FAMILY LAW UPDATE

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PRESENTED BY:

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I. PROTECTION FROM ABUSE:

FAMILY LAW: Protection from Abuse. In 2019, M.J.E. ("the daughter") filed a petition seeking a protection-from-abuse ("PFA") order against her father. In her petition, the daughter alleged that the father had sexually abused her in 2014, that he emotionally abused her by "stalking" her, that he had yelled at her at her high school graduation and that he had contacted the college she was entering as a freshman student "for info about me." After a hearing, the trial court entered a PFA order preventing the father from contacting the daughter and directed that he not be permitted to attend any events hosted at the college that the daughter attends. The PFA order expired by its terms on June 1, 2020. After his postjudgment motion was denied by operation of law, the father appealed. **Reversed.** (1) In a footnote to its opinion, the court noted that although the PFA had expired by the time that its opinion was rendered, it was not moot. "The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." Here, the father noted that the PFA order is recorded in the National Crime Information Center database and he argued that he could suffer adverse consequences in his employment, which could require a background check for security clearances in the future. Accordingly, the court determined that because there could be "collateral consequences" to the father, the mootness doctrine did not apply. (2) The father argued that the trial court erred by not holding a hearing on his postjudgment motion because there was probable merit to his argument that the conduct about which the daughter complained did not constitute an act of abuse warranting the entry of a PFA. The daughter was a cheerleader in college. She testified that the father came to her high-school events although she asked him not to and she was concerned that he would try to be involved in her "college experience." The daughter never stated that the father had spoken to her when he attended those events or that he had threatened her in any manner. Numerous emails that had been exchanged between the parties were admitted into evidence. In some of those exchanges, the father and the daughter discussed money and the daughter asked the father why he had stopped paying child support. The father agreed to send $1,000 to her and the daughter responded by saying "If it is from child support I legally cannot except [sic] it. And if you send it I will return the check so never mind." The father then sent the daughter a message indicating that he had mailed the check to her. The next day, the daughter filed the PFA action. A psychologist testified on behalf of the father. She had counseled both the daughter and the father. She explained that the sexual-abuse

allegations had arisen because the daughter had complained that the father had laid down beside her and stroked her hair. The mother had perceived the father's actions to be sexual but the daughter did not until the mother told her that they were. The psychologist testified that she was concerned about parental alienation and coaching. Under The Protection from Abuse Act, Ala.. Code 1975, §30-5-1 et seq., the term "abuse" is defined to include: arson, assault, child abuse, criminal coercion, criminal trespass, harassment, kidnapping, menacing, reckless endangerment, sexual abuse, stalking, theft, or unlawful imprisonment. The daughter's PFA petition alleged acts of sexual abuse, emotional abuse and stalking. With regard to stalking, a person commits stalking in the first degree if he or she "intentionally and repeatedly follows or harasses another person and…makes a threat, either express or implied, with the intent to place that person in reasonable fear of death or serious bodily harm." Ala. Code 1975, §13A-6-90(a). Stalking in the second degree requires a showing that a person, acting with an improper purpose, initiates communication with another and causes material harm to the mental or emotional health of the other person, or causes such person to reasonable fear that his or her employment, business or career is threatened. Ala. Code 1975, §13A-6-90.1(a). However, in order to be guilty of stalking in the second degree, the perpetrator must have been previously informed to cease the offending conduct. Here, the daughter admitted that the father had not made a threat to her. The father's attendance at the daughter's activities appear to be lawful actions by the father. "Thus, we are unable to conclude that the father's argument that the daughter did not establish that the father was guilty of stalking lacks merit." The same conclusion was reached by the court with regard to the offense of harassing communications. In order to be entitled to the PFA order, the daughter was required to present evidence indicating that the father's communications were performed in a manner "likely to harass or cause alarm." Ala. Code 1975, §13A-11-8(b)(1)a. Here, the majority of the emails sent by the father to the daughter were innocuous. Finally, with regard to the allegation of sexual abuse as a ground for the PFA, the father had been criminally charged but the district attorney abandoned the charges. Moreover, the father had been granted unsupervised visitation after those charges had been litigated. "Accordingly, we reverse the trial court's order denying the father's postjudgment motion, and we instruct the trial court to hold a hearing on the father's postjudgment motion. Judge Edwards dissented, holding that the evidence presented by the daughter was "entirely insufficient to support the protection-from-abuse order entered by the trial court." Therefore, she opined that the PFA order should be reversed. ***M.R.E. v. M.J.E.,*** 29

ALW (2190284), 9/11/2020, Lauderdale Cty., Per curiam; Moore, Donaldson and Hanson concur; Thompson concurs in the result, without writing; Edwards dissents, with writing, 25 pages. [ATTY: Appt: Leigh Ann Landis, Tuscumbia; Patrick Hill, Huntsville]

FAMILY LAW: Due Process--Protection from Abuse. The mother and the father were previously divorced. In May 2019, the mother filed a complaint in which she requested that the trial court hold the father in contempt for a provision contained in a judgment entered by the trial court in June 2018 prohibiting contact between the father and the mother's husband, Brian Manderson. The provision stated that when attending events in which the parties' children participated, the father and Manderson were to remain at least 100 feet from each other. The mother alleged that the father had followed Manderson to a store parking lot and later attacked him while he sat in his car during one of the children's softball practices. Contemporaneously with her complaint, the mother filed a "motion for ex parte temporary emergency order" in which she alleged that the father's behavior was causing harm to the children. She requested that the trial court order that the father could not attend any of the children's activities if she and Manderson were going to be present. She also requested that that father be ordered to undergo mental health treatment and that until such time as said treatment was completed, that the father's visitation be supervised. The trial court entered an order suspending the father's visitation and ordering that the father have no contact with Manderson or the children ("the ex parte visitation order"). The trial court also entered a protection-from-abuse ("PFA") order on May 13, 2019 in which it restrained the father from having any contact with the mother, the children or Manderson. The PFA order further awarded the mother the sole legal and sole physical custody of the children. In October 2019, the father filed a motion to set aside the PFA order and the ex parte visitation order. After a hearing, those motions were denied by the trial court. The father filed a petition for writ of mandamus on November 13, 2019. **Writ of mandamus granted in part and denied in part.** (1) The father is challenging orders of the trial court entered in May 2019. His petition for writ of mandamus is untimely and he failed to include a statement of good cause for his failure to file the petition within a presumptively reasonable time. However, because part of the father's challenge to the court's orders is on jurisdictional grounds, the merits of the writ of mandamus concerning jurisdiction can still be considered. (2) The father argues that the ex parte visitation order should be vacated because the mother's motion for an ex parte

temporary emergency order was not supported by the certification required by Ala. R. Civ. P. 65(b). The court acknowledged that the failure to include such a certification has served as grounds to set aside an ex parte order in other cases. In addition, the trial court failed to hold an evidentiary hearing as soon as practicable after the entry of the ex parte order which is further required. "Thus, the trial court is directed to set aside the ex parte visitation order and to hold further proceedings as necessary in a manner consistent with this opinion." (3) The father next argued that the trial court lacked jurisdiction to enter the PFA order because the mother had not filed a protection-from-abuse complaint. "A party need not institute a separate action to secure a PFA order; [a] protection order may be requested in any pending civil or domestic relations action..." §30-5-3(b)." The mother requested ex parte relief to restrain the father's conduct and to limit his contact with her, the children and Manderson, all of which is relief that may be afforded under the Protection from Abuse Act. This portion of the father's petition for writ of mandamus is due to be denied. ***Ex parte Lester (Lester v. Lester),*** 28 ALW (2190140), 12/13/2019, Lee Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 14 pages. [ATTY: Pet: Robert Poole, Opelika; Resp: Zach Alsobrook, Opelika]

