Huntsville Bar Association

Last Chance Seminar

Domestic Relations Update

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I. Alimony

FAMILY LAW: Alimony--Attorney Fees--Child Support. 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 post judgment 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. "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." 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); 08/19/2022; Madison Cty.; Thompson; Hanson and Fridy concur; Moore and Edwards concur in the result, without opinions, 46 pages. [ATTY: Appt: Dinah P. Rhodes, Huntsville; Apee: Joan-Marie Sullivan, Huntsville]

FAMILY LAW: Life Insurance. Joseph Hadden ("Insured") was a one-third owner of Phoenix Printing Group, Inc. ("PPG") which he owned and operated with his brother, Jeffrey Hadden. In June 2010, PPG acquired a $3,000,000 life insurance policy for the life of the insured. The insurer was Talcott Resolution Life and Annuity Insurance Company. The policy owner is identified as PPG on the application and beneficiary designation forms. The Insured and his wife, Emily Hadden ("Hadden") divorced in 2012. Pursuant to a settlement agreement which was incorporated into the divorce decree, the Insured agreed to maintain $1,000,000 in life insurance for the benefit of his children with his ex-wife named as beneficiary. In June 2013, Hadden was named a 33.3% beneficiary of the PPG Talcott policy on the Insured's life. In 2014, PPG bought out the Insured's interest in the business but the Talcott policy remained in place. In October 2016, PPG named itself 100% primary beneficiary of the Talcott policy. Hadden filed a contempt action and the Insured filed a divorce action in 2017. As part of an agreement in that postdivorce action, Hadden released the Insured "from any and all obligations that are being claimed to be owed by him…under the terms and provisions of the divorce decree…" The Insured died in February 2020. After his death, both PPG and Hadden made competing claims for death benefits. Talcott filed an interpleader action and deposited $1,000,000 with the court. After a summary judgment motion was filed, the district court ruled that Hadden had no vested interest in the life insurance policy and that the doctrine of unclean hands did not apply. Hadden appealed. **Affirmed.** Under Georgia law (as in Alabama) settlement agreements in divorce actions are construed the same as any other contract. Moreover, where the terms of a written contract are clear and unambiguous, no extrinsic evidence will be considered. In this case, the parties agreed that the Insured would "maintain *his* $1,000,000 life insurance policy." "But as there is no evidence in the record that the Insured owned a policy on his life, there is no policy in which Hadden could have had a vested interest." The Talcott policy was owned by PPG, not the Insured. Moreover, even if Hadden had some claim to the Talcott policy, she released it in the 2017 postdivorce settlement agreement. Accordingly, the judgment of the district court is due to be affirmed. ***Talcott Resolution Life and Annuity Insurance Company v. Hadden,*** 31 ALW (No. 22-11086); 09/14/2022; S. D. Ga.; Per curiam; Pryor, Jill, Branch and Brasher, 8 pages.

FAMILY LAW: Alimony--Jurisdiction. The parties were married for 29 years prior to their separation in 2017. The husband lives in North Carolina and the wife moved to Alabama in 2018. At the time of trial, the husband was 55 years old, and the wife was 57. The husband suffers from diabetes and had to have part of his foot cut off. The wife testified that she left the husband because he was not taking care of himself. The husband was employed as a banker at Wells Fargo and earned over $100,000 per year in 2009, 2010 and 2011. At the end of 2012, the husband lost that position and was only able to find another job in that company earning

$50,000. The wife earned $30,000 annually during the marriage. Both parties testified regarding financial difficulties that had ensued during their marriage. The husband made withdrawals from his 401k after he lost his banking position in 2012 and as a result, the parties owed $26,000 to the IRS. The wife disavowed any knowledge of those withdrawals. In January 2021, the husband ceased working and began drawing disability benefits in the amount of $3,700 per month. At the time of trial, the wife was employed as a teacher in Georgia earning $67,000 annually. Her total monthly expenses are $4,200 and she requested an award of $1,500 per month in alimony for 9 years. After a trial, the trial court entered a judgment ordering the husband to pay the IRS debt, awarding the wife $1,100 per month in rehabilitative alimony for 5 years and reserving the issue of periodic alimony. After his post judgment motion was denied, the husband appealed. **Reversed.** (1) The court first addressed whether the trial court had jurisdiction to enter the divorce judgment. Pursuant to §30-2-5, Ala. Code 1975, if a defendant in a divorce action is a nonresident, the other party must have been a resident of Alabama for six months prior to the filing of the action. Jurisdiction cannot be conferred by agreement. For purposes of this statute, residency is the equivalent to domicile. Domicile is defined as "residence at a particular place accompanied by an intention to stay there permanently, or for an indefinite length of time." A person can generally only have one domicile. Here, the wife moved to Alabama in 2018. She claimed that her permanent residence is the "family home" in Alabama but she rents an apartment in Georgia. The wife testified that she plans to retire in 9 years and return to live in Alabama. She spends holidays in Alabama. "A change of domicile cannot be inferred from an absence, temporary in character, and attended with the requisite to return." (citation omitted). Here, the trial court could have concluded that the wife's continuing to maintain her "family home" in Alabama coupled with an intention to return when she retires "is indicative of an intent on the part of the wife to return to her 'permanent' home in Alabama." Accordingly, the trial court had jurisdiction to enter the divorce decree. (2) The court next considered the trial court's award of rehabilitative alimony and its reservation of periodic alimony. Section 30-2-57, Ala. Code 1975 sets forth the factors necessary for an award of alimony. As a threshold matter, a party seeking an alimony award must prove that his or her separate estate is insufficient to enable him or her to preserve "the economic status quo of the parties as it existed during the marriage." Here, the evidence was undisputed that the parties struggled financially during the marriage. The parties have three children who have reached the age of majority. Although the wife claimed that she had a monthly budget deficit of $800, she testified that she spends $600 per month for room and board for her adult daughter, $600 per month on loans that she took out for college expenses for her adult children and $500 per month on charitable donations. Moreover, the adult children's cellular telephone expenses are included in the wife's monthly cellular-telephone bill. The wife's expenditures for the adult children are "gratuitous undertakings" that cannot be considered when evaluating her need for alimony. If such were permitted, it would be akin to requiring the husband to pay support for the adult children in contravention of the law. The evidence presented in this case indicated that the wife's salary was sufficient to pay her monthly bills, to maintain two homes and to undertake certain

gratuitous expenses. Accordingly, there was insufficient evidence to show that the wife lacked a sufficient separate estate to preserve the economic status quo of the parties as it existed during the marriage. Therefore, this portion of the trial court's judgment is due to be reversed. (3) The husband also challenged whether the trial court erred by requiring him to pay the entire debt owed to the IRS. Matters of alimony and property division are interrelated and the entire judgment must be considered in determining if a trial court abused its discretion as to either of those issues. Because the alimony award was due to be reversed, any consideration as to the propriety of the husband's responsibility for the IRS debt was pretermitted. ***Myrick v. Myrick,*** 31 ALW (2200951); 08/05/2022; St. Clair Cty., Moore; Thompson, Edwards, Hanson and Fridy concur; 20 pages. [ATTY: Appt: Tiffany Jones, Irondale; Apee: Matthew Gossett, Moody]

FAMILY LAW: Alimony. APPEAL & ERROR: Preservation of Issue. The parties were married for 8 years. During the divorce proceedings, the husband and wife filed a claim against Ben Milam and U Park U Sell, LLC ("UPUS"), an Alabama limited liability company of which Milam is a member. The claim filed by the husband and wife alleged breach of a purported loan agreement and fraud. In December 2019, the trial court entered an order purporting to divorce the husband and wife. In that order, the wife was awarded "periodic, rehabilitative alimony" of $2,800 per month for 60 months. The December 2019 order also included a judgment against Milam for $35,000 in compensatory damages and $35,000 in punitive damages but it failed to adjudicate any claim as to UPUS. The husband filed an appeal but it was dismissed as having been taken from a nonfinal judgment. The claims against Milam and UPUS were severed and in December 2020, the trial court entered an order divorcing the parties and once again awarding the wife "periodic, rehabilitative alimony" of $2,800 per month for 60 months. No findings were contained in the December 2020 judgment regarding the award of alimony. After his postjudgment motion was summarily denied, the husband appealed. **Reversed.** Periodic alimony and rehabilitative alimony are intended to serve distinct purposes. Rehabilitative alimony is intended to allow a spouse time to begin (or resume) supporting himself or herself. Periodic alimony is designed to enable a spouse to enjoy the same standard of living as he or she did during the marriage. The award of alimony in this case is governed by Ala. Code 1975, §30-2-57. That Code section does not expressly define rehabilitative alimony or periodic alimony. The December 2020 judgment awarded the wife "periodic, rehabilitative alimony." "The legislature has clearly required that an alimony award be either rehabilitative alimony or periodic alimony and that, to award either type of alimony, the trial court must make certain express findings after considering the various factors described in §30-2-57(d)-(f)." Because no such findings were made in this case, the judgment of the trial court is due to be reversed and the case remanded. Presiding Judge Thompson authored a dissent, which was joined by Judge Hanson in which he noted that the husband had not preserved for appellate review the issue of whether findings were made pursuant to §30-3-57. Moreover, the dissent held that based on the "structure of the alimony awarded" and the evidence presented at trial, it was clear that the trial

court intended to make an award of rehabilitative alimony. ***Merrick v. Merrick,*** 30 ALW (2200188), 10/29/2021, Autauga Cty.; Edwards; Moore and Fridy concur; Thompson dissents, with writing, which Hanson joins. 19 pages. [ATTY: Appt: Tina S. Moon, Prattville; Apee: Clifford W. Cleveland, Prattville]

FAMILY LAW: ALIMONY- After a four-day trial, the trial court entered an order in October 2020 in which it divorced the parties, divided the marital estate and awarded the wife alimony. With regard to the alimony award, the trial court's judgment stated: "Beginning September 1, 2020, husband shall pay alimony to the wife in the amount of $1500 per month as permanent alimony until he retires from the U. S. Post Office. Thereafter, upon his retirement from the U.S. Post Office, husband shall pay alimony to the wife in the amount of $1217.00 per month until the wife either (a) begins to receive social security retirement benefits or (b) reaches the age of 65, whichever happens first. Thereafter, the husband shall pay no alimony. The Court retains jurisdiction to modify alimony based upon a significant change in circumstances." The husband appealed. **Reversed**. The issue of alimony in the present case is governed by Ala. Code 1975, § 30-2-57, which is titled "Rehabilitative or periodic alimony" and which applies to "actions for divorce ... filed on or after January 1, 2018." Section 30-2-57 provides, in pertinent part: "(a) Upon granting a divorce or legal separation, the court shall award either rehabilitative or periodic alimony as provided in subsection (b), if the court expressly finds all of the following: (1) A party lacks a separate estate or his or her separate estate is insufficient to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage. (2) The other party has the ability to supply those means without undue economic hardship. (3) The circumstances of the case make it equitable." In a case released last month, the court reversed an alimony award because the trial court did not make the express findings required by §30-2-57. *Merrick v. Merrick,* [Ms. 2200188, Oct. 29, 2021] ___ So.3d ___ (Ala. Civ. App. 2021)[ALW}. Accordingly, the judgment in this case is also due to be reversed. ***Laurendine v. Laurendine*** 30 ALW (2200305), 11/12/2021, Baldwin Cty.; Fridy; Thompson, Moore, Edwards, and Hanson concur; 3 pages. [ATTY: Appt: Floyd C. Enfinger Jr., Montrose; Apee: Stephen P. Johnson, Fairhope]

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]

II. CHILD CUSTODY

FAMILY LAW: Child Custody--Modification. In August 2018, the Washington Juvenile Court entered a judgment awarding the father and the child's maternal grandmother the joint legal and physical custody of the child. The previous custody judgment afforded the father "custodial periods" that essentially constituted a standard visitation schedule. The grandmother's residence was specified to be the child's "primary residence" and the mother was awarded visitation at the grandmother's discretion, but the judgment specified that the mother's visitation must be supervised. In August 2020, the grandmother filed a petition to modify the previous custody judgment. She alleged that since the prior custody judgment was entered, the father had been using, buying, or selling illegal drugs. She also alleged that members of the father's family had exposed the child to inappropriate behavior. She requested that the father's "custodial periods" be supervised. She also sought to have the supervision requirement regarding the mother's visitation removed. The father filed an answer and a counterclaim seeking sole physical custody of the child. He asserted that the mother had been arrested for trafficking in cocaine in June 2021 and that when sheriff's deputies conducted a search of the mother's house, the mother was exercising visitation with the child outside the presence of the grandmother. The mother's boyfriend was also arrested for several drug offenses. At a hearing on an emergency motion

filed by the father, evidence was adduced that the grandmother's house was "next door and behind" the house where the mother lived with her boyfriend. Law enforcement officials testified at the hearing that a large amount of illegal drugs were seized at the time that the search warrant was executed on the mother's house. The child and two younger children were present when the search warrant was executed, which took about an hour. The grandmother conceded that she had left the child alone with the mother on numerous occasions. The father was living in Louisiana at the time of the hearing. A hair follicle test that he was required to take was negative. The juvenile court entered an order denying the father's request for custody. The father appealed. **Reversed.** (1) The court first determined the applicable standard to be utilized in this custody modification action. Although the previous custody judgment purported to award the father and the grandmother "joint legal and physical custody" of the child, the father was afforded "custodial periods" according to a "standard visitation schedule" and the grandmother's house was specified to be the child's "primary residence." The court examined the definitions of custody contained in Ala. Code 1975, §30-3-151 and determined that the previous custody judgment awarded the grandmother "sole physical custody" of the child. Accordingly, the standard for modification set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984) applies. (2) In its judgment, the juvenile court stated that the law enforcement officers who testified had "stated that they had no reason to suspect that [the grandmother] knew what was going on" in the mother's house. However, that statement is contrary to the evidence presented. "Thus, it appears that at least part of the juvenile court's reason for refusing to modify custody was based on a finding that was not supported by the evidence." Because the juvenile court's misapprehension of the officers' testimony may result in a different conclusion by the juvenile court, the judgment is due to be reversed. ***J.S. v. S.B.,*** 31 ALW (2200906), 1/7/2022, Washington Cty., Fridy; Thompson, Moore, Edwards and Hanson concur; 19 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Modification--Child Support. The parties were divorced in 2018. Pursuant to an agreement of the parties which was incorporated into the divorce judgment, the mother was awarded sole legal custody of the parties' minor child and the parties agreed to share joint physical custody. However, the father was only entitled to exercise visitation with the child one weekend, or three consecutive days, a month, one week in the summer and alternating holidays. The father was ordered to pay $325 per month in child support. In 2020, the father filed a petition to modify custody alleging that the mother had moved to Mississippi with the child and that they were living in a one-bedroom apartment with the mother's boyfriend. The mother filed an answer and counterpetition seeking an increase in child support. The father was awarded pendente lite custody of the child. The trial took place on March 31, 2021, and April 2, 2021. On April 6, 2021, the mother filed a motion seeking to reopen the testimony. She alleged that the father had not disclosed at trial that just a few days before the first day of trial, a drive-by-shooting incident had occurred at the father's home while the child was present. On April 9, 2021, the mother was awarded pendente lite custody. Additional evidence was allowed at a hearing on June 8, 2021. The father testified that he and his new wife live in South Carolina. He admitted that after he and the mother separated in 2015, he did not visit the child for

approximately 2 1/2 years. Although he claimed that he had been visiting the child consistently since that time, the mother disputed that evidence. The father complained about the mother's instability. In response, the mother informed the trial court that she had married Jason Sword and that in May 2018, she and Sword decided to earn money as long-haul truckers. From June 2019 until November 2019, the child had stayed with Sword's former wife. In March 2020, the mother and Sword separated and thereafter, the mother and the child moved to Mississippi. With regard to the drive-by-shooting, the father testified that he was sleeping when the incident occurred. He claimed that he did not mention the incident because law enforcement officers had asked him not to discuss the matter. However, a police officer who investigated the incident indicated that "not informing court authorities" would not be a good practice. The trial court denied the father's modification claim, stating that he had failed to meet the burden set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). The final judgment was entered on October 11, 2021. The father filed a post judgment motion on November 10, 2021 and on that same day, he filed a notice of appeal. On February 16, 2022, the trial court entered an order purporting to modify the mother' s child support award. However, that order is void inasmuch as the father's post judgment motion was denied by operation of law on February 8, 2022--90 days after his motion was filed. Rule 59.1, Ala. R. Civ. P.. **Affirmed in part; reversed in part.** (1) The court first addressed whether the trial court applied the correct standard of proof with regard to the father's modification claim. "[T]he record in this case supports the trial court's implicit determination that, in the divorce judgment, the mother had been awarded sole physical custody of the child and the father had been awarded visitation." Although the parties agreed that they would share the joint physical custody of the child, the father's visitation with the child was much less than the periods of custody enjoyed by the mother. Therefore, the parties did not actually engage in shared physical custody of the child. Because the divorce judgment in actuality awarded the mother the sole physical custody of the child, the *McLendon* standard was correctly applied. (2) The father next challenged whether the great weight of the evidence supported his custody modification claim. The court held that it did not. The father had to prove a material change of circumstances of the parties since the divorce judgment which affected the welfare and best interests of the child. Moreover, he was required to demonstrate that a change in custody would "materially promote" the child's welfare. However, the father did not present evidence regarding the mother's current circumstances or how her current housing detrimentally affected the child. Moreover, the fact that the father did not disclose the drive-by-shooting incident "could have drawn the veracity of the father's testimony into question." The denial of the father's custody modification is due to be affirmed. (3) Finally, the father challenged the trial court's child-support award. That award was made retroactive to the date the mother filed her counterpetition. Such a determination was within the trial court's discretion. However, the record does not contain documentation in compliance with Rule 32, Ala. R. Jud. Admin.. In addition, the record contains insufficient information from which the court can determine the propriety of the child-support award. Therefore, this portion of the trial court's judgment is due to be reversed. ***Grantham v. Grantham-Potts,*** 31 ALW (2210139); 7/15/2022; Elmore Cty.;

Thompson; Moore, Edwards, Hanson and Fridy concur; 20 pages. [ATTY: Appt: Katie O'Malia, Montgomery; Apee: Clifford Cleveland, Prattville]

