied the father's custody modification claim but found that the mother was in contempt for violating certain provisions of the divorce judgment. On April 26, 2022, the mother filed a petition requesting that the trial court suspend the father's visitation with the children ("the .02 action"). She alleged that the father had not maintained a suitable living arrangement for the children and that the children had been sexually abused while in his care. On May 24, 2022, the father filed a petition for modification and contempt in which he requested that he be awarded sole physical custody of the children, an award of child support, a finding of contempt against the mother, an award of supervised visitation to the mother and an award of attorney fees ("the .03 action"). The .02 and .03 actions were consolidated. On November 2, 2022, the mother filed a notice with the trial court indicating that she had filed a request for the inspection of the father's electronic records and devices. Thereafter, she filed a motion to compel. The father filed a response to that motion stating that his electronic devices contained personal and confidential information which was not relevant to the issues in the case. The father then filed a motion for a protective order and a supplemental objection to the mother's request for inspection. In that supplemental response, he argued that his electronic devices contained privileged communications, including those subject to the attorney-client privilege or protected under the work-product doctrine. On December 12, 2022, the trial court entered an order granting, in part, the father's motion for a protective order. The order stated that "[i]f [the father] believes that there are emails, documents or other forms of electronically stored information on his devices that are privileged communications or contain privileged information, he must asset the privilege as to those items by filing a motion seeking protection from disclosure. Upon the filing of such a motion the [mother's] expert is stayed from examining those items pending the court's ruling as to the asserted privilege." On December 22, 2022, the trial court granted the mother's motion to compel and directed the father to deliver all electronic devices specified in the mother's request for inspection to the mother's expert and it required him to provide his passwords necessary to access those devices. The father filed a petition for the writ of mandamus. **Writ of mandamus denied.** (1) The mother's discovery requests were filed in the .02 action. The father filed a petition for the writ of mandamus in both the .02 and .03 actions. However, the fact that these actions were consolidated does not mean that the orders and motions regarding discovery were considered part of both actions. "Because the father has not presented anything to this court indicating that the mother's motion

to compel, the father's motion for a protective order, or the trial court's orders in response to those motions were filed or entered in the .03 action, there is nothing for the this court to review in that case." The father's petition for the writ of mandamus is due to be denied in that action. (2) With regard to the orders entered in the .02 action, the court noted that mandamus relief is only available with regard to discovery matters if: (a) there is a showing that the trial court clearly exceeded its discretion and (b) where the aggrieved party does not have an adequate remedy by ordinary appeal. The father argued that the mother's discovery request is an impermissible fishing expedition designed to harass him. Pursuant to Rule 26, Ala. R. Civ. P., information is discoverable if it is "relevant" and if there is a reasonable possibility that the information will lead to other information that will be admissible as evidence at trial. Here, the mother asserted that the father failed to maintain a suitable living arrangement and that she believed that the children had been sexually abused while in the father's care. She further alleged that the parties' eldest child had disclosed inappropriate behavior toward him by the father and that she was seeking an inspection of the father's electronic devices to discover whether the father was exposing the children to his "potential perverse fascinations and pornographic [Web sites]." The father never challenged the relevancy of the information sought by the mother. Instead, he discounted the allegations made by her. "Because the trial court could have determined that the mother's discovery request was relevant to the allegations in her petition and had the potential to lead to admissible evidence, we do not conclude that the trial court erred in declining to deny the mother's discovery requests as an impermissible fishing expedition." (3) With regard to the father's assertion that the information sought by the mother fell within the attorney client privilege and constituted work product, the trial court addressed those concerns in its prior order. The father also asserted that the communications contained on said devices were protected under Rule 504(b), Ala. R. Evid. which relates to spousal privilege. Rule 26(b)(6), Ala. R. Civ. P. states that when information is withheld that is otherwise discoverable on a claim that it is privileged, the other party may request a description of the nature of the documents, communications or things which are claimed to be privileged and this supporting description must be served by the objecting party within 21 days after the request is made. Here, the father only referenced a spousal privilege in his December 1, 2022 reply to the mother's response to his motion for a protective order. However, that response did not satisfy the requirements of Rule 26(b)(6). The trial court did not exceed its discretion by excluding from its protective order any reference to items purportedly protected by "spousal privilege". The remainder of the items which the father claimed were protected by privilege were adequately protected by the trial court's order. Any additional arguments raised by the father were not preserved for appellate review. The petition for the writ of mandamus is due to be denied. ***Ex parte Suhy (Suhy v. Willard)***, 32 ALW (CL-2023-0017; CL-2023-0018); 04/07/2023; Baldwin Cty.; Moore; Thompson, Hanson

and Fridy concur; Edwards concurs in the result,without opinion; 23 pages. [ATTY: Pet: Scott Hunter, Fairhope; Resp: Josh Myrick, Fairhope]

CIVIL PROCEDURE: Dismissal. APPEAL & ERROR: Waiver. The parties were divorced in 2015. In July 2019, the father, through attorney Scott Harwell, filed a complaint seeking to modify the child-support provisions of the 2019 judgment. He also filed a contempt petition alleging that the mother had violated provisions of the divorce judgment by preventing telephone communications between the father and the parties' children. In February 2020, counsel for the mother filed a notice of appearance and a motion to disqualify Harwell. The mother alleged that Harwell had represented the mother in a 2003 divorce action and as a result, had acquired private and confidential information regarding the parties' oldest child. Harwell had attempted to represent the father in the 2015 divorce action but had been disqualified by an order of the trial court. The divorce judgment was entered on June 11, 2015. On October 14, 2015, the mother filed a contempt action and once again, Harwell filed a notice of appearance for the father. The mother filed a second motion to disqualify and the trial court granted that motion. In May 2017, Harwell filed a civil action on behalf of the father against the mother but that case was settled before the trial court could rule on a third motion filed by the mother to disqualify Harwell. After oral argument was held in the current action, the trial court entered an order on April 8, 2020 disqualifying Harwell. The father filed a petition for the writ of mandamus from that order. That petition was denied on August 7, 2020. *Ex parte Fipps*, 317 So.3d 999 (Ala. Civ. App. 2020). After a certificate of judgment was issued, the trial court entered an order requesting that the parties submit a status report regarding the case. Candace Peeples filed a notice of appearance for the father on October 29, 2020. On November 6, 2020, the parties filed a joint status report and indicated that because the case had essentially been "on hold" since the mandamus petition was filed in May 2020, they requested three or four months during which they could complete discovery and attempt to resolve the action . No other filings were made until September 7, 2021 when the trial court entered an order setting the case for trial on December 16, 2021. Shortly thereafter, the father amended his complaint, seeking a retroactive modification of his child support obligation and a reduction in his life-insurance obligation. He also added a claim for contempt against the mother for violating the divorce judgment by claiming the children as dependents on her income-tax returns. The mother filed a counterclaim seeking modification of the divorce judgment and asserting a petition for rule nisi alleging that the father owed a child support arrearage. The father filed a motion to dismiss the counterclaim. The father filed a notice to comply with a local COVID-19 protocol and he served a witness and exhibit list on the mother's counsel in compliance with the trial court's pretrial order. On December 9, 2021, the mother filed a motion to continue the trial date because she had contracted COVID-19. That motion was granted and the trial was continued until March 15, 2022. Peeples was permitted to withdraw as counsel for the father on February 17, 2022. When the case was called for trial on March 15, 2022, the father did not appear. A final judgment was entered on March 16, 2022.

Pursuant to that final judgment, the trial court dismissed all pleadings filed by the father and granted the relief requested in the mother's counterclaim. The mother was granted final authority over all medical decisions regarding the children and she was awarded the right to claim the children as tax dependents. The father was found to be in contempt for failing to pay child support and the trial court determined that the father could purge himself of said contempt by paying $72,079.91 within 30 days. The mother was also awarded an $8,000 attorney fee. The father filed a motion to alter, amend or vacate the final judgment on the same day that the order was entered, explaining that he had miscalendared the trial date. Through counsel, he later filed a verified motion to set aside the final judgment and a motion for new trial. That motion was denied without a hearing. The father appealed. **Reversed.** (1) Rule 41(b), Ala. R. Civ. P. governs involuntary dismissals for failure to prosecute. The father never specifically challenged that aspect of the trial court's final judgment granting the relief requested in the mother's counterclaim. "The father cites only cases discussing and applying the standards for entering an order dismissing an action under Rule 41(b) and denying a motion to set aside such an order. The father makes no legal argument as to why that part of the judgment granting the mother's counterclaim should be reversed." Therefore, any argument regarding that issue has been waived. (2) The court then turned to whether the trial court erred in denying the father's postjudgment motions to set aside the dismissal of his claims for his failure to appear. Mere inadvertence of a plaintiff or counsel in calendaring a trial date will not generally warrant the dismissal of that party's claims. Here, the father asserted that he had miscalendared the trial date for March 16, 2022 and in fact, he showed up for trial that day. He also filed a pro se motion to set aside the judgment on that same day. The mother argued that the father had displayed a history of willful, contumacious and dilatory conduct by continuing to try and be represented by Harwell after Harwell had already been disqualified. However, the court noted that after the father's petition for the writ of mandamus was denied in August 2020, "[t]he record does not reveal any conduct committed by the father...that could be characterized as willful, contumacious, or dilatory." The judgment of the trial court dismissing the father's complaint, amended complaint and second amended complaint filed by the father is due to be reversed. ***Fipps v. Fipps,*** 32 ALW (CL-2022-0725); 02/10/2023; Jefferson Cty.; Moore; Thompson, Hanson and Fridy concur; Edwards concurs in the result, without opinion; 18 pages. [ATTY: Appt: Jessica Drennan, Birmingham; Apee: Laura Montgomery, Birmingham]

In April 2020, the father filed an objection to the mother's notice that she was relocating to Chicago, Illinois with the parties' two minor children. At that time, he also filed a petition seeking an award of sole custody of the children. The mother propounded requests for the production of documents to the father on February 1, 2021. AS part of those discovery requests, the mother sought credit card statements from January 1, 2020 through the date of production. When responses were not timely received, the mother filed a motion for an order compelling discovery. The motion was granted and the father was ordered to supply the requested discovery by April 21, 2021. On April 20, 2021, the father filed a response wherein he objected to the request for credit-card statements on the grounds that it was vague, overly broad and irrelevant. Nonetheless, he indicated that he was producing some documents responsive to this request and that others would be provided as they became available. The mother filed a motion for sanctions on May 28, 2021 to which the father filed a response indicating that he had complied with the order granting the motion to compel. On June 23, 2021, the father filed a motion for protective order asserting that the mother was requesting documents in the possession of Regions Bank. The father alleged that since he had closed his account with Regions Bank, the bank demanded that he cease all communications regarding his account and had threatened him with legal action if he persisted. A hearing on the motion for sanctions was held at which the mother agreed to dismiss her motion for sanction based on the father's counsel agreeing to ask the father about his credit-card accounts and to convey that information to the mother's counsel. On September 22, 2021, the mother propounded a second set of discovery requests to the father, which included interrogatories asking the father to, once again, produce his credit card statements. The father filed an objection and sought a protective order. A hearing took place on December 7, 2021 which was not attended by the father. At that hearing, the trial court determined that the father should be required to disclose the credit card statements. Counsel for the father explained that those documents could only be obtained through a nonparty subpoena because the father no longer had an account or access to those records. The trial court denied the father's objections and entered an order requiring the father to produce the credit-card statements by January 6, 2022. The father's counsel was permitted to withdraw and the mother filed a second motion for sanctions. The mother's motion was set for a virtual hearing on March 28, 2022. On that date, the father filed a handwritten document indicating that he did not have the technical ability to attend the virtual hearing. In an order dated March 29, 2022, the trial court entered an order in which it stated that the father had telephoned the court prior to the virtual hearing and indicated that he could not attend either in person or virtually. The trial court granted the motion for sanctions and required the father to produce his discovery responses by April 11, 2022; the order further specified that if the father failed to do so, his case would be dismissed. The father filed a document indicating that he had delivered a large volume of financial documents in

response t the mother's requests for production six months earlier and that he was uncertain as to what other documents she needed. The mother filed a motion to dismiss which was set for hearing on June 6, 2022. AT that hearing, the mother's counsel advised the court that no credit-card statements had been produced by the father responsible to the September 22, 2021 requests for production. The father admitted that he had not produced any documents specifically responsive to those requests but contended that he had no other documents to produce other than those provided to the mother prior to the second requests for production. The mother's counsel and the guardian ad litem provided testimony about their attorney's fees. On June 19, 2022, the trial court entered a judgment dismissing the case "without prejudice" and ordering the father to pay $20,250 to the mother's counsel and $6,600 to the guardian ad litem. After his postjudgment motion was denied, the father appealed. **Reversed.** (1) The court noted that while generally, a dismissal of an action without prejudice is not sufficiently final to support an appeal, if the "applicable statute of limitations would bar a subsequent action, the dismissal becomes, in effect, a dismissal with prejudice." (citation omitted). Here, the father was objecting to the mother's relocation with the children. Pursuant to § 30-3-169, Ala. Code 1975, a party objecting to a relocation must file an action within 30 days of receiving notice from the relocating party. Here, the mother sent notice of her proposed relocation to the father on April 7, 2020 and the father then had until May 7, 2020 to filed an objection. "The dismissal of the underlying action prevents the father from refiling his objection within the period set forth in § 30-3-169 and, thus, acts as a dismissal with prejudice of that claim that will support an appeal." (2) In this case, the trial court granted an involuntary dismissal pursuant to Rules 37 and 41, Ala. R. Civ. P. because of his failure to comply with its discovery orders. Such an action will be reviewed for an abuse of discretion. In this case, the father asserted that he could not produce the requested financial documents because he did not have access to them. The mother presented no evidence to dispute this contention. A party cannot be ordered to produce documents that are under the exclusive control of a third party. "Thus, we conclude that the father did not willfully disobey the order requiring him to produce the Regions Bank records because he was not capable of complying with that order." However, the father had also opened a new account at Synovus Bank and did not prove that he was unable to obtain those records. Accordingly, there is a clear record of delay, willful default, or contumacious conduct." However, the father did make some effort to respond to the mother's discovery requests and a lesser sanction could have been imposed. The trial court erred by dismissing the father's claims with prejudice. Moreover, the award of attorney's fees is also due to be vacated and the trial court directed to reconsider those awards on remand. ***J.A.S. v. S.W.S.***, 32 ALW (CL-2022-1175); 09/15/2023; Jefferson Cty.; Moore; Thompson, Edwards and Hanson concur; Fridy recuses himself; 24 pages. [ATTY: Appt: Lois Carlisle, Birmingham; Apee: Stephen Arnold, Birmingham]

FAMILY LAW: Dependency—Right to Counsel. APPEAL & ERROR: Mandamus. The Calhoun County Department of Human Resources ("DHR") filed a dependency action in September 2022 after receiving a report that the child had been admitted to the hospital with a fractured skull. The juvenile court appointed attorney Jennifer Wilkinson to serve as the mother's counsel "for shelter care purposes only." At the shelter-care hearing, the juvenile court awarded DHR custody of the child. Thereafter, the mother was charged with aggravated child abuse. In December 2022, the child was declared to be dependent and custody remained with DHR. After the mother was released from jail, she contacted DHR about visiting with the child. A DHR supervisor told the mother that the District Attorney's office had "invoked DA protocol" and as result, the mother was not permitted to visit. The mother filed a motion for a hearing on the "DA Protocol." At a hearing on that motion, the juvenile court indicated that the DA had a right to be part of any individualized-service plan ("ISP) team. In February 2023, the juvenile court entered an order relieving Wilkinson from serving as the mother's attorney. The mother filed a petition for writ of mandamus on February 14, 2023. On February 17, 2023 the juvenile court entered a notice of right to counsel, advising the mother of her right to an attorney "if indigent" and "if requested." **Petition dismissed in part and denied in part**. (1) The mother challenged that portion of the juvenile court's order wherein it stated that the DA's office had a right to take part in ISP meetings and have input on whether the mother could visit the child. However, the juvenile court subsequently set aside that order and therefore, this issue is now moot. (2) The mother also asserted that the juvenile court abused its discretion by relieving Wilkinson of her representation of her in the dependency action. Pursuant to Section 12-15-3-5(b), Ala. Code 1975, a juvenile court must notify a parent in a dependency proceeding of his or her right to counsel and if the juvenile court determines that the parent is indigent, it must appoint an attorney. Here, the mother has not submitted any evidence that she presented the juvenile court with evidence of indigency. "Because the materials before us do not show that the mother made such a showing to the juvenile court, we hold that she failed to demonstrate that she had a clear legal right to the relief she requests." In addition, the mother has another adequate remedy in that she can still make the required showing of indigency to the juvenile court and obtain appointed counsel. ***Ex parte B.M.F. (Calhoun County Department of Human Resources v. B.M.F. and M.H.);*** 32 ALW (CL-2023-0090); 03/23/2023; Calhoun Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 6 pages. [ATTY: Not listed-confidential]