FAMILY LAW: Protection from Abuse. The mother filed a petition for protection-from-abuse ("PFA") seeking to restrain J.L.L. from having contact with her daughter, A.S. ("the child"). In her petition, the mother alleged that J.L.L. had washed the child in a washing machine, had threatened to hurt the child if the child told the mother about the washing-machine incident and had pulled the child's hair when the child needed to use the restroom in a grocery store. The trial court entered an ex parte PFA order on August 23, 2019 and a trial was held on September 11, 2019. At trial, evidence was adduced that J.L.L. was living with the child's father from October 2017 through April 2018. At that point, the father and J.L.L. ended their relationship and since, the child has had limited contact with J.L.L.. The child's half-sister, who was 11 years old, testified at the PFA hearing that J.L.L. did not like the child and that she had treated her better than she did the child. H.B. claimed that one time, while J.L.L. was brushing the child's hair, J.L.L. had pulled her hair and the child said "ow." Moreover, H.B. claimed that J.L.L. had referred to the child as a "devil" and made other unkind comments about her. The mother introduced a Facebook post made by J.L.L. wherein she referenced the child stating: "OMG yes. Perfect example. People play little Miss Angel when in

reality they know they got a monster ha ha ha." No evidence was presented regarding the alleged washing-machine incident or evidence that corroborated the claim made in the petition that J.L.L. had pulled the child's hair in the grocery store. Thereafter, the trial court entered a final PFA order enjoining J.L.L. from having any contact with the child. The final PFA order provided that it would expire on August 21, 2025. J.L.L. filed a postjudgment motion in which she asserted that the mother had not introduced any evidence indicating that J.L.L. had committed an act of abuse against the child that would support the entry of a PFA order. The trial court held a hearing on J.L.L.'s postjudgment motion and amended its final PFA order to provide that it would terminate on August 21, 2020, but otherwise denying the postjudgment relief sought by J.L.L.. J.L.L appealed. **Reversed.** In order to have been entitled to a PFA order, the mother was required to prove by a preponderance of the evidence that J.L.L. had committed an act of abuse. The Protection from Abuse Act ("the Act"), Ala. Code 1975, §30-5-1 et seq. sets forth definitions for what constitutes "abuse." §30-5-2(a). In this case, neither the original PFA order nor the amended PFA order specifies what act of abuse the trial court found had been established. "The evidence presented at trial did not establish that J.L.L. committed the acts that were alleged by the mother in her petition, and we are not directed to any other act established by the evidence presented that would constitute abuse as defined in §30-5-2(a)(1)." Therefore, the judgment of the trial court is due to be reversed. ***J.L.L. v. K.S.,*** 29 ALW (2190242), 10/23/2020, Calhoun Cty., Donaldson; Thompson, Moore, Edwards and Hanson concur, 8 pages. [ATTY: Appt: Pro se; Apee: Pro se]

II. PERIODIC ALIMONY

FAMILY LAW: Alimony--Property Division--Expert Witness Fees. The parties were married in 1998 and the wife filed for divorce in 2016. At the time of the divorce trial, the husband was 62 years old and the wife was 52. The wife has a master's degree and taught school for 11 years. She then owned and operated a boutique and worked for a website developer. The husband owned a business known as "Medicare Advantage Specialists" ("MAS"). The husband valued his interest in the business at $1.6 million. An expert witness retained by the wife did a calculation of the value of the business which was admitted into evidence but the trial court explained in its judgment that it gave that calculation little weight. The

parties owned three parcels of real property: the marital residence which was valued at $850,000 with an associated indebtedness of $444,000; a lake house valued at $500,000 with an associated indebtedness of $270,000 and farmland valued at $750,000 with an indebtedness of $380,000. The divorce judgment awarded the husband all of his interest in MAS as well as all of the real estate. The wife was awarded a property settlement in the amount of $2,000,000 to be paid in one lump sum of $500,000 and the remainder to be paid in the monthly amount of $10,000. The husband was ordered to pay rehabilitative alimony in the amount of $5,000 per month for 60 months. The husband was also ordered to pay $30,000 in attorney fees and $10,900 for "necessary litigation expenses." The wife appealed and the husband cross-appealed. **Appeal—reversed; Cross-appeal—reversed.** (1) The wife argued that the trial court erred by excluding the calculation of value made by her expert as to the value of MAS. However, the record shows that this calculation *was* admitted into evidence but that the trial court assigned very little weight to that evidence. Such was the prerogative of the court. The wife further argued that no evidence supports some of the trial court's findings of fact regarding its reasons that it did not give weight the wife's expert's calculation. The court rejected that claim. "We therefore find no basis for reversing the judgment based on the trial court's calculation of value and its ultimate determination of the value of MAS." (2) However, the court did find that the award of rehabilitative alimony "even when coupled with her large property settlement and her earning capacity, inequitably deprives her of means to maintain the marital standard of living." Evidence was adduced that the parties enjoyed a luxurious standard of living during the marriage. The wife testified that they traveled to expensive resorts and that she routinely shopped "without even looking at the price tags." She demonstrated that she had averaged approximately $7,500 per month in discretionary spending for the first five months of 2016. The wife requested an alimony award of $30,000 per month. The husband argued that the wife's monthly budget included "unnecessary expenses." "However, the purpose of periodic alimony is not simply to supply support for the basic necessities of life, but also to maintain the lifestyle the parties enjoyed during the marriage." A vocational expert testified that the wife was capable of earning between $34,000 and $66,800 annually. If this evidence is factored in with the amount of property settlement that the wife was awarded, it would appear that the wife could "at least approximate the marital standard of living." However, there was no evidence that at the end of the 60 month period for which the wife is to receive rehabilitative alimony that she can be expected to earn sufficient wages to maintain the marital standard of living. In

contrast, the husband earned $1,500,000 annually and even with the obligations imposed upon him by the divorce judgment, he should have sufficient disposable income to pay periodic alimony. The court also pointed to the equities of an award of periodic alimony, noting that the parties struggled at the beginning of their marriage and the wife worked for the company, at times without compensation. "After the wife discovered evidence indicating that the husband was involved with other women, the marriage ended, along with the way of life to which the wife had become accustomed." The alimony award is due to be reversed as well as the property-division. (3) The final issue raised by the wife was the adequacy of the attorney fees awarded to her. The husband was ordered to pay only a portion of her fees. Because the property-division and alimony awards were due to be reversed, the trial court was instructed to consider this issue on remand. (4) In his appeal, the husband challenged the trial court's award of $10,900 as "necessary litigation expenses." The expenses for the wife's valuation of MAS were $10,900. The remainder of the wife's litigation expenses do not total that amount. Therefore, the trial court's award of litigation expenses must include, to some extent, expert witness fees. "Neither our legislature nor our supreme court has seen fit to permit expert-witness fees to be recovered in domestic-relations matters." Accordingly, this portion of the trial court's judgment is also due to be reversed. ***Klamer v. Klamer,*** 29 ALW (2180768; 2180814), 7/17/2020, Shelby Cty., Per curiam; Moore, Donaldson, Edwards and Hanson concur; Thompson concurs in the result, without writing, 22 pages. [ATTY: Appt: Charles Dunn, Birmingham; Apee: Bruce Gordon, Birmingham]

FAMILY LAW: Child Support-- Division of Property--Alimony--Contempt--Protection from Abuse. The parties were married in 2004 and had two children. The husband is a plumber and owns his own business. The wife had been employed until 2015 at a local hospital as an ultrasound technician but at the time of the trial, she was only working part-time. In January 2017, the wife filed a petition for protection from abuse ("the PFA action"). Shortly thereafter, the husband filed a divorce action. The PFA action and the divorce action were assigned to the same trial judge and eventually consolidated. A pendente lite order was entered in the divorce action which required the husband to pay certain household bills , to pay $1,000 per week as pendente lite support, to submit to color-code testing for drugs and alcohol, and to visit with the minor child once per week at "the parenting center." During the next few months, the parties attempted

a reconciliation. When those attempts failed, the wife sent a letter to the trial court and then in February 2018, she filed a motion seeking to hold the husband in contempt for testing positive for alcohol, for failing to pay certain household bills, for failing to ready the parties' Orange Beach house for rent and for violating the no-contact provisions of the PFA order. The husband filed a petition for contempt against the wife for failing to allow him to retrieve equipment from the marital residence. After a hearing, the trial court entered an order holding the husband in criminal contempt for failing to appear for color code testing and/or testing positive on nine separate occasions. He was sentenced to 45 days in the county jail but 40 of those days were suspended. He was also held in contempt for violating the no-contact order on 23 occasions for which he was sentenced to 90 days' incarceration; he was required to serve 5 of those days. The case was set for trial in October 2018. The husband filed a motion in limine seeking to prevent the wife from presenting evidence regarding her reasonable and necessary monthly expenses because she failed to respond to discovery requests seeking that information. Instead, she stated that she needed $10,000 per month upon which to live. The trial court granted the motion in limine in part, but stated that it would consider testimony from prior hearings related to those expenses. At trial, the wife produced audio recordings that portrayed the husband's volatility and anger on several occasions. She testified that the husband had thrown items at her, had removed the tires from her vehicle and had broken in a door at the marital residence. She described the husband as a violent drunk, who threatened her and physically abused her. The husband testified that he had never hit the wife but admitted that he might have pushed her. He denied being an alcoholic but he tested positive for alcohol after the contempt hearing. The wife testified that the husband earned over $400,000 per year in the business. She claimed that much of that income was derived in cash and that the husband did not claim it on his income taxes. The parties' personal income tax returns indicate that he earned $64,867, $83,132 and $38,993 in 2014, 2015 and 2016, respectively. The business's ordinary income was $127,848, $ 66,256, and $124,979 for those same years. The parties owned a home in Loxley ("the Loxley house"), an unimproved lot ("the Loxley lot"), the current marital residence and a house in Orange Beach. After the trial, the trial court entered a judgment awarding the wife the sole legal and sole physical custody of the children and ordered the husband to pay $1,582 per month in child support. The husband was afforded supervised visitation "up to two times per week". The older child was to remain in counseling and the child's counselor was authorized to determine when the husband's visitation could