FAMILY LAW: Child Support--Visitation--Child Custody. In December 2013, the Autauga Juvenile Court found the child dependent and awarded the child's paternal grandparents, "primary physical custody" of the child. Such an award is properly termed an award of "sole physical custody" of a child. § 30-3-151(5), Ala. Code 1975. In that judgment the juvenile court specified that the paternal grandparents and the child's mother share joint legal custody of the child, awarded the mother a schedule of visitation and specified that the mother's boyfriend, S.M., not be present during said visitation periods. Over the next few years, four additional judgments, each in a new action, were entered. Pursuant to those judgments, the paternal grandparents remained the physical custodians of the child and each judgment reiterated the requirement that the mother not allow S.M. to have any contact with the child. In July 2018, a judgment was entered establishing that the mother owed a child support arrearage of $10,813.75 and that judgment required the mother to pay $50 per month toward the satisfaction of that arrearage. In June 2020 the mother filed a petition seeking to modify custody of the child. The paternal grandparents answered and counterclaimed seeking to have the mother held in contempt for her failure to pay child support and her portion of the child's medical expenses. After a hearing, the juvenile court entered a judgment in which it found that the mother had failed to meet the required standard of proof for a custody modification. However, the juvenile court also found that the mother was entitled to additional visitation, and it awarded the mother alternating weeks of "visitation" with the child, in addition to certain holiday visitation. Also in its judgment, the juvenile court determined, in pertinent part, that the mother was "not in willful contempt" for her failure to pay certain of the child's medical expenses, but it ordered her to pay for her share of those expenses. In addition, the juvenile court stated that, "[b]ased on the income information submitted to the court, the mother's child-support payment would be $297; however, with the modified visitation schedule, the mother is ordered to pay $197, plus $100 towards arrears." The paternal grandparents appealed. The juvenile court was reinvested with jurisdiction to clarify the child support provision in its order, and it entered an amended judgment requiring the mother to pay $100 per month toward the child support arrearage established in the 2018 order. **Reversed.** The paternal grandparents argue that by increasing the mother's visitation, the juvenile court made a "de facto change in custody." In support of their argument, the paternal grandparents cite *Hays v. Elmore, 585 So. 2d 40* (Ala. Civ. App. 1990). In that case, Mavis Hayes was awarded sole physical custody of the children and Michael Elmore was awarded visitation in an earlier judgment. After a modification action was filed, the trial court refused to modify custody, but it altered the visitation order to specify that Hays and Elmore would alternate equal periods of physical custody every two weeks. This judgment was reversed on appeal after the court determined that Elmore had not satisfied the standard set forth in *Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984). In this case, the juvenile court specifically found

that the mother had failed to meet the *McLendon* standard for modifying custody. The mother did not challenge that finding by filing a conditional cross-appeal. In awarding the mother alternating weekly periods with the child, the juvenile court's "visitation" award effected an award of joint physical custody of the child to the mother. See § 30-3-151(3), Ala. Code 1975. That award was an improper modification of the earlier custody judgments in favor of the paternal grandparents. Accordingly, the "visitation" portion of the juvenile court's judgment is due to be reversed. (2) The paternal grandparents also challenged the juvenile court's failure to redetermine the mother's child support arrearage. The paternal grandparents presented evidence that the mother owed $17,958.73 in child support arrearage. The mother admitted that she had failed to consistently pay child support since the July 2018 judgment. Thus, additional arrearages had accumulated since the entry of the July 23, 2018, judgment, and the juvenile court erred in denying the paternal grandparents' claim seeking a redetermination of the mother's child-support arrearage. ***Ja.T. and Jo.T. v. N.T.*** 30 ALW (2200422), 11/12/2021, Autauga Cty.; Thompson; Moore, Edwards, Hanson, and Fridy concur. 14 pages. [ATTY: Not Listed - Confidential]

FAMILY LAW: Child Custody--Modification--Automatic Reversionary Clause. The parties were divorced in 2017 by a Georgia divorce judgment. Pursuant to the Georgia judgment, which incorporated an agreement of the parties, the parties were awarded joint legal and joint physical custody of their minor child and the father was ordered to pay $600 per month in child support. In December 2020, the mother filed a verified petition for registration and modification of the Georgia judgment in the Lee Circuit Court. The mother asserted that her current husband is in the military and that he had received orders to transfer to Fort Hood, Texas. The mother sought sole physical custody of the child. The father filed an answer and counterclaim in which he requested that if the mother moved to Texas, he be awarded sole physical custody of the child and that the mother be required to pay him child support. The Georgia judgment was registered, and an evidentiary hearing took place. The mother testified that the parties had initially alternated custody on a weekly basis, but after the COVID-19 pandemic, they started exchanging the child every two weeks. The mother married her new husband in March 2020, and she conceded that she knew when she married him that he would have to move to another duty station. In April 2021, the mother and her new husband moved to Texas and purchased a home there. Evidence was adduced that all of the child's extended family lives in Lee County. No extended family lives in Texas. According to the mother, she has always been flexible with the father regarding his requests to have the child at times other than his custodial periods; the father has not reciprocated. The mother testified that if the trial court awarded custody to the father, she would move back to Alabama. The mother had posted on the Internet photographs of herself in which she was scantily clad. Evidence was presented that the parties' child mimicked the mother's poses in those photographs. The father remarried and has another child, with whom the parties' child shares a close relationship. The trial court entered a judgment in which it found that the parties had exercised joint custody of the child "admirably." It noted, however, that if the child is permitted to relocate to Texas, she will be deprived of her

family in Alabama and the trial court stated that the mother's contemplated move was a matter of her own choosing when she decided to become involved with her husband, a career military man. The trial court stated that the parties shall continue to exercise "joint custody" of the child. If the mother remains in Texas or "takes residence in excess of 40 miles from the father", she is required to pay $350 per month in child support and the trial court fashioned a visitation schedule. If the mother decides to live within 40 miles of the father, the trial court determined that they would share custody on an alternating two-week schedule during the school year and neither party would owe a duty of child support to the other. The mother appealed. **Affirmed.** (1) The mother challenged the sufficiency of the evidence. The father argued that the trial court did not modify the original custody arrangement. The court rejected this argument, noting that the mother was living in Texas and the judgment specified that unless and until she returns to within 40 miles of the father, the father has custody. "Because the judgment awards the father custody of the child for a substantially greater proportion of time, the judgment can only be interpreted as awarding the father sole physical custody of the child." (2) The mother argued that no material change of circumstances had occurred that warranted a modification of custody. The Alabama Parent-Child Relationship Protection Act ("the Act"), §30-3-160 et seq., Ala. Code 1975, does not apply to the parties' Georgia judgment. However, while a change in the custodial parent's residence, standing alone, does not necessarily justify a change in custody, it is a factor that can be considered in determining if a material change of circumstances has occurred. The distance between the parents' respective homes precludes the exercise of joint physical custody. "We find that, under these circumstances, the trial court did not err in finding that a material change of circumstances has occurred requiring modification of the child-custody provision of the Georgia judgment." (3) Evidence was also presented that the child's best interests would be served by awarding custody to the father. "The trial court could have determined that the child would experience the least disruption in her familial relationships, friendships and educational and community life by leaving the child in the custody of the father for the majority of the time rather than allowing the child to live with the mother in Texas." (4) Finally, the mother argued that the trial court erred by including an automatic reversionary clause awarding the parties joint physical custody of the child if the mother relocates to Lee County. The court first noted that the mother may lack standing to raise this issue since that portion of the trial court's judgment "appears to inure to her benefit." However, the court further concluded that this portion of the trial court's judgment is of "no effect." It cited prior precedent in which the court concluded that automatic reversionary clauses were void. "Hence, we find no need to reverse the judgment to correct that error." The judgment of the trial court is due to be affirmed. ***Dowdy v. Dowdy,*** 31 ALW (2200861); 4/22/2022; Lee Cty., Moore; Thompson; Edwards, Hanson and Fridy concur; 22 pages. [ATTY: Appt: Mallory Harper, Opelika; Apee: Elaine Thomaston, Auburn]

FAMILY LAW: Child Custody-- Modification. CIVIL PROCEDURE: Jurisdiction. The parties were divorced in November 2018. Pursuant to that judgment, the mother was awarded sole physical custody of the parties' child and the father was awarded specified visitation. In April 2019, the mother filed a petition to terminate the father's visitation, or in the alternative, to

modify his visitation. The father filed an answer and counterclaim, requesting sole physical custody of the child and child support. He amended his counterclaim to assert a claim for contempt against the mother, asserting that she routinely refused to allow him to exercise visitation with the child. After a trial, the trial court entered an order holding the mother in criminal contempt but failing to address the other aspects of the case. The father submitted a proposed order to the trial court, which granted the father sole physical custody of the child subject to the mother's visitation. Thereafter, on February 26, 2020, the trial court entered an order stating: "Proposed order filed by [the father] is hereby GRANTED." The father filed a "proposed amended order" which incorporated the terms of the February 26, 2020, order and added a clause that said: "the mother shall pay child support in accord with Rule 32 of the Alabama Rules of Judicial Administration." The trial court entered a judgment on June 24, 2020, adopting the proposed amended order. The mother appealed and the appeal was dismissed as having been taken from a nonfinal order because the amount of child support was not specified. *Wood v. Gibson,* [Ms. 2200064, May 28, 2021] ___ So.3d ___ (Ala. Civ. App. 2021). After the first appeal was dismissed, the trial court entered a judgment that awarded sole physical custody of the child to the father and ordered the mother to pay $200 per month in child support. The mother appealed and the trial court granted her motion to incorporate the record from the previous appeal into the record for this appeal. While the first appeal was pending, the mother filed a motion in the trial court requesting that the trial court approve her statement of the evidence and proceedings pursuant to Rule 10(d), Ala. R. App. P.. In that motion, the mother explained that a transcript from the original trial was unavailable. The mother had served a copy of her statement of the evidence on the father, but he failed to respond. The trial court entered an order granting the mother's motion to adopt her statement of evidence. **Reversed.** According to the statement of evidence, the child is developmentally delayed and is seeing a therapist. The therapist testified that the mother had obtained appropriate care and services for the child. The child had tested positive for placement on the autism spectrum. According to the therapist, the child would benefit from parallel routines at both parents' houses with similar structure. The mother testified that the father and his girlfriend had made negative or disparaging comments toward or about her. The child had bruises after his visits with the father and he bit himself and pulled his own hair. According to the statement of the evidence, the father claimed that the mother had tried to alienate the child's affection for him and referenced a message on Facebook by the mother on Father's Day wherein she complimented her husband for being a good stepfather. The father also complained that the child had been baptized without his knowledge and that the mother had been rude to his girlfriend during custody exchanges. He also claimed that the mother had consumed alcohol while the child was in her custody. (1) The mother first asserted that the trial court did not have jurisdiction over the father's counterclaim for custody because he failed to pay a filing fee. However, the failure to pay a filing fee for a counterclaim does not divest a trial court of subject-matter jurisdiction. A party can seek a stay of an action until a filing fee is paid. However, the mother did not raise this issue until she filed her post judgment motion. Although the trial court should have required the payment of a filing fee, the

failure to do so did not deprive the trial court of jurisdiction. (2) The mother next asserted that the father failed to meet the burden set forth in *Ex parte McLendon,* 455 So.2d 863, 866 (Ala. 1984). In order to meet that burden, the father had to demonstrate that (a) he is a fit custodian; (b) that material changes have occurred which would affect the child's welfare and (c) that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting the child. In this case, insufficient evidence was presented to support a conclusion that a change of custody would materially promote the child's best interests. "'Parental alienation" involves "[a] situation in which one parent has manipulated the child to fear or hate the other parent; a condition resulting from a parent's actions that is designed to poison a child's relationship with the other parent." (citations omitted). The statement of evidence does not indicate that the child feared or hated the father or that the mother instilled such a condition in the child. The fact that the mother posted a message to her husband on Father's Day or that she had unilaterally terminated visitations after some heated custody exchanges does not prove parental alienation. Moreover, the statement of evidence does not present any testimony indicating that a change in the child's custody to the father would materially promote the child's best interests. The judgment of the trial court is due to be reversed. ***Wood v. Gibson,*** 31 ALW (2210060), 4/8/2022, Winston Cty., Moore; Thompson, Edwards, Hanson and Fridy concur; 15 pages. [ATTY: Appt: Kevin Teague, Decatur; Apee: Pro se]

FAMILY LAW - Child Custody--Modification. In March 2012, the father was adjudicated as the child's father, and he was ordered to pay child support. The mother was awarded the sole physical custody of the child subject to the father's right to visitation. In December 2018, the father filed a petition seeking a modification of custody. The mother filed an answer to the father's petition, and she also filed an action seeking to modify the father's child support obligation and to hold him in contempt for failing to pay child support. The cases were finally tried in March 2021 and in April 2021, the juvenile court entered a judgment that addressed both cases. In that judgment, custody of the child was awarded to the father and the mother was awarded a judgment for child-support arrearage. The mother appealed from the April 2021 judgment entered in both cases but only challenged the trial court's holding regarding custody. **Reversed.** The applicable standard in this case is that found in *Ex parte McLendon,* 455 So.2d 863 (1984). Accordingly, the father was required to show that the proposed change of custody will materially promote the child's welfare and best interest such that the benefits of the requested change will more than offset the "inherently disruptive effect caused by uprooting the child." In these cases, the juvenile court stated that "[a] change in custody is necessary for the best interest of the child." It further held that circumstances had "changed…since the previous" custody judgment. "However, the April 2021 judgment modifying custody is silent as to whether the benefits of the ordered child-custody modification outweigh the disruptive effects of uprooting the child." It is does no clearly indicate that the juvenile court applied the heightened *McLendon* standard. As a result, the judgment of the juvenile court is due to be reversed. ***L.W.***

v. B.C.D., 31 ALW (2200520; 2200521), 3/18/2022; Mobile Cty., Hanson; Thompson, Moore, Edwards and Fridy concur; 10 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Modification--Visitation--Contempt--Child Support. CIVIL PROCEDURE: Due Process. The mother and the father were divorced pursuant to a Missouri judgment entered on February 15, 2013. That judgment provided that the parties were awarded the joint custody of their children and the father was required to pay the mother child support in the amount of $879 per month. After the parties relocated to Tennessee, the father successfully petitioned to have his child support reduced to $650 per month. Thereafter, both parties relocated to Morgan County, Alabama. In February 2020, the mother filed a petition to modify the custody award, the father's child support obligation, and the provisions regarding the parties' respective custodial periods. The father filed an answer and counterclaim directed to the custody of the children and the amount of child support. Thereafter, the father filed an amended counterclaim seeking to have the mother held in contempt of court. Just before testimony was taken at the final hearing, the trial court reiterated its understanding of an agreement that the parties had reached about the children giving testimony. The trial court admonished the parties that they should not attempt to "pry" into the testimony given by the children. The mother's counsel advised the trial court that the parties had agreed that the children would testify with the parties not being present. The father's counsel responded, "Just other than [sic] we would invoke the rule and so forth, have all the witnesses other than the parties outside." Three witnesses testified about the father's interactions with the children. Apparently, one of the children, A.J.C., refused to visit with the father. According to the father, the mother had "poisoned" the children against him and had bribed A.J.C. not to visit the father by promising him a car. The mother testified that she encouraged A.J.C. to visit with the father. A.J.C. made a remark at school about firearms and was suspended. A school-resource officer was required to inspect both parents' homes before A.J. C. would be permitted to return to school. The father did not immediately allow this inspection and as a result, A.J.C. was delayed in returning to school. The parties disagreed with the children's medical care. The younger child, C.W.E.C., testified that his father would make him do pushups as a method of punishment. According to C.W.E.C., because he was "scrawny" those push-ups were particularly painful. A.J.C. testified that when he was younger, the father would "beat up" C.W.E.C.. He claimed that his father had violent mood swings and that as a result, he had anxiety problems while visiting with the father. The trial court entered an order awarding the mother the sole legal and sole physical custody of the children. The father's child support was increased to $1,088 per month. The father was awarded "standard visitation" with C.W.E.C.. If the parties are unable to agree, the father is afforded visitation with A.J.C. via telephone two times per week and at any joint-counseling session approved by A.J.C.'s counselor through November 2021. In-person visitation was to increase incrementally thereafter. After the trial court considered and ruled upon each party's post judgment motion, the father appealed. **Affirmed in part; reversed in part.** (1) The father argued that his due process rights were violated because the trial court had conducted an in-camera interview with the children. The mother's counsel represented that the parties had agreed

to this arrangement and the father's counsel did not refute her statement or lodge an objection. Moreover, the father's counsel was present during the children's testimony and "had an ample opportunity to test the veracity of the children's testimony." (2) The father next challenged the trial court's refusal to admit into evidence testimony regarding certain events that had occurred prior to 2017. The father attempted to introduce testimony that A.J.C. had respiratory problems and that those problems were the result of A.J.C.'s living in the basement of the mother's home. The mother's counsel objected, and the trial court asked the father if he had personal knowledge about the living conditions in the mother's home. The father responded negatively, and the trial court sustained the objection. Rule 602, Ala. R. Evid. With regard to other evidence that the father alluded to in his brief as having been improperly excluded, no offer of proof was made at trial. (3) The father argues that the evidence was insufficient to support a change in custody. Because the parties had previously been awarded joint physical custody, the "best interests of the child" standard applies. The court rejected the father's contention that evidence given by A.J.C. was "speculative." It further noted that the father improperly relied upon cases which involved the more stringent burden imposed by *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). (4) With regard to the father's visitation schedule with A.J.C., A.J.C. testified that he had suffered stomach problems, migraines and panic attacks while visiting with the father. Therefore, the trial court acted within its discretion by fashioning a visitation schedule that would afford the father a gradual increase in visitation time. (5) The father argued that insufficient evidence was adduced regarding a change in C.W.E.C.'s custody. C.W.E.C. objected to the father's preferred form of discipline. In addition, evidence was presented that the father had prevented C.W.E.C. from participating in a gifted program and that he opposed the receipt of routine vaccines recommended by the CDC. Based on these factors, the trial court could have concluded that the best interests of C.W.E.C. would be served by an award of sole legal and sole physical custody to the mother. (6) The court addressed whether a material change in circumstances had occurred which would warrant a modification of child support. The modification of the custody of the children warranted the modification of child support. Such a change in custody is "inherently a material change in circumstances." (7) With regard to the amount of child support ordered, the mother testified that she has an annual salary of $22,5000 and that she received additional income of $3,600 per year from that same employer. In addition, the mother takes care of dogs for extra income. In its final order, the trial court calculated the mother's monthly income at $1,900. That amount does not match the amount disclosed by the mother at trial. Moreover, no Form CS-41 "Child Support Obligation Statement/Affidavit" was submitted. "Because we cannot determine how the mother's monthly gross income of $1,900 was calculated, that portion of the trial court's judgment regarding child support is reversed…" (8) Finally, the court addressed the trial court's refusal to find the mother in contempt for withholding custody of A.J.C. from him. There was no evidence that the mother obfuscated the father's ability to visit with A.J.C. and there was evidence that "forced in-person visitation could cause A.J.C. 'adverse psychological damage.'" Therefore, no error was committed regarding the denial of this claim. ***Corbitt v. Corbitt,*** 31 ALW (2200786), 7/22/2022; Morgan Cty., Hanson; Thompson, Moore,