CIVIL PROCEDURE: Personal Jurisdiction. FAMILY LAW: UCCJEA--UIFSA. The father filed a custody action in Autauga Circuit Court on May 31, 2022. In that custody complaint, he alleged that he and the mother had resided in Arizona when they were divorced in 2017, the he presently lives in Autauga County and that the mother resides in North Dakota. The father alleged that the trial court had personal jurisdiction over the mother because she had been arrested in Montgomery on May 10, 2022. The mother filed a special appearance for the limited purpose of filing a motion to dismiss the modification action based on a lack of personal jurisdiction. A hearing was held on the mother's motion to dismiss, but it does not appear that any evidence was taken at that hearing. Thereafter, the trial court entered an order denying the mother's motion to dismiss. The mother timely sought mandamus relief. **Writ of mandamus granted.** (1) The mother argued that the trial court did not have personal jurisdiction over her under Alabama's "long-arm rule" under Rule 4.2(b), Ala. R. Civ. P.. "Alabama's 'long-arm rule' allows service of process on a person outside Alabama when that person has such contacts with Alabama that the prosecution of the action against the person here 'is not inconsistent with the constitution of this state or the Constitution of the United States.'" An Alabama court has personal jurisdiction over a nonresident defendant only when the defendant has sufficient minimum contacts with this state. General personal jurisdiction exists when the defendant has continuous and systematic contacts with this state but which are unrelated to the cause of action. Specific personal jurisdiction is established when the defendant has contacts with Alabama that are related to the plaintiff's action or have given rise to it. Moreover, those contacts must be sufficient to establish that the defendant "should reasonably anticipate being haled into court here." Here, the only contact alleged by the father that the mother had with Alabama was her arrest in Montgomery in 2022 regarding a criminal matter. "Because there is no reason to believe that the mother's arrest had any relation to the modification action, and because there is nothing before the court to indicate that the mother reasonably should have expected to be haled into court here, the father's assertion that the trial court had specific jurisdiction over the mother relative to his request to modify custody must fail." The court further rejected the father's contention that Alabama had jurisdiction to determine the custody modification because Arizona had relinquished jurisdiction under §30-3B-201, Ala. Code 1975, a part of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), §30-3B-201, Ala. Code 1975. In so doing, it noted that Alabama's version of the UCCJEA requires both subject-matter jurisdiction and personal jurisdiction over the parties before a modification order can be entered. (2) The father's modification petition also included a request to modify child support. The resolution of this aspect of his modification petition with regard to jurisdiction is governed by the Uniform Interstate Family Support Act ("the UIFSA"), §30-3D-101 et

seq., Ala. Code 1975. Section 30-3D-611(a)(1) provides that when one of the parties to a child-support modification action lives outside Alabama, a child support order from another state may only be modified by an Alabama court if the court finds that neither the child nor the child's parents reside in the issuing state, the party petitioning for the modification is not a resident of Alabama and the respondent is subject to the personal jurisdiction of the Alabama court. In this case, the father, as the petitioning party, is a resident of Alabama and therefore, the Alabama court lacks jurisdiction to modify the child support award. The court further noted that UIFSA permits a modification of another state's child support award if the child is a resident of Alabama, or if a parent of the child is subject to the personal jurisdiction of the Alabama court and if, all parties have filed consents to the jurisdiction of the Alabama court in a record in the issuing tribunal. There is no indication in the record that the parties filed consents in the Arizona court for an Alabama court to modify the child support order. Therefore, Alabama did not have jurisdiction to modify the Arizona child support order. ***Ex parte Sperry (Quinlivan v. Sperry)***, 31 ALW (CL-2022-1036); 12/09/2022; Autauga Cty.; Fridy; Thompson, Moore and Hanson concur; Edwards concurs in the result, without opinion, 10 pages. [ATTY: Pet: Jerry Blevins, Montgomery; Resp: Kristen Clark, Prattville]

FAMILY LAW: Child Custody--Modification. CIVIL PROCEDURE: Personal Jurisdiction. The parties were divorced by a Texas judgment in 2014. Pursuant to that judgment, the mother was awarded what would be the equivalent of sole physical custody of the parties' child under Alabama law. In March 2022, the mother filed a petition seeking to modify the Texas judgment by requiring the father's visitation to be supervised at her discretion. In her petition, the mother alleged that she and the child were residing in Haleyville and that the father resides in Michigan. The father filed a notice of appearance for the limited purpose of challenging the trial court's subject-matter jurisdiction and personal jurisdiction. In that motion, the father pointed out that the mother had failed to register the Texas judgment as required by the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), §30-3B-1-101 et seq., Ala. Code 1975. The mother argued that the UCCJEA did not require the registration of the Texas judgment but then proceeded to file a verified motion to register the Texas judgment. The father opposed that registration and filed a motion to strike the mother's motion to register that judgment. The trial court denied the father's motion to dismiss and his motion to strike. Thereafter, the mother's motion to register the Texas judgment was granted. The father filed a petition for writ of mandamus. **Writ of mandamus granted.** Even if the trial court has subject-matter jurisdiction under the UCCJEA, it must also have personal jurisdiction over the parties. (Alabama's version varies from the Model Uniform Child Custody Jurisdiction and Enforcement Act which does not require personal jurisdiction.). Rule 4.2, Ala. R. Civ. P. governs service of process on out-of-state residents. Under that rule, a trial court can only exercise personal jurisdiction if the out-of-state party has "some minimum contacts with this state [so that]...it is fair and reasonable to require the party to come to this state to defend an action." The mother's modification petition did not include allegations sufficient to establish that the father has sufficient contacts with Alabama for this state to have personal jurisdiction over him pursuant to Rule 4.2. The only allegations regarding personal jurisdiction are that the father lives in Michigan, that he has lived there since before June 2016 and that the child travels to Michigan to exercise visitation with him. "[T]he failure of the complaint specifically to identify any factual basis for the assertion of personal jurisdiction relieves the objecting defendant of the burden of producing evidence negating jurisdiction." (citation omitted). The petition for writ of mandamus is due to be granted. ***Ex parte Moultrie (Serrato v. Moultrie)***, 31 ALW (CL-2022-0864); 10/21/2022; Marion Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 17 pages. [ATTY: Pet: Jerry Blevins, Montgomery; Resp: John Martine, Winfield]

CIVIL PROCEDURE: Injunction—Standing. FAMILY LAW: Parental Rights. The mother moved from Georgia to Chambers County in January 2019. The child's father died in December 2020. The child was 8 years old at the time of the hearing. The mother testified that Georgia's Family and Children Services ("FCS") became involved with the family in 2016 because of the mother's drug use. FCS removed the child from the mother's home and required the mother to submit to random drug testing, submit to a substance-abuse assessment, comply with the recommendations of the evaluator, attend parenting classes, maintain stable housing and maintain employment. The child was placed with the maternal grandmother from June 2016 until June 2017. However, the maternal grandmother did not want to be a long-term placement for the child so FCS placed the child with the maternal aunt. Custody was restored to the mother in late 2017. In January 2018, the mother relapsed and the child was again removed from her care. She completed the requirements of her case plan and the child began living with her again in August 2018. The mother moved to Alabama in January 2019. In February 2019, FCS asked the Chambers County Department of Human Resources ("DHR") to locate the mother and the child. A caseworker went to the mother's home but the mother refused entry. The caseworker put her foot in the doorway to prevent the mother from closing the door and the mother threatened to punch the caseworker. The caseworker called law enforcement but before the police arrived, the mother fled with the child through a window. In April 2019, DHR learned that the mother and child were again living in Chambers County. Law enforcement was called and the mother was arrested for resisting arrest and obstructing governmental operations. DHR entered the residence after the arrest and found that the mother had no food, no water service and the only source of electricity was the battery from the mother's vehicle. DHR filed a dependency action ("the .01 action") and placed the child in foster care. The maternal grandmother was permitted to intervene in the .01 action. At DHR's request, FCS performed a home study on the maternal grandmother but recommended against placement with her because the maternal grandmother lacked the capacity to protect the child and had demonstrated a lack of commitment. After receiving the home study, DHR filed a motion to dismiss the maternal grandmother as a party in the .01 action. The juvenile court granted that motion on April 8, 2020. The maternal grandmother filed a postjudgment motion on April 29, 2020; no ruling was made. More than 14 days after the maternal grandmother's motion was denied by operation of law, the maternal grandmother appealed from the judgment dismissing her as a party in the .01 action. That appeal was subsequently dismissed and a certificate of judgment was entered on December 4, 2020. In the interim, the maternal grandmother filed a dependency action ("the .02 action"). On April 16, 2020, DHR filed a petition to terminate the parental rights of the father and the mother to the child ("the .03 action"). The maternal grandmother sought to intervene in the .03 action and requested custody. The juvenile court did not grant that request but rather, treated the

maternal grandmother's petition as a separate action ("the .04 action"). In April 2021, the mother filed a motion to dismiss all the actions arguing that the juvenile court lacked subject-matter jurisdiction under Alabama's Uniform Child Custody Jurisdiction and Enforcement Act, § 30-3B-101 et seq. , Ala. Code 1975. She claimed that the child had not lived in Alabama for six months before DHR filed the .01 action. The maternal grandmother filed dependency actions in three different counties in Georgia. Each of those courts declined to exercise jurisdiction. The .03 action was set for trial on May 19, 2022. The mother and the maternal grandmother appeared on a program broadcast on the Internet ("the Internet program") and discussed the .03 action. DHR filed a motion to hold the mother and the maternal grandmother in contempt, to impose sanctions on them and to issue an ex parte order directing the mother and the maternal grandmother not to make any further public statements about the pending action. The motion was not verified and it was not accompanied by a written certification by DHR's attorney stating the efforts, if any, that had been made to give the mother and the maternal grandmother notice or the reasons that notice should not be required. On May 18, 2022, the juvenile court entered an order ("the May 18, 2022 order") without notice or hearing. The May 18, 2022 order stated that the mother and the maternal grandmother were to have no contact of any kind with the Internet program or any other person about this case except their legal counsel. The May 18, 2022 order further stated that a sanction hearing would be conducted at a separate time. After the termination-of-parental rights trial took place, the juvenile court orally pronounced that it was going to terminate the mother's parental rights. On May 23, 2022, the maternal grandmother filed a notice of appeal in the .03 action. On August 24, 2022, the juvenile court entered a written judgment terminating the mother's parental rights and vesting DHR with legal custody. That judgment also stated that the May 18, 2022 order "remains in place." The mother appealed. **Maternal grandmother's appeal- dismissed in part; reversed; Mother's appeal-dismissed.** (1) The maternal grandmother argued that the juvenile court erred by denying her motion to intervene in the .03 action. That order was entered by the juvenile court on November 2, 2020. While the denial of a motion to intervene is always an appealable order, the maternal grandmother's notice of appeal had to be filed within 14 days after its entry. She failed to do so and as a result, the court lacks jurisdiction to consider her challenge to that order. Her appeal as to this issue is due to be dismissed. (2) The court next considered the maternal grandmother's contention that the juvenile court did not accord her a custodial preference based on the fact that she is related to the child. "Apparently, the maternal grandmother is arguing that the juvenile court's judgment terminating the mother's parental rights is erroneous because, she says, the juvenile court did not accord her a custodial preference in making a custodial disposition of the child." However, the maternal grandmother lacked standing to assert this issue because she was not a party to the .03 action. This portion of her appeal is also due to be dismissed. (3) Finally, the maternal grandmother argued

that the juvenile court erred in entering the May 18, 2022 order prohibiting her from discussing the .03 action without affording her notice and an opportunity to be heard. The court looked to the potential statutory authority that exists for such an order. Section 12-15-131, Ala. Code 1975 permits a court to enter an order "restraining the conduct of any party over whom the juvenile court has obtained jurisdiction." However, this Code section is inapplicable given that the maternal grandmother was not a party to the .03 action. Moreover, that section also requires notice and hearing before a restraining order is entered, which was not provided in this case. Section 12-15-138 allows a juvenile court to enter an ex parte order "to protect the health or safety of a child subject to the proceeding." Here, no allegation was made that the order which DHR sought was necessary to protect the health or safety of the child. The court also looked to § 12-15-141, Ala. Code 1975 which provides jurisdiction for a juvenile court to enter an ex parte order "upon a showing of verified written or verbal evidence of abuse or neglect injurious to the health or safety of a child"; it further requires a showing that the abuse or neglect will likely continue in the absence of such an order. Again, DHR's motion was not verified nor did it contain allegations that such an order was necessary to protect the child from abuse or neglect. Section 12-1-7(1), Ala. Code 1975 allows all courts to issue orders to prevent hindrance of their proceedings. A juvenile court is also authorized to admit a person, other than a party, to a juvenile court hearing "on condition that the persons refrain from divulging any information which would identify the child under the jurisdiction of the juvenile court or family involved." § 12-15-129, Ala. Code 1975. "Assuming without deciding, that the juvenile court relied on these statutes, or the general intent of the legislature that juvenile court records shall be confidential, see § 12-15-216, Ala. Code 1975, we find nothing in these statutes that authorizes the juvenile court to enter an ex parte gag order against a non-party to protect the dignity of the court or the privacy of a child." The court went on to hold that the issuance of the injunction in this case is governed by Rule 65(a)(1), Ala. R. Civ. P. That rule allows for the issuance of a temporary restraining order but only if the applicant's attorney certifies in writing the efforts, if any, which have been made to give notice to the other party and the reasons supporting the claim that notice should not be required. No such affidavit was provided in this case by DHR. Rule 65 also allows for the entry of a preliminary injunction but notice to the adverse party before such an injunction is issued is mandatory. "Accordingly, regardless of whether the May 18, 2022, order is characterized as a temporary restraining order or as a preliminary injunction, the juvenile court erred in entering it because DHR had not met the requirements for obtaining either." The maternal grandmother is entitled to a reversal on this issue. (4) With regard to the mother's appeal, insofar as the juvenile court's August 24, 2022 judgment purported to maintain the May 18, 2022 order in effect, the juvenile court lost jurisdiction to enter that order because the maternal grandmother had already filed a notice of appeal. Once the maternal grandmother filed her notice of

appeal, the juvenile court no longer had jurisdiction to act on the May 18, 2022 order. However, because the maternal grandmother lacked standing to appeal the termination of the mother's parental rights, the juvenile court did have jurisdiction over that aspect of the case in spite of the maternal grandmother's filing of the notice of appeal. However, the August 24, 2022 judgment terminating the mother's parental rights failed to adjudicate the mother's contempt claim. Therefore it was not a final judgment which will support an appeal. Accordingly, the mother's appeal is due to be dismissed. ***J.T. v. Chambers Cty. Dept of Human Resources,*** 32 ALW (CL-2022-0687; CL-2022-0972); Per curiam; maternal grandmother's appeal—Thompson, Moore, Edwards, Hanson and Fridy concur; mother's appeal—Thompson, Moore, Hanson, and Fridy concur; Edwards concurs in the result, without opinion; 23 pages. [ATTY: Not listed-confidential]

Court Holds That Service of Witness Subpoena by Email is Invalid

Facts and Procedural History: On February 10, 2022, Assistant District Attorney Jessica Catlin sent Bradley Grandquest, a former Mobile County sheriff's deputy, an email with an attachment entitled "Criminal Witness Request and Order to Appear. A subpoena was attached to the email directing Grandquest to appear and testify on February 15, 2022 at the criminal trial of Thomas Carter. Grandquest had interviewed the victim in the Carter case. Grandquest replied by sending an email stating "Email received."

Grandquest failed to appear at Carter's trial and law enforcement officers were sent to his home after a writ of attachment was issued. Grandquest was brought to the courthouse and the trial judge who was presiding over Carter's trial conducted a hearing. Grandquest told the trial court that he had intended to appear at the Carter trial but that he was sick on the morning of February 15 and failed to notify anyone that he was ill and would not be attending.

Grandquest was charged with constructive criminal contempt of court for his failure to appear and testify. At the contempt hearing, Grandquest's counsel moved to dismiss the contempt charge because he asserted that Grandquest had never been properly served with the subpoena. The prosecutor noted that the District Attorney's office "regularly serve our subpoenas in that manner." The circuit court indicated that it was satisfied that § 12-21-180(e), Ala. Code 1975 had been complied with when serving the subpoena. After the hearing, the circuit court issued an order finding Grandquest guilty of constructive criminal contempt for his failure to appear in court to testify and assessed a $100 fine against him. Grandquest appealed.

Court's Analysis: Rule 33.3, Ala. R. Crim. P. states that criminal contempt is the "willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, decree of command where the dominant purpose of the contempt is to punish the contemnor." An improperly served subpoena provides a witness with a valid defense in a contempt proceeding.

Rule 17.4, Ala. R. Crim. P. governs the service of subpoenas. It allows service by mail unless personal service is requested. The State argued that pursuant to § 12-21-180(e), Ala. Code 1975 ,Grandquest acknowledged service by replying "Email received". Section 12-21-180(e) states: "A witness may acknowledge service of a subpoena by endorsing acceptance thereof on the subpoena, in writing, in which event service by the sheriff shall not be required." However, the court "questioned" the applicability of that statute in this case given that the subpoena was issued electronically and the statute requires that the actual subpoena be endorsed in writing in order to waive proper service.