progress to unsupervised. The husband was required to remain on color-code. The wife was awarded $2,500 per month in periodic alimony, $10,845 for past due pendente lite expenses and $48,500 representing one-half of the amount that the wife claimed was in the parties' safe at the time of the filing. The husband was awarded all interest in his business. The wife was awarded all four parcels of real estate. The PFA was made permanent and the husband was required to surrender all guns and was enjoined from possessing any guns. The husband filed an appeal in the divorce action. **Affirmed in part; reversed in part.** (1) The husband challenged the trial court's finding of contempt against him for nine instances of either testing positive for alcohol or for failing to submit to color-code testing when called. He asserted that the results of the color-code testing should not have been admitted because they were not properly authenticated. However, the husband did not object to the admission of the one positive color code test at the hearing and this issue cannot be considered on appeal. But, it appears that the trial court held the husband in contempt for the same nine instances of contempt in the divorce judgment for which he had previously been tried and sentenced. A trial court's finding of two different counts of contempt based on the same occurrence will not be permitted to stand. This portion of the trial court's divorce judgment is due to be reversed. (2) The next issue addressed on appeal was the propriety of the permanent PFA and the trial court's prohibition with regard to the husband's ownership of a firearm. The husband did not appeal from the PFA action. Moreover, he only filed a postjudgment motion in the divorce action. Even if the notice of appeal that he filed in the divorce action was construed to be an appeal of the PFA action, the appeal in the PFA action would be untimely given that no postjudgment motion was filed to stay the time for filing the appeal. However, the divorce judgment refers to the permanent PFA and includes some of its provisions. Those provisions will be reviewed on appeal. Ala. Code 1975, §30-3-135(b)(8) allows a trial court to impose any other condition that is deemed necessary for the safety of a child or a victim of domestic violence. Based on the evidence that the husband drank, had used profane and abusive language and had threatened the wife's life, "[w]e cannot conclude that the trial court's prohibition on contact between the parties and on the husband's possession of firearms is not supported by the evidence." (3) With regard to the child support obligation imposed upon the husband, the husband argued that the trial court incorrectly determined his monthly income to be $14,000 and that his income should have been based on his personal tax returns. However, testimony at trial indicated that the husband used his business account regularly to pay the family's expenses and that he earned a

substantial amount of cash income. In its decree, the trial court noted that "the only plausible way to explain the lifestyle in which the parties lived" was to conclude that the husband had earned more income than he had reported on the business's and the parties' personal income-tax returns." The trial court did not err in its calculation of the husband's income. However, the trial court failed to include the health insurance premium that the husband paid on behalf of the children as required by Ala. R. Jud. Admin. 32(B)(7)(e). This portion of the trial court's judgment is due to be reversed. (4) The next issue addressed by the court was the division of property. The parties failed to provide property values for their real estate holdings or the value of the business. Evidence was adduced that the business was so profitable that the parties had constructed a $500,000 beach house with little indebtedness. "The trial court was free to believe the wife's testimony indicating that the business earned significant income in cash in addition to the earnings reported on the business's tax returns." The trial court's apparent conclusion that the value of the business was nearly equivalent to the value of the real property is supported by the evidence. (5) The husband challenged the award of $2,500 per month in alimony to the wife. Although there was no testimony to establish the monthly expenses of the parties during the marriage, evidence was presented regarding the cash accumulated by the parties, the real property, the lack of debt and the purchase of a horse for their daughter. Inferences from the wife's testimony support a finding that the parties' general household expenses totaled $4,000 per month. Based on this evidence, the trial court did not err in its award of alimony. Other issues raised on appeal were rejected because they were not properly argued or preserved. Judge Edwards authored a dissent, with which Judge Moore concurred, holding that the trial court erred in awarding alimony to the wife because of her failure to establish the marital standard of living. ***Fields v. Fields,*** 29 ALW (2180594), 3/20/2020, Baldwin Cty., Per curiam; Thompson, Donaldson and Hanson concur; Edwards concurs in part and dissents in part, with writing, which Moore joins, 51 pages. [ATTY: Appt: Floyd Enfinger, Montrose; Apee: Joshua Myrick, Fairhope]

FAMILY LAW: Alimony--Termination--Child Support--Contempt. The parties were divorced in April 2012. The divorce judgment incorporated an agreement of the parties wherein the parties were awarded joint legal custody of their child, the mother was awarded sole physical custody and the father was ordered to pay alimony and child support. In October 2012, the parties resumed

cohabitation and they later had a second child, although they did not remarry. The father did not pay child support during this time but his VA disability benefits of $699 per month were deposited into the mother's bank account. In April 2016, the father moved out of the former marital residence. In March 2017, the father filed a modification petition in which he sought a decrease in child support and a modification of visitation. At that time, he stopped having his VA benefit deposited into the mother's bank account. The mother filed an answer and a counterclaim for contempt alleging that the father had failed to pay child support and alimony. At trial, evidence was adduced indicating that the father owed an alimony arrearage of $11,144.88 plus interest. He also owed a child support arrearage of $10,038.50. The father suffered two heart attacks in November 2017 and his VA disability was increased to $3,615.94 per month. In December 2018, the trial court entered a judgment modifying the father's child support obligation, declining to modify his visitation, holding the father in contempt for failing to pay child support and alimony and ordering him to pay, in specified installments, $10,842.25 in past-due child support and $11,144.88 in past-due alimony. It also awarded the mother an attorney fee. The father filed a postjudgment motion in which he argued that the parties' post-divorce cohabitation should have nullified or abrogated the child custody, child support and alimony provisions of the April 2012 divorce judgment. The trial court denied the postjudgment motion and the father appealed. **Affirmed.** (1) Prior precedent suggests that the remarriage of previously divorced parents abrogates the child custody and child support provisions of a prior divorce judgment. *See Ray v. Ohio National Life Insurance Co.,* 537 So.2d 915, 916 (Ala. 1989) and *Ex parte Phillips,* 266 Ala. 198, 95 So.2d 77 (1957). Here, the parties never remarried. "[T]he cohabitation of divorce parents does not legally restore their marital status or the legal rights that attend that status." Therefore, the trial court did not err by refusing to abrogate the father's child support payments. (2) With regard to the effect of the parties' cohabitation on the father's obligation to pay alimony, the father relied on *Stone v. Sintz,* 572 So.2d 1270, 1272 (Ala. 1990). However, that case involved the transfer of properties in anticipation of a divorce that never transpired and the principles contained therein are inapplicable to the facts of this case. The court further rejected the father's argument that his obligation to pay alimony should have been terminated pursuant to the cohabitation provisions of Ala. Code 1975, §30-2-55. Prior precedent established the this Code section does not apply when a former husband cohabitates with a former wife. *Vaughn v. Vaughn,* 507 So.2d 960, 962 (Ala. Civ. App. 1987). The court rejected the father's argument that *Vaughn* was

due to be overruled. It also noted that the legislature did not choose to change the consequences borne out by the *Vaughn* decision when it enacted its new statute governing the award of periodic alimony. Ala. Code 1975, §30-2-57. The judgment of the trial court as to this issue is due to be affirmed. (3) The father challenged the trial court's finding of contempt against him based on the fact that he was not given proper notice of the mother's contempt claims as required by Ala. R. Civ. P. 70A. Although no show-cause order indicating that the father might be subject to an arrest was entered in compliance with Rule 70A, any error in failing to do so was harmless. The father was able to litigate his contempt claims and no writ of arrest was issued. The judgment of the trial court is due to be affirmed. ***Rivera v. Sanchez,*** 28 ALW (2180624), 12/20/2019, Morgan Cty., Edwards; Thompson, Donaldson and Hanson concur; Moore concurs in the result, without writing, 29 pages. [ATTY: Appt: Tanya Hendrix, Huntsville; Apee: Julia Roth, Decatur]

FAMILY LAW: Periodic Alimony--Alimony in Gross. The parties were divorced in 2011 by a judgment which incorporated an agreement of the parties. Pursuant to that agreement, the former husband agreed to pay for the former wife's "future household bills and other typical/traditional living expenses for the next seven (7) years..." Said obligation was termed as a "property settlement" and the agreement explicitly provided that it would not be affected by the former wife's remarriage. In April 2017, the former husband stopped paying the expenses that the former wife claimed he owed to her. The former wife filed a petition for contempt and the former husband filed a counterclaim for modification based upon the former wife's remarriage in 2013. The former husband claimed that the former wife had misrepresented her relationship with another man to him at the time of the execution of the divorce agreement. The former husband asserted that he had not become aware of this alleged fraud until early 2017 and he argued that he had an additional two years after the discovery of said fraud to file a motion to set aside the divorce pursuant to Ala. R. Civ. P. 60(b). In addition, the former husband claimed that 50 U.S.C. §3936(a), a part of the Servicemembers' Civil Relief Act, tolled any limitations period under Rule 60(b) until he was no longer an active duty servicemember, thus permitting him to bring his Rule 60(b) claim regardless of the expiration of any limitations period. After a trial, the trial court entered a judgment finding the former husband in contempt for violating certain provision of the divorce judgment. It also denied the former husband's request to set aside the 2011

divorce judgment on the ground of fraud. After his postjudgment motion was denied, the former husband appealed. Reversed.