Edwards and Fridy concur, 35 pages. [ATTY: Appt: Jimmy Sandlin, Huntsville; Apee: Brian White, Decatur]

FAMILY LAW: Child Custody--Modification--Jurisdiction--Dependency. APPEAL & ERROR: Mandamus-Timeliness. The parties were never married but had a child who was born in October 2016. In May 2019, a Mississippi court awarded the parties joint legal custody of the child and awarded the father visitation. An award of sole physical custody of the child to the mother was implicit in that judgment. The father was ordered to pay child support. At the time that the Mississippi judgment was entered, the mother lived in Mississippi and the father lived in Birmingham. In March 2020, the mother and father filed a joint motion in the Mississippi court seeking to end the father's child support payments based on the fact that they were living together in Birmingham and were engaged to be married. The mother and the child moved back to Mississippi in September 2020. In March 2021, the mother filed a contempt petition in Mississippi based on the father's failure to return the child to her after his last visitation period. The father was served with the contempt petition, and he then filed a motion to register the Mississippi judgment in the Bessemer Division of the Jefferson Juvenile Court. He also filed a custody-modification petition. In that petition, he alleged that the mother exposes the child to "inappropriate sexual activities, content, and/or pornographic material." The mother filed a motion to dismiss the father's custody-modification petition based on a lack of subject-matter jurisdiction. Alternatively, the mother argued that the father had filed the custody-modification petition in the wrong venue because his home was located in the territorial limits of the Birmingham division. In May 2020, the juvenile court granted the father's motion to register the Mississippi judgment and denied the mother's motion to dismiss the custody-modification action. In so doing, it stated that it was exercising temporary emergency jurisdiction pursuant to §30-3B-204, Ala. Code 1975, which is part of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"). The juvenile court then ordered that the Jefferson County Department of Human Resources ("DHR") be made a party to the action and that it conduct an investigation. The mother was awarded supervised visitation. In September 2021, the mother filed a second motion to dismiss the custody-modification action based on lack of subject matter jurisdiction and improper venue. The juvenile court denied that motion and the mother filed a petition for a writ of mandamus. **Writ of mandamus granted in part and denied in part.** (1) The court first addressed the timeliness of the mother's petition. The presumptively reasonable time period for filing a petition for a writ of mandamus is the same as the time for taking an appeal. In juvenile cases, that time period is 14 days. The mother's first motion to dismiss asserted the same grounds as her second motion to dismiss and it was denied on May 25, 2021. The father argued that the mother's time for filing for mandamus relief ran from that date and thus, her petition was untimely. With regard to the mother's venue challenge, the court agreed. Her failure to file for mandamus relief from the May 2020 order resulted in a waiver of that issue and her filing of the second motion to dismiss did not "reset" the clock. (2) However, the court was not precluded from reviewing the mother's challenge to the trial court's denial of her motion to dismiss based on her contention that it lacked subject-matter jurisdiction. A lack of subject-

matter jurisdiction can be raised at any time. The mother and the child reside in Mississippi and the Mississippi court previously made a child custody determination. Therefore, Mississippi is the home state of the child and Mississippi retains exclusive, continuing jurisdiction over its previous custody determination under its version of the UCCJEA. Section 30-3B-204 allows a "court of this state" to exercise temporary emergency jurisdiction if it is necessary for the court to protect the child from mistreatment or abuse. Section 30-3B-102(6) defines "court" as "[a]n entity authorized under the law of a state to establish, enforce, or modify a child custody determination." A juvenile court in this state has "exclusive original jurisdiction" over dependency matters. §12-15-114(a), Ala. Code, 1975. Here, the father did not expressly allege dependency, but the allegations of his complaint could potentially support an allegation of dependency. However, §12-15-114(a) further states: "[a] dependency action shall not include a custody dispute between parents." "The primary relief the father seeks in his action against the mother in the juvenile court--a modification of the Mississippi chancery court's award of physical custody to the mother--plainly renders the father's action the quintessential 'custody dispute' between parents, over which the juvenile court cannot exercise dependency jurisdiction." The court recognized that there is "tension" in our caselaw and cited that prior precedent. It overruled *T.K. v. M.G.,* 82 So.3d 1 (Ala. Civ. App. 2011) and its progeny. In so doing, it adopted Judge Moore's rationale contained in his dissent in that case. The phrase "custody dispute between parents" in §12-15-114(a) refers to a legal contest between parents for the custody of their child and it explicitly excludes such disputes from a juvenile court's jurisdiction. (3) A juvenile court can also exercise jurisdiction when "an equivalent court of another state issued an order." §12-15-115(a)(9). However, the original custody determination was made by a Mississippi chancery court which is the equivalent of an Alabama circuit court. Therefore, the juvenile court in this case lacked jurisdiction over the father's custody-modification action because it did not qualify as a "court of this state" under the UCCJEA. However, instead of dismissing the case, §12-11-1 requires the juvenile court to transfer the case to the circuit court--which is the proper court where the action should have been filed. Accordingly, the petition for a writ of mandamus is issued with instructions that the juvenile court transfer the case to the circuit court to consider whether it can exercise temporary emergency jurisdiction over the action pursuant to §30-3B-204. ***Ex parte T.M. (J.D. v. T.M.)***, 31 ALW (2201010), 01/28/2022, Jefferson Cty.; Fridy, Moore, Edwards, and Hanson concur; Thompson concurs in part and dissents in part, with writing. 29 pages. [ATTY: Not listed-Confidential]

FAMILY LAW: Custody--Name Change. CIVIL PROCEDURE: Postjudgment Motion--New Evidence. The mother and the father were never married. The mother became pregnant while she was still in high school, and the child was born in February 2019. About a week later, the father's parents, on the father's behalf, filed a complaint in the Jefferson Circuit Court alleging that that mother and father were both minors and that the mother intended to place the child for adoption. The father's parents sought to enjoin the adoption and requested custody of the child. The motion for a restraining order was denied and the case was transferred to the juvenile court. In August 2019, the juvenile court ordered DNA testing and the mother's parents

and the father's parents were dismissed from the action, inasmuch as the mother and the father were no longer minors. The father filed a second amended complaint in which he sought an award of custodial time and an order changing the child's surname from the mother's to his. The disposition of this case was delayed by the COVID-19 pandemic. On January 11, 2021, the juvenile court entered an order in which it adjudged the father as the legal father of the child, ordered that the father's name be added to the child's birth certificate, required the father to pay child support and awarded him visitation. It reserved the issues of custody and the requested name change. The father was the only witness at trial, and he testified that he was a student at a university in Vermont. His testimony was contradictory as to when he found out that the mother was pregnant. The father testified that he wanted the child's surname to be changed because he was the child's father and because he wanted to be in the child's life. The guardian ad litem recommended that the child's surname be changed because the child was of such an age that it would not have any negative impact. The guardian ad litem also recommended that the parties share joint legal custody of the child with the mother maintaining sole physical custody. The juvenile court entered an order awarding the parties the joint legal custody of the child with the mother having sole physical custody. It also found that it was in the child's best interest to change the child's surname from the mother's to the father's. After her post judgment motion was denied by operation of law, the mother appealed. **Affirmed in part; reversed in part.** (1) Pursuant to §26-17-636(e), Ala. Code 1975, "[o]n request of a party and for good cause shown, the court may order that the name of the child be changed." However, a parent seeking to change a child's name must present evidence showing that the change would benefit the child in some positive manner. *J.M.V. v. J.K.H.,* 149 So.3d 1100 (Ala. Civ. App. 2014). Here, the father's reasons for seeking a name change did not demonstrate that such a change would promote the child's interest as opposed to his own. Moreover, the guardian ad litem's position that a name change would not negatively impact the child was rejected in *J.M.V.* wherein the court concluded that such a standard "would essentially place the burden on the nonmoving parent to prove that the requested name change would harm the child instead of placing the burden on the petitioning parent to prove that the name change will benefit the child, as §26-17-636(e) contemplates." *Id.* at 1106. This portion of the juvenile court's judgment is due to be reversed. (2) The mother also challenged the juvenile court's award of joint legal custody. The mother claimed that insufficient evidence was presented to show that such a custody award was warranted. However, "she fails to explain why a dearth of evidence relating to [the factors to be considered for joint custody] should result in an award of sole custody of the child to her." The mother sought to rely on evidence about social media posts made by the father after the trial took place which was attached to her post judgment motion. However, that evidence would constitute "new evidence" and was not properly before the juvenile court. This portion of the juvenile court's judgment is due to be affirmed. ***K.G. v. M.E.,*** 30 ALW (2200716), 12/3/2021, Jefferson Cty., Fridy; Thompson, Moore, Edwards and Hanson concur, 15 pages. [ATTY: Not listed-confidential]

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: 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]

III. Visitation

CIVIL PROCEDURE: Default Judgment--Due Process. APPEAL & ERROR: Preservation of Issue--Waiver. FAMILY LAW: Division of Property--Visitation. The husband filed a divorce action against the wife in October 2016 to which the wife filed an answer and counterclaim. The trial of this action was rescheduled numerous times. In February 2020, the March 4, 2020 trial was continued on the motion of the wife because the husband's attorney had been arrested. In September 2020, the trial court entered an order noting that the husband's attorney was "not presently practicing law" and it directed the husband to obtain new counsel within thirty days. That order also stated that notice of any future hearings would be sent to the husband's home address. A trial took place on March 2, 2021, at which the husband failed to appear. The trial court entered an order on March 9, 2021, divorcing the parties, dividing the marital property, awarding sole physical custody of the parties' three children to the wife and awarding the husband visitation at all reasonable times agreed upon by the parties. The husband was also required to pay child support. On March 10, 2021, a new attorney entered a notice of appearance for the husband, and he also filed a post judgment motion. The husband's March 10,

2021, post judgment motion was denied by operation of law on June 8, 2021. On June 16, 2021, the husband filed a notice of appeal. **Affirmed.** (1) The husband first argued that the trial court erred by denying his post judgment motion because he was denied an opportunity to be heard. In his post judgment motion, the husband asserted that he was unaware of the trial date. However, on January 27, 2021, the action was set for trial on March 2, 2021, and the notice was provided to the parties electronically. On February 22, 2021, an entry made on the case-action summary indicates that notice of the March 2021 trial date was sent to "all parties." Finally, the husband failed to submit any evidence that supported his allegation that he was not provided notice of the trial date. "Given the number of years this action had been pending, the numerous opportunities the trial court afforded the husband to obtain a new attorney, and the notice of the March 2, 2021, trial that the case-action summary indicates was provided in this case, the husband has not demonstrated that the trial court denied him an opportunity to be heard." (2) The husband asserts that the trial court erred by allowing his post judgment motion to be denied by operation of law without making findings regarding the factors set forth in *Kirtland v. Fort Morgan Authority Sewer Systems, Inc.,* 524 So.2d 600 (Ala. 1988). In deciding whether to set aside a default judgment, a trial court must consider: (a) whether the defendant has a meritorious defense; (b) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and (c) whether the default judgment was the result of the defendant's own culpable conduct. "However, in order to trigger the mandatory requirement that the trial court consider the *Kirtland* factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the *Kirtland* factors." In his post judgment motion, the husband did not allege that he had a meritorious defense or that the wife would be unfairly prejudiced if the March 9, 2021 judgment was set aside. Therefore, the trial court's duty to analyze the *Kirtland* factors was never triggered. (3) The husband challenged whether the division of marital property was equitable. However, the wife did not present evidence as to the value of any of that property and therefore, the appellate court cannot determine if the division of that property was equitable. (4) The husband sets forth a two-sentence argument regarding the trial court's award of visitation. Because that issue was not raised at the trial court level, it is not subject to appellate review. "We note, however, that an award of visitation is always subject to modification and, therefore, that the husband could seek to modify the visitation award in a separate action." (5) Judge Edwards authored a separate writing in which she dissented from that portion of the main opinion that affirms the portion of the trial court's order regarding visitation. It is well-settled that a visitation order awarding visitation with the children at the discretion of the custodial parent should not generally be allowed because it authorizes the custodial parent to deny visitation altogether which would not be in the best interests of the children. "The record is devoid of evidence indicating that the best interests of the children would be served by an award of visitation at the sole discretion of the wife." ***Dubose v. Dubose,*** 31 ALW (2200737), Sumter Cty., Thompson; Moore, Hanson and Friday concur; Edwards concurs in part and dissents in part, with opinion, 17 pages. [ATTY: Appt: Nettie Blume, Northport; Apee: J. Perry Newton, Butler]

FAMILY LAW: Visitation. The mother and father are the unmarried biological parents of a 4-year-old child. In March 2018, the juvenile court entered an order awarding the mother sole legal and physical custody of the child. The father was awarded limited visitation which had to be supervised by the father's grandparents. According to the order, the father's visitation was to "progress to be unsupervised" after the child reached the age of 12 months. Moreover, the parties were ordered to follow the juvenile court's standard "restricted visitation with child under the age of three years". According to the father, he began exercising unsupervised visitation with the child when the child was 2 years old and the parties agreed that as the child grew older, the father began having increased periods of visitation, including visitation every other weekend. In February 2021, the mother filed a petition seeking to suspend the father's visitation, asserting that the child had told her that the father had touched her inappropriately. The mother notified the Marshall County Department of Human Resources. A DHR social worker testified that DHR opened an investigation but found the allegations to be "not indicated." Moreover, the Child Advocacy Center ("CAC") became involved in this matter and determined that they could not help the child. The mother continued to allow the child to visit the father until December 2020, when she claimed that the child made yet another disclosure. At that point, the mother would only allow the father to exercise supervised visitation. The father had only seen the child three times thereafter. In November 2021, the juvenile court entered an order establishing a supervised visitation schedule for the father that graduated to standard unsupervised visitation as of July 2022. The mother appealed. **Reversed.** On appeal, the mother argued that the juvenile court improperly permitted the father to have unsupervised visitation after the passage of a set amount of time without any basis in so doing. In support of her argument, the mother relied upon *Long v. Long,* 781 So.2d 225 (Ala. Civ. App. 2000). In that case, the trial court entered a judgment granting the mother supervised visitation for 6 months after which visitation was automatically modified to unsupervised. No conditions or obligations were imposed on the mother during that 6-month time period. The court reversed the trial court's judgment, holding that the automatic modification of visitation was not supported by any evidence nor was the change in visitation based upon a change in circumstances to warrant such a modification. In this case, the father's visitation was supervised for 6 months. limited in time for 3 months and then changed to standard visitation. However, the judgment does not indicate the trial court's rationale for the expansion of the father's visitation rights nor does it explain what circumstances would change during that time period which would warrant a modification. Accordingly, the judgment of the trial court is due to be reversed. ***R.N.C. v. A.V.P.,*** 31 ALW (2210189); 7/29/2022; Marshall Cty., Fridy; Thompson, Moore and Hanson concur; Edwards concurs in the result, without opinion, 12 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Visitation--Contempt--Attorney Fees. EVIDENCE: Prior Bad Acts--Statement Against Interest. In January 2017, the mother filed a no-fault divorce against the father. In February 2017, the father was arrested for second-degree rape, second-degree sodomy, third-degree burglary and for violating §13A-6-91, Ala. Code 1975, which prohibits a school employee from engaging in a sex act with a student under the age of 19. These charges stemmed

from allegations that the father, who was 29 years old and employed as a public-school teacher, had crawled through the window of a 15-year old female student, K.B., and had engaged in sexual intercourse with her. On April 5, 2017, the trial court entered a divorce judgment which incorporated an agreement of the parties. Pursuant to that judgment, the mother was awarded the sole legal and sole physical custody of the parties' minor child. Visitation was ordered to be exercised as agreed upon by the parties. In 2018, the father filed a petition seeking to modify his visitation with the child. The parties entered into a settlement agreement pursuant to which the father was awarded visitation every other Sunday from 2:00 p.m. until 5:00 p.m. in Cullman. Gene Aiken or anyone mutually agreed upon by both parties was designated to serve as the supervisor of the father's visitation. The criminal charges against the father were dropped in February 2019 based on the father's motion for a mistrial based on prosecutorial misconduct. In October 2019, the father filed a petition for modification and for a rule nisi. He requested that the trial court award him standardized, unsupervised visitation and to find the mother in contempt for withholding visitation from him. He also sought an award of joint legal custody. The mother filed an answer and a counterpetition in which she sought an increase in child support and the award of an attorney fee. At trial, the mother testified that during the pendency of the original divorce action, she did not seek to suspend the father's visitation with the child because she did not believe the accusations against him. In late August 2017, the father admitted to the mother that the alleged criminal charges were true and that he had had intercourse with K.B.. Thereafter, she stopped allowing the father to visit with the child until she agreed to supervised visitation in October 2018. With regard to those visits, Aiken would pick up the child from the mother's house and drive him to visitation. He continued to do so for approximately a year but during that time, some of the visitations did not take place due to Aiken's unavailability. When Aiken informed the parties that he could no longer supervise, the mother would not suggest a different supervisor. However, the mother requested that DHR supervise the visits and ultimately agreed to another third-party supervisor. Both the mother and her new husband testified that the child was anxious after visiting with his father. The current third-party supervisor testified that the father had inappropriate conversations with the child during his visitation periods. The father is remarried and has a two-year old daughter and a stepdaughter. According to the father, he and the mother had sexual relations during the summer of 2017 when the mother had started dating her new husband. The father claims that the mother stopped permitting the father to visit the child after he told her new husband about their sexual encounters. The father denied having sexual relations with K.B. but K.B. disputed this testimony. She explained that she had known the father since she was four years old and that he was a leader in her church. K.B. further testified that the father entered her bedroom through a window and that they then had sexual intercourse five times. The father discussed running away and marrying K.B.. On February 8, 2021, the trial court entered a judgment in which it found that "any further contact between [the father] and the [child] would be detrimental to the health, safety and well-being of [the child] based on the prior conduct of [the father]." The trial court terminated the father's visitation and contact with the child, increased the father's child support