The court noted that it could find no prior precedent indicating whether a defendant's acknowledgement of a subpoena constitutes a waiver of any challenge to proper service of that subpoena. It looked to a Mississippi civil case wherein that court held to the contrary (citation omitted). According to Florida law, a witness may waive defective

process of service if he or she appears and fails to object. "We cannot say that Grandquest's response, 'Email received' was an affirmative or clear waiver of personal service or consent to service by email."

Moreover, although Alabama has not addressed this issue, other jurisdictions have held that service of a subpoena for a witness to testify by email was not proper. "Given that the question of serving a subpoena via email is not provided for in either the procedural rules of court adopted by the Alabama Supreme Court or statutes governing subpoenas, this Court cannot say that the subpoena that formed the basis of the contempt charge was a 'lawfully' served subpoena." Therefore, the basis for the constructive contempt finding against Grandquest was invalid and the judgment of the trial court is due to be reversed.

Grandquest v. State of Alabama, 32 ALW (CR-2022-1067); 03/24/2023; Mobile Cty.; Kellum; McCool, Cole, and Minor concur; Windom recuses herself; 14 pages. [ATTY: Appt: Thomas Walsh, Mobile; Apee: Atty. Gen.]

CIVIL PROCEDURE: Stay of Judgment. FAMILY LAW: Visitation. The parties were divorced in 2020. Pursuant to the divorce judgment, the parties were awarded the joint legal and joint physical custody of their two children; the father's residence was designated as the older child's residence "for all legal intents and purposes" and the mother was afforded visitation with the older child after the mother and the older child completed specified counseling. In March 2021, the father filed a custody modification action and the mother filed a counterclaim seeking to hold the father in contempt. In December 2021, the trial court entered an order that found the father to be in criminal contempt of the divorce judgment and sentenced the father to a 10-day suspended jail sentence. The father was permitted to purge himself of the contempt by complying with several specific provisions set forth in that order which related to the older child's visitation or relationship with the mother. In January 2022, the father filed another custody-modification action and the mother filed a counterclaim for contempt alleging that the father continued to violate the terms of both the divorce judgment and the December 2021 contempt judgment. In October 2022, the trial court entered a judgment once again holding the father in criminal contempt. It sentenced the father to an additional 10 days in jail. The trial court lifted the suspension of the jail sentence contained in the December 2021 contempt judgment and it ordered the father to serve the two 10-day jail sentences concurrently over five consecutive weekends beginning on October 14-16, 2022. The father filed a motion to stay the imposition of the jail sentence pursuant to Rule 62(a), Ala. R. Civ. P.. The trial court denied that motion and the father filed a petition for writ of mandamus. The court granted a motion to stay the jail sentence until the merits of the mandamus petition could be considered. However, Rule 62(a) only provides for an automatic stay for a 30-day period following entry of a judgment. That automatic stay expired before the resolution of the father's first mandamus petition and therefore, the father filed a motion to dismiss his initial petition for mandamus. Said motion was granted by the court on November 8, 2022. While the first mandamus petition was pending, the father filed a postjudgment motion in the trial court and a motion requesting a stay of the jail sentences pursuant to Rule 62(b), Ala. R. Civ. P. The trial court set the father's postjudgment motion for hearing but denied the father's motion to stay under Rule 62(b). The father then filed this petition for writ of mandamus. Upon motion of the father, the court granted a stay of the jail sentences pending resolution of this second petition. **Writ of mandamus granted.** Rule 62(b) provides that a trial court has the discretion to grant a stay while a postjudgment motion is pending. The exercise of that discretion will not be disturbed unless it was exercised in an "arbitrary and capricious manner." (citation omitted). In his response to the mandamus petition, the trial court argued that staying the sentences of incarceration would permit "a party appearing before the trial court [to] continually and routinely perform the same contempt..." The trial court further contended that it would be deprived of the authority to enforce its orders. "However, a stay of a sentence of

incarceration under Rule 62(b) merely forestalls the execution of that particular sentence pending resolution of a postjudgment motion." The trial court also indicated concern that, "because the older child will reach the age of majority on January 12, 2023, a delay in the sentences of incarceration will prevent the trial court from restoring the relationship between the mother and the older child." The court rejected this argument,, stating: "We cannot conceive of a basis under which a sentence of incarceration for criminal contempt imposed on one parent would serve as a method of restoring a relationship between a child and the other parent." If the father does not prevail on his postjudgment motion or an appeal, he will still have to serve those sentences. Moreover, if the father was required to serve those sentences before he exhausts any remedies for review, his postjudgment motion and any appeal would be mooted because he would have already served the jail sentences. Accordingly, the trial court abused its discretion by denying the father's motion to stay and the petition for writ of mandamus is due to be granted. ***Ex parte Oden (Oden v. Oden)***, 31 ALW (CL-2022-1156); 12/09/2022; Morgan Cty.; Edwards; Moore, Hanson and Fridy concur; Thompson concurs in the result, without opinion, 10 pages. [ATTY: Pet: Joan-Marie Sullivan, Huntsville; Resp: Sherry Phillips, Athens]

The wife filed a divorce action in November 2018 in the Elmore Circuit Court. The action was assigned to Judge Sibley G. Reynolds. Judge Reynolds presided over 10 pendente lite hearings before he retired on January 16, 2023. Thereafter, the Chief Justice of the Supreme Court of Alabama issued an order assigning Judge Reynolds to continue to preside over the divorce action. On February 17, 2023, Judge Reynolds entered an order scheduling the parties' divorce trial for May 16, 2023. In that order, the trial court specified that "[i]t is noted that no court-supplied court reporter is to be present for this trial." Counsel for the husband requested a continuance and then filed a motion requesting that the trial court provide a court reporter at all future hearings. The trial court denied the motion to continue and then stated "[t]he undersigned is not provided a court reporter. The parties can provide a record [sic] and, if qualified, the Court will allow them to participate and be sworn for the record." The husband filed a petition for a writ of mandamus in which he challenged the trial court's denial of his request for an official court reporter. The husband also moved for a stay of the proceedings which was granted by the appellate court on May 9, 2023. Shortly thereafter, the trial court entered an order in which it granted the wife's motion to obtain a certified court reporter. The wife submitted a purported order of the trial court entered on May 22, 2023 in which the trial court stated that it had engaged a certified court- reporter for the trial and that the trial had been rescheduled for September 2023. The wife argued that this order and the order entered on May 9, 2023 rendered the husband's petition moot. **Petition granted in part; denied in part.** (1) The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction or stay the case. However, "a matter submitted to this court for review by petition for a writ of mandamus can be rendered moot only if the courts do not stay the underlying action in the trial court." Here, the court issued its May 9, 2023 order before the trial court entered its purported May 9, 2023 order. After the stay was granted, the trial court no longer had jurisdiction to enter any orders and the May 9, 2023 and May 22, 2023 orders are void. Therefore, those orders cannot operate to render the petition for a writ of mandamus moot. (2) As for the merits of the husband's petition, an unofficial transcript, prepared by a person not appointed pursuant to §§ 12-17-270-277, Ala. Code 1975 is not admissible evidence. Section 12-17-270 requires circuit court judges to appoint an official court reporter who shall be an officer of the court. This Code section does not apply to circuits which consist ofonly one county and have three or more judges. The 19th Judicial Circuit comprises Autauga, Elmore and Chilton counties. Therefore, the exception contained within § 12-17-270 does not apply. "Given the language of § 12-17-270, we conclude that the trial court erred in denying the husband's request for the appointment of an official court reporter." The trial court is ordered to vacate its order denying the father's request to appoint an official court reporter. (3) The husband sought a directive from the court that the trial court provide an official court reporter in "all subsequent hearings." However, it appears that the only hearing

left to take place in this case is the final hearing. A writ of mandamus will not issue if it is based on "mere speculation as to the possible occurrence of future events." The husband's concern about future hearings is based on such speculation and therefore, this part of his petition is due to be denied. ***Ex parte Fraiser (Fraiser v. Fraiser)***, 32 ALW (CL-2023-0308); Elmore Cty.; 07/14/2023; Thompson; Moore, Edwards, Hanson and Fridy concur; 12 pages. [ATTY: Pet: Melissa Isaak, Montgomery; Resp: Walter James, Wetumpka]

CIVIL PROCEDURE: Dismissal--Mootness. GOVERNMENT: Immunity--Separation of Powers. The Walker Circuit Court issued a warrant for the arrest of Dalen Gaines after he failed to appear to answer criminal charges. Three months later, Gaines was taken into custody. Walker County Sheriff's Deputy Christopher Doeur made the arrest. Deputy Doeur informed the Walker Circuit Court that he had arrested Gaines and he placed Gaines in the Walker County jail. Gaines remained in jail for approximately a month with no bond hearing. He then filed suit against Walker County Sheriff Nick Smith and Deputy Doeur ("the Officers") both in their official and individual capacities. Four days after the complaint was filed, the trial court set Gaines's criminal case for hearing and then released him on bond. Shortly thereafter, Gaines was arrested on a separate capital-murder charge in Jefferson County. Four months later, the Officers filed a motion to dismiss the action against them. They alleged insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief could be granted. The trial court granted the motion to dismiss with prejudice. Gaines appealed. **Affirmed.** (1) Gaines argued that the trial court erred by failing to hold a hearing on the motion to dismiss. Rule 78, Ala. R. Civ. P. states that a trial court may not enter an order denying a motion to dismiss without holding a hearing. Pursuant to the negative-implication canon of interpretation, "the expression of one thing implies the exclusion of others." (citation omitted). "Based on that canon, it follows that because Rule 78 allows a court to deny a motion to dismiss without an oral hearing, it does not allow a court to grant such a motion without a hearing." So, while the trial court may have erred by granting the Officers' motion to dismiss without holding a hearing, the Court still had to consider whether that error was harmless. The burden fell upon Gaines to show that the error probably injuriously affected his substantial rights. He failed to do so. Gaines never explained in his initial brief how or why he was prejudiced by the error. In his reply brief, he addressed the harmless-error argument but that argument "comes too late." Arguments not contained in an appellant's initial brief are deemed waived. Accordingly, Gaines failed to show that the trial court's error was prejudicial. (2) The next issue asserted on appeal was whether Gaines's complaint stated a plausible claim for relief. Gaines sought monetary and injunctive relief in his complaint. However, with regard to the monetary claim regarding the Officers in their official capacities, the Officers are immune based on State immunity. Moreover, §1983 claims for money damages cannot be asserted against State officials in their official capacities. Therefore, the trial court did not err by dismissing Gaines's monetary claims against the Officials. (3) The Court next turned to the equitable relief requested by Gaines. Gaines argued that he should be afforded two kinds of equitable relief: (a) a declaratory judgment that the Officers' actions violated his constitutional rights and (b) "prospective injunctive relief" requiring the Officers to bring others similarly situation before the trial court so that they can secure their release. However, those claims are now moot. A case must remain justiciable at all

stages of review. "Here, Gaines's request for equitable relief became moot just four days after he filed the complaint because the trial court released him on bond, meaning that the trial court could no longer order Sheriff Smith (or Deputy Doeur) to release Gaines from jail." Gaines then argued that his claims for injunctive relief were not moot because he has habitually failed to appear for court hearings and therefore, his claims for injunctive relief fall under the exception that said claims are capable of repetition but evading review. "Therefore, his argument goes, because he is a self-proclaimed dyed-in-the-wool bail-jumper, he asserts that he faces a realistic threat of future injury..." However, injunctive relief cannot be based on speculative future harm. In order for Gaines to encounter the same scenario in the future, he would have to beat his capital murder charge or complete his sentence if he is found guilty. He would then have to resolve other criminal charges against him and then he would have to fail to appear in Walker County for future criminal charges. "It is exceedingly unlikely that he will ever face this issue again." Gaines's claims for prospective injunctive relief are moot. (4) Finally, with regard to Gaines's claims for injunctive relief against the Officers in their individual capacities, the Court relied upon a separation of powers analysis. Article V,§112 of the Alabama Constitution of 1901 specifies that "the executive department shall consist of... a sheriff for each county." Moreover, a deputy sheriff is the alter ego of the sheriff. Therefore, the Officers are part of the State's executive branch and the Alabama Constitution prohibits any legislative or judicial power over the executive branch. Moreover, the Officers have no authority as to when criminal defendants are brought before the court for a hearing. Such a function rests within the purview of the judicial branch. "Because the Officers had neither the obligation nor the authority to schedule a hearing for Gaines, Gaines's claims against the Officers in their individual capacities fail as a matter of law." ***Gaines v. Smith and Doeur,*** 31 ALW (1210304); 11/18/2022; Walker Cty.; Mitchell; Parker concurs; Shaw, Bryan, and Mendheim concur in the result; 17 pages. [ATTY: Appt: Seth Diamond, Jasper; Apee: James McNeill, Montgomery]

APPEAL & ERROR: Timeliness—Notice of Appeal. CIVIL PROCEDURE: Electronic Filing. This is the sixth time that the parties have been before the court. The parties were divorced in 2014 and in 2017, the former wife filed a contempt action against the former husband. The former husband filed a counterclaim for custody. In March 2018, the trial court awarded the former husband sole physical custody of the parties' children and the former wife was ordered to pay $300 per month in child support. That judgment was reversed with regard to the former wife's child support obligation and remanded. *Seibert v. Fields,* 290 So.3d 420 (Ala. Civ. App. 2019)("*Seibert*"). On remand, the trial court conducted a trial and received evidence. On May 6, 2022, the trial court entered a judgment which determined that the former wife owed a child support arrearage of $5,196, ordered the former husband to pay the fees and expenses to an expert witness in the amount of $2,000, ordered each party to pay his or her own attorney's fees and denied all other relief. The former husband filed a postjudgment motion on June 3, 2022 and on August 29, 2022, the trial court denied it. The former husband filed a notice of appeal on October 12, 2022. After the court called for the parties to file letter briefs addressing the timeliness of the appeal, the former wife filed a motion to dismiss. **Appeal dismissed.** The timely filing of a notice of appeal is a jurisdictional act and an untimely appeal must be dismissed. The former husband's timely filed judgment motion was denied on August 29, 2022. Thereafter, the former husband had 42 days within which to file his notice of appeal. Here, the 42nd day fell on October 10, 2022, which was a legal holiday. As a result, the former husband had until October 11, 2022 to file his notice of appeal. Rule 4, Ala. R. App. P.; Rule 26(a), Ala. R. App. P. The notice of appeal was not filed until October 12, 2022. The former husband's attorney indicated that he experienced technical difficulties with the trial court's electronic filing system and was unable to file the notice of appeal in the trial court. However, he attached a notice of appeal filed with the Court of Civil Appeals which bears a time stamp dated October 11, 2022 at 6:53 p.m. Pursuant to Rule 3(a)(1), Ala. R. App. P., a notice of appeal must be filed with the clerk of the trial court; said notice may be filed electronically. In *Crawford v. Kindred,* 418 So.2d 908, 909 (Ala. Civ. App. 1982), the court dismissed an appeal because the notice of appeal was filed directly with the appellate court instead of the trial court. "[N]either the Alabama Rules of Appellate Procedure nor any provision of the Code of Alabama allows this court to treat a notice of appeal filed directly with the clerk of this court as having been filed with the clerk of the trial court." The former husband argued that his notice of appeal should be treated as having been timely filed because the failure to file it in the trial court was a result of technical difficulties. Rule 5(e), Ala. R. App. P. allows for electronic filing. Rule 44, Ala. R. Jud. Admin. Provides for the publication by the Administrative Director of Courts "a policies and procedures manual pertaining to electronic filing to be placed on the Administrative Office of Courts' Web site." Such a policy manual is on the AOC website and constitutes an order of the Alabama Supreme

Court. The electronic-policy manual states that if a party misses a filing deadline because of an inability to electronically file based upon the unavailability of the system, the party may submit the untimely filed document, along with a declaration setting forth the reason that the deadline was missed. However, the document and the declaration must be filed by 12:00 noon of the first day on which the court of jurisdiction is open for business following the original filing deadline. In this case, after missing the filing deadline on October 11, 2022, the former husband had until noon on October 12, 2022 within which to file the notice of appeal and the declaration. The notice of appeal was not filed with the trial court until 12:07 p.m. on October 12, 2022. Moreover, it was not accompanied by a declaration. Because the notice of appeal was not timely filed, the appeal is due to be dismissed. ***Seibert v. Fields***, 32 ALW (CL-2022-1062); 03/17/2023; Madison Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 14 pages. [ATTY: Appt: Scott Rogers, Huntsville; Apee: Amber James, Huntsville]