Integrated Bargain. The majority opinion first dealt with the contention of the dissenting opinion authored by Presiding Judge Thompson that the divorce agreement was an integrated bargain. The parties did not have much property and they divided what they had equally. In *DuValle v. DuValle,* 348 So.2d 1067, 1069 (Ala.Civ . App. 1977), the court stated that before a court could determine, as a matter of law, that a settlement agreement was an integrated bargain, "a...pronounced intent to settle claims of property rights and rights of maintenance and support is required." If the language of the agreement does not clearly establish an integrated bargain, parol evidence is required to determine if the agreement is an integrated bargain. In this case, neither party raised the issue of whether the agreement was an integrated bargain. As a result, little evidence was offered in this regard. "Thus, we cannot, as does the dissent, conclude that the divorce agreement was, in fact, an integrated bargain, and we will consider the arguments raised by the former husband."

Alimony in Gross v. Periodic Alimony. The substance of an award of alimony takes precedence over the label given to it. Alimony in gross is designed to compensate a spouse for his or her inchoate right to marital property. In order to qualify as alimony in gross, two requirements must be satisfied: (a) the award must be payable out of the present estate of the paying spouse as that estate existed at the time of the divorce and (b) the time of payment and the amount must be certain.

Periodic alimony is "an allowance for the future support of the recipient spouse payable from the current earnings of the paying spouse." Its purpose is to support the former dependent spouse and to enable that spouse, to the extent possible, to maintain a status similar to that enjoyed during the marriage. Periodic alimony is modifiable based on a showing of a material change in circumstances.

In this case, the divorce agreement characterizes the monthly payments of the former wife's expenses and the award to her of 50% of the former husband's remaining military pay as a "property settlement." In addition, the agreement clearly states that the award to the former wife would not be affected by the former wife's remarriage or cohabitation. All of these factors point to a finding that the payment of living expenses by the former husband was in the nature of alimony in gross. But the nature of those obligations is controlling. The purpose of the

payment of the former wife's living expenses appears to be in the nature of periodic alimony. Nothing in the divorce agreement supports the conclusion that the monetary obligations imposed upon the former husband were payable out of his estate at the time of the divorce. In fact, the former wife testified that at the time of the divorce, the parties did not own sufficient assets "for [me] to get a lump sum compensory [sic] to the amount of time we had been married."

In making its assessment, the court also noted that the amount of the expenses for which the former husband was required to pay was not a sum certain; the former wife's expenses fluctuated. Also, pursuant to the agreement, the parties were permitted to modify the monetary obligations by mutual agreement. Based on the totality of the evidence, the trial court erred by determining that the monetary obligations imposed by the settlement agreement are alimony in gross and are not modifiable or terminable.

Fraud. In his answer to the former wife's petition for contempt, the former husband asserted that the divorce agreement was procured by fraud. However, he never filed a motion to set aside the divorce decree pursuant to Ala. R. Civ. P. 60(b). At trial, the trial court refused to allow him to present evidence relating to the alleged fraud in the procurement of the divorce agreement on the ground that his attempt to do so was untimely. "Although the procedural posture of this case is unusual, we cannot agree that the former husband did not assert as a counterclaim in his answer an attack on the 2011 divorce judgment under Rule 60(b)." The former husband's allegation of fraud contained in his answer was sufficient to give notice that he challenged the 2011 divorce judgment on that ground.

As for timeliness, a Rule 60(b)(3) motion seeking to set aside a judgment based on fraud must be filed within four months and an independent action for fraud must be filed within three years from the date of the entry of the judgment. Here, the former husband did not assert his fraud challenge until June 2017. Section 3936(a), a part of the Servicemembers' Civil Relief Act, states that the period of a servicemember's military service may not be included in computing any time period required by law. The court rejected the argument that a change from §3936(a)' s predecessor statute-which stated that a military member's service "shall not" be included in computing a time period--to the more permissive term "may not" be included which is now part of $3936--effected the applicability of the Code section. Accordingly, the trial court erred by failing to apply §3936(a) to toll the

limitations period for the former husband to set aside the divorce judgment on the ground of fraud under Rule 60(b). Its judgment is due to be reversed.

Dissent: Presiding Judge Thompson authored a dissent in which he determined that the parties' settlement agreement was a non-modifiable integrated bargain. "The effect of the main opinion is to allow one party to obtain the benefit of the agreement and to negate the rights of the other party despite the clear language characterizing the parties' agreement."

The case is styled ***Wikle v. Boyd,*** 28 ALW (2180283), 12/20/2019, Dale Cty., Edwards; Moore Donaldson and Hanson concur; Thompson dissents with writing, 33 pages. Charles Reese, who practices in Daleville, represented the former husband on appeal and Jason Brogden, who practices in Ozark, represented the former wife.

FAMILY LAW: Division of Property--Separate Property--Guardian ad Litem. CIVIL PROCEDURE: Recusal. The parties were married in 2008 and they have two children. The wife filed a motion seeking the recusal of the trial court judge because of the trial judge's "long-standing relationship" with the husband's grandfather. That motion was denied. The trial court appointed Bethany Malone to serve as the guardian ad litem for the children. However, because the husband's relatives approached Malone's law partner in an apparent attempt to influence her report, the trial court appointed Jenna Smith to serve as the replacement guardian. At the conclusion of the trial, the trial court asked Smith if she wanted to submit a report and she indicated that she would do so. Smith apparently submitted her report but it is not contained in the State Judicial Information System. In December 2018, the trial court entered a divorce judgment and it invited Smith to file a motion seeking an award of her fee. She requested a fee of $10,035 and the wife was ordered to pay a portion of it. The wife filed a postjudgment motion which was denied without hearing and she then filed an appeal. **Affirmed in part; reversed in part.** (1) The wife first challenged the trial court's refusal to recuse herself. The trial court indicated in response to the wife's postjudgment motion that although she knew the husband's grandfather, her relationship with him was not significant enough to cause a conflict. Adverse rulings are not sufficient to establish bias or prejudice. The wife presented no evidence of the type of relationship that the trial judge had with the husband's grandfather and her assertions were "simply not sufficient to demonstrate that the

trial-court judge was biased." The wife pointed to the fact that the husband's family members contacted the initial guardian ad litem's partner in an apparent attempt to influence her. However, the trial judge immediately replaced the guardian ad litem after the disclosure was made. "We fail to see a demonstration of bias against the wife in the actions of the trial-court judge in that regard." The trial court's denial of the wife's motion to recuse is due to be affirmed. (2) The wife next argued that her due process rights were infringed upon when Smith submitted the guardian ad litem report solely to the trial court and not to the parties. A guardian ad litem is not permitted to have ex parte communications with the trial court and a guardian ad litem's recommendation should be provided to the parties so that they have an opportunity to challenge that recommendation. Moreover, the wife was not permitted to challenge the reasonableness of Smith's fee. The husband candidly admitted that the irregularities in the submission of the guardian ad litem report and the assessment of a portion of Smith's fee against the wife without an evidentiary hearing warranted a hearing on the wife's postjudgment motion. Accordingly, the award of custody of the children to the husband is due to be reversed and the trial court is instructed to reconsider its custody award after the guardian ad litem's report is provided to the parties and they are permitted to challenge Smith's findings. (3) The wife was required to pay $6,202.50 of the fee claimed by Malone. She contends that the fact that the husband's family tried to influence Malone should absolve her of responsibility for Malone's fee. The wife failed to present any authority for her argument. "Thus, we cannot agree that the wife has presented a sufficient or convincing argument that the trial court's decision to require her to pay a portion of Malone's fee is error entitling the wife to a reversal of that aspect of the trial court's judgment..." (4) The court next considered the propriety of the trial court's property division. During the early years of the marriage, the parties resided in a house ("the Allsboro house") provided to them rent-free by the husband's great-aunt. The Allsboro house has been in the husband's family for over 100 years. The husband's great-aunt conveyed the house and the 105 acres associated with it to the husband as a gift in April 2014. During the time that they lived there, the parties made certain improvements to the house. The wife valued the Allsboro house and surrounding property at $1,000,000. Two years after the Allsboro house was conveyed to the husband, the parties purchased another house ("the Riviera house") and the parties moved into it in June 2016. The wife vacated the Riviera house five months later. The husband valued the Riviera house at $240,000 and the wife claimed it was worth $400,000; a mortgage in the amount of $198,000 remained on the Riviera