obligation and required the father to pay $2,443.50 of the mother's attorney fee. After his post judgment motion was denied, the father appealed. **Affirmed in part; reversed in part.** (1) During the trial of this modification action, the father sought to suppress any evidence regarding the prior criminal charges against him, the conduct resulting in those charges and his video-recorded statement made to law enforcement officials. The trial court denied that motion and allowed the evidence to be presented. On appeal, the father challenged this admission. During the criminal case, the trial court denied admission of the father's statement because the State failed to prove that the father had waived his right to remain silent and his right to counsel. The court determined that the trial court in the modification action did not abuse its discretion by admitting evidence regarding the father's criminal charges. "The dismissal of the criminal charges against the father…did not establish, as a matter of law, that the father did not commit the acts in question." Here, the criminal charges were dismissed because of a purported violation of the father's constitutional rights, not because he did not commit the offenses. The court further noted the lesser burden of proof in the civil action-preponderance of the evidence--as compared to proof beyond a reasonable doubt in the criminal case. (2) The court next turned to the admission of the father's video-recorded statement made by law enforcement officers. However, the fact that the statement was suppressed during the criminal trial does not foreclose its admission in the modification action. The video-recorded statement at issue here constituted a declaration against interest and was properly admitted. (3) The court further rejected the father's argument that the probative value of the evidence regarding his prior criminal charges was outweighed by its unfair prejudice. Evidence may be precluded under Rule 403, Ala. R. Evid. if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues. or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, the trial court was charged with determining the best interests of the child. Implicit in such a determination is the character of the father and his influence upon the child. The father's prior conduct with regard to other children was relevant to that determination. (4) With regard to his request for increased visitation, the father was charged with proving that a material change in circumstances had taken place since the October 2018 judgment and that a modification would serve the best interests of the child. Although the father pointed to such circumstances as the dismissal of the criminal charges and his remarriage and stable employment as material changes in circumstance, the court rejected that argument. "The father expressed no remorse that he--as a father, a church leader, and an educator--had engaged in conduct that manipulated a child and had harmed her." Moreover, although he may be a good parent to his new child, evidence was adduced that his conversations with the parties' child cause the child to experience anxiety. Based on *the ore tenus* standard, the trial court's determination that no material change in circumstance warranting a change from supervised to unsupervised visitation had occurred is not plainly and palpably wrong. (5) The father next challenged the termination of his visitation rights. The fact that the mother did not file a counterclaim seeking such a termination is not dispositive; that issue was tried by the implied consent of the parties. However, the mother bore the burden of proving that

the father's conduct negatively impacted the child. She failed to do so. No evidence was presented that the father had harmed the child or that continuing the father's supervised visitations would harm the child. Accordingly, this portion of the trial court's order is due to be reversed. (6) The court rejected the father's argument that the trial court erred by failing to hold the mother in contempt for failing to facilitate visitation. In so doing, it noted that evidence was presented that the father's visitations were missed largely based on the unavailability of the supervisor. (7) Finally, the court addressed the propriety of an award of an attorney fee to the mother. The mother was the prevailing party in this action and the father "had refused to recognize that his conduct caused the strain on his relationship with the child and that the mother had acted in the best interests of the child." This portion of the trial court's judgment is due to be affirmed. (8) Presiding Judge Thompson authored a writing which was joined by Judge Hanson. In that writing, Judge Thompson opined that "[t]he record in this case contains ample evidence from which the trial court could have concluded that visitation with the father is not in the child's best interests and that no less restrictive option is available." He pointed to the father's past conduct regarding K.B. and noted that the trial court could have inferred that the child was not harmed by the father's conduct because of the "mother's instinct to protect the child by telling the child that the father was at work instead of incarcerated." ***Cantrell v. Cantrell,*** 31 ALW (2200590), 5/6/2022; Winston Cty., Per Curiam; Moore Edwards and Fridy concur in the result, without opinions; Thompson concurs in part and dissents in part, with opinion, which Hanson joins, 88 pages. [ATTY: Stella Wennberg, Winfield; Apee: Richard Turner, Tuscaloosa]

FAMILY LAW: Visitation--Contempt. On February 17, 2011, the juvenile court entered an order finding the child to be dependent and awarding the father the sole legal and sole physical custody of the child. The mother was awarded visitation each Wednesday and alternate Sundays at specified times. The 2011 order also stated that when the mother's "home life stabilized" she could petition for additional visitation without having to pay a filing fee. In November 2020, the mother filed a petition seeking to modify her visitation award. In March 2021, the mother filed an amended petition, asserting that the father had failed to allow her to visit with the child as set forth in the 2011 order. After a trial, the juvenile court denied the mother's petition to modify visitation as well as "all other relief" sought. The date of that order was July 2, 2021. The mother filed a post judgment motion on July 9, 2021. On July 29, 2021, the juvenile court entered an order which purports to find the child to no longer be dependent, to relinquish further jurisdiction and to modify the mother's visitation award. The mother filed a notice of appeal on August 3, 2021. (2200869), On October 13, 2021, the father filed a motion in the appellate court seeking leave to file a Rule 60(b) motion in the juvenile court. The appellate court granted that motion, and the father filed his Rule 60(b) motion, arguing that the juvenile court's July 29, 2021 post judgment order was void for lack of jurisdiction. The juvenile court denied that motion and the father appealed (2210104). **Mother's appeal affirmed; father's appeal reversed.** (1) The court first considered the denial of the father's Rule 60(b) motion. The mother's July 9, 2021, post judgment motion was denied by operation of law on July 23, 2021. Rule 1(B), Ala. R. Juv. P.. After that date, the juvenile court was without jurisdiction to enter any post judgment order.

Because the post judgment order was entered on July 29, 2021, it is a void order. "We therefore reverse the juvenile court's October 26, 2021 order and remand the cause with instructions that the juvenile court grant the father's Rule 60(b)(4) motion and vacate its July 29, 2021, post judgment order." (2) With regard to the mother's appeal, the father testified that he curtailed the mother's visitation with the child in June 2020 after the child used a vaping device he obtained from the mother. He also presented evidence that the mother told the child to lie to DHR with regard to the vaping. The mother was married, and her husband was arrested for illegal possession of testosterone in 2020; the child was present for that arrest and for the execution of a search warrant. The child was 13 years old and testified that he felt himself to be in danger with the mother's husband. The mother's husband drinks in the presence of the child and the child testified that this "bother[s] him." The mother argued that the juvenile court erred in denying her petition to modify visitation. In order to modify a visitation judgment, there must be a material change in circumstances and a showing that the modification would serve the child's best interests. With regard to a material change in circumstances, the mother pointed to the age of the child, the fact that she now had other children (two of whom were in her physical custody), her remarriage, her purchase of a residence and the fact that the father had allowed her to have expanded visitation before the vaping incident. The court cited the testimony of the child regarding the mother's husband, the vaping incident, the mother's suggestion that the child lie to DHR and her husband's arrest. "Even assuming the mother is correct that a material change of circumstances has occurred, the juvenile court could have determined from the evidence presented that a modification of the visitation award was not in the child's best interest." (3) The mother also challenged the trial court's failure to find the father in contempt. At trial, the father's counsel argued that he could not be held in contempt because no "nisi order providing…the potential term of incarceration and/or fines" had been entered. Based on that argument, the mother abandoned her claim for criminal contempt. With regard to civil contempt, the mother only cited to one case which did not involve the denial of visitation based on safety concerns. "The mother fails to cite any authority in which this court has reversed a judgment denying a motion for contempt with circumstances similar to those existing in the present case." Moreover, visitation matters are left to the sound discretion of the trial court and the appellate court cannot substitute its judgment for that of the juvenile court. The juvenile court's judgment is due to be affirmed. ***B.W. v. S.S.,*** 32 ALW (2200869; 2210104), 02/18/2022; Marshall Cty., Moore; Thompson, Edwards, Hanson and Fridy concur; 20 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Grandparent Visitation. CIVIL PROCEDURE: Guardian ad Litem Fee--Costs. The mother and the father had a child in 2017. After her birth, the child visited with the paternal grandmother frequently until the father filed for divorce. In early 2019, the mother filed a protection-from-abuse ("PFA") petition against the father and a PFA order was entered which prohibited the mother from communicating with the father. The father was awarded supervised visitation with the child which the paternal grandmother facilitated. The father died on August 6, 2019. After the father's death, the mother still allowed the child to visit with the paternal grandmother until October 2019 when the visitation stopped. In July 2020, the

paternal grandmother filed a petition seeking grandparent visitation privileges. The paternal grandmother sought and was awarded pendente lite visitation. At a final hearing, the paternal grandmother testified that she has two living children, ages 18 and 12. According to her, the child had visited with her regularly until the paternal grandmother made contact with the father's girlfriend and his child with that girlfriend who was born shortly after the father died. The mother testified that the paternal grandmother had "abandoned" the child after the birth of the child's half-sibling. The mother expressed concerns about the child's safety while in the care of the paternal grandmother, claiming that she drank alcohol and drove at high speeds with the child as a passenger. The trial court entered a judgment awarding the paternal grandmother visitation with the child for certain overnight visits and holidays. Each party was also required to pay $600 of the guardian ad litem's attorney fee. After her post judgment motion was denied, the mother appealed. **Reversed.** (1) On appeal, the mother did not challenge the trial court's determination that the paternal grandmother had established a significant and viable relationship with the child as required by §30-3-4.2(c)(1),Ala. Code 1975. Rather, she argued that the paternal grandmother failed to present clear and convincing evidence that "the loss of an opportunity to maintain a significant and viable relationship between [the paternal grandmother] and the child has caused or is reasonably likely to cause harm to the child." §30-3-4.2(e)(2). Pursuant to that code section, there is a rebuttable presumption that a fit parent's decision to deny or limit visitation with a grandparent is in the best interest of the child. That presumption may be rebutted if a grandparent can prove that actual or reasonably expected harm will befall the child in the absence of court-ordered grandparent visitation. Here, "ample evidence" was presented regarding the beneficial effect of a relationship between the paternal grandmother and the child. "No evidence, however, was presented that the child would suffer harm, as defined in §30-3-4.2(a)(2), if the child's relationship with the paternal grandmother was limited or terminated." Accordingly, the judgment of the trial court is due to be reversed. (2) The mother also challenged the assessment of a portion of the guardian ad litem's attorney fee against her. Pursuant to Rule 17(d), Ala. R. Civ. P., a guardian ad litem fee is to be taxed as part of the costs. Generally, costs are taxed against to the prevailing party, but a trial court may direct otherwise at its discretion. "Because we are reversing the trial court's judgment awarding the paternal grandmother visitation, we also reverse the trial court's award of the guardian ad litem's fee and remand the case for the trial court to reassess the award of the guardian ad litem's fee considering this court's holding." ***Barkley v. Gulledge,*** 31 ALW (2210174); 6/30/2022; St. Clair Cty., Thompson; Moore, Edwards, Hanson and Fridy concur; 15 pages. [ATTY: Appt: Charles Dunn, Birmingham; Apee: Meg Clements, Pell City]

FAMILY LAW: Grandparent Visitation. In November 2020, the paternal grandmother filed an action in circuit court seeking an award of grandparent visitation with her granddaughter who was born in 2006 during the marriage of the father and the mother. The father and the mother were divorced in February 2020 and the mother had been awarded sole physical custody of the child. After a *pendente lite* hearing, the trial court entered an order finding that the paternal grandmother "had met her burden of proof in establishing grandparent-visitation privileges" and

she was awarded *pendente lite* visitation. On May 17, 2021, the trial court entered a judgment finding that the parties had stipulated that the paternal grandmother had met her burden and it awarded the paternal grandmother scheduled visitation. After her post judgment motion was denied, the mother appealed. **Reversed.** Section 30-3-4.2, Ala. Code 1975 is applicable to grandparent visitation. Pursuant to §30-3-4.2(f), a trial court must make specific written findings of fact in support of its rulings in grandparent visitation cases. In this case, the only arguable factual finding made by the trial court was that the parties had stipulated that the paternal grandmother had met her burden. Because the trial court's judgment does not set forth the requisite findings of fact, the judgment of the trial court is due to be reversed. All other arguments are pretermitted. ***East v. Adkins,*** 31 ALW (2201052), 5/6/2022; Talladega Cty., Thompson; Moore, Edwards, Hanson and Fridy concur; 7 pages. [ATTY: Appt: S. Dale Price, Sylacauga; Apee: Steven Adcock, Talladega]

IV. DIVISION OF PROPERTY-

CIVIL PROCEDURE: Unjust Enrichment-Conditional Gift. Terrell Hattaway and Valerie Coulter were involved in a romantic relationship for several years. Throughout the relationship, Hattaway gave Coulter numerous gifts. Hattaway testified that those gifts were unconditional gifts and that he had had no expectation of their return. On December 24, 2018, Hattaway presented Coulter with a diamond ring, valued at $32,000. According to Hattaway, he proposed at the same time. Coulter denied that a proposal accompanied the gift. Nine months later, the parties broke off their relationship. Hattaway did not ask for the ring back until November 2019. Instead of returning the ring, Coulter sold it for $10,000. In March 2020, Hattaway filed a complaint against Coulter, alleging claims of conversion and intentional infliction of emotional distress. That complaint was later amended to include a claim alleging unjust enrichment. Coulter filed a motion to dismiss, arguing that Hattaway's conversion claim should be dismissed because the engagement ring was a gift and, therefore, Hattaway could not prove that she had exercised dominion and control over his property. She further argued that Hattaway's intentional infliction-of-emotional-distress claim should be dismissed because that claim rested upon Hattaway's emotional hurt caused by the ending of the romantic relationship. With regard to Hattaway's unjust-enrichment claim, Coulter maintained: "The engagement ring at issue in this case was a gift from [Hattaway] to [Coulter]. " The trial court granted the motion to dismiss as to the conversion and intentional infliction of emotional distress claims but conducted a bench trial as to the unjust-enrichment claim. It then entered a judgment in favor of Coulter. After his post judgment motion was denied, Hattaway appealed. **Reversed.** (1) The court first considered whether, as a matter of law, an engagement ring is a conditional gift. The court looked to case law from other jurisdictions and concluded: "when a donor gives an engagement ring, i.e., a ring in contemplation of marriage, the engagement ring is a conditional gift." Until the condition underlying the gift--the parties' contemplated marriage--takes place, the attempted gift is unenforceable, and it must be returned at the donor's request. Accordingly, Hattaway is entitled to the return of the ring. (2) The court rejected the argument that Hattaway had waived his right

to the return of the ring by waiting 2 1/2 months before requesting it back. "When an engagement ends, the person who did not initiate the end of the relationship might be emotionally distraught and need time to adjust to the new circumstances or be hoping for a reconciliation. Requiring the donor to demand the return of the ring during or immediately after the relationship ends seems unduly harsh and unnecessary." (3) With regard to Hattaway's unjust enrichment claim, whether such a claim is a proper means for a donor to recover an engagement ring is an issue of first impression. The court determined that it was. In order to prevail on a claim for unjust enrichment, the plaintiff must show: (a) the donor acted under a mistake of fact or in misreliance on a right or duty; and (b) the recipient engaged in some unconscionable conduct, such as fraud, coercion or abuse of a confidential relationship. "Here, the evidence unequivocally establishes that, after the engagement ended, Coulter refused to return the engagement ring or its value, which in equity and good conscience belonged to Hattaway." Hattaway met his burden of proving that Coulter had been unjustly enriched at his expense. ***Hattaway v. Coulter*** 30 ALW (2200502), 12/17/2021, Baldwin Cty.; Thompson, Moore, Edwards, Hanson, and Fridy, concur. 23 pages. [ATTY: Appt: Tina Moon, Prattville; Apee: Abner Powell, Gulf Shores]