APPEAL & ERROR: Timeliness—Certiorari Review. The parties were divorced in 2014 and in 2017, the former wife filed a contempt action against the former husband. The former husband filed a counterclaim for custody. In March 2018, the trial court awarded the former husband sole physical custody of the parties' children and the former wife was ordered to pay $300 per month in child support. That judgment was reversed with regard to the former wife's child support obligation and remanded. *Seibert v. Fields*, 290 So.3d 420 (Ala. Civ. App. 2019)("*Seibert*"). On remand, the trial court conducted a trial and received evidence. On May 6, 2022, the trial court entered a judgment which determined that the former wife owed a child support arrearage of $5,196, ordered the former husband to pay the fees and expenses to an expert witness in the amount of $2,000, ordered each party to pay his or her own attorney's fees and denied all other relief. The former husband filed a postjudgment motion on June 3, 2022 and on August 29, 2022, the trial court denied it. Thereafter, the former husband had 42 days within which to file his notice of appeal. Here, the 42nd day fell on October 10, 2022, which was a legal holiday. As a result, the former husband had until October 11, 2022 to file his notice of appeal with the trial court. Rule 4, Ala. R. App. P.; Rule 26(a), Ala. R. App. P. The notice of appeal in this case was not filed until October 12, 2022. The former husband's attorney indicated that he experienced technical difficulties with the trial court's electronic filing system and was unable to file the notice of appeal in the trial court. However, he attached a notice of appeal filed with the Court of Civil Appeals which bears a time stamp dated October 11, 2022 at 6:53 p.m. After the Court of Civil Appeals called for the parties to file letter briefs addressing the timeliness of the appeal, the former wife filed a motion to dismiss. The Court of Civil Appeals dismissed the former husband's appeal as having been taken from a nonfinal judgment. *Seibert v. Fields*, [Ms. CL-2022-1062, Mar. 17, 2023] ___ So.3d ___ (Ala. Civ. App. 2023). The former husband filed a petition for a writ of certiorari. **Writ denied.** (1) The former husband first asserted that the decision of the Court of Civil Appeals conflicts with prior precedent. Specifically, the former husband argued that the filing of a notice of appeal with the clerk of the trial court is not a jurisdictional act. In so doing, he relied upon prior precedent which he contended conflicted with decisions of the Court of Civil Appeals. However, in those cases upon which the former husband relied, the notices of appeal were timely filed in the right court; the issue was whether defects in those notices rendered them void. "Additionally, none of those cases included any suggestion that the filing of a notice of appeal in an incorrect court is effective as a timely filed notice of appeal." Accordingly, the former husband failed to demonstrate any probability of merit on this argument. (2) The former husband also argues that the Court of Civil Appeals' decision conflicts with its prior decision in *Crawford v. Kindred*, 418 So.2d 908 (Ala. Civ. App. 1982). In *Crawford*, the defendant appealed a judgment of the small-claims court directly to the Court of Civil Appeals. The Court of Civil Appeals dismissed that appeal because it was not filed in the correct court nor was it authorized under the Alabama Rules of Appellate Procedure. The former husband in this case argued that the Court of Civil Appeals had mistakenly relied upon *Crawford* in its decision dismissing his appeal. "However, appellate-court error is not a specific

ground for certiorari review pursuant to Rule 39(a)(1), Ala. R. App. P. Moreover, nothing in the Court of Civil Appeals' holding in the present case conflicts with its holding in *Crawford.* (3) Next, Seibert contends that the holding of the Court of Civil Appeals conflicts with the Supreme Court's decision in *Ex parte G.L.C.,* 281 So.3d 401 (Ala. 2018). In *Ex parte G.L.C.,* the Court permitted the untimely filing of a notice of appeal in a termination-of-parental rights case where the mother sought to file the notice of appeal on the last day that it was due to be filed but was told by a member of the court clerk's office that it had to be filed in a different office. When the mother tried to do as directed and file it there, security had already locked the door at 4:30 p.m. The Court held: "[W]hen considering the particular circumstances of this case—that the mother did everything she was supposed to do but was prevented from timely filing her notice of appeal based on erroneous information given to her by someone in the circuit clerk's office—together with the fact that the mother was appealing the termination of her parental rights, we must conclude that equity requires that we deem the mother's notice of appeal timely filed." Here, the former husband claimed that he was prevented from timely filing his notice of appeal based on technical difficulties with the trial court's electronic-filing system. Rule 44, Ala. R. Jud. Admin. provides for the publication by the Administrative Director of Courts a policies and procedures manual pertaining to electronic filing to be placed on the Administrative Office of Courts' Web site. Such a policy manual is on the AOC website and constitutes an order of the Alabama Supreme Court. The electronic-policy manual states that if a party misses a filing deadline because of an inability to electronically file based upon the unavailability of the system, the party may submit the untimely filed document, along with a declaration setting forth the reason that the deadline was missed. However, the document and the declaration must be filed by 12:00 noon of the first day on which the court of jurisdiction is open for business following the original filing deadline. In this case, after missing the filing deadline on October 11, 2022, the former husband had until noon on October 12, 2022 within which to file the notice of appeal and the declaration. The notice of appeal was not filed with the trial court until 12:07 p.m. on October 12, 2022. Moreover, it was not accompanied by a declaration. Unlike the situation in *Ex parte G.L.C.,* the former husband "did not do everything he was supposed to do." The petition for a writ of certiorari is due to be denied. ***Ex parte Seibert (Seibert v. Fields),*** 32 ALW (SC-2023-0234); 06/02/2023; Madison Cty.; Wise; Parker, Sellers, Stewart and Cook concur; 24 pages. [ATTY: Pet: Douglas Scofield, Birmingham; Resp: Amber James, Huntsville]

APPEAL & ERROR: Timeliness. Emmanuel Chijioke represented himself in an action he filed against Lamar OCI South, LLC ("Lamar") regarding a dispute which had arisen over the amount of rent owed by Lamar for a billboard placed on Chijioke's land. The district court entered a judgment in favor of Lamar on September 30, 2022. On October 17, 2022, Chijioke, still appearing pro se, filed a notice of appeal to the circuit court. The circuit court dismissed that appeal as having been untimely filed on November 16, 2022. On November 28, 2022, Chijioke filed a "motion to reconsider". The circuit court set the matter for hearing and thereafter, Chijioke retained counsel. In a brief filed by Chijioke prior to the hearing, Chijioke stated that on Friday, October 14, 2022, he went to the Clerk's Office to file a notice of appeal. Someone in that office indicated that he needed to speak with the district judge to waive the costs to perfect the appeal. He then went to the district judge's office and was advised that the judge was not there and was not expected to return that day. Chijioke returned to the judge's office on Monday and received approval to have the costs of appeal waived. After the hearing, the circuit court granted the motion to reconsider and returned Chijioke's appeal to its active docket. That order was entered on February 6, 2023. On March 23, 2023, Lamar filed a petition for a writ of mandamus. **Writ of mandamus denied.** Although the petition for writ of mandamus was filed more than 42 days after the February 6, 2023 order was entered—which is beyond the presumptively reasonable time within which to file—the issue presented is jurisdictional and therefore, it is still due to be considered. Lamar asserts that there is "no legal authority" for a circuit court to exercise jurisdiction over a late-filed notice of appeal. However, in *Ex parte G.L.C.*, 281 So.3d 401, 407 (Ala. 2018), the Alabama Supreme Court held that a mother's untimely notice of appeal was due to be considered timely filed where the mother tried to file it before the appeal time ran but was told by the juvenile clerk's office that she would have to file it with the circuit clerk but the circuit clerk's office was closed. In *Ex parte G.L.C.*, the Court held: "a filer cannot be prejudiced by the clerk's failure to 'do their part' once a document has been delivered to the clerk's office for filing." Here, Chijioke attempted to timely file his notice of appeal but was advised by the clerk's office that he would have to speak with the district judge to obtain a waiver of costs. It would have been "unjust and unfair" to dismiss Chijioke's notice of appeal in light of his good faith effort to perfect it in a timely manner. The circuit court did not err by deeming the notice of appeal as having been timely filed and the petition for the writ of mandamus is due to be denied. ***Ex parte Lamar OCI South, LLC, (Chijioke v. Lamar OCI South, LLC)***, 32 ALW (CL-2023-0191); 05/05/2023; Talladega Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 8 pages. [ATTY: Pet: J. Alex Robertson, Birmingham; Resp: Clarence Dortch III, Talladega]

FAMILY LAW: Parental Rights--Service. On April 14, 2022, the juvenile court entered a final judgment terminating the parental rights of the mother and the father to their child. On May 27, 2022, W.R. ("the uncle"), who is the maternal uncle of the child, filed a motion seeking to intervene in the termination proceeding for the limited purpose of filing a motion for relief from the final judgment. The juvenile court granted that motion on June 22, 2022. On that same day, the uncle filed a motion seeking to set aside the final judgment because the juvenile court had not served him with notice of the termination proceeding. In that motion, the uncle contended that the final judgment should be set aside because the juvenile court had failed to consider placing the child with a suitable relative, his son, J.R., as a viable alternative to terminating the parents' parental rights. The Marshall County Department of Human Resources ("DHR") filed a response in which it acknowledged that the uncle had not been served but it contended that the uncle was not entitled to service or notice of that proceeding. The juvenile court summarily denied the uncle's motion for relief from judgment and the uncle appealed. **Affirmed.** (1) The uncle argued that he was entitled to notice of the termination proceeding because the final judgment served to terminate his visitation rights. However, the uncle failed to present any evidence to the juvenile court that he had been awarded visitation rights with the child. Moreover, he failed to present any evidence that the final judgment terminated his right to visit with the child. Similarly, the uncle contended that he was entitled to notice of the termination proceeding pursuant to the Fourteenth Amendment. Because that issue was not raised to the juvenile court, it could not be considered on appeal. (2) The uncle also asserted that the juvenile court erred by failing to consider placing the child with his son, J.R., as a viable alternative to the termination of the parents' parental rights. Even if such a contention were true, such an error would not render the final judgment void. "Errors in the application of the law by the trial court do not render a judgment void." (citation omitted). Had the parents raised this issue, the final judgment may have been found to be voidable but the uncle lacks standing to assert the rights of the parents in this appeal. (3) DHR contended that the uncle could not maintain this appeal because he was not a party to the termination proceeding. However, when a person is permitted to intervene in a proceeding, that person becomes a party to that proceeding and may appeal any subsequently entered judgment. Here, the uncle was permitted to intervene for the purpose of filing a motion pursuant to Rule 13(A)(6), Ala. R. Juv. P. and as a result, he had a right to appeal from the denial of that motion. (4) Finally, the court considered whether the uncle was entitled to service in the termination proceeding. Rule 13(A)(1) provides that once a termination-of-parental-rights petition has been filed, "summonses shall be issued to and personally served...upon each of the following persons:...legal guardian, or legal custodian, and other persons who appear to the juvenile court to be proper or necessary parties to the proceedings." At the time that the subject termination-of-parental-rights action was filed, the uncle was not the legal

custodian or legal guardian of the child. The uncle argued that because he was the former custodian of the child, he was entitled to notice. However, the uncle lost custody of the child on March 24, 2021. "Considering that context, we perceive the uncle's argument to present the rather narrow issue of whether a former relative caregiver is entitled to service under Rule 13(A)(1) based solely on the fact that he or she once exercised custody of a child." A discussion of who is deemed a "proper or necessary part[y]" to a termination proceeding has not been undertaken by the court before. The court noted that pursuant to §12-15-307, Ala. Code 1975, a "relative caregiver" is entitled to notice of any juvenile court proceeding being held with respect to a child in his or her care. Notably, that Code section does not require that such a notice be given to a former relative caregiver. "Because a former relative caregiver has no statutory right to notice and an opportunity to be heard under the terms of the AJJA, it logically follows that a former relative caregiver would not automatically be entitled to service in a termination proceeding." The judgment of the juvenile court is due to be affirmed. ***W.R. v. Marshall County Department of Human Resources,*** 32 ALW; 01/20/2023; Marshall Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 15 pages. [ATTY: Not listed-confidential]

CIVIL PROCEDURE: Service of Process. FAMILY LAW: Parental Rights. In August 2021, the mother filed a petition to terminate the parental rights of T.F.H. to the child. T.F.H. was served by certified mail. The case was set for trial on December 7, 2021. However, the day before that trial, the juvenile court entered an order indicating that because T.F.H. had not been served by personal service, the case would be continued. The mother then filed a motion indicating that T.F.H. was personally served on December 11, 2021 and she requested a trial date. A trial was held on March 3, 2022. At the beginning of that trial, the mother's counsel asserted that T.F.H. had been served by certified mail on August 19, 2021 and that a private process server personally served T.F.H. on December 11, 2021. T.F.H.'s counsel stated on the record that T.F.H. was not present and that counsel was objecting to personal jurisdiction. T.F.H.'s counsel also challenged the sufficiency of the service of process made on T.F.H. and made an oral motion to dismiss. That motion was denied and the juvenile court entered a judgment terminating the parental rights of T.F.H. to the child. After his postjudgment motion was denied, T.F.H. appealed. **Appeal dismissed.** T.F.H. argued that his parental rights could not be terminated because service of process was not perfected as required by § 12-15-318, Ala. Code 1975. That Code section states that unless otherwise provided by the Alabama Rules of Juvenile Procedure, service of process of termination of parental rights actions shall be made in accordance with the Alabama Rules of Civil Procedure. Rule 13(A), Ala. R. Juv. P. requires a termination-of-parental-rights petition to be personally served by a process server. However, "[u]pon motion and for good cause shown, the court may direct that an adult be served by certified mail pursuant to Rule 4(i)(2)." In this case, the mother argued that T.F.H. was properly served by certified mail. However, the mother never filed a motion asserting that good cause existed for service of process to be made by certified mail as required by Rule 13(A)(1). The mother also contended that service was perfected when T.F.H. was personally served on December 11, 2021. However, Rule 4(i)(1)(C), Ala. R. Civ. P. requires a person who personally serves process to file a return indicating the first and last name of the person served, the date of service, and the name, the physical address of the home or business, and the telephone number of the server. The return of process must also indicate that a copy of the petition and accompanying documents were served and that the server meets the requirements of Rule 4(i)(1)(B). Here, the return failed to indicate the physical address of the home or business and the telephone number of the person serving process and it failed to indicate that the server was a person not less than 19 years of age, was not a party, and was not related within the third degree by blood or marriage to the mother. "Because the record indicates that the mother did not properly serve T.F.H. with the termination-of-parental-rights petition, the juvenile court lacked jurisdiction over T.F.H., rendering the juvenile court's judgment void." The appeal from that void judgment is due to be dismissed, with instructions to the juvenile court to vacate its judgment. ***T.F.H. v. A.L.S.***, 32 ALW (CL-2022-0531); 03/17/2023; Coosa

Cty.; Hanson; Thompson, Moore, Edwards and Fridy concur; 11 pages. [ATTY: Not listed-confidential]

GOVERNMENT: Administrative Law. Letonya Sullivan is a teacher who is employed by the Autauga County Board of Education. The Autauga County Department of Human Resources ("Autauga County DHR") investigated allegations that Sullivan had failed to supervise the children in her classroom and that, as a result, some students performed oral sex acts on one another. After the investigation was completed, the Autauga County DHR determined that the allegations against Sullivan were "indicated" for child abuse or neglect. Sullivan sought a hearing in front of an administrative law judge ("ALJ"). After said hearing, the ALJ issued a final order on April 1, 2021 affirming the Autauga County DHR's determination. Sullivan then filed a petition for judicial review in the Montgomery Circuit Court on June 3, 2021. Attached to that petition as exhibits were a copy of the April 2021 order and a copy of a May 4, 2021 email from one of Sullivan's attorneys to Serena Cronier, a member of the Alabama Department of Human Resources ("Alabama DHR"), who was acting counsel for the Autauga County DHR in the underlying administrative proceedings. Attached to that email was a copy of a May 4, 2021 notice of appeal from Sullivan's attorney to the Alabama DHR. The notice of appeal indicated that it was sent both by email and through the United States Postal Service ("USPS") overnight delivery. It was addressed to the Alabama DHR "c/o Hon. Serena Cronier" at "P.O. Box 34000, Montgomery, AL 36130." The Alabama DHR filed a motion to dismiss Sullivan's petition, claiming that it was untimely filed. It alleged that the post-office box used was "not associated with" the Alabama DHR, that the zip code used was incorrect and that sending the e-mail to Cronier could not serve as the filing of a notice of appeal. Cronier executed an affidavit denying receipt of a notice of appeal in the mail. Thereafter, Sullivan filed an amended petition in which she alleged that Fredreke Riley signed a delivery receipt on May 7, 2021. Riley is employed by the State Department of Finance. The State Department of Finance includes within its divisions the Central Mail Office for the departments and agencies of the State. The Alabama DHR then filed a motion to dismiss the amended petition which was subsequently granted by the trial court. Sullivan appealed. **Reversed.** The applicable statute in this case is §41-22-20, Ala. Code 1975. Pursuant to that statute, a notice of appeal must be filed within 30 days after receipt of the final decision of the agency. A petition for judicial review must be filed within 30 days after the filing of the notice of appeal. "Copies of the petition shall be served upon the agency and all parties of record." However, § 41-22-20 "does not set forth the manner in which a notice of appeal may be filed, and no regulation promulgated by the Alabama DHR specifically addresses the method for perfecting the filing of a notice of appeal with that agency or any of the county departments of human resources." *L.C. v. Shelby Cnty. Dep't of Hum. Res.*, 293 So.3d 912,914 (Ala. Civ. App. 2019). In *L.C.*, the court determined that electronically forwarding a notice of appeal to an attorney who represented the agency did not constitute sufficient service. However, §41-22-20 does implicitly permit the filing of a notice of appeal by certified mail. But that Code section does not designate to

whom that certified mail must be directed. It merely states that the notice of appeal must be filed "with the agency." Alabama DHR's regulations are silent on the issue of where or with whom to file a notice of appeal. "Section 41-4-180 expressly provides that the Division of Service for the Department of Finance must operate a 'central mailing room' for 'each state department' or agency, which includes the Alabama DHR." Although the certified mail label was incorrect, it was actually received by the central mail office. Accordingly, the trial court incorrectly dismissed Sullivan's complaint and its judgment is due to be reversed. ***Sullivan v. Alabama Department of Human Resources,*** 31 ALW (2210229); 09/30/2022; Montgomery Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 21 pages. [ATTY: Appt: Clinton Daughtrey, Montgomery; Apee: Leah Reader, Montgomery]