house. The husband is a teacher and the wife is a licensed insurance procurer. The wife claimed that the husband was emotionally abusive to her and the husband claimed that the wife had committed adultery. The trial court awarded the Allsboro house and the 105 acres associated with it to the husband after determining that it was his "sole and separate property." The trial court presented two options with regard to the Riviera house: the husband could pay the wife $20,000 or the house could be sold and the wife would receive a minimum of $20,000 and one-half of any equity received over that amount. The wife contends that the Allsboro house was used for the common benefit of the parties and therefore, pursuant to Ala. Code 1975, §30-2-51(a), it should have been included in the marital estate. The court noted that even if the Allsboro house was regularly used for the common benefit of the parties, the determination as to whether to include that asset as part of the division of marital property was within the discretion of the trial court. "Nothing in the language of §30-2-51(a) indicates that property acquired by one spouse before marriage or property acquired through inheritance or gift is transmuted into marital property by its use for the common benefit of the parties." Instead, Section 30-2-51(a) grants the trial court the discretion to make an allowance for one spouse out of the estate of the other if property acquired by gift or inheritance is used for the common benefit of the parties during the marriage. Of the remainder of the parties' assets, the husband was awarded $37,500 and the wife received $44,000. The judgment of the trial court regarding the division of property is due to be affirmed. Presiding Judge Thompson and Judge Moore dissented in part regarding the trial court's determination that the Allsboro property was not marital property. Judge Moore noted that "all other states hold that separate property, to the extent that it has been transmuted into marital property, must be included in the marital estate…In Alabama, however, a trial court may conclude that separate property, such as property acquired by gift by one spouse during the marriage, has been transmuted into marital property but nevertheless exempt that property from equitable division." ***Morgan v. Morgan,*** 29 ALW (2180486), 6/5/2020, Colbert Cty., Edwards; Donaldson and Hanson concur; Thompson and Moore concur in part and dissent in part, with writings, 43 pages. [ATTY: Appt: Lindsey Davis, Florence; Apee: Terry Mock, Tuscumbia]

FAMILY LAW: Division of Property--Separate Property. APPEAL & ERROR: Waiver. The parties were married for 61 years. During the marriage,

the wife was employed as a bookkeeper and the husband was employed by the IRS. The wife managed the home and cared for the husband until she sustained neurologic injuries that caused her to be unable to walk. The husband refused to make the marital residence handicap accessible. In 2013, the wife left the marital home and moved in with the parties' adult daughter. Although she intended to move back into the home, the husband refused to make the necessary modifications to the home and the wife was displaced. In July 2015, the wife filed a complaint for a legal separation and the trial court entered an order enjoining the parties from dissipating or transferring any assets. The husband filed an answer and a counterclaim for divorce. In February 2018, the trial court entered an order awarding the wife monthly spousal support. When the husband failed to pay that pendente lite support, the wife filed for contempt and the husband was ordered to be incarcerated. However, the trial court entered an order providing that the husband could be released upon the payment of a $50,000 bond. A guardian ad litem was appointed to represent the husband. The wife filed a motion to compel the husband to pay her the court-ordered spousal support payments. In response, the trial court entered an order condemning $16,800 of the $50,000 held by the court clerk. After a trial, the trial court entered a final judgment granting a legal separation to the wife. In its order, it noted that the husband had withdrawn $400,000 from two bank accounts in August 2015. The trial court determined that the funds from one of the accounts (in the amount of $250,000) had been used for the common benefit of the parties but that the funds from the second account (in the amount of $150,000) were inherited by the husband and constituted his separate property. The trial court awarded the wife $125,000. The husband appealed. **Affirmed in part; reversed in part.** (1) The husband argued that the trial court erred by awarding the wife a portion of the $250,000 held in his bank account because the trial court specifically determined that it was inherited. However, the trial court also held that the funds in this account had been used for the common benefit of the parties. Ala. Code 1975, §30-2-51(a) provides that a judge may not take into consideration inherited or gifted property unless that property has been used regularly for the common benefit of the parties. Here, the wife introduced evidence that the husband had used the account that contained the $250,000 to pay for utilities, roof repairs to the marital residence, gifts to the parties' children, and payments to various creditors. "However, those payments were all made <u>after</u> the date the parties separated while the wife was living in another state, and the record does not disclose how those payments were used for the common benefit of the parties." In fact, the wife testified that the only spousal

support she had received after the parties' separation was the pendente lite spousal support ordered by the trial court. "To the extent that the roof repairs to the marital residence could be deemed 'for the common benefit of the parties,' we note that a one-time use of inherited funds does not constitute 'regular" use." The portion of the trial court's judgment awarding the wife a portion of these funds is due to be reversed. (2) The husband next challenged the trial court's disbursement of the $50,000 which was paid to the court clerk as an appearance bond. He argues that the trial court's actions violated Ala. R. Crim. P. 7.6 and Ala. Code 1975, §15-13-42. However, because the husband failed to raise this argument at the trial court level, it cannot be considered on appeal. The judgment of the trial court is due to be affirmed in part and reversed in part. ***Bragg v. Bragg,*** 29 ALW (2180949), 5/22/2020, Jefferson Cty., Moore; Thompson, Donaldson, Edwards and Hanson concur, 11 pages. [ATTY: Appt: Candice Shockley, Pelham; Apee: Lee Loder, Birmingham]

FAMILY LAW: Child Custody—Child Support—Division of Property. The parties were married in 2008. Three children were born during the marriage. Further, the husband adopted the mother's daughter, T.J., who was over the age of majority. The wife moved out of the marital residence in January 2018, leaving the children there with the husband. At a pendente lite hearing held in February 2018, the wife objected to a provision which precluded her paramour, B.S., from staying in her residence overnight while she had the children there. T.J. testified at the pendente lite hearing and stated that the wife does not provide care for the children. Sole physical custody of the children was awarded to the husband and the parties were enjoined from having overnight guests of the opposite sex to whom they are not related when the children are in their custody. At a trial which took place in July 2018, the husband testified that his leg had been amputated as a result of an injury that occurred before the marriage and that the wife had signed waivers and releases regarding the settlement that he received as a result of that injury. The funds from that settlement were used for the benefit of the parties, including building the marital residence and to purchase jointly owned CDs. The husband receives Social Security disability benefits and the children receive benefits as well. The only income received by the wife is interest income generated from an investment account in her name. She worked as a registered nurse until 2010 and the husband testified that he encouraged her to find employment during the marriage. In 2017, the husband signed a letter stating that

he would give the wife $57,448 if she found employment. The husband testified that the wife openly discussed her relationship with the paramour in front of the children. He believed that the paramour is an alcoholic. The husband testified that he found marijuana in the family automobile after the wife had been to visit the paramour. A private investigator confirmed that the paramour was spending the night at the wife's residence while the children were present. The wife claimed that the husband was physically abusive to both her and the children, allegations denied by the husband. The husband admitted to smoking marijuana once or twice a week for pain relief. After the trial, the trial court entered an order granting the husband sole physical and legal custody of the children. The wife was awarded an account in her individual name which was funded by the husband's settlement proceeds and the husband was awarded accounts in his individual name. The trial court ordered the marital residence to be sold and the proceeds divided equally. Ultimately, the wife was ordered to pay $753 per month in child support. The husband appealed and the wife cross-appealed. **Affirmed in part; Reversed in part.** (1) The wife claimed that the trial court erred by failing to award custody of the children to her. She pointed to the husband's physical disabilities, his use of marijuana and his use of pain medication that affects his ability to drive. Based on the ore tenus standard, the court stated that it could not "overturn the trial court's decision that was made following the presentation of the disputed evidence in this case." (2) The court next addressed the division of property. The husband argued that the financial account awarded to him which contained $500,000 solely in his name was separate property and that if removed from the division of marital assets, resulted in an inequitable division. The husband's testimony regarding the transfer of funds into accounts which eventually led to the establishment of the subject account was imprecise. No exhibits were admitted regarding those transactions and the wife testified that the funds were, at one time, contained in accounts in the parties' joint names. "The evidence did not compel the trial court to find the funds in the husband's account to be separate property." (3) The wife claimed that the trial court should have granted her 75% of the marital assets because of the husband's purported misconduct. The evidence was conflicting in this regard and coupled with the wife's admitted adultery, did not compel such a result. (4) The wife challenged the income imputed to her for child support purposes. She argued that she was not voluntarily unemployed because she cared for the children and the husband after the husband was injured in lieu of employment. The wife did not dispute that she was physically able to work as a registered nurse. "We discern no evidence that disturbs the trial court's discretion to have imputed income to the

wife." Both the husband and the wife argue that the calculation of child support improperly failed to take into account interest income or the Social Security benefits received by the children. Under Ala. R. Jud. Admin. 32, "gross income in the calculation of child support includes interest income and Social Security benefits received by a child because of a parent's disability." This portion of the trial court's judgment is due to be reversed. ***Phillips v. Phillips,*** 29 ALW (2180489; 2180531), 02/14/2020; Shelby Cty., Donaldson; Thompson, Moore, Edwards and Hanson concur, 40 pages. [ATTY: Appt: David G. Thomas, Birmingham; Apee: Clint Thomas, Calera]