FAMILY LAW: Division of Property--Child Custody. APPEAL & ERROR: Preservation of Issues. CIVIL PROCEDURE: Postjudgment Motion--Hearing. The parties were married for approximately two years prior to their separation. One child was born during the marriage; she was two years old at the time of the divorce trial. The husband claimed that the wife's behavior became increasingly erratic during the parties' marriage. The wife claimed that she suffered from postpartum depression for which she had successfully obtained treatment. According to the wife, the major cause of the breakdown of the parties' marriage was the husband's work schedule, the demands of the husband's family and his controlling behavior. Both parents claimed to be the primary caregiver of their child. A woman who was hired by the parties to assist in childcare testified that the husband was more involved in the child's day-to-day care than was the wife. The husband testified that when the child became school-aged, he wanted to enroll her in private school and that he was willing to pay the tuition. Each party asked that the other be required to maintain life insurance for the benefit of the child in the amount of $200,000. The husband wanted that obligation to continue until the child reached the age of 22; the wife wanted it to end when the child turned 19. The wife wanted the trial court to order the husband to return to her the engagement ring that the husband had given her when he proposed, or in the alternative, to award her the value of the ring. The husband testified that the engagement ring was a family heirloom. The husband has a separate business that owns seven rental properties. Four of the properties were acquired during the marriage; one was a gift from the husband's mother. The marital residence was purchased prior to the marriage. At the time of the divorce hearing, the husband testified that the fair market value of the marital residence was $97,000; the outstanding mortgage indebtedness was $85,936. The trial court entered a judgment in which it awarded the parties the joint legal and joint physical custody of the child. The husband was ordered to pay $500 per month in child support and to pay the child's private

school tuition. The parties were ordered to divide equally the child's non-covered medical expenses, day care and school expenses other than tuition as well as all agreed-upon extracurricular activity expenses. The trial court awarded the marital residence and the rental properties to the husband and awarded the wife $10,000 for her equitable interest therein. Each party was required to maintain $200,000 in life insurance until the child reaches the age of 22. All other relief was denied. After her post judgment motion was denied without a hearing, the mother appealed. **Affirmed in part; reversed in part.** (1) The wife first challenged the trial court's failure to conduct a hearing on her post judgment motion. Generally, it is error for a trial court to fail to hold a hearing on a post judgment motion if such a hearing is requested. However, that error is harmless if there was no probable merit to the post judgment motion or where the appellate court resolved the issues presented, as a matter of law, adversely to the appellant. In her appeal, the wife argued, in pertinent part, that the trial court exceeded its discretion by requiring the parties to maintain life insurance until the child was 22 years old; that it impermissibly deviated from Rule 32, Ala. R. Jud. Admin. without setting forth its reasons, by ordering the parties to equally divide the child's extracurricular activity expenses, educational expenses and noncovered medical expenses and by failing to award the wife a portion of the husband's retirement benefits that had accrued during the marriage. However, these arguments were not specifically raised in the wife's post judgment motion. "Because this court may not hold a trial court in error with regard to grounds not presented to that court…we cannot hold that the trial court erred by refusing to conduct a hearing on grounds that were not presented in the wife's post judgment motion." Any error by the trial court in failing to conduct a hearing on the wife's post judgment motion was harmless. (2) The wife next challenged the trial court's award of joint physical custody of the child. Based on the ore tenus standard, this portion of the trial court's judgment is due to be affirmed. Evidence was presented that both parties love the child and conflicting evidence was presented as to which parent served as the child's primary caregiver. (3) The court next examined the division of real and personal property. With regard to the former marital residence, evidence was presented that the husband purchased that property prior to the marriage and that since its purchase, the value of that residence had only increased by $1,000. Moreover, the marital residence had only been used for the common benefit of the parties for two years. Based on this evidence, the trial court did not err by failing to award the wife an equitable interest in the marital residence. With regard to the husband's rental property business, the wife claimed that the net equity in those properties was $30,640 and that the $10,000 award to her for her marital interest in said properties was inequitable. However, a property division does not have to be equal in order to be equitable. Because the wife's arguments regarding the division of property did not have probable merit, the trial court did not err by failing to hold a hearing on these grounds. (4) "We, however, cannot conclude, as a matter of law, that the trial court did not exceed its discretion with regard to its determination of the ownership of the engagement ring." The wife repeatedly asserted that the engagement ring was her separate property. After the wife filed her appeal, the court issued its opinion in *Hattaway v. Coulter,* [Ms. 2200502, Dec. 17, 2021] ___ So.3d ___ (Ala. Civ. App. 2021), in

which it determined, as a matter of law, that an engagement ring is a gift conditioned upon the fulfillment of marriage. "Although neither this court nor our supreme court has directly addressed whether an engagement ring is considered to be the wife's personal property or is considered to be marital personal property subject to division, based on our holding in *Hattaway,* supra, we determined [sic] that the evidence in the record clearly established that the engagement ring is the wife's personal property and that the trial court exceeded its discretion by awarding the engagement ring to the husband." Accordingly, this portion of the trial court's judgment is due to be reversed and the case remanded for the trial court to conduct a hearing and either award the engagement ring to the wife or award her the value of that ring. ***Burkett v. Burkett,*** 31 ALW (2200720); 5/6/2022; Butler Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 36 pages. [ATTY: Appt: Jacquelyn Wesson, Warrior; Apee: John Henig, Jr., Montgomery]

FAMILY LAW---Division of Property. The parties were married on June 28, 2014, and they separated in December 2015. In 2008, the wife purchased the land upon which the parties' marital residence was later built; she paid $108,000 for it. Between 2008 and 2012, the wife spent an additional $128,000 building what would later become the marital residence. Shortly after the parties married, the wife conveyed an ownership interest in the marital residence to the husband and the deed provided that the marital residence was held jointly, with the right of survivorship. The wife owned and operated an antique business and the husband owned and operated an automotive repair business. At some point, the parties decided they wanted to relocate their respective businesses to a joint location. The parties co-signed for a $13,200 loan and the wife maintained that she made most of the payments thereon. The parties moved into the marital residence in March 2015 and according to the wife, the husband did not work for the next nine months, and she paid most of the household bills. In December 2015, the husband got into a physical altercation with a neighbor for which he was arrested and charged with a crime. The wife separated from the husband, claiming that she was afraid of him. She filed for divorce while the husband was in jail; upon his release, he moved in with his former wife. An appraisal of the marital residence from 2017 established its value at $85,000. The tax assessor's office valued the property at $108,000 in 2017 and $99,000 in 2018. The case was tried in October 2019, but no ruling was made until almost a year later. The divorce judgment provided that the marital residence be sold, with each party receiving 50% of the net sales proceeds. In the alternative, the wife could keep the property and pay the husband 50% of its fair market value. After her post judgment motion was denied by operation of law, the wife appealed. **Reversed.** Section 30-2-51(b)(1) , Ala. Code 1975 provides that "[t]he marital estate is subject to equitable division and distribution." The purpose of equitable division and distribution is to give "each spouse the value of [his or her] **interest in the marriage**." The legal title to real property is not controlling with regard to its division. The trial court noted that the husband had regularly used the marital residence and that he had made improvements to it. A spouse may obtain an interest in real property, although it was acquired by the other spouse wholly from his or her own funds before the marriage, when that real property is regularly used as the marital residence for the common benefit of the parties during the marriage. See Ala. Code 1975, § 30-2-51(a). The extent of the interest of the nonpurchasing spouse still depends upon the equities of the case. *Morgan v. Morgan*, 322 So. 3d 531, 546 (Ala. Civ. App. 2020). Factors to be considered include: the source, value, and type of the property, the length of the marriage, and the economic and noneconomic contributions of the parties to the marriage. Here, the wife paid $236,000 to

acquire the marital residence while the husband paid nothing. The husband did pay for some improvements to the property, but the cost of those improvements was not put into evidence nor was there any evidence that those improvements increased the value of the property. The parties only lived in the marital residence for 9 months. In fashioning a division of property, the trial court may also consider the conduct of the parties leading to the breakdown of the marriage and the spouse's need for support, taking into account the parties' ages, health, and earning capacities. No evidence was presented that the husband needed support from the wife. No finding of fault was made with regard to either party. "Although the husband came into the marriage with few assets and although he made relatively small contributions to the marriage, by the terms of the judgment he exits from the parties' 16-month marriage with an asset worth between $42,500 and $49,500." Such an award is inequitable under the circumstances and the judgment of the trial court is due to be reversed. ***Corriveau v. Corriveau,*** 30 ALW (2200425), 11/19/2021, Bibb Cty.; Moore, Thompson, Edwards, Hanson, and Fridy concur, 15 pages. [ATTY: Appt: Nettie Cohen Blume, Northport; Apee: Megan J. Johnson, Centreville]

FAMILY LAW: Property Division--VA Disability--Contempt. The parties were married for almost ten years before they separated in June 1999. In 2000, the former husband was discharged from the United States Army after almost 18 years of service. The former husband was awarded disability benefits through the Department of Veteran Affairs ("the VA"). The VA disability benefits were based on injuries that the former husband sustained, as well as the status of his dependents which included three dependent children. His initial combined disability rating from the VA was 50%. The effective date of the former husband's claim was August 1, 2000, at which time he was entitled to $689 per month. The VA informed the former husband that because he had received $49,809 as separation pay from the military, the VA was required to "hold back" the former husband's VA disability benefits until his separation amount was paid in full. A divorce judgment was entered on November 28, 2001. The divorce judgment noted that the former husband had received the separation pay referenced above. The trial court further stated that the former wife was not entitled to any portion of that separation pay because the former husband was required to pay that amount back to the government. The divorce judgment provided: "as part of the property settlement in this divorce, the [former husband] is awarded [sic] to pay to the [former wife] an amount equal to forty percent (40%) of his disability income to begin when he starts to receive said benefits." The former husband should have repaid the amount he received in separation pay in approximately 6 ½ years. It is undisputed that the former wife never received any portion of the VA disability benefits. Both parties remarried at some point. The former husband was incarcerated from 2008 until 2010. In December 2010, the former husband's VA disability was increased to $2,870 per month based on certain unemployability and compensation adjustments. His combined disability rating increased to 90%. By the time of trial, he was receiving $3,500 per month from the VA. In June 2018, the former wife filed a complaint requesting the VA disability benefits that she was awarded. The former husband argued that he was not required to pay those benefits to the former wife. The trial court entered a judgment in favor of the former wife in the amount of $191,040.14 for payments due to her from December 4, 2001, through July 31, 2020. The trial court further held the former husband in contempt for his nonpayment. After his post judgment motion was denied, the former husband appealed. **Reversed.** The disposition of this appeal centers on federal preemption. 10 U.S.C. §1408(a)(4)(A)(iii) governs the treatment of VA disability benefits in a divorce proceeding. Moreover, in *Howell v. Howell,* 581 U.S. ___, 137 S.Ct. 1400

(2017), the parties agreed that the former husband's military retirement benefits would be divided as part of their divorce property division. However, the former husband subsequently elected to waive a portion of his military-retirement benefits in order to receive non-taxable VA disability benefits. The former wife in *Howell* filed an action seeking indemnification or reimbursement for the loss of her portion of the former husband's military retirement benefits. The *Howell* court concluded "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objective of Congress. All such orders are thus pre-empted." 137 S.Ct. at 1406. Here, the former husband was not entitled to military retirement benefits; instead, the VA disability benefits were awarded to the former husband under 38 U.S.C. §101 et seq.. Nonetheless, the trial court lacked the authority to award the former wife any portion of those benefits. The former wife pointed to the fact that the former husband never appealed from the divorce judgment and argued that he was precluded from asserting any challenge to the trial court's judgment as a result. "[T]he strong language used by the Court in *Howell* suggests that the lack of power to award VA disability benefits as part of a property settlement is the type of defect that would make any such award void." In addition, 38 U.S.C. §5301(a)(1) provides that disability benefits are generally nonassignable and are exempt from the claim of creditors. "In short, there is no exception to preemption for purposes of an enforcement proceeding; what §5301 prohibited as to the divorce judgment, it likewise prohibits as to an order purporting to enforce the divorce judgment." The judgment of the trial court is due to be reversed. ***Williams v. Burks,*** 30 ALW (2200169); 11/05/2021, Coffee Cty., Edwards; Thompson, Moore, Hanson and Fridy concur; 24 pages. [ATTY: Appt: Nichole Woodburn, Enterprise; Apee: Donna Crooks, Daleville]

FAMILY LAW: Alimony—Military Benefits. The husband joined the Air Force in September 1974, and the parties were married a few months later. During the husband's military career, the family moved frequently, and the husband was deployed 15-20 times. The wife testified that she shouldered most of the parenting responsibilities for the parties' five children. The husband retired from the military in November 2018 and the wife filed for divorce in October 2019. The husband receives income from the Social Security Administration ("the SSA"), the Department of Veterans Affairs ("the VA") and the Defense Financing and Accounting Service ("DFAS"). The husband was declared disabled by the SSA in 2001and he receives $1,640 per month in Social Security disability benefits. The VA found that the husband is 100% disabled and he receives monthly disability benefits in the amount of $3,480. Finally, the husband receives "Combat-Related Special Compensation" ("CRSC") from DFAS in the monthly amount of $2,466. The wife's income was limited to $587 per month in social security disability. In the divorce judgment, the trial court ordered the husband to pay $2,500 per month in alimony. In so doing, the trial court noted that it could not consider "military-retirement-benefits" in determining an award of alimony but held that insufficient evidence was adduced to show that the husband's VA disability income was "in lieu of retirement." The husband appealed. **Reversed.** The husband argued that the trial erred in its alimony award because a portion of that award would have to be paid from his veteran's disability benefits. The Uniformed Services Former Spouses' Protection Act ("the USFSPA") was enacted in 1982 and it permits a state to divide a veteran's military "disposable retired pay" as marital property upon

divorce. 10 U.S.C. §1408. "Disposable retired pay: does not include amounts that are deducted from the retired pay "as a result of a waiver of retired pay required by law in order to receive compensation under…Title 38." Moreover, a veteran's disability benefits that are paid in lieu of military-retirement benefits are not subject to division in a divorce action. *Mansell v. Mansell,* 490 U.S. 581 (1989). In prior precedent, the Supreme Court of Alabama held that a trial court could not consider a veteran's disability benefit received in lieu of military-retirement benefits when awarding alimony. However, a veteran's disability benefits that are not paid in lieu of military benefits may be awarded as alimony. In this case, the evidence established that in order to receive his VA disability benefits, the husband had to waive a corresponding amount of his military-retirement income. "Therefore, the husband's VA disability benefits cannot be considered as 'disposable retirement pay' under USFSPA." Moreover, the husband's CSRC benefits fall under 10 U.S.C. §1413a which specifically provides that payments under that section are "not retired pay" but rather, a disability award. Therefore, CSRC benefits cannot be considered when determining an alimony award. "Because the record establishes that the husband's veteran's disability benefits cannot be considered 'disposable retired pay,' the trial court lacked the authority to consider any portion of those benefits in determining the alimony award." The judgment of the trial court is due to be reversed. ***Colafrancesco v. Colafrancesco,*** 31 ALW (2200494), 02/11/2022, Shelby Cty., Thompson; Moore, Edwards, Hanson, and Fridy concur, 14 pages. [ATTY: Appt: John Southerland, Birmingham; Apee: Jim Debardelaben, Wetumpka]

FAMILY LAW: Division of Property--Child Support. On September 26, 2019, the father filed a divorce action in the Cullman Circuit Court. In his verified complaint, the father indicated that he married the mother in South Carolina in 2009 and that the parties' two minor children were born there. The father moved to Alabama on March 29, 2019, and the mother and the children moved to Alabama in August 2019. An attorney filed a limited appearance notice on behalf of the mother and indicated the mother's intention to contest the jurisdiction of the trial court. On that same date, the mother filed a motion to dismiss for lack of subject matter jurisdiction. At a hearing held on October 16, 2019, the father and the trial court concluded that any jurisdictional defect in the original action could be cured by the filing of a new action. On that same date, the father filed a new divorce action. The second case was assigned DR-19-900325. The mother filed a motion to dismiss the new action. After her motion to dismiss was denied, the mother filed a petition for writ of mandamus and in *Ex parte Cate,* 303 So.3d 142 (Ala. Civ. App. 2020), the court directed the trial court to make a determination under the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), §30-3B-101 et seq. regarding its jurisdiction over custody. Thereafter, the trial court entered an order in which it determined that it had jurisdiction over the divorce action, as well as jurisdiction over child custody under the UCCJEA. After an evidentiary hearing, the trial court entered a judgment on September 1, 2021, in which it divorced the parties, awarded the parties joint custody of their children and ordered the father to pay $1,571 per month in child support. Moreover, the divorce judgment divided the parties' marital assets, including the father's retirement accounts, and

awarded the mother alimony in gross. The father appealed. **Reversed.** (1) At the final trial of this action, the parties stipulated that the total value of the father's retirement accounts as of July 29, 2021, was $108,439.51. However, the divorce judgment awarded the mother a total of $115,630.97 from the father's retirement accounts. Pursuant to §30-2-51, Ala. Code 1975, "unless the parties agree otherwise, the total amount of the retirement benefits payable to the noncovered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court." In this case, the parties stipulated to the amount of the retirement benefits, but they did not agree to a division that awards the mother more than 50% of the father's retirement benefits. Accordingly, this portion of the trial court's judgment is due to be reversed. (2) The father challenged other aspects of the trial court's division of marital property, including the award of alimony in gross to the mother. However, because issues of property division and alimony in gross are all interrelated, the entirety of the trial court's division of property is due to be reversed. (3) The father next challenged the trial court's award of child support to the mother, especially in light of the fact that the parties were awarded joint physical custody. Application of the child-support guidelines set forth in Rule 32, Ala. R. Jud. Admin. is mandatory. However, a trial court may deviate from those child-support guidelines when the application of those guidelines would be "manifestly unjust or inequitable" under the circumstances. Although shared physical custody is a reason to deviate from the application of the child-support guidelines, an award of shared physical custody does not mandate a deviation. Here, the evidence at trial indicated that the father earns 90% of the parties' total income and the mother was trying to obtain her nurse practitioner's degree. She hoped to be employed in that capacity in January 2022. The evidence was sufficient to warrant an award of child support to the mother under the facts of this case, especially given the fact that the "mother's lack of income was a result of her efforts to improve her education level and earning potential." (3) The father next argued that the trial court erred by failing to impute to the mother income in an amount equal to what she could have earned as a full-time registered nurse. Such a decision is purely discretionary with the trial court. However, no child support forms were included in the record in this case and the evidence does not support the trial court's determination of child support. "Accordingly, this court is unable to discern the manner in which the trial court reached its child-support award." This portion of the trial court's judgment is due to be reversed and the case remanded for the trial court to calculate the amount of child support to be awarded in accordance with Rule 32. ***Cate v. Cate,*** 31 ALW (2210021); 8/12/2022; Cullman Cty.; Thompson; Moore, Edwards, Hanson and Fridy concur; 14 pages. [ATTY: Appt: William Bradford, Clanton; Apee: Matthew Carter, Cullman]