FAMILY LAW: Paternity. APPEAL & ERROR: Timeliness. In July 2019, the mother filed a paternity action against H.B. ("the father") . Because the father did not appear in the paternity action, a judgment was entered on November 20, 2019 determining paternity and ordering the father to pay $778 in child support. In May 2021, the mother filed a contempt action against the father based on his failure to pay child support. After a trial, the juvenile court entered a judgment on February 24, 2022 finding the father to be in contempt, determining the amount of child-support arrearage and ordering the father to purge himself of his contempt by paying his regular child support and an additional $75 per month toward the arrearage. The father filed a timely postjudgment motion. However, that motion mainly challenged the validity of the paternity judgment pursuant to Rule 60(b)(4), Ala. R. Civ. P. The caption of the father's postjudgment motion contained the case numbers of both the paternity action and the contempt action but the father's motion was never docketed in the paternity action. That portion of the father's postjudgment motion directed to the contempt judgment was denied by operation of law on March 10, 2022. However, the juvenile court did not enter any order in the paternity action addressing the postjudgment motion. On March 25, 2022, the father filed a notice of appeal in which he indicated that he was appealing from the February 24, 2022 judgment and the March 10, 2022 order purportedly denying his Rule 59 and Rule 60(b)(4) motion in both the paternity and the contempt action. **Appeals dismissed.** (1) With regard to the father's appeal from the contempt judgment, it was untimely filed. The father's postjudgment motion was denied by operation of law on March 10, 2022. Pursuant to Rule 28(D), Ala. R. Juv. P., a party must file a notice of appeal from a juvenile court order within 14 days of entry of that judgment. The filing of a postjudgment motion suspends that time but the notice of appeal must be filed within 14 days from the denial of any such postjudgment motion. The father's appeal was filed 15 days after his postjudgment motion was denied by operation of law. Accordingly, that appeal is due to be dismissed. (2) The father's appeal from the denial of his Rule 60(b) motion is also due to be dismissed. That motion was never docketed in the paternity action even though the caption to the father's motion indicated that he was seeking relief from that paternity judgment. Moreover, the juvenile court never entered an order in the paternity action disposing of the father's Rule 60(b)(4) motion. Accordingly, the father has not received an adverse ruling on his Rule 60(b) motion and therefore, no judgment exists to support his appeal. The appeal of the father's motion directed to the paternity judgment is also due to be dismissed. ***H.B. v. P.N.***, 32 ALW (CL-2022-0517); 02/17/2023; Jefferson Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 6 pages. [ATTY: Not listed-confidential]

APPEAL & ERROR: Timeliness. The maternal great-uncle and the maternal great-aunt filed a petition the Jefferson Probate Court in August 2018 seeking to adopt the child who was born in May 2009. They alleged that the child had been living in their home since March 2018 and that previously, the maternal grandmother had been awarded custody of the child. On September 3, 2018, the probate court entered an order awarding custody to the maternal great-aunt and great-uncle. On May 1, 2019, the probate court granted the adoption petition. On July 11, 2019 the child's mother filed a motion in the probate court seeking to set aside the adoption. In that motion, the mother alleged that she had not been provided adequate notice of the adoption action. The probate court conducted an evidentiary hearing on the mother's motion on February 22, 2022. On June 30, 2022, the probate court denied the mother's motion. The mother filed a motion on August 4, 2022 purportedly pursuant to Rule 77(d), Ala. R. Civ. P.. In that motion, the mother explained that her attorney did not receive notice of the June 30, 2022 judgment until July 29, 2022. Although the time for filing an appeal did not actually expire until August 11, 2022 (42 days after the judgment was entered), the mother erroneously asserted in her motion that the time for appeal had already expired when she received the judgment. The probate court entered an order purportedly granting the mother's motion and extending the time for filing the notice of appeal until August 12, 2022. The mother filed her notice of appeal on August 12, 2022. **Appeal dismissed.** Rule 77(d) permits a party who failed to learn of the entry of a judgment due to excusable neglect to obtain an extension of the time for appeal. However, "that rule does not operate to extend a party's time for taking an appeal if the party learns of the entry of the judgment prior to the expiration of the time for taking a timely appeal from that judgment." Such is the case here. The mother became aware of the judgment on July 29, 2022. Counsel for the mother apparently thought that an appeal had to be taken from that judgment within 14 days of its entry based on §26-10A-26(a), Ala. Code 1975. However, that Code section applies to an appeal from a judgment of adoption. In this case, the mother sought to appeal from the denial of her Rule 60(b) motion. The appeal from such a denial is governed by Rule 4(a)(1), Ala. R. App. P.. The miscalculation of the time for taking an appeal does not constitute "excusable neglect" under Rule 77(d); it only applies when a litigant failed to learn of the entry of a judgment. The mother's notice of appeal was untimely and her appeal is due to be dismissed. ***J.A. v. C.G.H. and M.C.H.,*** 32 ALW (CL-2022-0927); 03/03/2023; Jefferson Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 10 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Dependency. APPEAL & ERROR: Preservation of Error. The applications for rehearing were overruled. Judge Moore authored a special concurrence in order to explain why he concurred in the no-opinion order of affirmance issued on original submission. The Limestone County Department of Human Resources ("DHR") filed a dependency petition. After a hearing, the juvenile court entered a judgment finding that the child "is a dependent child" and disposing of the temporary custody of the child . On original submission, the mother and the father argued that insufficient evidence was presented to support a finding that the child was dependent. When a juvenile court enters a judgment finding a child to be dependent without making specific findings of fact supporting that conclusion, the party aggrieved by the judgment must file a postjudgment motion in which he or she raises the issue of the sufficiency of the evidence. *K.M. v. S.R.*, 326 So.3d 1062 (Ala. Civ. App. 2020). Here, the juvenile court failed to specify the grounds upon which it relied when it found the child to be dependent. "Based on *K.M. v. S.R.*, this court could not, on original submission, review the issue of the sufficiency of the evidence argued by the mother and the father in their appellate briefs." ***J.P. v. Limestone Cty. Dep't of Human Resources,*** 32 ALW (2210354; 2210368); 02/17/2023; Limestone Cty.; Thompson; Edwards, Hanson and Fridy concur; Moore concurs specially, with opinion; 6 pages. [ATTY: Not listed-confidential]

APPEAL & ERROR: Final Judgment. CIVIL PROCEDURE: Postjudgment Interest. The parties were divorced in 2010 based on the parties' settlement agreement. Pursuant to the settlement agreement, the husband was to pay the wife $3,050 per month in periodic alimony. In November 2018, after the husband filed a petition to modify, the trial court entered a judgment reducing the husband's alimony obligation to $2,440 per month. The November 2018 judgment also awarded the wife attorney fees of $20,586.84 which the husband was to pay in 24 installments of $857.79. The wife filed a petition for rule nisi in November 2019 alleging that the husband had failed to pay her attorney fees as ordered. She requested that he be held in contempt and that he be required to pay her attorney fees, plus interest. After a virtual hearing, the trial court entered an order requiring the husband to pay the attorney fees as previously ordered and instructing counsel to meet and arrange for payment of the fees and interest accrued. The wife filed a postjudgment motion which was denied by operation of law, and she appealed. **Appeal dismissed.** The Court of Civil Appeals held that because the trial court's order did not specify the amount of interest owed by the husband that the order was not a final judgment. A nonfinal judgment will not support an appeal. Therefore, the appellate court dismissed the appeal. ***Kitchens v. Kitchens,*** 32 ALW (CL-2022-1242); 08/04/2023; Montgomery; Edwards;Thompson, Moore, Hanson, and Fridy concur;. 11 pages. [ATTY: Appt: Chip Cleveland, Prattville; Apee: Thomas T. Gallion III, Inlet Beach, FL]

CIVIL PROCEDURE: Postjudgment Motion—Timeliness. FAMILY LAW: Grounds. The parties were divorced on August 6, 2021. The divorce judgment incorporated an agreement of the parties. Neither party filed a postjudgment motion or an appeal. In November 2022, the mother filed a motion for relief from the divorce judgment pursuant to Rule 60(b), Ala. R. Civ. P. After a hearing, the trial court denied the motion and the mother appealed. **Affirmed.** (1) The mother asserted that Rule 60(b)(4) relief should have been afforded to her because the father failed to present evidence establishing a statutory ground for divorce. "Although the parties must present evidence to support a determination that a divorce may be granted on the ground of incompatibility in order 'to overcome the prohibition of consensual divorce found in [Ala. Code 1975,] § 30-2-3,' ...both this court and our supreme court have explained that the lack of such evidence in the record does not deprive the trial court of subject-matter jurisdiction over the divorce action or render any judgment entered by the court void." If the mother had filed a timely appeal, she may have been entitled to a reversal but she cannot now collaterally attack the divorce judgment through a Rule 60(b) motion. (2) The mother also sought relief under Rule 60(b)(6) asserting that there was no "meeting of the minds" between the parties. The mother contends that she believed that the parties had agreed to joint legal and joint physical custody. However, the custody agreement does not mention joint custody of any kind but states that the child's "primary residence" will be with the father. In essence, the mother is making the argument that she was mistaken about the terms of the agreement. However, a motion challenging the validity of a judgment on the grounds of "mistake" should be filed under Rule 60(b)(1), Ala. R. Civ. P. and it must be filed within four months after the entry of the challenged judgment. The mother's motion is untimely. ***Miller v. Miller,*** 32 ALW (CL-2023-0251); 09/29/2023; Butler Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 11 pages. [ATTY: Appt: Jerry Blevins, Montgomery; Apee: John Nichols, Luverne]

FAMILY LAW: Parental Rights. APPEAL & ERROR: Final Judgment. In January 2021, the Jackson County Department of Human Resources ("the Jackson County DHR") filed a dependency petition. In that petition, the Jackson County DHR alleged that the child's mother and father were abusing illegal substances and that they were unable to care for the child. After a shelter-care hearing, custody was placed with the Jackson County DHR. Thereafter, the case was transferred to the Madison Juvenile Court ("the juvenile court"). At that same time, the Jackson County DHR transferred its case to the Madison County Department of Human Resources ("DHR"). It was assigned case number JU-21-73.01 ("the .01 action"). In April 2021, the juvenile court entered an order finding the child to be dependent and awarding pendente lite custody to DHR. In turn, DHR placed the child in the custody of the foster parents. In October 2021, the foster parents sought to intervene in the dependency action. DHR opposed that motion, arguing that it had located a relative with whom it intended to place the child. Thereafter, the foster parents filed a new action in which they sought to terminate the parental rights of the mother and the father ("the .02 action"). As part of that action, the foster parents sought to "modify" the pendente lite order entered in the .01 action and asked for an award of custody of the child. The juvenile court entered an order in the .01 action allowing the foster parents to intervene. The actions were then consolidated. In January 2022, the child's paternal grandmother filed a motion to intervene in both actions and sought custody of the child. That motion was granted. Shortly thereafter, DHR sought permission to remove the child from the foster parents' home and to place the child in the custody of the paternal grandmother. After a hearing, the juvenile court entered an order on February 17, 2022 in both actions in which it terminated the parental rights of the father and the mother, denied the paternal grandmother's request for custody and denied DHR's motion to remove the child from the foster parents' home. It further held that the foster parents' petition to modify custody would "remain under advisement pending review." The father filed an appeal in the .02 action and the mother filed an appeal in both actions. **Appeals dismissed.** (1) The mother's appeal in the dependency action is due to be dismissed. Although the orders entered in both cases are identical, the portions pertaining to the termination of parental rights are surplusage. (2) With regard to the appeals from the termination of parental rights case, the court determined, ex mero motu, that it lacked jurisdiction to consider same. "In order for a judgment that terminates parental rights to be sufficiently final to support an appeal, the juvenile court must make a permanent custodial disposition of the child." In the absence of such a custodial award, the judgment is nonfinal. The February 17, 2022 order does not make an award of permanent custody. Apparently, the juvenile court entered an order on March 22, 2022 in which it purported to grant the foster parents' request for custody but by that time, the mother and father had already filed their notices of appeal. Therefore, the juvenile court had already lost jurisdiction to enter the March 2022 order and it is void. Accordingly, the appeals filed in this action are due to

be dismissed. ***C.C. v. L.B. and S.B.,*** 31 ALW (2210410; 2210423; 2210435); 11/10/2022; Madison Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 9 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Dependency. APPEAL & ERROR: Final Judgment. In January 2021, the Calhoun County Department of Human Resources ("DHR") filed a dependency petition. Pendente lite custody was awarded to DHR and the juvenile court ordered DHR to use reasonable efforts to reunite the child with the mother and father. In the interim, DHR placed the child in the physical custody of the paternal aunt and paternal uncle. On April 15, 2021, the juvenile court adjudicated the child dependent, awarded custody to DHR and ordered DHR to continue to attempt rehabilitation efforts. On October 4, 2021, the juvenile court determine that reasonable efforts to reunite the family had not been successful but would continue and that the most appropriate placement plan was "relative custody". In December 2021, DHR filed a "motion to transfer custody" requesting that the paternal aunt and uncle be awarded custody of the child. A trial was conducted in March 2022. The father consented to custody being awarded to the paternal aunt and uncle. The paternal aunt testified that she wanted to maintain custody of the child but that she would adhere to any order of the court. The mother requested additional access to the child. On March 15,2022, the juvenile court entered an order awarding custody of the child to the paternal aunt; thereafter, said order was purportedly modified on April 7, 2022 to reflect a custody award to both the paternal aunt and the paternal uncle. The mother filed a notice of appeal on March 16, 2022. **Appeal dismissed.** Generally, an order determining that a child is dependent along with a disposition of that custody is a final, appealable judgment. Although such findings were contained in the juvenile court's April 15, 2021 order, that order specifically called upon DHR to use reasonable efforts to reunite the family. Therefore, DHR was only vested with temporary custody of the child. The March 15, 2022 order determined that the paternal aunt should be awarded custody but it failed to rule upon DHR's claim that the paternal uncle should also be awarded custody of the child. Furthermore, both the mother and the father asserted a right to visitation with the child but that March 15, 2022 order failed to address these visitation claims, although that issue was tried by the implied consent of the parties. A final judgment is one that conclusively adjudicates all the issues litigated by the parties to a case. In some cases, an omission of an express determination implies that the court intended to deny the claim. However, the entire record must be analyzed when making such a determination. At a hearing on a postjudgment motion filed by the guardian ad litem, the juvenile court indicated that it had failed to address both issues because of an oversight. "These actions clearly indicate that the juvenile court had not intended the omission of an express determination as to those claims from the March 15, 2022, order to be an implied adjudication of those claims, so that order was not a final judgment that would support an appeal." Accordingly, the appeal is due to be dismissed. ***B.J. v. Calhoun Cty., Dept. of Human Resources,*** 31 ALW (CL-2022-0514); 09/16/2022; Calhoun Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 11 pages. [ATTY: Not listed-confidential]