FAMILY LAW: Division of Property--Attorney Fees. The opinion of January 24, 2020 is withdrawn and the following is substituted therefor. In October 2016, William Ballard ("the husband") filed a complaint seeking a divorce from Gaylyn Horne-Ballard ("the wife"). The parties were married in December 2009 and separated in September 2016. The parties had no children together but the wife had a child from a previous marriage who was 4 years old when the parties married and resided with the parties during their marriage. When the parties married, the husband was employed as the president and general manager of a television station. In 2011, the husband's income was $411,665, but he lost his employment in 2013. The husband testified that he received consulting income of $23,582 in 2014; however, he had not been employed in his field again before trial. There was disputed testimony from the husband that the parties agreed he would manage the remodeling of the marital home and be the primary caregiver for the wife's child. The wife is an anesthesiologist. In 2015 she opened her own medical practice, Ballard Pain and Wellness ("BPW"). Her income from BPW in 2016 was $735,923. There was disputed testimony about the husband's involvement in BPW. He paid himself $25,000 in salary from BPW after the parties separated. After losing his job, the husband initiated litigation in Florida to reduce a pre-existing child support obligation. He admitted to hiding assets in order to benefit his position in that litigation and testified that the wife was aware and assisted him in these efforts. There were allegations of fault by both parties, such as affairs and abuse. In its divorce judgment, the trial court ordered that the marital home be sold and the proceeds of that sale be divided equally between the parties, and it awarded the husband the proceeds of the sale of a lake house owned by the husband before the parties' marriage and of another property ("the Beckham Drive property") owned by the husband before the parties' marriage; in doing so, the trial court

stated that it had taken into consideration the wife's payment of the mortgage indebtedness on those properties in fashioning its alimony-in-gross award. The trial court awarded the wife sole ownership of BPW, denied the husband's claim for periodic alimony, and awarded the husband $550,000 as alimony in gross. The trial court also, among other things, divided the parties' financial assets. The wife appealed. **Affirmed.** (1) The wife first argued that the trial court erred in failing to make a factual finding concerning the value of BPW. No requirement exists for a trial court to make such a finding as part of a property division. In addition, the court may presume that, in fashioning its property division and alimony award, the trial court made those findings necessary to support its judgment. *K.W.M. v. P.N.M.,* 116 So. 3d 1179 (Ala. Civ. App. 2013)[ALW]. The wife thus failed to demonstrate that the trial court erred in not making a specific finding regarding the value of BPW. (2) The wife also argued that the trial court erred in admitting into evidence the testimony of the husband's expert witness, a CPA who testified as to the value of BPW. The husband's expert testified that her estimate was based on a calculation of value as opposed to an opinion of value. When the expert was asked about her determination of the value of BPW, the wife objected, arguing that a calculation of value was not as thorough as an opinion of value. The trial court overruled the objection and the husband's expert testified that the fair market value of BPW was $2,470,000. The wife's expert witness, also a CPA, testified that he used an opinion of value methodology and stated that the value of BPW was $241,000. The Court declined to make a determination as to which methodology is best in valuing assets in the context of a divorce action. "Rather, determining the efficacy of a method of valuation is dependent on the facts, which is an issue within the province of the trial court." (3) The Court next rejected the wife's argument that the trial court erred in dividing certain financial assets that had been placed solely in her name as a part of the husband's hiding of assets relating to the Florida child support litigation. The Court noted that the testimony was conflicting and that the trial court could have determined that the wife was a willing participant in the parties' hiding of assets. The Court further pointed out that that portion of the judgment that divided the financial accounts prevented either party from receiving the sole benefit of their hiding of financial assets for the purpose of lowering the husband's child support obligation. "We hold that the trial court's determinations that the financial assets subject to the parties' fraud were divisible and that the promissory notes were satisfied as a part of the property division to be equitable decisions by the trial court under the specific facts of this case and as between the parties to this appeal." (5) The Court rejected the wife's argument

about the division of the real property, noting that in essence the wife was asking the Court to conduct a piecemeal analysis of only one part of the trial court's property division in its divorce judgment. "In examining the equity of a trial court's judgment, an appellate court must consider the entirety of the property division, any alimony-in-gross award, and any award of periodic alimony." The Court also pointed out that the allegations of misconduct made by both parties could have impacted the overall property division. (6) Finally, the Court rejected the wife's argument that the trial court erred in its award of an attorney fee to the husband because most of the fee had been paid by selling certain assets. "The wife has cited to no authority supporting a conclusion that a trial court or this court should consider whether an attorney has been paid or whether an attorney-fee bill is outstanding in determining the equity of an attorney-fee award." ***Horne-Ballard v. Ballard,*** 29 ALW (2180194); 5/1/2020, Jefferson Cty., Thompson; Donaldson, Edwards and Hanson concur; Moore concurs in part and concurs in the result in part, with writing, 51 pages. [ATTY: *Not listed - confidential*]

FAMILY LAW: Division of Property. The parties were married for 21 years. In its decree of divorce, the trial court directed the wife to pay to the husband "thirty percent (30%) of all her income on her published books, books currently under contract, the Magnolia Summer book series and all other books that have been written or conceived during the time of the marriage." The decree then specifically identified seventeen (17) books. After a postjudgment motion was filed by the wife, the trial court clarified its judgment so as to base the husband's award of a portion of the royalties on the wife's **net** royalty income received. The wife appealed. **Affirmed.** With regard to the 17 books that were specifically identified by the trial court, prior precedent of the court allows an award of income derived from those extant works to either party to the marriage. The wife asserted that an award of royalties as to other books that may have been conceived during the marriage was improper. Based on principles of construction, the court concluded that the list of specific books are the only books for which the husband is entitled to receive royalties. Therefore, "we are not called upon in this case to establish a rule governing such assets in the manner apparently sought by the wife." The trial court did not err by awarding the husband an interest in the wife's existing publishing catalog and the judgment of the trial court is due to be affirmed. Judge Moore authored a dissent which was joined by Presiding Judge Thompson in which he disagreed with the main opinion's conclusion that the list of specific

books cited in the divorce decree were the only books for which the wife must pay a portion of the royalties and that any award of royalties for books that were not in existence during the marriage was error. ***Dickerson v. Dickerson,*** 29 ALW (2180306), 2/7/2020, Madison Cty., Hanson; Donaldson and Edwards concur; Moore concurs in part and dissents in part, with writing, which Thompson joins, 12 pages. [ATTY: Appt: Joan-Marie Sullivan, Huntsville; Apee: Marcus Helstowski, Huntsville]

FAMILY LAW: Division of Property--Alimony--Attorney Fee--Contempt. The parties were married for 24 years; they have no children. Both were 53 years old at the time of their divorce trial. Both had college degrees. The parties moved frequently during their marriage and many of those moves were engendered by changes in the husband's employment. At the time of trial, the husband earned a base salary of $78,083 plus commission. He testified that he could earn $170,000 for the year that the trial was taking place. The wife worked four part-time jobs during the parties' marriage. She had not worked in fourteen months prior to the trial. In 2017, the husband indicated that he wanted a divorce and he abruptly moved to Florida. During the parties' separation, the wife discovered sexually explicit emails between the husband and a woman that he had met online. These email exchanges dated back to 2014. The husband claimed that he did not have sex with this woman until after the parties separated. A pendente lite order was entered in December 2017 which required the husband to pay the wife $3,500 per month in temporary alimony plus 35% of all commissions he earned. From that amount, the wife was responsible for the mortgage and future "household bills." The husband demonstrated a proclivity for gambling. He withdrew $25,000 from his retirement account which he claimed he was going to use to repair the marital residence to prepare it for sale. Instead, the money was used to buy the wife a $9,000 vehicle and the rest was gambled away by the husband. The husband claimed that the house was worth $350,000; the wife testified that it was worth $275,000 because of the extensive repairs it needed. The balance on the mortgage was $235,000. The wife submitted a monthly budget of $7,311. After a trial, the husband was ordered to pay periodic alimony of $3,000 per month for 8 years to give the wife an opportunity to complete graduate studies and re-enter the workforce. The wife was awarded the marital residence and all equity therein. She was also awarded a $20,000 property settlement, a $5,000 parcel of property owned by the parties in Mexico and her car. The husband was awarded all of the