FAMILY LAW: Division of Property--Child Custody. PROPERTY: Purchase-Money-Trust. The wife filed for divorce in 2018 and the husband filed a counterclaim. In 2019, the trial court added the husband's father, Isaac Jones ("Isaac") as a party based on his purported ownership of the former marital residence. A private judge presided over the case based on the agreement of the parties. Thereafter, the trial court entered a judgment that awarded the parties the "shared custody" of their three children and required the husband to pay rehabilitative

alimony of $500 per month for 36 months. With regard to the marital residence, the court determined that Isaac owned a one-half interest in same and that the remaining one-half interest was divisible as a marital asset. The parties agreed that the marital residence was valued at $250,000 and it had a mortgage balance of $89,000. The trial court awarded the wife an alimony-in-gross award of $140,000. After the husband's post judgment motion was considered, the husband appealed. **Affirmed in part; reversed in part.** (1) A trial court may not award a party alimony in gross in an amount exceeding the other party's interest in the marital estate. Here, the total equity in the marital residence was $161,000. Therefore, the husband argued that he should have been entitled to $80,500 of that equity. However, under Alabama law, property owned by a third party is not subject to equitable distribution. The court looked to a Mississippi case wherein that court reversed an award of a portion of the equity in the marital home to the husband where the property was titled in the name of the wife and the parties' eldest daughter. *McGee v. McGee,* 726 So.2d 1220, 121 (Miss. Ct. App. 1998). The court noted that there was no evidence that Isaac had contributed financially to the purchase of the marital residence. Therefore, the trial court could have determined that a purchase-money trust was created which occurs when one person pays for the purchase of land and title is taken in the name of another. "In such circumstances, the law deems the nonpaying grantee to hold the title in trust for the benefit of the purchaser, who holds the entire equitable interest in the property." If the court had determined that a purchase-money resulting trust existed, it could have treated all of the equity as part of the marital estate. However, the trial court in this case expressly determined that Isaac owned a one-half interest in the marital residence. "We cannot discern any legal theory that supports the trial court's implied determination that the marital estate includes $140,000 of the equity in the marital residence." Accordingly, this portion of the trial court's judgment is due to be reversed. (2) The court was next called upon to consider the propriety of the rehabilitative alimony award. However, because it already ordered the trial court to reconsider its alimony-in-gross award, it pretermitted any discussion of the rehabilitative alimony award and reversed and remanded that issue also. (3) With regard to custody, the husband argued that the trial court erred by awarding the parties the joint custody of their eldest child, R.J., (age 14) whom he asserts has a poor relationship with the wife. According to the husband, the wife took the children to live with her in a hotel and at a shelter for 5 weeks and denied him all communication. Moreover, he claimed that the wife had told R.J. that the husband was dangerous, had not helped R.J. with homework and had failed to take him to counseling. In contrast, the wife testified that she had been the primary caregiver for the children and that she moved out of the marital residence because of the husband's threatening conduct toward her. Additionally, the mother told R.J. that that divorce was "all her fault." Although R.J. testified that he wanted to live with his father, a child's preference is not dispositive. Based on the <u>ore tenus</u> standard, this portion of the trial court's judgment is due to be affirmed. ***Jones v. Jones,*** 31 ALW (2200988); Shelby Cty., Moore; Thompson, Hanson and Fridy concur; Edwards, concurs in the result, without opinion; 20 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Divorce--Adultery-Division of Property: The parties married in February 2012 and began experiencing marital difficulties shortly thereafter. As a result, they separated and reconciled several times, but their final separation took place in November 2018. In 2016, the husband met Alexandra Yap who hired him to build a house for her and her husband. The construction was completed in fall 2018. In December 2018, the husband filed for divorce on the ground of incompatibility. Alexandra also filed for divorce from her husband. In February 2019, the husband and Alexandra began to have an intimate relationship. Shortly before the trial of this action, the wife filed a counterclaim for divorce, but she did not allege adultery. At trial, April testified that she had seen telephone records in November 2018 that indicated that there had been numerous telephone calls between Alexandra and the husband. The wife stated that she had a "gut feeling that something was going on." The husband admitted to having a sexual relationship with Alexandra, but he did not specify when that relationship began. Alexandra did not testify at trial, but the husband filed an affidavit of Alexandra in which she averred that a sexual relationship between her and the husband did not begin until mid-February, 2019. Near the end of the trial, the judge stated that it was undisputed that the husband had committed adultery. The judge indicated that he would not consider an equal division of the property due to the husband's infidelity stating: "If I split down the middle, I'm saying it's okay to cheat on your wife…It ain't ever okay to cheat on your wife." Ultimately, the trial court ordered a"60/40" division of property in favor of the wife. The Court of Civil Appeals affirmed the judgment in a no-opinion order. The Supreme Court granted certiorari review. **Affirmed.** Pursuant to §30-2-1(a)(2), Ala. Code 1975, adultery is a statutory ground for divorce. The husband argued that there was insufficient evidence to demonstrate that he committed adultery prior to the filing of his complaint for divorce in December 2018. The Court noted that it is difficult to adduce direct proof of adultery. "[T]he proof must be such as to create more than a mere suspicion, but be sufficient to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference." *Maddox v. Maddox,* 281 Ala. 209,212, 201 So.2d 47,49 (1967). In *Maddox,* evidence that a wife and a man traveled out of town together, entered a motel and remained there for approximately an hour was insufficient to prove adultery. Similarly, in a case where the husband made frequent and lengthy telephone calls to his alleged paramour, the alleged paramour had visited the parties' lake home and marital residence, the husband had visited the alleged paramour's apartment three times and given her gifts and where the husband had "shunned" his wife, insufficient evidence existed to prove adultery. *Fowler v. Fowler,* 636 So.2d 433, 435-36 (Ala. Civ. App. 1994). The Court examined these and other cases and concluded that the evidence of the husband's prefiling conduct in this case was insufficient to prove adultery. The existence of numerous telephone calls between the husband and Alexandra and the wife's "gut feeling" were not enough to rise above a "suspicion" of adultery. The husband next argued that adulterous conduct after the filing of a divorce complaint is not a ground for divorce under Alabama law. The Court noted that §30-2-1(a)(2) merely states that "adultery" is a ground for divorce. In contrast, other grounds for divorce set forth in that same Code section specify that the facts supporting that ground must be present

before the filing of the complaint. For instance, the ground of voluntary abandonment requires a showing that it occurred for "one year next preceding the filing of the complaint." So, too, does the ground based on a spouse's confinement in a mental hospital. "[W]e presume that a difference in wording, especially in provisions with similar statutes, reflects a difference in meaning." *Ex parte Smiths Water & Sewer Auth.*, 982 So.2d 484, 488 (Ala. 2007). The Court examined earlier decisions of the Court of Civil Appeals that distinguished between prefiling and post filing adultery. Before 1973, divorce cases were governed by equity procedure. A bill was filed which had to set forth every averment of material fact; if such an averment was not contained in the bill, it was "deemed not to exist." When the Court adopted the Alabama Rules of Civil Procedure, the law and equity procedure were merged. Moreover, pursuant to Rule 15, Alabama Rules of Civil Procedure, issues not raised by the pleadings could be tried by express or implied consent and the pleadings would be deemed "amended" to conform to that evidence. Earlier Alabama decisions which addressed post filing and prefiling adultery were decided based on the equity-procedure limitations on evidence. "[T]his Court's earlier treatment of post filing adultery was rooted in that procedural era's requirement that, in equity proceedings (including divorce actions), all evidence had to conform to the facts pleaded in the bill, and thus the judgment could not be based on events that occurred after the filing of the bill." The Court also cited to cases in other states that permit divorce based on post filing conduct. These decisions also reflected a change in those states' laws based on the adoption of "modern civil procedure." "Therefore, the language of the divorce-grounds statute, the legal definition of adultery, and this Court's precedent read in procedural context do not support a substantive rule that post filing adultery cannot be a ground for divorce. Rather, under Rule 15(b), if adultery that occurred after the filing of the operative pleadings is tried by consent, whether express consent or consent implied by the absence of a proper objection, then that adultery is properly a ground for divorce." Here, the husband did not dispute that he committed adultery during the pendency of the divorce case. In fact, he submitted Alexandra's affidavit to the trial court confirming that fact. "Thus, under Rule 15(b), the ground of adultery, based on [the husband's] post filing conduct, was before the circuit court by [the husband's] implied consent, and the court did not err by basing its divorce judgment on this ground." The judgment of the Court of Civil Appeals is due to be affirmed. ***Ex parte Grimmett (Grimmett v. Grimmett),*** 31 ALW (1200220), 1/14/2022, Winston Cty., Parker; Mitchell concurs in part and concurs in the result; Bolin, Shaw, Wise, Bryan, Sellers, Mendheim and Stewart concur in the result, 29 pages. [ATTY: Appt: Thomas Carmichael, Jasper; Apee: Jonathon Lowe, Haleyville]

V. CONTEMPT-

FAMILY LAW: Contempt--Child Custody--Modification. APPEAL & ERROR: Waiver. EVIDENCE: Harmless Error. Pursuant to a 2018 custody order, the mother was awarded sole physical custody of the parties' then minor children, J.D.S., I.S. and J.S.. J.S. is hereinafter referred to as "the child". Thereafter, the father filed a custody modification action as well as a claim seeking to hold the mother in contempt. The mother responded by filing a contempt

counterclaim against the father. In November 2020, the trial court entered an order noting that J.D.S. had attained the age of majority and denying the request father's request for custody. The father's visitation with I.S. was suspended unless I.S. agreed to visit and both parties were found in contempt. In that order, the trial court held that although the mother had done little to "forge" a relationship between the father and the children, "the father's own actions have caused the children to develop such a strong animosity toward him." Those actions included among other things: forcing the three children to shower with him until one of the children was 11 years old, physical violence, drunkenness, and nudity in the presence of the children (while intoxicated). Nine months after the court denied the father's custody request, the father filed another petition seeking to modify the child's custody or his visitation with him and alleging contempt against the mother. He alleged that the mother was interfering with his relationship with the child. At a hearing in November 2021, the father called the parties' adult son, J.D.S,. as a witness. The father's attorney tried to elicit from J.D.S. testimony that the mother had spoken negatively about him in front of the children, that she encouraged the children to find loopholes in the prior orders so that they would not have to visit with the father, that she had talked about hiring a hit man to murder the father, that she had shared information about the litigation with the children and that she had tried to alienate the children from the father. The mother's attorney lodged an objection to his testimony on the grounds that J.D.S. had moved out of the mother's home shortly after the November 2020 judgment and that the introduction of any evidence that occurred before that time was barred by the doctrine of res judicata. Apparently, J.D.S. did not move out of the mother's residence until December 2020 so the trial court ultimately limited his testimony to events about which J.D.S. had personal knowledge and which occurred after November 2020. When the father's counsel tried to admit evidence through J.D.S. about the mother's interference with his relationship with the child after the father had filed his petition in August 2021, the trial court refused to allow said testimony. Thereafter, the trial court entered an order reducing the father's child support obligation but denying all other claims. A few weeks later, the father filed an offer of proof consisting of the proposed testimony of J.D.S. and of evidence to support his claim of contempt for acts the mother purportedly committed after he had filed his August 2021 petition. He also filed a post judgment motion. After his post judgment motion was denied, the father appealed. **Affirmed.** (1) The court first addressed whether the trial court erred by excluding some of J.D.S.'s testimony. The father asserted that the trial court should have allowed J.D.S. to testify that after the entry of the November 2020 judgment, he discovered that "the mother had 'engaged in a strategy to brainwash, gaslight, manipulate and abuse [J.D.S.] and the child.'" However, the trial court permitted J.D.S. to testify that the mother had brainwashed the child and attempted to alienate the child from the father from November 2020 until he moved out shortly thereafter. The proposed testimony in the father's offer of proof indicates that any evidence that was excluded would be cumulative of the evidence already admitted. "Accordingly, we conclude that any error on the part of the trial court regarding this issue was harmless." (2) The father next challenged whether the trial court erred by excluding evidence of any allegedly contemptuous conduct that occurred after he filed his August 2021 petition.

Pursuant to Rule 70A(c)(1), Ala. R. Civ. P., a proceeding for constructive contempt must be initiated by the filing of a petition which provides the alleged contemnor notice of the essential facts constituting the alleged contemptuous conduct. Rule 15(d), Ala. R. Civ. P. allows a party to file a motion to permit the party to serve a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Here, the father was seeking to hold the mother in contempt for instances of contempt that happened since the date of the filing of his petition. Accordingly, he was required to file a supplemental pleading pursuant to Rule 15(d). The trial court did not abuse its discretion in excluding evidence of instances of contempt occurred after the filing of the father's August 2021 petition. (3) The father argued that the standard set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984) is unconstitutional and contrary to public policy. Specifically, he contends that it violates the doctrines of equal protection, due process, and separation of powers. He also argues that it is against public policy and that it conflicts with §30-3-150, Ala. Code 1975. "We note, however, that in *Gallant v. Gallant,* 184 So.3d 387, 395 (Ala. Civ. App. 2014), this court addressed those same arguments at length and concluded that the *McLendon* standard did not violate any of the aforementioned constitutional principles or public policy." The court once again rejected these arguments. (4) The court next considered the propriety of the trial court's denial of a custody or visitation modification. Under either of these modification requests, the father had to prove a material change in circumstances. The evidence was disputed as to whether the mother attempted to alienate the child from the father. I.S., the parties' daughter who still lives at home with the mother, testified that after the entry of the November 2020 judgment, J.D.S. had rarely been home and that he had been untruthful in the two years prior to the trial. I.S. denied that the mother had acted inappropriately with regard to the father's relationship with the child. Applying the ore tenus standard, the court held that "the trial court could have properly determined that the father had not met his burden of showing that a material change in circumstances had occurred since the entry of the November 2020 judgment." (5) Finally, the father asserted that the trial court erred by failing to find the mother in contempt. The court noted that the trial court did not make specific findings of fact in its judgment and the father did not raise the issue of the sufficiency of evidence in his post judgment motion. Accordingly, this issue was not preserved for appellate review. The judgment of the trial court is due to be affirmed. ***Shackelford v. Shackelford,*** 31 ALW (2210201), 08/05/2022; Tuscaloosa Cty.; Moore; Thompson, Hanson and Fridy concur; Edwards concurs in the result, without opinion, 19 pages. [ATTY: Appt: Austin Burdick, Bessemer; Apee: Jason Fleishman, Tuscaloosa]

FAMILY LAW: Jurisdiction--PKPA--Grandparent Visitation--Contempt--Attorney's Fees. APPEAL & ERROR: Reassignment of Judge. The Court's opinion of October 8, 2021 is withdrawn and the following is substituted therefor. In a previous action, a New York court awarded the paternal grandmother visitation with the child. In 2017, the paternal grandmother registered the New York judgment in the Madison County Circuit Court, and she also sought enforcement of that judgment. In a previous appeal, the court held that the trial court properly

confirmed the New York judgment and that "[i]t is clear that the mother has resisted visitation between the paternal grandmother and the child at least since the filing of the grandparent-visitation action." *Marler v. Lambrianakos,* 281 So.3d 415, 430 (Ala. Civ. App. 2018) (*"Marler I"*). In March 2018, the mother field an "emergency" petition in the trial court seeking to modify the New York judgment. The paternal grandmother filed a counterclaim for contempt, and she sought to dismiss the modification claim. The trial court granted the motion to dismiss the mother's modification claim. The mother filed an appeal, but it was dismissed as having been taken from a non-final judgment. After a three-day trial on the contempt petition, the trial court found the mother in contempt, sentenced her to 775 days of incarceration, suspended 410 days of the sentence, enforced the paternal grandmother's right of visitation as set forth in the New York judgment, and ordered that the paternal grandmother be allowed additional days of visitation to "make-up" for the visitation that she had been denied. After the mother served 3 days of her sentence, the trial court entered an order releasing her from incarceration and suspending the rest of the remaining sentence for criminal contempt. However, the trial court admonished the mother that it was adopting a "zero-tolerance" policy with respect to future compliance with its orders. Pursuant to the trial court's order, the mother was required to pay $87,894 to the grandmother's attorney, $8,839 to the paternal grandmother for visitation cost reimbursement and $16,550 to the guardian ad litem. After post judgment motions were filed, the trial court reduced the sentence for criminal contempt to 110 days; the mother was ordered to serve 50 of those days and the remainder was suspended. The mother appealed. **Affirmed in part; Reversed in part.** (1) The mother argued that the trial court erred by dismissing her claim seeking to modify the New York judgment. The Parental Kidnapping Prevention Act ("the PKPA"), 28 U.S.C. §1738A provides that a state that has made a child custody determination retains continuing jurisdiction if that state's law provides for continuing jurisdiction and either the child or a contestant remain living in that state. A "contestant" is defined in the PKPA to include a person who claims a right to custody or visitation of a child. The child in this case no longer lives in New York but the paternal grandmother does. Therefore, the next issue to be considered was whether New York laws provide for a court in that state to retain continuing jurisdiction. New York's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA") states that a New York court retains jurisdiction unless (a) a court of that State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant contact with that state or (b) a New York court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently live in New York. The child's father is deceased. A New York case held that a grandmother who was exercising visitation was not a "person acting as a parent" under its version of the UCCJEA. The Alabama court as a "court of another state" under the New York statute, could make a determination whether New York retained continuing jurisdiction. The record supports such a finding. Moreover, Alabama is the child's home state and therefore, the trial court had the jurisdiction not only to enforce the New York judgment but to modify it also. The trial court's dismissal of the mother's modification claim is due to be reversed. (2) The evidence pertaining to the remaining issues is

set forth herein. In 2017, the paternal grandmother traveled to Alabama along with her daughter ("the aunt"). The mother, who is an attorney licensed to practice in Alabama, filed an emergency motion to prevent the visitation, arguing that the paternal grandmother was a danger to the child. The trial court ordered that the visitation take place but placed parameters on it. The mother was permitted to stay for visitation on Friday and Saturday, but the maternal grandmother was permitted to exercise unsupervised visitation on Sunday. The mother refused to leave. In February 2018, the paternal grandmother tried to exercise weekend visitation. The mother took the child to the hotel where the paternal grandmother was staying and the child, who was then 10-years old, threw a tantrum in the hotel lobby. The mother and the aunt testified that the child would periodically look at the mother for cues. No visitation occurred that night. The next day the mother eventually allowed the child to go with the paternal grandmother but when the child got in the car, she asked to go to a specific restaurant. When the child, aunt, uncle and paternal grandmother went to the restaurant, the mother appeared a few minutes later. Evidence was adduced regarding another attempted visitation in April 2018. The paternal grandmother had arranged to pick up the child from school, but the mother texted with the child for 13 minutes and told the child to tell school officials "over and over again" that she didn't want to go on the visitation. Ultimately, the child left the school with the paternal family, but the child claimed that she was dragged down the sidewalk. The mother filed an emergency motion to stay enforcement of the paternal grandmother's visitation rights which was granted pending the decision in *Marler I.* That decision was released on September 28, 2018. Attempts made by the paternal grandmother after that time to exercise visitation were fruitless. After seeking court intervention, the trial court ordered that the summer visitation in 2019 would take place but directed the guardian ad litem ("GAL") to travel with the child to New York. The mother brought the child to the airport but became so emotional that it upset the child. After the GAL and the child left the mother, the child was fine. The visit went well. However, the aunt and paternal grandmother testified that the mother made statements to the child during that summer visitation that were designed to upset the child. The COVID-19 pandemic prevented the paternal grandmother from exercising her visitation rights during most of 2020. The mother interfered with court-ordered weekly telephone calls. At the time of trial, the child was 12 years old, and she testified that she did not want to visit with her paternal grandmother and aunt. (3) The court first addressed the propriety of the trial court's finding of criminal contempt. The elements of criminal contempt include: (a) the existence of an order of reasonable specificity and (b) a willful violation of that order. Each of these elements must be proven beyond a reasonable doubt. Here, the trial court found that the mother had committed 22 instances of criminal contempt. Two of those contempt findings related to the paternal grandmother's scheduled weekend visitations in February 2018 and April 2019. The trial court also found the mother in contempt for denying telephone calls on 20 separate occasions. With regard to the February 2018 visitation, the mother argued that the evidence was not sufficient to support the trial court's finding. However, the mother failed to raise that issue at the trial court level and therefore, that argument is waived. With regard to the April 2019 visitation, the mother asserted that she didn't think that the June