CIVIL PROCEDURE: Judgments. Allie Construction, Inc. obtained a judgment against Debra Mosier in the amount of $59,400.00 on March 12, 2002. Additionally, the judgment ordered a lien on Debra's property in the amount of $28,500.00. In November 2018, the judgment against Mosier was revived through "that date that is twenty (20) years from the date of the judgment." Sometime thereafter, Allie Construction learned that Mosier was the beneficiary of her husband, Willard Mosier. On March 11, 2022—one day before the judgment was due to expire--Allie Construction obtained writs of garnishment against the estate to collect on its judgment against Debra. A month later, Debra, as personal representative of the estate, filed an answer in which she denied that the estate was obligated to satisfy the judgment. She then filed a "Motion in Opposition to Revive Judgment" in which she argued that the 2002 judgment had been extinguished. The trial court then entered an order entitled "ORDER DENYING PLAINTIFF'S MOTION TO REVIVE JUDGMENT." In that order, the trial court decreed that "no execution shall issue on the 2002 judgment" and that "any judgment lien" was "released and extinguished." Allie Construction filed a postjudgment motion which was denied by the trial court. Allie Construction appealed. **Reversed.** Pursuant to §6-2-32, Ala. Code 1975, "Within 20 years, actions upon a judgment or decree of any court of this state, of the United States, or of any state or territory of the United States must be commenced." The resolution of this appeal turns on the definition of "commenced." The Court has previously held that an action is "commenced" if the plaintiff obtained writs of garnishment within 20 years of the judgment. (citation omitted). In this case, Debra argues that because she was not served with the writ of garnishment until March 14, 2022—two days after the 20-year anniversary of the 2002 judgment—the writs of garnishment are unenforceable. When an action is filed, there must also exist a bona fide intent to have it immediately served. In this case, Allie Construction obtained the writs of garnishment on Friday, March 11, 2022. Allie Construction served the probate judge who was presiding over the administration of the estate that same day. The following Monday—Debra was served by special process server. "Thus, Debra's lack-of-bona-fide-intent argument is a nonstarter." The trial court erred by extinguishing the judgment lien and its judgment is due to be reversed. Justice Sellers authored a special concurrence in which he noted that pursuant to §6-9-190, Ala. Code 1975, "[a] judgment cannot be revived after the lapse of 20 years from its entry." But the lapse of 20 years from the date of entry of the judgment is not conclusive as to the validity of a judgment. Instead, a judgment has only been satisfied after 20 years "if there has been no activity or engagement between the debtor and the creditor regarding the judgment in the 20 years since its entry." Here, Allie Construction took action to collect on the judgment by seeking writs of garnishment. Therefore, no presumption that the judgment had been satisfied continued to exist. Justice Bryan, joined by Justices Shaw and Wise, dissented. In that dissent, these Justices opined that Allie Construction did not adequately address prior precedent on appeal regarding the proper interpretation and application of §6-9-190. ***Allie***

Construction, Inc. v. Mosier, 32 ALW (SC-2022-0790); 03/24/2023; Jefferson Cty.; Mitchell; Parker, Mendheim, Stewart and Cook concur; Sellers concurs specially, with opinion; Bryan dissents, with opinion, which Shaw and Wise join; 13 pages. [ATTY: Appt: John Frawley, Irondale; Apee: Jennifer McInerney, Homewood]

CIVIL PROCEDURE: Postjudgment Motion—Orders. The trial court entered a divorce judgment on August 19, 2022. The wife filed a postjudgment motion to alter, amend or vacate the judgment on September 1, 2022. The trial court set the motion for hearing on November 29, 2022. After the hearing, the trial court signed and dated an order amending the divorce judgment. The amended divorce judgment was not entered into the State Judicial Information System ("SJIS") until December 2, 2022. On December 15, 2022, the husband filed a petition for a writ of mandamus asserting that the amended divorce judgment was void because it was entered into the SJIS after the 90 days allotted for the trial court to rule upon that motion pursuant to Rule 59.1, Ala. R. Civ. P. The wife countered that argument by pointing out that the amended divorce judgment was signed and dated 1 day before the 90-day deadline. **Writ of mandamus denied.** Rule 58, Ala. R. Civ. P. states that a judge may render a judgment by: (a) executing a separate written document; (b) including the order in a judicial opinion; (c) endorsing the ruling on the motion by using words such as "denied" or "granted"; (d) making a notation in the court records or (e) executing and transmitting an electronic document to the SJIS. Once a judgment is "rendered", the order or judgment must be entered by the clerk into the court record. "An order or a judgment shall be deemed 'entered'...as of the actual date of the input of the order or judgment into the [SJIS]." The Committee Comments to Rule 59.1 explain that a 2008 amendment to that Rule allows a trial court to render a ruling on a Rule 59 motion within the 90-day period but delay the entry of that order. Rule 59.1 specifically states that a postjudgment motion will be denied by operation of law if the trial court does not "render" an order disposing of the motion within the time proscribed. Here, the trial court had until November 30, 2022 within which to rule on the wife's postjudgment motion. It then rendered the amended divorce judgment on November 29, 2022. Accordingly, the amended divorce judgment is a valid order and the petition for writ of mandamus is due to be denied. ***Allen v. Allen,*** 32 ALW (CL-2022-1251); 03/31/2023; Jefferson Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 5 pages. [ATTY: Pet: Marylee Abele, Mountain Brook; Resp: Michael Trucks, Fairfield]

CIVIL PROCEDURE: Garnishment--Conditional Judgment. APPEAL & ERROR: Record on Appeal. Karen Moore and her former husband, Jeffrey Scott Moore, were divorced in 2006. In 2008, the trial court entered a judgment finding that the former husband was in arrears in child support in the amount of $21,750 plus interest of $217.50. Additional findings were made regarding unpaid medical bills and past-due alimony. The total amount awarded to Moore was $31,292.31. In October 2020, Moore filed a process of garnishment naming Townsquare Media Tuscaloosa License, LLC ("Townsquare")as the garnishee to recover the $31,292.31 judgment, interest on that amount of $45,373.85 and costs of $106. Townsquare was the former husband's alleged employer. It was served with the process of garnishment on October 23, 2020. It failed to file an answer and on July 23, 2021, Moore filed a motion for a conditional judgment. The trial court entered a conditional judgment on September 29, 2021. On October 18, 2021, Townsquare filed a motion to set aside the conditional judgment. In that motion, it asserted that it had not employed the former husband from the time that it was served with the garnishment through the date of the motion. After a hearing, the trial court entered a final judgment on December 30, 2021. In that judgment, the trial court noted that an employee of Townsquare in New York had notified the accounting manager to "disregard" the process of garnishment. Moreover, in August 2019, a conditional judgment had been entered in a different case against Townsquare which the trial court subsequently set aside. The president of Townsquare acknowledged that the process of garnishment received by Townsquare required that an answer be filed within 30 days; Townsquare filed no response for over a year. The trial court's judgment stated that Townsquare's behavior was "intentional, unacceptable, and egregious." The trial court entered a judgment in favor of Moore in the amount of $25,000, plus costs. Townsquare appealed. **Affirmed.** (1) Townsquare argued that it was entitled to have the conditional judgment set aside because it answered the process of garnishment within 30 days after the conditional judgment was entered. Section 6-6-457, Ala. Code 1975 states that a conditional judgment must be entered against a garnishee who fails to appear and answer and is "to be made absolute unless he appears within 30 days after notice of the conditional judgment." Townsquare argues that §6-6-457 affords a trial court no discretion in applying that statute and requires a trial court to set aside a conditional judgment when the garnishee properly appears within 30 days after service of notice of the conditional judgment. The court examined the plain language of the statute and held that while a final judgment must be entered against a garnishee if he or she fails to answer or appear within 30 days of notice of the conditional judgment, "the inverse is not true." A trial court is not *required* to set aside a conditional judgment just because a garnishee has answered within the time specified in the statute. Instead, it is a matter committed to the trial court's discretion. Moreover, Townsquare did not argue on appeal that the trial court in this case abused that discretion. Therefore, that argument is waived. (2) Townsquare next argued that the trial court erred by entering a judgment against it because it had never employed the former husband. "An appellant has the burden of ensuring that the record contains sufficient evidence to warrant reversal." In this case, the trial court held two

evidentiary hearings; no transcript is included of either hearing. "Because we do not have the transcripts of the evidentiary hearings, we cannot determine whether there was evidence from which the trial court could have disbelieved Townsquare's assertion that it was not indebted to the former husband and therefore was not liable to Moore for $25,000 plus costs." (3) Finally, Townsquare challenged the trial court's award of costs to Moore. Costs can be awarded to a successful garnishee. However, under Alabama law, costs do not include attorney fees. Prior precedent does allow imposition of deposition costs, travel expenses, copying costs, filing fees and guardian ad litem fees as "costs." Rule 54(d), Ala. R. Civ. P. allows a clerk court to tax costs. However, such an action is reviewable by the trial court upon a timely filed motion. It does not appear that the clerk in this case has taxed any costs against Townsquare. The judgment of the trial court is due to be affirmed. ***Townsquare Media Tuscaloosa License, LLC v. Moore;*** 31 ALW (2210386); 10/07/2022; Jefferson Cty.; Fridy; Thompson and Hanson concur; Moore and Edwards concur in the result, without opinions; 15 pages. [ATTY: Appt: Katherine Weinart, Birmingham; Apee: Charles Gorham, Birmingham]

FAMILY LAW: Dependency--Visitation. APPEAL & ERROR: Preservation of Issues--Waiver. On November 22, 2019, the child's maternal great-grandmother, J.C.R. ("the maternal great-grandmother"), filed a petition alleging that the child was dependent. The mother failed to appear at the 72-hour hearing and temporary custody of the child was awarded to the maternal great-grandmother. After a trial on the dependency petition, the juvenile court entered a judgment on October 20, 2020, stating that the mother had stipulated that the child was dependent, adjudicating the child dependent, and awarding temporary legal and physical custody of the child to the maternal great-grandmother and the maternal grandfather. On August 6, 2021, the juvenile court held a "permanency" hearing. During said hearing, the juvenile court indicated that because the issue of dependency had been stipulated to previously, that it was only going to consider the issue of the placement of the child. Only the guardian ad litem testified at that trial. The juvenile court subsequently entered a judgment awarding the permanent legal and physical custody of the child to the maternal great-grandmother and the maternal grandfather subject to the mother's visitation. The mother appealed and the Court reversed, holding that insufficient evidence was presented at the time of the dispositional hearing that the child was dependent. As a result, the juvenile court lacked jurisdiction to make a custody disposition. *A.R. v. T.R.*, [Ms. 2200903, Jan. 14, 2022] ___ So.3d ___ (Ala. Civ. App. 2022). The case was reversed and remanded and the juvenile court was given the authority to take additional evidence regarding the child's dependency. *Id.* On remand, the juvenile court entered an order in which it found that the child remained dependent and it awarded custody of the child to the maternal grandfather. The mother was awarded visitation "at times and placed within the discretion" of the maternal grandfather. The mother appealed. **Appeal dismissed in part; affirmed.** (1) The mother argued that the juvenile court's determination that the child remained dependent was not supported by clear and convincing evidence. However, the mother did not file a postjudgment motion and the juvenile court made no specific findings of fact so this issue was not preserved for appellate review. Rule 52(b), Ala. R. Civ. P.. Rule 52(b) applies in juvenile cases. (2) The mother also challenged the provision in the juvenile court's order regarding visitation. The Court noted that after the mother filed her notice of appeal, the juvenile court, ex mero motu, entered an order purporting to amend its order and substitute a visitation schedule for the original visitation provision. However, generally, the filing of a notice of appeal divests the juvenile court of jurisdiction over the case, except in collateral matters. "Collateral matters are those that "d[o] not raise any question going behind the [judgment] appealed from, nor [do they] raise any question decided by the judgment.'" [citations omitted]. The juvenile court's order regarding visitation goes behind the prior final judgment to alter the visitation provision and therefore, is not a collateral matter. Accordingly, the juvenile court lacked jurisdiction to enter that subsequent order and it is void. To the extent that the mother appealed from that order,

said appeal is due to be dismissed. (3) With regard to the original provision which left visitation to the discretion of the maternal grandfather, the mother is correct that such an award is impermissible. However, she failed to preserve that issue for appellate review. The mother did not file a postjudgment motion or otherwise alert the juvenile court to its error. Therefore, this issue cannot be considered on appeal. ***A.R. v. T.R.***, 31 ALW (CL-2022-0635); 11/4/2022; Limestone Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 12 pages. [ATTY: Not listed-confidential]

Facts and Procedural History. The parties were divorced in Missouri in 2017. The Missouri divorce judgment incorporated an agreement of the parties pursuant to which the parties were awarded the joint legal custody of their child; sole physical custody was awarded to the father.

The father is in the United States Air Force. In 2019, he advised the mother of his intent to move overseas. The mother filed an objection to that relocation and on October 30, 2019, the Missouri court entered a judgment holding that the proposed relocation would be contrary to the child's best interest. The Missouri court awarded the mother and the father joint legal and joint physical custody of the child. However, because the father and the child resided in Missouri and the mother was living in Georgia, the Missouri court determined that it was in the child's best interests to remain living with the father.

At some point, the father and the child moved to Alabama. In June 2021, the father filed a petition to register the previous judgments of the Missouri court in the Montgomery Circuit Court ("the trial court"). The mother filed a response in which she consented to the registration of the Missouri judgments and she also filed a counterclaim seeking to hold the father in contempt for purportedly interfering with her custodial rights. She requested an award of sole physical custody. The mother also asked the trial court to enter an order directing the father to "immediately relinquish" the child to her for her court-ordered summer custodial period. A hearing was conducted on July 16, 2021 after which the trial court entered an order stating that the child had left the courtroom with the mother after the earlier hearing and it set forth specific custodial times for the summer of 2021.

Thereafter, the father filed a petition seeking sole physical custody of the child and alleging that the mother was in contempt for allegedly violating several provisions of the Missouri judgments and for failing to pay child support. In November 2021, the mother filed a new motion seeking to hold the father in contempt alleging that the father had interfered with her Thanksgiving custodial time. An evidentiary hearing was conducted on May 9, 2022. The mother testified that the father had obstructed her custodial periods for both Thanksgiving and Christmas. The father testified that he had not forced the child to attend those visits and the child's counselor testified that it would not be good for the child to be forced to visit with the mother.

No action was taken by the trial court after the May 2022 hearing for several months. In December 2022, the mother apparently submitted an "unsolicited proposed order" to the trial court. On December 12, 2022, the trial court entered an order holding the father in contempt and ordering that the child would "now primarily reside with the Mother in accordance with the schedule that the Father has heretofore been awarded." "Primary" physical custody of the child was "temporarily" awarded to the mother. The

father filed a petition for writ of mandamus and the court stayed the effect of the trial court's December 12, 2022 order.

Court's Analysis: In order to be granted mandamus relief, the father was required to demonstrate: (a) a clear legal right to the order sought; (b) an imperative duty upon the trial court to perform, accompanied by a refusal to do so; (c) the lack of another adequate remedy; and (d) the properly invoked jurisdiction of the court. Mandamus review is the proper vehicle to challenge a pendent lite order entered by a trial court.

Here, the father argued that a change in custody was an improper sanction for contempt. The law is well-settled that visitation disputes cannot serve as the basis for the modification of custody judgments. "The only sanction the trial court levied against the father upon finding him in contempt for his failure to comply with visitation provisions in the previous custody judgments was to modify custody. Such a 'punishment' is inappropriate, and the trial court erred in entering its 'temporary order' awarding the mother sole physical custody of the child."

The court pretermitted other issues raised by the father but did discuss his argument that the 7-month delay between the hearing on the issue of contempt and the removal of the child from the father's home in the middle of the school year was unreasonable. In a previous decision, the same trial judge was admonished for the unreasonable delay in ruling on motions requesting pendente lite custody. *Ex parte Taylor,* 335 So.3d 1159 (Ala. Civ. App. 2021). "Nonetheless, the trial judge has persisted in her refusal to enter timely orders, even for the sake of the lives of the children involved. To say that this court is disappointed that the trial judge has failed to take seriously the admonitions and pleas for her to discharge her duties responsibly understates our concern about the behavior of the trial judge." The petition for writ of mandamus is due to be granted and the trial court ordered to vacate the December 12, 2022 order awarding custody of the child to the mother.