furniture in the marital residence with an estimated value of $8,000 and the balance of his retirement account which was $30,000. During the pendency of the action, the wife had filed a motion for contempt claiming that the husband had failed to pay her medical bills, her share of the commission for November 2017 and alimony for December 2017. The total amount claimed by the wife was $9,319.21 which also included $2,800 for a furnace. At trial, the wife agreed that the charge for the furnace was not included in the pendente lite order and could be removed from the amount owed to her. Instead, the trial court found the husband in contempt and ordered him to pay $9,319. Finally, the husband was ordered to pay $15,000 in attorney fees. The husband appealed. **Affirmed in part; reversed in part. (1)** On appeal, the husband challenged many of the trial court's factual findings. "Regarding four of the five statements, the husband is actually challenging the conclusions the trial court drew from the evidence." For instance, the trial court stated that the wife assisted the husband in job relocations wherein "they moved around the United States 9 times. During each move, the wife managed the move." The husband argued that they had only moved four times and that the wife did not pack and totally unpack for each move. The record indicates that the parties moved four times from state to state but they also moved from house to house within a given area. "Based on the record, although the trial court possibly overstated the number of times the parties moved--it appears they moved eight times and not nine as the judgment states--the error, if any, is so minimal it cannot be said to have probably injuriously affected the husband's substantial rights." (2) Another statement challenged by the husband was the trial court's finding that the husband owed the wife $9,319.21 for unpaid items that "he was ordered to pay" pursuant to the pendente lite order. There was no order requiring the husband to pay for the furnace repair, which was a component of the $9,319 judgment entered against him. Therefore, the trial court abused its discretion in including this amount as a contempt citation against the husband. (3) The husband challenged the trial court's alimony award and its division of property. The only two large marital assets were the marital residence and the husband's retirement account. The wife was awarded the former and the husband the latter. The wife was also awarded a $20,000 property settlement but in making that award, the trial court could have determined that it was justified in so doing based on the money that the husband had used from his retirement account to cover gambling losses. With regard to the alimony award, the wife had not worked appreciably during the marriage. And, the trial court could have reasonably believed that the husband's "emotional affair" since 2014 led to the decline of the marriage. The trial court did

not err with regard to its division of property and award of alimony. (4) With regard to the $15,000 attorney fee awarded, the husband argued that much of the wife's attorney fee involved a review of his emails that were improperly obtained. The wife testified that she had paid her attorney $30,000. The trial court noted that the wife had to subpoena information because the husband would not provide it to her. Three pendente lite hearings took place, one of which the husband failed to attend. The husband earned substantially more money and was better able to afford the attorney fee. This portion of the trial court's judgment is due to be affirmed. ***Cheshire v. Cheshire,*** 28 ALW (2180470), 11/1/2019, Shelby Cty., Thompson; Moore, Donaldson, Edwards and Hanson concur, 37 pages. [ATTY: Traci Owen, Birmingham; Apee: Kathryn Henry, Birmingham]

FAMILY LAW: Property Division. CIVIL PROCEDURE: Postjudgment Interest. The parties were divorced in 2006. Pursuant to the divorce judgment, the former wife was awarded her Wachovia 401k account and all other retirement accounts in her name. In addition, she was awarded $59,750 from the parties' American Express investment account and the former husband was awarded the remaining balance. In 2016, the former wife filed a petition for rule nisi in which she alleged that the former husband had only paid her $16,156.04 toward the $59,750 she had been awarded. At trial, evidence was adduced that the American Express investment account had been composed of several subaccounts--some of which were in the name of the former wife and some in the name of the former husband. The subaccounts owned by the former wife consisted of two life insurance policies and two individual retirement accounts. According to evidence submitted, the individual retirement accounts had a value of $14,104.49 and $4,410.40 respectively. The combined cash value of the life insurance policies was $22,444.65. The former husband paid the former wife $16,156.04 in December 2006. He determined that amount by subtracting the value of the life insurance policies and the individual retirement accounts awarded to the former wife from the $59,750 figure. The former wife contended that she had been awarded $59,750 in *addition to* the value of the life insurance policies and the two individual retirement accounts. After a trial, the trial court entered a judgment requiring the former husband to pay the balance between the $59,750 awarded to the former wife and the $16,156.04 that had been paid. The trial court did not award interest on that judgment. The former husband appealed and the former wife cross-appealed. **Appeal-affirmed; cross-appeal-reversed.** (1) A trial court has the

inherent power to interpret, implement or enforce its own judgment. Here, there were no joint subaccounts contained in the American Express investment account. The only investment accounts from which the former wife could have been paid from were those belonging to the former husband. The divorce judgment did not provide that the $59,750 awarded to the former wife be reduced by the value of her individual retirement accounts or the value of her life insurance policies. Accordingly, the trial court's award to the former wife of $43,595.96 is due to be affirmed. (2) In her cross-appeal, the former wife challenged the trial court's failure to award interest on the judgment. The court previously held that "an unpaid property settlement incorporated into a divorce judgment may accrue interest as long as it is unpaid and the judgment fixes the amount owed." *Self v. Self,* [Ms. 2171024, May 10, 2019] ___ So.3d ___. ___ n.19 (Ala. Civ. App. 2019)[ALW]. Based on this precedent and the fact that the property settlement was for a sum certain, the trial court erred by failing to award statutory interest. This portion of the trial court's judgment is due to be reversed. ***Messina v. Agee,*** 29 ALW (2180718; 2180733), 6/26/2020, Jefferson Cty., Moore; Thompson, Donaldson, Edwards and Hanson concur, 11 pages. [ATTY: Appt: Gerard Durward, Birmingham; Apee: Charles Dunn, Birmingham]

FAMILY LAW: Child Custody--Division of Property--Alimony. EVIDENCE: Lay Opinion. Following a second application for rehearing, the Court's opinion of February 14, 2020 is withdrawn and the following is substituted therefor. The father filed a divorce complaint on January 23, 2018. In May 2018, the trial court entered an order awarding the mother the pendente lite custody of the parties' three children. The father was required to pay $2,000 per month in child support and pendente lite spousal support in the amount of $4,000 per month. Six weeks later, the trial court amended its pendente lite order to award the parties "shared custody". A few weeks later on August 9, 2018, the trial court amended its pendente lite order again to award physical custody of the children to the husband, with supervised visitation to the wife. The husband's pendente lite child support obligation was suspended. The wife was awarded unsupervised visitation in October 2018. After a trial, the trial court entered a judgment on November 2, 2018 in which it awarded the husband "primary" physical custody of the children. The wife was not ordered to pay child support and in that regard the trial court noted that the wife was receiving Social Security disability payments and that her "prospects for employment are marginal." The trial court ordered that the parties'

marital residence be sold and that the equity be divided equally between the parties. The husband was awarded all interest in the business known as "I.M.O." and the wife was awarded $25,000 for her interest in that business. The wife was awarded 10% of the husband's 30% interest in another business known as "I.M.T." and the trial court further provided that if the Buy/Sell Agreement of that business did not allow for a transfer to the wife, then the husband was required to pay $75,000 to the wife for her interest. The husband owned an interest in a third company, "M.B.L." which generated approximately $3,000 per month in rental income. This asset was not addressed in the divorce judgment. The wife was awarded 40% of the husband's retirement account which had a balance of $362,722 and rehabilitative alimony in the amount of $4,000 per month for 120 months. After her postjudgment motion was denied, the wife appealed. **Affirmed in part;Reversed in part.** (1) The wife challenged the trial court's custody award. She argued that the trial court impermissibly permitted her minister to testify as to his observations of her. Ala. R. Evid. 505 prohibits the disclosure of confidential communications made to a clergyman. However, the minister could testify about his observations made outside any confidential communications. The children's school administrator was permitted to testify that she was "surprised" that the wife was displeased with the eldest child's test scores, which were above average. Ala. R. Evid. 701 permits a witness to testify as to opinions which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. The testimony of the school administrator fell within those parameters. A court-appointed psychologist testified that the wife suffered from a generalized anxiety disorder as well as a personality disorder. At trial, the wife's counsel objected to this testimony, noting that the psychologist was not appointed to make a psychiatric diagnosis of either party. The trial court noted that the psychologist had reviewed the wife's psychiatric records and that she had a sufficient foundation to render a diagnostic impression. "Given the sensitive nature of the child-custody inquiry, the trial court did not exceed its discretion in ruling that the diagnostic impression was relevant and that the probative value of the diagnostic impression exceeded any prejudice to the mother." As to the substantive issues surrounding custody, it was undisputed that the wife served as the children's primary caretaker because of the husband's work schedule. However, the parties separated because the wife falsely accused the husband of physically abusing one of the children and after the separation, she claimed that he had sexually abused the parties' two daughters. DHR investigated those allegations and found them to be "not indicated." The