2018 stay was lifted until all appellate review was exhausted. However, the certificate of judgment in *Marler I* was issued on March 15, 2019. The June 2018 stay order stated that it remained in effect until *Marler I* was decided. The mother also argued that she relied on the advice of counsel, but she provided no authority to support her proposition that one with knowledge of the terms of an order may disregard that order based on purported advice from his or her attorney. The mother also argues that she did not think it was in the child's best interest for the April 2019 visitation to take place. The court noted that the mother never filed anything with the trial court to stop this visitation even though she certainly had done so in the past. With regard to the telephone calls, the mother told the child that all that she had to do was to answer the phone and say goodbye before disconnecting. The mother argued that 14 of the 20 telephone calls for which she was found in contempt actually took place but, on those occasions, the child literally picked up the phone and immediately hung up. The child was never disciplined for or discouraged from being rude or disrespectful to the paternal grandmother. "The evidence supports a determination that the mother's attitude and conduct toward the paternal grandmother is clear to the child and that the mother has, either intentionally or unintentionally, influenced and encouraged the child's behavior during the attempts at telephone contact by the paternal grandmother." The court further rejected the mother's argument that the sentence imposed upon her was too harsh, pointing to the trial court's specific findings that her conduct was a "willful, malicious disobedience of court orders."(5) The mother next argued that the imposition of the $87,894 attorney fee on her was improper because it was made pursuant to a finding of criminal contempt. However, the trial court specifically stated that it was finding the mother in civil contempt also "to discourage future noncompliance." The mother pointed out that the last act of contempt for which she was held accountable occurred in September 2019 and therefore, she argued that because civil contempt means "willful, continuing failure" to comply with a court order, she was not in civil contempt. However, the paternal grandmother presented evidence that the mother has engaged in continuous actions to prevent and/or obstruct the paternal grandmother's right to visit with and speak to the child. The mother also argued that the exhibits submitted into evidence with regard to the attorney fee included amounts related to the mother's modification petition and fees charged to the paternal grandmother in the previous appeals. However, this issue was never raised at the trial court level. "There is something unseemly about telling a lower court it was wrong when it was never presented with the opportunity to be right." *Birmingham Hockey Club, Inc. v. National Council on Compensation Ins., Inc.*, 827 So.2d 73, 80 (Ala. 2002). This argument was not preserved for appellate review. On application for rehearing, the mother pointed to a portion of her post judgment motion wherein she claimed that the evidence was insufficient to support the imposition of a $100,000 attorney fee and that the fines imposed were excessive. These assertions were not sufficient to preserve her argument on appeal. (6) The mother challenged the trial court's award of makeup visitation to the paternal grandmother. She argues that in so doing, the trial court modified the New York judgment. Prior precedent allows a trial court to award makeup visitation. Moreover, the mother failed to cite any precedent applicable to her claim that such a provision modified the New York

judgment. Finally, the mother asserted that the award of makeup visitation violated her fundamental right to make decisions regarding the custody and control of her daughter because she did not authorize such makeup visitation. "However, the award of visitation at issue occurred as part of the New York judgment. The trial court's…order enforced the New York judgment and did not award the paternal grandmother any additional visitation." The court agreed that the mother had a fundamental right to the care, custody and control of her daughter but noted that her right was "somewhat curtailed" by the award of grandparent visitation. "Thus, the mother did not have a constitutionally protected right to the sole care, custody and control of the child on days designated under the New York judgment as grandparent-visitation days awarded to the paternal grandmother." (7) The mother asked the appellate court to order that a new trial-court judge serve on remand. The current trial-court judge is the third trial-court judge to preside over this case. The mother did not file a motion seeking recusal of the current judge. The appellate court has the authority to order reassignment to enforce compliance with the court's previous opinions. Reassignment may be warranted if the trial-court judge, on remand, would have "'substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected.'" *C.D.S. v. K.S.S.,* 978 So.2d 782, 789 (Ala. Civ. App. 2007). The mother argued that reassignment should be made because of the harsh sanctions imposed upon her. However, "she fails to acknowledge that those sanctions and payments are reflective of an extended, three-year dispute" between the parties. In addition, any reassignment would entail waste and duplication. The judgment of the trial court is affirmed in part and reversed in part. The paternal grandmother was awarded a $15,000 attorney fee on appeal. ***Marler v. Lambrianakos,*** 32 ALW (2200269), 02/23/2022, Madison Cty., Thompson; Moore, Edwards and Hanson concur; Fridy recuses himself, 98 pages. [ATTY: Appt: Benjamin Maxymuk, Montgomery; Apee: Mitch Howie, Huntsville]

VI. EVIDENCE

EVIDENCE: Motion in Limine--Privilege. APPEAL & ERROR: Mandamus. The parties were divorced in 2010. Pursuant to that divorce judgment, the parties were awarded the joint legal and joint physical custody of their child. In 2021, the mother filed a petition seeking to hold the father in contempt for interfering with her custodial time ("the contempt action"). The father then filed a petition seeking an award of sole physical custody of the child ("the custody-modification action"). The trial court appointed a guardian ad litem to represent the child in the contempt action. The mother filed a motion in limine in both actions seeking to preclude the admission of certain records that purportedly contained privileged confidential communications between the child and a psychologist and a licensed professional counselor. After a hearing took place, the trial court entered an order in both actions denying the mother's motion in limine and holding that the guardian ad litem had waived the privileges on behalf of the child. The mother filed two substantively identical petitions for the writ of mandamus regarding the denial of her motion in limine in both actions. **Writ of mandamus denied.** The mother asserted that the trial court erred by denying her motion in limine because a guardian ad litem cannot waive a child's

evidentiary privileges. The court declined to address this issue inasmuch as it held that the mother had an adequate remedy on appeal. In so doing, it relied upon *Ex parte Houston County,* 435 So.2d 1268, 1271 (Ala. 1983) wherein the trial court granted a motion in limine and prohibited the defendants from introducing certain evidence "without further order of th[e] Court." The supreme court determined that the inclusion of this language made the order granting the motion in limine "preliminary" and not "absolute." In that regard, the non-moving party may offer the disputed evidence at trial and if the other party objects and the trial court sustains the objection, the party offering the evidence may appeal from that ruling. In this case, the trial court denied the mother's motion in limine but stated in its order that its ruling was "limited to the questions raised in the motion regarding privilege" and that it was not "ruling on any hearsay objections." "Thus, like in *Ex parte Houston County,* the trial court's order is preliminary, rather than absolute, and, thus, not subject to mandamus review." Accordingly, the mother's petitions for writ of mandamus are due to be denied. ***Ex parte Cortez (Cortez v. Vilaseca),*** 31 ALW (2210488); 6/17/2022; Mobile Cty.; Moore; Thompson, Hanson and Fridy concur; Edwards concurs in the result, without opinion; 8 pages. [ATTY: Pet: Grady Edmondson, Mobile; Resp: Not listed]

EVIDENCE: Offer of Proof. FAMILY LAW: Dependency. In January 2021, the maternal grandparents filed a dependency petition in the Limestone Juvenile Court. According to the pleadings filed in the dependency action, the Limestone County Department of Human Resources ("DHR") had intervened in a 2017 divorce action in circuit court involving the child's mother. The maternal grandparents alleged that the child had suffered injuries at the time of the 2017 divorce action and the mother refused to explain how those injuries occurred. In 2017, the circuit court entered a judgment in the divorce action awarding the maternal grandparents custody of the child. No appeal was taken from that judgment. In January 2021, the circuit court entered a judgment determining that it lacked jurisdiction to award custody of the child to the maternal grandparents. After the entry of that judgment, the maternal grandparents filed their dependency action. At a hearing on the dependency petition, the juvenile court ruled that it would not allow the maternal grandparents to present evidence regarding the incident that resulted in the child's being placed in their home and in the circuit court's award of custody to them in 2017. The maternal grandparents attempted to make an offer of proof regarding the underlying facts of that incident, and they tried to offer photographs depicting injuries that the child had sustained as a result of that incident. The juvenile court refused to allow the maternal grandparents to make that offer of proof. The colloquy between the juvenile court judge and counsel for the maternal grandparents is set forth in the court's opinion. Thereafter, the juvenile court entered a judgment finding that the child was not dependent, and that custody was to be returned to the mother. The maternal grandparents filed a post judgment motion. The juvenile court denied that motion, stating: "the Court does not find that evidence of alleged unexplained injuries sustained by the minor child many years ago to be relevant in consideration of whether the child currently meets the definition of a dependent child." The maternal grandparents appealed. **Reversed.** The purposes of an offer of proof are to allow the trier of fact to

determine the admissibility of the evidence and to allow the party seeking to introduce the evidence to preserve any error with regard to the ruling on that issue for appellate review. Generally, an offer of proof is required to preserve an issue regarding the exclusion of evidence for appellate review. However, if the substance of the evidence is evident from the context within which questions were asked, an offer of proof is not required. Here, the juvenile court excluded the proffered evidence because it deemed it too remote to be relevant to the issue of the child's dependency. "In reaching that conclusion, the juvenile court apparently erroneously concluded that only a parent's current condition pertains to the issue of a child's dependency. However, in addition to considering a parent's current circumstances, in determining whether a child is dependent a juvenile court may consider the family's history." The juvenile court erred by refusing to allow the maternal grandparents to make an offer of proof. It further erred by concluding that the evidence that the maternal grandparents sought to introduce was inadmissible without first considering the offer of proof. Accordingly, the judgment of the juvenile court is due to be reversed. ***K.C.B. and D.E.B. v. B.D.C.,*** 31 ALW (2200740), 1/7/2022, Limestone Cty., Thompson; Hanson and Fridy concur; Moore and Edwards concur in the result, without writings; 11 pages. [ATTY: Not listed-confidential]

VII. CIVIL PROCEDURE

APPEAL & ERROR: Mootness. FAMILY LAW: Dependency. The court's opinion of October 8, 2021 is withdrawn and the following is substituted therefor. The mother appealed from an order of the Madison Juvenile Court modifying her visitation with her older son, P.L.. She also appealed from a judgment finding her younger son, J.W., dependent and awarding custody to the maternal grandparents. On October 8, 2021, the court, on original submission, issued an opinion reversing the juvenile court's judgments and remanding the cases with instructions. The maternal grandparents filed timely applications for rehearing. While the applications for rehearing were still pending, the mother died. The court directed both parties to file letter briefs addressing whether these appeals had been rendered moot by the death of the mother. **Appeals dismissed.** In *C.J. v. T.J.,* 225 So.3d 115 (Ala. Civ. App. 2016), the court addressed whether the death of a mother during the pendency of her appeal from a judgment terminating her parental rights rendered her appeal moot. "The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." In *C.J.,* the court concluded that because the case did not "involve merely a personal interest of [C.J.] that ceased to exist at her death but, instead, involved a property interest of the child that exists because of [C.J.'s] death", C.J.'s appeal was not moot. *Id.* at 119. Here, P.L. and J.W. will maintain any property rights associated with their mother's status as their mother. "The rights involved in these appeals are purely personal to the mother, and, therefore, the appeals have been rendered moot by the mother's death during the pendency of the appeals." The appeals are due to be dismissed. ***T.M.W. v. W.S.L and C.S.L.,*** 31 ALW (2200174; 2200175), 1/07/2022, Madison Cty., Moore; Thompson, Edwards, Hanson and Fridy concur; 6 pages. [ATTY: Appt: Ruby Panter, Huntsville; Apee: Joan-Marie Sullivan, Huntsville]

CIVIL PROCEDURE: Service of Process. In June 2021, the father filed a petition in the Covington Circuit Court to register a Tennessee child custody order that awarded him "primary custody" of the child but had reserved ruling on all issues relating to child support. In his registration petition, the father requested the trial court to register and enforce the Tennessee child custody order and to establish child support. The trial court scheduled a hearing for August 9, 2021. The mother was sent notice of the filing of the registration petition via certified mail from the father's attorney. The father subsequently filed a notice asserting that he had perfected service on the mother at her home in Florida by certified mail, "restricted delivery." He attached to the notice a United States Postal Service certified-mail return receipt. However, the signature on the receipt was illegible and the receipt was incomplete inasmuch as the date of delivery and the printed name of the recipient were left blank. On August 6, 2021, the mother filed a motion to continue the hearing set for August 9, 2021, alleging that she had not been properly served. The hearing was continued until October 5, 2021. On August 13, 2021, the father amended the registration petition and reissued notice of the registration petition to the mother through Alacourt. On September 28, 2021, the mother filed a motion requesting that the October 5th hearing be held virtually because she and several persons employed by her attorney had tested positive for COVID-19. The trial court denied that motion. The mother did not appear at the October 5, 2021, hearing and her attorney only appeared to contest service of the notice of the registration petition. On November 18, 2021, the trial court entered an order in which it denied the mother's objection to registration. In that order, the trial court concluded that the mother received "adequate notice" of the registration and it set the father's petition for a hearing. The mother filed a petition for writ of mandamus on the day of that hearing. **Writ of mandamus denied.** Pursuant to §30-3B-305(b)(2), Ala. Code 1975, once a court of this state receives a request to register a foreign child-custody determination, the registering court must serve notice on the persons named and afford them an opportunity to contest the registration. Rule 4, Ala. R. Civ. P. provides for service via certified mail. Rule 4(i)(2)(B)(ii) authorizes an attorney for a complaining party to send process to a defendant through certified mail, return receipt requested. An agent may accept service by certified mail and the "agent's authority shall be conclusively established when the addressee acknowledges actual receipt of the summons and complaint. Rule 4(i)(2)(C). Moreover, pursuant to a 2004 amendment to Rule 4, "no action shall be dismissed for improper service if the defendant actually received the summons and complaint in time to avoid a default." Committee Comments to Amendment to Rule 4, Ala. R. Civ. P.. Because the appellate courts in this state have yet to address the propriety of service of process based on actual notice of an action, the court looked to federal case law interpreting the federal counterpart to Alabama's Rule 4(i)(2)(C). In those cases, service of process was upheld due to the fact that the defendants appeared in the action in time to avoid a default, thereby demonstrating actual notice. In this case the incomplete return receipt raises a question as to whether the father strictly complied with the service requirements for certified mail. However, the trial court determined that "the [mother] has received adequate notice of the registration." That finding was based upon the fact that the mother retained an attorney and filed a motion contesting service within 8 days

after the attorney notified the court that the mother had been served by certified mail. "Accordingly, the illegible signature on the return receipt for the certified mail is conclusively deemed to be that of someone 'specifically authorized by the [mother] to receive the [mother's mail and to deliver that mail to the [mother]. Rule 4(i)(2)(C). " The court further noted that the mother was never in danger of default. Based on the evidence presented the trial court's determination that the mother had been properly served with notice of the registration petition was correct. The petition for a writ of mandamus is denied. ***Ex parte Rich (Johnson v. Rich),*** 31 ALW (2210228), 3/4/2022, Covington Cty.; Moore; Thompson, Edwards, Hanson, and Fridy concur. 17 pages. [ATTY: Appt: Jessie M. Hamilton, Andalusia; Apee: Joshua M. O'Neal, Cullman]

FAMILY LAW: Divorce. CIVIL PROCEDURE: Service of Process—Default Judgment—Jurisdiction. On October 7, 2011, the husband filed a complaint for a divorce with the Etowah Circuit Court On October 19, 2011, the summons and complaint were purportedly served on the wife by leaving a copy of the same with the husband at the marital residence, where the wife also purportedly resided; it is undisputed that the husband accepted service of the summons and complaint from the process server and that the husband signed the return copy of process. The wife never filed an answer. The divorce action was set for trial on August 27, 2012, and the wife failed to appear. On that same date, the trial court entered a judgment of default. That judgment divorced the parties, awarded the husband the marital residence and divided the parties' personal property. After the entry of the divorce judgment, the parties apparently continued to reside together for a few months. The wife moved out because the husband was texting the 18-year-old mother of the parties' grandson. The wife eventually lived at the former marital residence sporadically with the husband According to the wife, she first found out about the divorce in 2016. In September 2020, the wife filed a motion pursuant to Ala. R. Civ. P. 60(b) seeking to set aside the divorce judgment on the ground that it was void for lack of personal jurisdiction because of defective service of process. She also sought to set aside the divorce based upon the husband's allegedly fraudulent conduct. A hearing was held on the wife's Rule 60(b) motion, but no evidence was taken. However, the husband's counsel argued that the wife had found out about the divorce the day it was finalized. He also pointed out that the wife had filed for bankruptcy after the divorce was entered and represented that she was not married in that proceeding. In response to another motion filed by the wife, the trial court conducted an evidentiary hearing in March 2021. At that hearing, the wife testified that she was not aware of the divorce until 2016 and that she waited to challenge it because she "believed it to be true" and because the husband threatened to "put [her] out" if she took action. Documents were introduced from the wife's bankruptcy proceeding and from a Social Security disability benefit claim, including a note from a doctor in June 2015 stating that the wife "is in the process of getting married in the near future." Another doctor's note from April 2015 mentioned the wife's contemplated marriage to her "former husband." The husband never testified as to whether he had informed the wife about the divorce. The trial court denied the wife's Rule 60(b) motion and the wife appealed. **Reversed.** Rule 4(c)(1), Ala. R. Civ. P., provides, in pertinent part, that "[s]ervice of process ... shall be made ... [u]pon an individual, other than a minor or an incompetent person, by serving the individual or by leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein ..." The issue here was whether the husband is a "person

of suitable ...discretion" under Rule 4(c)(1) for purposes of receipt of service of process for the wife in the divorce action; such an issue is a question of law. The rules of civil procedure are to be construed to "secure the just...determination of every action." Rule 1(c), Ala. R. Civ. P.. To allow the husband, who was the opposing party to the wife in the divorce proceedings, to accept service of process for her would in no way secure the just determination of the parties' divorce action. "As the opposing party in the divorce action, he simply is not a 'person of suitable ... discretion' who is permitted to accept service." A judgment that is entered in the absence of personal jurisdiction is void. The husband also claimed that the wife should be judicially estopped from asserting the trial court's lack of jurisdiction based on her subsequent representations that she was not married. Estoppel is an affirmative defense that was not raised by the husband until he filed his brief on appeal. Therefore, the court refused to consider this argument. The judgment of the trial court is due to be reversed. ***Heald v. Heald,*** 30 ALW (2200527), 11/05/2021, Etowah Cty.; Per curiam; all judges concur; 21 pages. [ATTY: Appt: Christopher R. Garner, Gadsden; Apee: Anthony Clark Hall, Gadsden]