The case is styled: ***Ex parte Hale, (Hale v. Colvin),*** 32 ALW (CL-2022-1253); 02/10/2023; Montgomery Cty.; Fridy; Hanson concurs; Moore and Edwards concur in the result, without opinions; Thompson recuses himself; 11 pages. [ATTY: Pet: Melissa Isaak, Montgomery; Resp: Jerry Blevins, Montgomery]

APPEAL & ERROR: Timeliness. CIVIL PROCEDURE: Postjudgment Motion. Jonathan Brown was involved in an automobile accident with a vehicle occupied by Ronnie Gilbert and his son, J.G. Gilbert filed a civil action in district court against Brown to recover damages for injuries that J.G. had allegedly suffered. On October 31, 2022, the district court entered a judgment awarding Gilbert damages in the amount of $1,196.60. On November 11, 2022, Gilbert filed a postjudgment motion challenging the sufficiency of the damages awarded and requesting a new trial. On November 15, 2022 , at 6:06 p.m., the district court denied the postjudgment motion. On November 15, 2022, at 10:51 p.m., Gilbert purported to file a second postjudgment motion, asking the district court to award an additional $5,000. However, that motion was not a proper amendment to the first postjudgment motion because that motion had already been denied. Moreover, the second postjudgment motion was not a proper new postjudgment motion because it was not directed toward an amendment of the final judgment. The district court purportedly denied the second postjudgment motion on November 28, 2022. Gilbert had until November 29, 2022 to file a notice of appeal to the circuit court. Instead, he mailed a notice of appeal, via certified mail, to the circuit court on December 12, 2022; it was received on December 14, 2022. Brown filed a motion to dismiss Gilbert's appeal, arguing that it was untimely. The circuit court denied the motion to dismiss and Brown filed a petition for a writ of mandamus. **Writ granted.** In his motion to dismiss, Brown mistakenly argued that the time for filing an appeal commenced on November 28, 2022, fourteen days after the district court purportedly denied the second postjudgment motion. Gilbert asserted that he complied with that deadline by depositing his notice of appeal in the mail on December 12, 2022. However, the time for filing an appeal had actually expired fourteen days after the first postjudgment motion was denied. "In this case, the circuit court did not acquire jurisdiction over the case because Gilbert did not file a notice of appeal on or before November 29, 2022. " The circuit court never acquired jurisdiction and therefore, the petition for a writ of mandamus is due to be granted. ***Ex parte Brown (J.G. v. Brown);*** 32 ALW (CL-2023-0467); 09/08/2023; Shelby Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 7 pages. [ATTY: Pet: Patrick Norris, Birmingham; Resp: Elizabeth Bone, Birmingham]

FAMILY LAW: Dependency. CIVIL PROCEDURE: Postjudgment Motion. APPEAL & ERROR: Timeliness. The Etowah County Department of Human Resources ("DHR") filed petitions seeking to terminate the parental rights of the mother to three children. After a trial, the juvenile court entered a judgment terminating the mother's parental rights. The mother filed a timely postjudgment motion in each of the actions on January 13, 2022. DHR filed a response on January 24, 2022. On January 27, 2022, fourteen days after the mother's postjudgment motions were filed, the case-action-summary sheet indicates that the juvenile court set a hearing on the mother's postjudgment motions for February 24, 2022. At that hearing, DHR's counsel argued that the motions were not due to be heard because the juvenile court had lost jurisdiction to rule on those motions. The juvenile court agreed and it entered an order stating that it lacked jurisdiction to rule on the motions. The mother filed notices of appeal on that same day. **Appeals dismissed.** The court requested letter briefs to address the timeliness of the appeals. The mother argued that the juvenile court's orders setting the February 24, 2022 hearing constituted an implicit extension of time within which to rule on her postjudgment motions. Rule 1(B), Ala. R. Juv. P. provides that a postjudgment motion is denied by operation of law if it is not ruled upon within 14 days or within a proper extension of that 14-day period. The extension granted by a juvenile court may not exceed 14 days and the extension may not be done by consent of the parties. Rule 28, Ala. R. Juv. P. requires a notice of appeal from a judgment entered by a juvenile court to be filed within 14 days after the entry of the judgment. In *K.T. v. B.C.*, 232 So.3d 897, 898-99 (Ala. Civ. App. 2017), the juvenile court entered a dependency order on November 1, 2016. The mother filed timely postjudgment motions. On November 23, 2016, the juvenile court entered orders providing that the mother's postjudgment motions were "granted in part" and noted that it would address further issues regarding the service of the mother, who was, herself, a minor. On appeal, the court determined that the orders entered on November 23, 2016 had implicitly granted the juvenile court a 14-day extension within which to rule on the mother's postjudgment motions. The mother then filed notices of appeal on December 6, 2016, which was within 14 days of the juvenile court's orders setting aside those judgments. Those appeals quickened on December 12, 2016 when the additional 14-day period expired. Therefore, the mother's appeal in that case was timely. Eight weeks later, the court released *K.R. v. W.L.*, 238 So.3d 664, 665-66 (Ala. Civ. App. 2017). In that case, the court held that a parent's postjudgment motion from a juvenile court order had been denied by operation of law fourteen days after it was filed even though the juvenile court had entered an order within that 14-day period setting a hearing within the additional 14-day period that the juvenile court could have extended the time to rule. "Rule 1(B))(1) is quite simple—to extend the time for ruling on a pending postjudgment motion, a juvenile court must enter a written order doing so. The rule allows for an extension of the time for ruling on a postjudgment motion for up to an

additional 14 days, and it presupposes that the written order will specify the additional number of days that the period is extended, which can be less than the entire 14-day extension period permitted under the rule." In this case, the court declined to find that the juvenile court, by setting a hearing on the mother's postjudgment motions well-outside the 14 day additional time period permitted by Rule 1(B)(1), had implicitly granted an extension. Accordingly, the mother's appeals were not timely filed and they are due to be dismissed. Judge Hanson authored a dissent in which Judge Moore joined. The dissent noted that Rule 59.1, Ala. R. Civ. P. previously "ensnared many an appellant" where the parties had agreed to continue a hearing on a postjudgment motion beyond the 90-day deadline set forth in the Rule but failed to expressly state that they were agreeing to extend the time within which the trial court could rule on that motion. In 2020, the Supreme Court amended Rule 59.1 to provide that consent to extend the time for a hearing on a postjudgment motion beyond 90 days includes consent to extend the time for the trial court to dispose of such a motion. In 2020, the Supreme Court also amended Rule 1(B), Ala. R. Juv. P. to delete the parties' ability to consent to an extension. Judge Hanson opined that the order entered in this case should be liberally construed to extend the time that the postjudgment motion can remain pending. "Construing the order liberally also comports with the supreme court's 2020 amendment to Rule 59.1 eliminating the overly technical construction of Rule 59.1..." ***D.D. v. Etowah Cty. Dep't of Human Resources,*** 32 ALW (2210430; 2210431; 2210432); 02/17/2023; Etowah Cty.; Edwards; Thompson and Fridy concur; Hanson dissents with opinion, which Moore joins, 22 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Modification. CIVIL PROCEDURE: Venue. In April 2020, the Lauderdale Juvenile Court ("the juvenile court") entered a final judgment that granted the mother and the father joint legal custody of their minor child; sole physical custody was vested in the mother. Thereafter, the mother filed a petition in the juvenile court to modify the April 2020 judgment. The father filed two motions to transfer the action from Lauderdale County to Morgan County. In those motions, the father asserted that both of the parties were now residents of Morgan County and that neither party had substantial ties with Lauderdale County. The juvenile court granted the motion to transfer. In its order, the juvenile court stated that because the parties and the child were spending time and expense commuting to Lauderdale Count for supervised visitation, it was "unfair to these parties" to continue to litigate this matter in Lauderdale County. In a subsequent order, the juvenile court concluded that Morgan County was a more convenient forum for the parties. The mother filed a petition for a writ of mandamus. **Writ of mandamus granted.** A petition for the writ of mandamus is the proper vehicle to challenge a venue transfer based on forum non conveniens. The standard of review in such a case is whether the trial court exercised its discretion in an arbitrary and capricious manner. Venue in child custody modification actions is governed by § 30-3-5, Ala. Code 1975 which states that the venue of such actions lies in (a) the original court rendering the final decree or (b) in the court where both the current custodial parent and the child have resided for at least 3 consecutive years prior to the filing of the modification action. The custodial parent has the right to choose between those forums, regardless of which party filed the petition. In this case, venue was proper in Lauderdale County and the mother was permitted to choose the forum in which the action was filed; she chose Lauderdale County. The doctrine of forum non conveniens only applies when the action is filed in a county in which venue was appropriate. However, the forum non conveniens statute--§ 6-3-21.1(a), Ala. Code 1975-- specifically states that it does not apply in cases subject to § 30-3-5 (custody modification actions). "Therefore, the juvenile court erred in relying on it to transfer this action to Morgan County." The petition for a writ of mandamus is due to be granted and the juvenile court is directed to vacate its order transferring the mother's custody-modification action to Morgan County. ***Ex parte M.K.G. (M.K.G. v. J.K.J.)***, 32 ALW (CL-2023-0438); 08/11/2023; Lauderdale Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 7 pages. [ATTY: Not listed-confidential]

CIVIL PROCEDURE: Transfer of Venue. FAMILY LAW: Grandparent Visitation. APPEAL & ERROR: Mandamus—Timeliness. In March 2020, the Jefferson Juvenile Court entered an order determining a child to be dependent and placing the custody of the child with the paternal grandparents. The order precluded any contact between the child and the maternal grandmother. In May 2022, the maternal grandmother filed an action in the Walker Circuit Court seeking visitation with the grandchild pursuant to Alabama's Grandparent Visitation Act ("the GVA"), § 30-3-4.2, Ala. Code 1975. Thereafter, the maternal grandmother filed a motion seeking to have the visitation action transferred to the "circuit civil division" of the Jefferson Circuit Court. The Walker Circuit Court granted that motion. On September 12, 2022, the Jefferson Circuit Court purportedly transferred the case to the "Family Court of Jefferson County"—that is, to the Jefferson Juvenile Court. On September 22, 2022, the Jefferson Juvenile Court entered an order transferring the grandmother's visitation action to the Walker Juvenile Court, stating that the child lived in Walker County. On October 19, 2022, the paternal grandparents filed a "motion to reconsider order of transfer of venue", asserting that the child lived in Jefferson County. The Jefferson Juvenile Court purportedly granted the motion to reconsider. Thereafter, the paternal grandparents filed a motion to dismiss in the Jefferson Juvenile Court contending that the GVA does not create a cause of action wherein a grandparent can seek visitation from a nonparent custodian of a grandchild. On October 28, 2022, the Jefferson Juvenile Court purportedly denied the paternal grandparents' motion to dismiss. On November 4, 2022, the Jefferson Juvenile Court entered an order in which it awarded the maternal grandmother supervised visitation with the grandchild one day each month. On November 9, 2022, the paternal grandparents filed a petition for the writ of mandamus challenging the Jefferson Juvenile Court's refusal to dismiss the visitation action. On January 24, 2023, the paternal grandparents filed a second mandamus petition in which they challenged the jurisdiction of the Jefferson Juvenile Court in light of its September 22, 2022 order purporting to transfer the case to Walker County. **Petition granted in part and denied in part; Petition dismissed.** (1) The court first addressed the timeliness of the second filed mandamus action. Generally, a mandamus petition must "be filed within a reasonable time." Rule 21(a)(3), Ala. R. App. P.. In juvenile actions, that presumptively reasonable time is within 14 days of the entry of the challenged order. Rule 21(a)(3), Ala. R. App. P.. The January 24, 2023 mandamus petition was filed almost 4 months after the challenged order was entered and the paternal grandparents did not include a statement of circumstances constituting good cause for the appellate court to consider the petition, even though it was filed beyond the presumptively reasonable time set forth in Rule 21(a)(3), Ala. R. App. P. However, a mandamus petition that challenges the jurisdiction of the trial court is not governed by the presumptively reasonable time

period contained in Rule 21. Therefore, the court considered the second mandamus petition. (2) The paternal grandparents argued that once the Jefferson Juvenile Court transferred the case to the Walker Juvenile Court, it no longer had jurisdiction over the visitation action. Once a transferor court has granted a motion to transfer venue and the transferee court has received and docketed the file, the transferor court no longer has jurisdiction to reconsider the transfer or order the case to be returned. Moreover, the transferee court cannot grant a motion seeking to have the case transferred back to the transferor court. Here, once the Walker Circuit Court transferred the case to the Jefferson Circuit Court, the Jefferson Circuit Court did not have the option of transferring the case back to the Walker Circuit Court. The fact that the Jefferson Circuit Court attempted to transfer the case to the Jefferson Juvenile Court has no import. According to the GVA, a grandparent visitation action may be filed in the circuit court where the grandchild resides or any other court exercising jurisdiction with respect to the grandchild. Here, the Jefferson Juvenile Court had closed the dependency action and there was no other pending action regarding the grandchild. Therefore, the maternal grandmother could only file her action in circuit court. The purported transfer of the Jefferson Circuit Court to the Jefferson Juvenile Court was void. Thus, all orders entered by the Jefferson Juvenile Court thereafter were also void. The action is due to be transferred back to the Jefferson Circuit Court. (3) With regard to the first petition for a writ of mandamus filed by the paternal grandparents, they challenge the Jefferson Juvenile Court's denial of their motion to dismiss. But, as explained herein, the denial of that motion to dismiss constituted a void order. Thus, the petition filed in that case is due to be dismissed as being moot. ***Ex parte D.A. and M.A. (In re: C.H. v. D.A. et al.),*** 32 ALW (CL-2022-1148; CL-2022-1191); 03/24/2023; Jefferson Cty.; Fridy; Thompson, Moore, Edwards and Hanson concur; 12 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody—UCCJEA—Jurisdiction. CIVIL PROCEDURE: Personal Jurisdiction-Waiver. APPEAL & ERROR: Mandamus. The parties were married in Alabama in 2019. The father is an officer in the United States Air Force. The parties' child was born in April 2021 when the parties were living in Texas. In September 2021, the father was reassigned to North Dakota and the parties lived there until June 6, 2022 when the mother relocated to Alabama. At the time of their separation, the parties agreed that the child would remain in North Dakota in order to attend a family wedding but the father brought the child to Alabama on June 16, 2022. The father continues to reside in North Dakota. On November 16, 2022, the father filed an action for legal separation in North Dakota ("the North Dakota action") and the mother was served with the summons and complaint in that action on November 18, 2022. On December 18, 2022, the mother filed an action for legal separation in the Jefferson Circuit Court ("the Alabama action"). In January 2023, the mother filed a motion in the Alabama action seeking pendente lite custody and child support. The father filed a motion to dismiss the Alabama action, citing the ongoing North Dakota proceeding. After a hearing, the trial court entered an order denying the father's motion to dismiss. The father filed a petition for the writ of mandamus. **Writ of mandamus granted in part and dismissed in part.** (1) The father argued that the trial court lacked personal jurisdiction over him. However, the father waived that argument given that he did not raise it in his initial pleading. The motion to dismiss filed by the father in the Alabama action only asserted that the action should be dismissed because the North Dakota court had already acquired jurisdiction over the case before the mother filed her complaint in Alabama. In essence, the father sought to dismiss the Alabama action based on lack of subject-matter jurisdiction. Pursuant to Rule 12(h)(1), Ala. R. Civ. P., a defense of lack of personal jurisdiction is waived if it is not plead in the initial pleading. Thereafter, it cannot be revived through a supplemental pleading. That portion of the father's petition for the writ of mandamus is due to be dismissed. (2) With regard to the father's challenge to the Alabama court's exercise of subject-matter jurisdiction, said jurisdiction is governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975. Pursuant to § 30-3B-201(a)(1), the trial court was required to stay its proceedings to ascertain if it had home-state jurisdiction to make the initial child-custody determination or whether such a determination fell within the jurisdiction of the North Dakota court. In his petition, the father called upon the court to make a determination that North Dakota has home-state jurisdiction and to order the trial court to dismiss the Alabama action because of that fact. "The office of the writ of mandamus is to compel a lower court to take such judicial action as it is required to do, not for the appellate court to usurp the lower court's role and perform the action for the lower court...It would be inappropriate for this court, a court of review, to perform the UCCJEA analysis in the first instance." In addition, under the UCCJEA, even if another state has home-state

jurisdiction, such a determination is not conclusive. Instead, the trial court is required to communicate with the North Dakota court to determine whether it will decline jurisdiction and determine that Alabama is a "more appropriate forum" under § 30-3B-201(a)(2). Since the Alabama court entered its order refusing to dismiss the case, the trial court has communicated with the North Dakota court and the North Dakota court stayed its proceedings to ascertain which forum is more appropriate. "Considering the procedural posture of this case, we conclude that the appropriate remedy is to direct the trial court to reconsider the motion to dismiss by determining its own jurisdiction under the UCCJEA ..." ***Ex parte Sullivan (Sullivan v. Sullivan)***, 32 ALW (CL-2023-0309); 06/23/2023; Jefferson Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 15 pages. [ATTY: Pet: Kylie Mimnaugh, Hoover; Resp: Jacklyn Morton, Gadsden]