CIVIL PROCEDURE: Due Process. The parties were divorced in 1999. Pursuant to the divorce judgment, the husband was required to maintain a life insurance policy with a minimum death benefit of $150,000 naming the wife as beneficiary. In 2006, the trial court found the husband in contempt for failing to comply with the life-insurance provision of the divorce judgment and the husband was ordered to pay $100 per day until he provided proof of his compliance with that provision. The husband provided the requisite proof. In August 2021, the wife filed another contempt petition, alleging that the husband had failed to maintain the life-insurance policy. The husband filed an answer and counterclaim seeking a modification of the divorce judgment. The actions were consolidated, and the trial postponed several times. On December 10, 2021, the husband moved to have the matter placed on the trial court's administrative docket due to his "serious and life-threatening" health conditions. The wife objected and requested a hearing. An order was entered setting the husband's motion for hearing on December 14, 2021, but the husband was specifically excused from attending that hearing. No evidence was taken at the December 14, 2021, hearing. However, when asked by the trial court, the husband's counsel conceded that no life-insurance policy was in place. During the hearing, the trial court indicated its intention to enter a pendente lite order which contained a judgment in favor of the wife in the amount of the life-insurance benefit so that she could file a claim for that amount against the husband's estate. The trial court explained that "this is an emergency situation" and that it had "no other way to deal with it." The husband's attorney argued that no notice was provided about the issue of the husband's compliance with the life-insurance provision and that the only issue that was supposed to be addressed is whether the case would be set on the administrative docket. On December 15, 2021, the trial court entered an order awarding the wife a judgment against the husband in the amount of $150,000. Said order stated that if the husband provided proof of a life-insurance policy before the wife executed on the order, the court would reconsider its order. The matter was placed on the administrative docket. On January 5, 2022, the trial court entered an order setting the matter for trial on February 25, 2022. The husband objected to the trial setting given that the matter was already placed on the administrative docket. The husband filed a petition for a writ of mandamus

challenging the trial court's order awarding the wife a $150,000 judgment against him. **Writ of mandamus granted.** "Due process" requires "notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing." *Hosey v. Lowery,* 911 So.2d 15, 17-18 (Ala. Civ. App. 2005). If a judgment is entered without affording the parties proper notice, that judgment is void. Here, when the trial court scheduled the December 14, 2021 hearing, the only issue it indicated it would consider was whether the matter would be placed on the administrative docket. "We are not without sympathy for the positions of the parties and the efforts of the trial court. However, based on the materials before us, there was no indication that the husband could have been on notice that a money judgment might be entered against him as a result of the December 14, 2021, hearing." As a result, that portion of the trial court's order awarding the wife a $150,000 judgment against the husband is set aside as void. Because the husband did not challenge the other aspects of the December 15, 2021, order, those arguments are waived. ***Ex parte Amberson (Barrett v. Amberson),*** 32 ALW (2210331), 02/22/2022, Calhoun Cty., Thompson, Moore, Edwards, Hanson, and Fridy concur.; 10 pages. [ATTY: Pet: Alyssa Enzor Baxley, Oxford; Resp.: Trudie Anne Phillips, Anniston].

CIVIL PROCEDURE: Voluntary Dismissal. On September 17, 2021, the wife filed a complaint for divorce. On September 23, 2021, the wife filed a motion to dismiss in which she stated that she no longer wanted to pursue a divorce. On September 24, 2021, the husband filed an answer and a counterclaim for divorce. The trial court set the wife's motion to dismiss for a hearing to be held in February 2022. The wife filed a "motion to vacate" the order setting her motion to dismiss for hearing, arguing that the hearing was not necessary pursuant to Ala. R. Civ. P. 41(a)(1)(i). She also requested that the husband's counterclaim be dismissed. The trial court entered an order granting, in part, the wife's "motion to vacate" stating that her divorce action was dismissed. However, the trial court further stated in that order that the husband's counterclaim could proceed. The wife filed a petition for writ of mandamus. **Writ of mandamus granted.** The wife argues that her "motion to dismiss" was actually a notice of voluntary dismissal pursuant to Rule 41(a)(1)(i). That rule allows an action to be dismissed by a plaintiff without order of a court if a notice of dismissal is filed before the defendant files an answer or a motion for summary judgment. "Our supreme court has clearly explained that a Rule 41(a)(1)(i) dismissal does not require court action to be effective; instead, it is the plaintiff's filing of a notice of dismissal before the defendant has filed either an answer or a motion for a summary judgment that effectuates the dismissal." The fact that the wife filed a "motion to dismiss" instead of a "notice of dismissal" is of no consequence; the substance of a motion and not its nomenclature is controlling. Once the wife filed her motion to dismiss, it was as if her action had never been brought. The husband could not revive that action by filing an answer and counterclaim. All orders entered by the trial court after the wife filed her motion to dismiss are void inasmuch as the trial court no longer had jurisdiction. The petition for writ of mandamus is due to be granted. ***Ex parte Baumgardner-Pickle (Baumgardner-Pickle v. Pickle),*** 30 ALW (2210091), 12/3/2021, Lauderdale Cty., Edwards; Thompson, Moore, Hanson and Fridy concur; 8 pages. [ATTY: Pet: Mary Baschab-Haslacker, Muscle Shoals; Resp: Michael Santos, Gulf

Shores]

CIVIL PROCEDURE: Counterclaims--Involuntary Dismissal--Discovery--Sanctions. FAMILY LAW: Divorce--Mental Capacity. The wife filed a divorce action in July 2018. The husband filed a timely answer and counterclaim. In June 2019, the wife filed a motion seeking the appointment of a guardian ad litem for the husband. She noted that the parties had participated in mediation and that the husband's daughters (from a previous marriage) had accompanied the husband to the mediation and indicated to the mediator that they held a power of attorney because the husband was experiencing diminished capacity. A guardian ad litem was appointed for the husband in September 2019. In January 2020, the guardian ad litem filed a notice with the trial court indicating that the husband's diminished capacity was "growing more serious as time goes by." The trial court set a hearing and directed the parties' counsel to address whether one can be divorced from an incompetent person. The wife filed a response in which she stated that she was going to dismiss her divorce action and expressing concern that the husband would not be able to respond to discovery propounded upon him. As a result, the wife contended that dismissal of the action would be an appropriate sanction under Ala. R. Civ. P. 37(b)(2)(C). Counsel for the wife then filed a motion seeking dismissal of both her claim and the husband's counterclaim. The husband was ordered to undergo a psychological evaluation. After the neuropsychologist submitted his report, the trial court entered a judgment dismissing the action. The husband appealed. **Reversed.** Ala. R. Civ. P. 41(a)(2) permits a plaintiff to dismiss an action after a counterclaim has been asserted. However, that rule specifies that, if such a dismissal is permitted, "the counterclaim shall remain pending for adjudication by the court." Rule 41(b) allows for the involuntary dismissal of an action under two circumstances: (a) failure to prosecute and (b) failure by a claimant to comply with any order of court. Here, the husband's retained trial counsel vigorously opposed the wife's motion to dismiss and there is no evidence that there was a failure to prosecute. Similarly, the record is devoid of evidence that would support the proposition that the husband had violated any rule of civil procedure or any court order. The court looked to decisions in other states which have held that a divorce action is so personal in nature that a legal representative of a mentally incapacitated spouse cannot maintain an action on behalf of that spouse. However, the supreme court in this state has held that a guardian may act on behalf of a mentally incompetent spouse in a divorce action. *Campbell v. Campbell,* 242 Ala. 141, 5 So.2d 401 (1941). The court rejected the wife's argument that because the husband would not be able to respond to discovery or sit for a deposition, the dismissal of this action would be an appropriate sanction under Rule 37(b)(2), Ala. R. Civ. P.. However such a sanction can only be imposed for a "conscious or intentional failure to act." The husband's inability to respond to discovery requests stems from his cognitive decline and cannot be classified as "conscious" or "intentional." The trial court erred by dismissing the husband's counterclaim and its judgment is due to be reversed. ***W.W.H. v. D.L.H.,*** 30 ALW (2200109), 10/29/2021, Jefferson Cty.; Hanson; Thompson, Moore and Fridy concur. Edwards concurs in the result, without writing. 16 pages. [ATTY: Not listed-Confidential]

CIVIL PROCEDURE - FAMILY LAW - Rule 65(b) - In a previous action, the Mobile Juvenile Court ("the juvenile court") entered an order that awarded custody of a minor child to S.L.P. ("the mother") and among other things, directed J.B. ("the father") to pay child support and a sum certain towards the child-support arrearage. However, this order did not contain any visitation provisions. The juvenile court later entered a second order awarding the father visitation with the child pending a hearing set for July 2020. On the day of the July 2020 hearing, neither party appeared and thus the juvenile court entered an order dismissing the action. On April 15, 2021, the father commenced the current action by filing a petition to modify custody and motion for emergency relief. On April 16, 2021, the day after the father filed his petition, the juvenile court entered an ex parte order awarding "temporary custody" of the child to the father. The order said that no hearing was scheduled but that one would be held upon the mother's written request. On September 28, 2021, the mother filed a motion to dismiss the father's petition to modify custody and his motion for emergency custody or, in the alternative, to vacate the April 16, 2021, order. In her motion, the mother asserted that she had never been served with the father's modification petition and that she and the child had moved to Cobb County, Georgia, in February 2019, and the two of them had lived there ever since. Furthermore, the mother said that the father had failed to comply with the requirements of Rule 65(b), Ala. R. Civ. P. in seeking emergency custody, because his petition and motion were neither verified nor supported by an affidavit and no certification had been made regarding attempts to provide notice or reasons stated to support a claim that notice should not be required. On September 29, 2021, the juvenile court entered an order denying the mother's motion to dismiss without any mention of the mother's alternative request to set aside the April 16, 2021, order. On October 5, 2021, the mother filed this petition for a writ. The father did not file an answer to this writ. Rule 65(b) provides, in pertinent part: "A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required." The father's custody-modification petition and his motion for emergency custody were not verified and neither filing had an affidavit attached. The father failed to meet the first prong of Rule 65(b). The father's attorney failed to certify the efforts, if any, made to give the mother notice or to cite reasons why notice to the mother should not be required. Therefore, the second prong of Rule 65(b) also was not met. Because the father and his attorney failed to comply with the requirements of Rule 65(b), the juvenile court erred by issuing the April 16, 2021, order. The mother has demonstrated a clear legal right to the relief she seeks, and her petition for the writ of mandamus is due to be GRANTED as to this issue. With regard to jurisdiction, the mother contends that, under the Uniform Child Custody Jurisdiction and Enforcement Act, § 30-3B-101 et seq., Ala. Code 1975, the juvenile court no longer has continuing, exclusive jurisdiction over issues involving the child's custody and, therefore, that the juvenile court erred when it denied the mother's motion to dismiss the father's current action. However, the juvenile court denied the mother's motion to dismiss the day after that motion was filed without conducting an evidentiary hearing or hearing arguments of the parties on this issue and the father has not yet had the opportunity to respond to the mother's assertion in the juvenile court. For these reasons the mother's petition with regard to this issue is DENIED; however, the juvenile court is encouraged to allow the parties to present argument and evidence on the issue of

jurisdiction before going forward with the final hearing scheduled currently for November 29, 2021. See Rule 12(h)(3), Ala. R. Civ. P. ***Ex parte S.L.P.***, 30 ALW (2210005), 11/22/2021, Mobile Cty.; FRIDY, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur. 11 pages. [ATTY: Not Listed - Confidential]

CIVIL PROCEDURE: Postjudgment Motion. APPEAL & ERROR: Final Judgment. Gary and Sheila Womble were injured in a 2018 motor-vehicle accident. A vehicle being driven by Collie Moore rear-ended the Wombles' vehicle. The Wombles sued Moore as a result of injuries they sustained in the accident. The trial court conducted a status conference on August 24, 2020, after which it entered a scheduling order setting the trial in this case for September 13, 2021. Two months later, the Wombles' attorney sought and was granted leave to withdraw as counsel. The Wombles proceeded pro se, participating in all scheduled proceedings conducted between January and April 2021. The case was called for trial on September 13, 2021. Moore was present but neither the Wombles nor an attorney on their behalf appeared. Based on an oral motion made by Moore, the case was dismissed, with prejudice. On October 12, 2021, the Wombles filed a motion pursuant to Rule 60(b), Ala. R. Civ. P. asking the trial court to set aside the order dismissing their action based on "excusable neglect." On January 12, 2022, the Wombles appealed. **Appeal dismissed.** Moore contended that because the Wombles' Rule 60(b) motion has never been ruled upon by the trial court, no final judgment exists from which an appeal can be taken. The Wombles argue that their Rule 60(b) motion was denied by operation of law 90 days after it was filed. Rule 59.1, Ala. R. Civ. P. provides that no post judgment motion filed pursuant to Rule 50, 52, 55 or 59, Ala. R. Civ. P. shall remain pending in the trial court for more than 90 days. However, that 90-day period does not apply to motions filed pursuant to Rule 60(b). Accordingly, the Wombles' motion was not denied by operation of law, and it remains pending. Because there is no final judgment, no appellate jurisdiction exists and the appeal regarding the Rule 60(b) motion is due to be dismissed. To the extent that the Wombles are appealing from the trial court's September 2021 judgment dismissing their claims against Moore, a notice of appeal would have had to have been filed within 42 days from the date of that judgment. A Rule 60 motion does not suspend the time for filing an appeal. Because the notice of appeal was untimely as to the trial court's judgment of dismissal, the Wombles' appeal, insofar as it challenges that judgment, is due to be dismissed. ***Womble v. Moore,*** 31 ALW (1210222); Jefferson Cty.; Shaw; Parker, Bryan, Mendheim and Mitchell concur; 9 pages. [ATTY: Appt: Michael Braun, Montgomery; Apee: Mark Hess, Birmingham]

CIVIL PROCEDURE: Stay. APPEAL & ERROR: Mandamus--Timeliness. FAMILY LAW: Contempt-Child Custody. The parties were divorced in 2012. The divorce judgment incorporated an agreement of the parties which provided that the parties would share joint custody of their minor child. The father was entitled to exercise custody on the first, third and fifth weekends of each month from Thursday afternoon until Monday morning as well as holiday and summer visitation. In 2014, the divorce judgment was modified, and the father's custodial periods were reduced. In that judgment, the trial court recounted the child's unwillingness to participate in the father's custodial periods. In June 2019, the father filed a contempt petition asserting that the mother was not ensuring that the child participated in his custodial periods. ("the .03 action"). The father then filed successive separate complaints seeking to hold the

mother in contempt for failing to require the child to participate in the father's custodial periods over the next several months; each of these actions was assigned a separate case-number point designation. In March 2021, the father filed a motion in the .03 action in which he alleged that the mother had been arrested for suspicion of driving under the influence of alcohol. The parties' child was then 16-years old and attending boarding school in Chattanooga. The father wanted the mother to have to participate in "Soberlink" testing. The trial court denied the father's motion but prohibited the mother from driving with the child pending further orders of the court. The mother filed a motion to stay the contempt actions pending resolution of her criminal charge. The trial court granted that motion and stayed all 10 contempt actions. The mother was directed to file a status report on July 23, 2021. The mother filed a status report indicating that her criminal case had been continued until August 18, 2021. The father filed a motion to lift the stay of the contempt actions, arguing that the mother could repeatedly continue the criminal case to thwart resolution of his contempt actions. The trial court denied the father's motion. On August 19, 2021, the father filed a motion seeking reconsideration of his motion to lift the stay and he informed the court that the mother had appeared in court on August 18, 2021 and waived a preliminary hearing. As a result, her criminal case had been bound over to the grand jury. The trial court denied the father's motion to reconsider on August 31, 2021, and the father filed a petition for writ of mandamus on August 18,2021. **Petition granted in part and denied in part.** (1) The mother argued that the father's petition was untimely because it was filed 154 days after the order granting her motion to stay. However, the father was not seeking a review of the initial order staying the actions. Instead, after the mother's criminal case was not resolved in July 2021, the father sought to have the stay lifted because of prejudice he contended would result from the additional delay of the trial of his contempt actions. A trial court may entertain a motion seeking to lift a stay based on changes in circumstances that impact the propriety of the stay. Therefore, the father's mandamus petition was timely filed. (2) Factors to be considered by a trial court when ruling on a motion to stay civil proceedings based on the invocation of a party's constitutional rights against self-incrimination include: (a) whether the civil and criminal proceedings are parallel; (b) whether the moving party's 5th Amendment rights will be threatened if the civil proceeding is not stayed and (c) whether the requirements of the balancing test set forth in *Ex parte Baugh,* 530 So.2d 234, 244 (Ala. 1988) and *Ex parte Ebbers,* 871 So.2d 776, 789 (Ala. 2003) are met. The father's contempt action is not parallel to the mother's criminal case. "The allegations relating to the mother's failure to secure the child's participation in the father's custodial periods 'can be proven without a determination of whether' the mother is guilty of the criminal charge." Moreover, the mother's right against self-incrimination will not be threatened by the continuation of the contempt claims against her. "The father's contempt actions should proceed, but the trial court should permit inquiry into solely whether the mother is in contempt." However, the mother asserts (and the father does not deny) that the father amended his petition to include a custody modification claim. Because the character and conduct of the mother is a consideration for the trial court in the custody modification action, the criminal case and the modification claim are sufficiently parallel to support the conclusion that a

stay might be warranted. The court then turned to the balancing test set out in *Ex parte Ebbers.* It concluded that the potential prejudice to the mother's right against self-incrimination outweighs the prejudice to the father's interest in resolving the custody modification claim. The stay is due to remain in effect regarding any custody modification claims. ***Ex parte Butts (Butts v. Butts),*** 30 ALW (2201027), 12/10/2021, Jefferson Cty., Edwards; Thompson, Moore and Hanson concur; Fridy recuses himself, 24 pages. [ATTY: Appt: William Clark, Birmingham; Apee: Sara Senesac, Birmingham]

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]