FAMILY LAW: Child Custody--Modification--UCCJEA. In October 2020, the mother filed a petition seeking to enforce and modify the child-custody provisions of an August 2019 divorce judgment entered by a Louisiana court. In the Louisiana judgment, the mother was designated as the "domiciliary parent" and the father was awarded visitation. The mother alleged that the she should be granted temporary emergency custody based on her allegations that the father had sexually abused the child. On October 8, 2020, the trial court granted the mother's request and set a pendente lite hearing for December 9, 2020. The father filed a motion to dismiss the mother's custody-modification action, asserting that the Alabama court did not have personal jurisdiction over him and that it lacked subject-matter jurisdiction to enforce or modify the Louisiana judgment. At the pendente lite hearing which subsequently took place, the trial court asked if any pretrial motions or issues needed to be addressed. The father had changed counsel at this point and his new counsel did not raise the father's motion to dismiss. After the hearing, the trial court entered a pendente lite order maintaining sole physical custody of the child with the mother and permitting the father to exercise supervised visitation only. A second pendente lite hearing took placed in February 2021 after which the trial court entered an order expanding the father's supervised visitation. In March 2021, the father filed a motion entitled "Motion for Expedited Final Hearing and Motion to Dismiss." In said motion, the father again asserted the issue of personal jurisdiction and he specifically cited to §30-3B-202, Ala Code 1975 which is a part of Alabama's version of the Uniform Child Custody Jurisdiction Enforcement Act ("the UCCJEA"). The trial court directed the father to present any relevant evidence regarding his motion to dismiss at a hearing set for March 31, 2021. However, shortly before that hearing, the mother filed a motion to disqualify the father's counsel based on a conflict of interest. The father's counsel voluntarily withdrew at the March 31, 2021 pendente lite hearing and as a result, no argument was received regarding the motion to dismiss. After a hearing in April 2021, the trial court entered an order denying the father's motion to dismiss. However, the order only addressed subject-matter jurisdiction. Another hearing in this case took place in September 2021 and the father once again raised the issues of personal and subject-matter jurisdiction. Counsel for the mother argued that because the father's counsel did not raise these issues at the initial pendente lite hearing, those issues had been waived. The trial court indicated that it would reconsider the jurisdictional issue after a trial on the merits . In November 2021, the trial court entered a final judgment in which it modified the father's visitation. In that judgment, the trial court indicated that it had communicated with the Louisiana court and held a hearing on the jurisdictional issue in October 2021 at which the parties were allowed to present legal arguments and evidence. The judgment further provided that the State of Alabama was the "more convenient" forum for the custody and visitation disputes and that Louisiana had declined to exercise continuing jurisdiction over the parties. After postjudgment

motions were denied, the mother appealed and the father cross-appealed. **Appeals dismissed.** At the time that the mother filed her custody-modification action, the only basis upon which the trial court could have exercised subject-matter jurisdiction was through its power to exercise temporary emergency jurisdiction pursuant to §30-3B-204 which allows an Alabama court to exercise said jurisdiction when a child is present in this state and has been abandoned or action by the court is necessary to protect the child from an emergency threatening the child's welfare. However, the trial court was required to "immediately communicate" with the Louisiana court and to specify in its temporary order the period of time that it considered to be adequate to allow the mother to obtain an order from the Louisiana court. Pursuant to §30-3B-203, a court of this state may not modify a child custody determination made by another state unless the court of the other state determines that it no longer has continuing exclusive jurisdiction or that a court of this state would be a more convenient forum. An Alabama court can also make a child custody modification if the child, the child's parents or any person acting as the child's parent no longer resides in the state which initially determined custody. Here, the father remains a resident of Louisiana. Accordingly, the court that should have determined whether Alabama was a more convenient forum was the Louisiana court, not the trial court. "Because the trial court failed to comply with the UCCJEA in any manner until after the completion of the trial in this matter, we conclude that the trial court lacked subject-matter jurisdiction to hold the trial and to enter the November 4, 2021, judgment. As a result, the trial court's final judgment is void and the appeals from that void judgment are due to be dismissed. ***A.M.H. v. D.E.H., Jr.***, 31 ALW (2210283; 2210342); 11/18/2022; Marshall Cty.; Per Curiam; Thompson, Edwards, Hanson and Fridy concur; Moore concurs specially, 23 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Jurisdiction. APPEAL & ERROR: Mootness. The parties were divorced by a Georgia divorce judgment in March 2020. The Georgia divorce judgment incorporated the parties' settlement agreement pursuant to which the mother was awarded the "primary physical custody" of the child and the father was awarded visitation. Further, the father was required to pay child support and other monetary obligations with regard to the property settlement and the mother's attorney fees. On March 8, 2022, the mother filed a petition in the Etowah Circuit Court ("the trial court") seeking to modify the visitation and child support provisions of the Georgia divorce judgment. She also sought to have the father held in contempt for failing to comply with the payment provisions of the Georgia divorce judgment. As part of that petition, the mother sought emergency relief, claiming that the father was abusing illegal drugs. On the same date that the mother's petition was filed, the trial court entered an order requiring the father to submit to a drug screen and suspending his visitation until he complied. At a hearing which took place on July 26, 2022, the father's attorney represented that the father had submitted to the drug screen, that he had tested positive for cocaine and that he had not visited with the child since the March 8, 2022 order. On April 26, 2022, the father moved the trial court to vacate any order entered by its until the trial court determined if it had subject-matter jurisdiction over the action. The trial court treated the father's April 26, 2022 order as a motion to dismiss and it conducted an evidentiary hearing on it. The father testified that he had moved to Alabama in 2019 and had been living there since. The mother and the child moved to Alabama in May 2020. At the time that she filed her petition, the mother had not sought to register the Georgia divorce judgment pursuant to § 30-3B-305, Ala. Code 1975. The trial court entered an order on July 28, 2022 indicating that it had exercised its emergency jurisdiction under § 30-3B-204, Ala. Code 1975 when it entered its March 8, 2022 order. It ordered the mother to register the Georgia divorce judgment and it denied the father's motion to dismiss. After the father filed a motion to reconsider, the trial court entered an order specifying that the emergency jurisdiction under which it was operating would expire 60 days from that date of that order. The father filed a petition for writ of mandamus. **Writ of mandamus granted in part and denied in part.** (1) The father argued that the trial court erred by directing the mother to register the Georgia divorce judgment in the trial court. However, based on the materials submitted, it does not appear that the mother ever sought to have that judgment registered. "Accordingly, any ruling by this court on whether the trial court erred by directing the mother to register the Georgia divorce judgment would be premature, and we deny the petition as to that issue." (2) The father also asserted that the trial court erred in denying that part of the mother's petition in which she sought to modify the visitation provisions of the Georgia divorce judgment. In *Hummer v. Loftis*, 276 So.3d 215, 221 (Ala. Civ. App. 2018), the court held that a party's failure to register a foreign custody judgment in Alabama pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)

deprived the Alabama court from enforcing or modifying the custody or visitation award contained in the foreign judgment. Based on that precedent, the father was due mandamus relief as to this argument. (3) The father contended that the trial court lacked subject-matter jurisdiction to consider that part of the mother's petition in which she sought the relief granted in the March 8, 2022 order. Under the UCCJEA, an Alabama court has temporary emergency jurisdiction if the child is in this state and an emergency exists because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. Moreover, if there is a previous child custody determination that is due to be enforced, any order issued by a court of this state must specify a period that the court considers adequate to allow the person seeking an order from the state having jurisdiction under the UCCJEA. Here, the trial court specified in its last order that its exercise of emergency jurisdiction was effective for 60 days from the date of that order. Therefore, it was due to expire on October 4, 2022. The matter was submitted to the court on October 3, 2022. Neither party has indicated that the trial court extended its exercise of emergency jurisdiction. Accordingly, because the trial court's exercise of emergency jurisdiction has already expired, the issue is now moot because "there is no effective remedy upon which relief can be granted." (citation omitted). This portion of the father's petition is due to be dismissed. ***Ex parte Slayton (Slayton v. Slayton);*** 32 ALW (CL-2022-0973); 01/27/223; Etowah Cty.; Thompson; Hanson and Fridy concur; Moore and Edwards concur in the result, without opinions; 13 pages. [ATTY: Pet: Jacqueline Morrette, Trussville; Resp: Scott Stewart, Gadsden]

FAMILY LAW: Jurisdiction--Foreign Judgment. In November 2022, N.J. filed in the Houston Circuit Court a request to register a judgment entered by a Texas court pursuant to which she was named as "the nonparent joint managing conservator" of the child, N.T.C.. The Texas judgment, which was entered by default, also named T.T. as the "parent joint managing conservator". The Texas judgment further provided that T.T. was allowed to "designate the primary residence of the child without regard to geographic location." N.J. was awarded specified visitation with the child. T.T. did not respond to the request to register the Texas judgment. After a hearing, the trial court entered an order in which it indicated that both T.T. and N.J. were present at the hearing. The trial court's order stated that it conducted a telephone conference with the Texas judge who issued the Texas judgment and both agreed that the trial court has jurisdiction. Because the Texas judgment had been entered by default, the trial court determined that it was due to be set aside and it dismissed the request to register the Texas judgment. N.J. filed a petition for writ of mandamus. **Writ of mandamus granted.** The registration of a child custody determination of another state is governed by § 30-3B-305, Ala. Code 1975. N.J. fully complied with the requirements set forth therein. Section 30-3B-305(d) permits a person to contest the validity of the registered order under certain circumstances and within a certain specified time period. However, in this case, T.T. never sought a determination by the trial court as to the validity of the Texas judgment. As a result, "the trial court acted outside its authority in holding...the hearing, in failing to register the Texas judgment, and in setting aside the Texas judgment." Accordingly, the petition for writ of mandamus is due to be granted and the trial court is directed to set aside its order and to register the Texas judgment. ***Ex parte N.J. (N.J. v. T.T.),*** 32 ALw (CL-2022-1228); 01/27/2023; Houston Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 9 pages. [ATTY: Not listed-confidential}

CIVIL PROCEDURE: Counterclaim. FAMILY LAW: Legal Separation. In September 2022, the husband filed a complaint for a legal separation ("the legal separation action"). That action was assigned to Judge Patrick Kennedy. A few days later, the wife filed a divorce action. That action was assigned to Judge Jonathan Spann and it was given a different case number. Thereafter, the husband filed a motion to dismiss in the divorce action, asserting that the wife's divorce complaint was a compulsory counterclaim that should have been asserted in the separation action. The wife filed a response wherein she requested that the cases be consolidated and that her divorce complaint be treated as a counterclaim to the complaint for legal separation. On October 26, 2022, Judge Spann entered an order in the divorce action denying the husband's motion to dismiss and directing the husband to file an answer to the wife's complaint within 14 days. The husband filed in the divorce action a motion to alter, amend or vacate the October 26, 2022 order. He also filed a motion to extend the time within which to file an answer. Judge Spann denied both of the husband's motions. The husband filed a petition for the writ of mandamus. **Writ of mandamus denied.** A writ of mandamus is an appropriate vehicle to review an order denying a motion to dismiss based on the compulsory-counterclaim rule. Rule 13(a), Ala. R. Civ. P. states that a pleading shall state as a counterclaim any claim which the pleader has against any party that arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. In denying the husband's motion to dismiss, Judge Spann relied upon §30-2-40(c), Ala. Code 1975 which states that "[a] proceeding or judgment for legal separation shall not bar either party from later instituting an action for dissolution of the marriage." Moreover, in *Faellaci v. Faellaci,* 98 So.3d 521 (Ala.Civ.App. 2012), the court held that a divorce action filed after the entry of a decree of legal separation is a separate, distinct action and does not constitute a modification of the legal separation decree. The husband argued that *Faellaci* is distinguishable because in this case, no final decree of separation has been entered. The court held that this distinction fails "in light of the language in §30-2-40 itself, which provides that a party is *not* barred from instituting an action for dissolution of the marriage by either a 'proceeding *or* judgment for legal separation.'" (emphasis added). The use of the word "or" in the statute was intended to allow for the filing of a divorce action even in those instances when a legal-separation action is already pending. Accordingly, the husband has not shown a clear legal right to the relief requested in his petition and the petition is due to be denied. ***Ex parte Pike (Pike v. Pike),*** 32 ALW (CL-2022-1157); 01/20/2023; Shelby Cty.; Moore; Thompson, Edwards, Hanson and Fridy concur; 9 pages. [ATTY: Pet: Tonya Burleson, Vestavia Hills; Resp: Margaret Casey, Pelham]

FAMILY LAW: Child Custody--Modification. CIVIL PROCEDURE: Jurisdiction. The mother and the father lived in Alabama until July 2015 when the mother and the child relocated to Tennessee. In December 2015, the father filed for divorce. Thereafter, the parties submitted a settlement agreement which was incorporated into a divorce judgment. Pursuant to that agreement, the parties were awarded joint legal custody of their child; sole physical custody was granted to the mother. In June 2020, the mother threatened to kill the child and then commit suicide. Instead of following through with her plan, the mother turned herself in to law enforcement. The Tennessee Department of Human Resources filed a petition in the Tennessee juvenile court seeking to have the child declared dependent. After a hearing, the Tennessee juvenile court declared the child to be dependent, "reinstated" custody of the child to the father, and "relinquished" jurisdiction over any further child custody proceedings to the Alabama court. The mother appealed the Tennessee juvenile court's judgment and that judgment was reversed and the case remanded. The Tennessee juvenile court first conducted an adjudicatory hearing after which it determined the child to be dependent. It ordered the mother to submit to therapy. After a dispositional hearing, the Tennessee juvenile court returned custody to the mother. In May 2022, the father filed a modification action in Alabama. The father was awarded pendente lite custody. The Tennessee juvenile court and the trial court held a telephonic hearing regarding jurisdiction. Thereafter, the trial court entered an order stating that it was retaining continuing, exclusive jurisdiction over the custody proceedings. The mother filed a petition for a writ of mandamus. **Writ of mandamus denied.** The Alabama Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, § 30-3B-101 et seq. establishes subject-matter jurisdiction over child-custody proceedings. Once an Alabama court has made an initial child custody determination, it retains continuing, exclusive jurisdiction over that determination until neither the child, nor the child and one parent, have a significant connection with this state and substantial evidence is no longer available in this state regarding the child's care, protection, training and personal relationships. Here, the trial court "impliedly determined" that the child continued to have a significant connection with this state. The court further noted that pursuant to § 30-3-169.9(b), Ala. Code 1975, a part of the Alabama Parent-Child Relationship Protection Act, when a parent who has joint legal custody of a child continues to reside in this state "the child shall have a significant connection with this state" even if the child has relocated to a different state. "Accordingly, the trial court is properly exercising its continuing, exclusive jurisdiction over the custody-modification proceedings concerning the child even though the child has relocated with the mother to Tennessee." ***Ex parte Dukes (Dukes v. Baker)***, 31 ALW (CL-2022-1012); 11/18/2022; Limestone Cty.; Hanson; Thompson, Moore, Edwards and Fridy concur; 9 pages. [ATTY: Pet: Henry Lagman, Birmingham; Resp: Sarah Meigs, Huntsville]

FAMILY LAW: Juvenile Court. CIVIL PROCEDURE: Due Process--Injunction. In 2019, the Jefferson Juvenile Court ("the juvenile court") entered a judgment placing the child in the custody of B.C. ("the former legal custodian"). However, shortly thereafter, the former legal custodian relinquished custody of the child to D.M. and A.M., who were the former legal custodian's neighbors. The mother filed an action in March 2020 seeking to modify custody and notifying the juvenile court that the former legal custodian had relinquished custody. This action was assigned case number JU-18-1934.02 ("the custody-modification action"). The mother filed a separate action in April 2021 in which she sought a modification of visitation. That action was assigned case number JU-18-1934.03 ("the visitation-modification action"). In November 2021, D.M. and A.M. sought to intervene in the custody-modification action and the visitation-modification action and the contempt action. Those motions were later denied. In February 2022, the juvenile court entered an order declaring the child to be dependent and after the former legal custodian testified that she did not want custody of the child, it made DHR a party and awarded custody of the child to it. The juvenile court held the mother's visitation-modification action in abeyance. D.M. and A.M. filed petitions for the writ of mandamus and notices of appeal. The court issued an opinion in *Ex parte D.M.*, [Ms. 2210403, Aug. 12, 2022] ___ So.3d ___ (Ala. Civ. App. 2022]. After the certificate of judgment was issued, the mother filed a motion in the custody-modification and visitation-modification actions asserting that D.M. and A.M. had thwarted her attempts to exercise visitation after DHR placed the child with them. After a hearing, at which D.M. and A.M. were not permitted to participate, the juvenile court entered a "no-contact order" prohibiting contact between D.M. and A.M. and the child. D.M. and A.M. filed a petition for the writ of mandamus. **Appeal dismissed.** Even though D.M. and A.M. were not permitted to intervene, "[a] nonparty whose conduct has been enjoined by an order of the trial court may appeal the order..." The court therefore exercised its discretion to treat the mandamus petition as an appeal. D.M. and A.M. argued that they were denied due process when the juvenile court entered the "no-contact order" without providing them notice and an opportunity to be heard. Section 12-15-139, Ala. Code 1975 states that a juvenile court can enter an order of protection or restraint in a dependency action to protect the health or safety of a child but only "after notice and a hearing." Section 12-15-141, Ala. Code 1975 allows the issuance of an ex parte order of protection but in such a case, the juvenile court is required to conduct a hearing within 72 hours. Any such order may be extended but only after notice and an opportunity to be heard. Here, even if the mother's allegations were sufficient to support the entry of an ex parte order of restraint, the juvenile court erred by entering that order without setting a hearing within 72 hours of the entry of that order. It further errred by failing to hold a hearing after A.M. and D.M. filed a

motion to dissolve the "no-contact order." Accordingly, the "no-contact order" is void for lack of due process and the appeal from that order is due to be dismissed, with instructions to the juvenile court to set aside the "no-contact order." ***D.M. and A.M. v. F.L.C.,*** 32 ALW (CL-2022-1070); Jefferson Cty.; Edwards; Thompson, Moore, Hanson and Fridy concur; 14 pages. [ATTY: Not listed-confidential]