court-appointed psychologist testified that the mother's actions had contributed to the alienation of the children from the husband. The wife suffers from a variety of mental-health problems and one expert opined that they were exacerbated by the divorce but had abated to some degree. Even if the wife's mental condition had improved "the trial court was not required to award her custody of the children based solely on her status as their former primary caregiver." Based on the evidence presented, the trial court did not err by awarding custody of the children to the husband. (2) The court next considered the property division and award of alimony. The wife argued that the husband received 90% of the marital assets. Insufficient evidence was presented regarding the values of the M.B.L. and I.M.O.. The wife argued that the husband's interest in M.B.L. was $288,000 based on an extrapolation of the purchase price and income received. However, the wife failed to cite any authority indicating that her method of valuation is a proper way to value the business. The husband was awarded a 27% interest in I.M.T. with the wife receiving a 3% interest but the husband testified that the only real asset of that business was a patent for a medical device that has yet to be approved by the United States Food and Drug Administration. In spite of the husband's argument that I.M.T. has no current cash value, I.M.T's accounting firm provided a calculated value of $290,000 per share. Moreover, the value of a business is equal to "the present worth of the future benefits of ownership." The court noted that the wife had contributed the entirety of proceeds that she had received from a lawsuit and that she had deposited her Social Security disability payments into the parties' joint checking account during the parties' marriage which were then used for the benefit of the parties. In addition, she made non-economic contributions by staying home with the children and managing the parties' finances. Here, it was unclear as to the value assigned by the trial court to M.B.L. and the classification of the value of I.M.T. used in formulating a property division. As a result, the portion of the trial court's judgment dealing with the property division is due to be reversed. Because alimony and the property divisions are interrelated, the alimony award is also due to be reversed. The judgment of the trial court is due to be affirmed in part and reversed in part. ***A.M. v. M.G.M.,*** 29 ALW (2180367), 05/08/2020, Mobile Cty., Moore; Edwards, Hanson and Donaldson concur; Thompson concurs in the result, without writing; , 33 pages. [ATTY: Appt: Thomas Nolan, Mobile; Apee: Randy Nichols, Birmingham]

FAMILY LAW: Division of Property. The parties were divorced in 2017. Pursuant to the divorce judgment, the former wife was awarded GTM Management, LLC ("GTM"), a business created by the parties to manage certain property, which included timberland and a cabin as well the real property managed by GTM ("the GTM property"). The parties agreed that the value of the GTM property was approximately $3,000,000 and that the balance owed on that property was $371,000. Additionally, the former wife was awarded 30% of the shares of Barry Graham Oil Services, LLC ("BGOS") a company owned primarily by the former husband. The divorce judgment gave the former husband the first right of refusal to buy the former wife out for the shares awarded to her for $4.3 million within 90 days. Thereafter, the terms of the sale would be left up to eh wife. In the divorce judgment, the trial court made specific reference to an effort of the former husband to shelter assets from the former wife by moving BGOS's banking business from Regions Bank to ServisFirst Bank. In so doing, the former husband paid off an $18 million loan with Regions that was secured by 5 vessels owned by BGOS and obtained a new $18 million loan from ServisFirst that was secured by all of BGOS's 19 vessels. The relevant portion of the divorce decree stated that if the former husband did not purchase the former wife's shares in BGOS, that the parties were encouraged to request permission to sell the boats in order to free up collateral. The divorce judgment did not award the former wife any other properties that were encumbered by a mortgage. The former husband was required to maintain an existing $15 million life insurance policy with the former wife named as owner and named as beneficiary for $5 million for so long as there is bank lien on any of the property awarded to the former wife. The parties both appealed from the divorce judgment but it was affirmed without opinion. In October 2018, the former husband filed a "motion for rule nisi and related instanter relief." He claimed that the outstanding debt owed on the GTM property had been paid and that as a result, he was entitled to ownership of the life insurance policy but that the former wife had refused to comply with a transfer of that ownership. The former wife filed a response and a motion for rule nisi and contempt. At a hearing on the contempt claims, Alex Arendall, the vice president of commercial banking at ServisFirst Bank testified that ServisFirst was not claiming a lien or security interest in the former wife's membership interest in BGOS and that the various items of collateral which secured the ServisFirst loan were in the name of BGOS. After the hearing, the trial court entered an order finding that the conditions which would justify a transfer of the life insurance policy had not yet been met and it required the former husband to continue to name the former wife

as the owner of the life insurance policy as well as to be the beneficiary of $5,000,000. After his postjudgment motion was denied, the former husband appealed. **Affirmed.** (1) The former husband argued that the trial court erred by denying him full ownership of the life insurance policy. He asserts that because there was no mortgage or lien on the GTM property and because ServisFirst was not claiming a lien on the former wife's membership share in ServisFirst, the life insurance policy was due to revert to his exclusive ownership. The divorce judgment provided that the former wife was entitled to remain the owner of the life insurance policy and that she was entitled to remain the beneficiary of $5,000,000 of that policy "so long as there is a bank lien on any of the property to which she has been awarded." The divorce judgment also stated that "[o]nce there is no lien on the [former] wife's assets herein", the former husband could remove the beneficiary designation in favor of the former wife. The former wife argued that the trial court's use of the plural "assets" signaled the applicability of the life insurance provision to more than one lien rather than only the lien on the GTM property. The court agreed and held that "the only reasonable interpretation" of the divorce decree would include the lien on the financial assets of BGOS. This portion of the trial court's judgment is due to be affirmed. ***Graham v. Graham,*** 29 ALW (2180856), 9/11/2020, Mobile Cty., Moore; Thompson and Edwards concur; Hanson dissents, with writing; Donaldson recuses himself, 21 pages. [ATTY: Appt: Robert Gibney, Mobile; Apee: Jene Owens, Mobile]

FAMILY LAW: Contempt--Division of Property--Retirement Benefits. The parties were divorced in January 2014 by a judgment incorporating an agreement of the parties. Pursuant to that divorce judgment, the former wife was awarded 100% of the former husband's retirement account with the Retirement Systems of Alabama ("RSA") as that value existed on October 22, 2012. The divorce judgment provided that the former wife would be responsible for preparing a Qualified Domestic Relations Order ("QDRO") for the collection of those retirement benefits. A QDRO was subsequently entered. However, RSA refused to honor the QDRO and instead of paying the former wife the retirement benefits, RSA paid them to the former husband. In February 2016, the former wife filed a petition asking the trial court to modify the divorce judgment by ordering the former husband to pay her $39,933.3 (the alleged value of the former husband's RSA account) and to hold the former husband in contempt for failing to transfer the RSA funds to her. The trial court dismissed the former wife's divorce-

modification claim on the ground that it sought a modification of the property division in the divorce judgment more than 30 days after the entry of that judgment. The action proceeded on the former wife's contempt claim. In April 2018, the trial court entered a judgment in which it found that the former husband was in civil contempt for "taking possession" of the RSA funds which were awarded to the former wife. It further provided that the former husband could purge himself of contempt by paying the former wife the monies awarded to her. The finality of this judgment was delayed because of a challenge to the trial court's denial of the former husband's counterclaim. After this issue was resolved, the former husband appealed; the former wife did not file a cross-appeal challenging the dismissal of her divorce-modification claim. **Reversed.** Pursuant to Ala. R. Civ. P. 70(A)(2)(D), civil contempt is defined as a "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process order, rule, or command that by its nature is still capable of being complied with." The divorce judgment in this case specified that a QDRO was to be served on the RSA as the means of collecting the award to the former wife of the value of the former husband's RSA account. The divorce judgment did not provide for an alternative means of collection if the RSA refused to honor the QDRO. Moreover, the divorce judgment neither ordered the former husband to refuse to accept his retirement benefits nor ordered him to pay his retirement benefits to the former wife if the RSA paid them to him. The record does not establish that the former husband willfully failed or refused to comply with a court order and accordingly, the trial court's order is due to be reversed. Judge Moore concurred specially, noting that in *Kleinatland v. Kleinatland,* 218 So.3d 1204 (Ala. Civ. App. 2016), the court assumed that a trial court could not divide RSA retirement benefits based on Ala. Code 1975, §36-27-28(a). "However, that conclusion would contradict the weight of caselaw holding that similarly worded provisions in other states, being intended as spendthrift provisions to protect state employees' retirement benefits from third-party creditors, do not apply to a property distribution in a divorce context." Judge Moore further held that because a trial court retains continuing jurisdiction to modify the enforcement provisions of a divorce judgment to assure that a substantive award is paid as intended, there was no jurisdictional barrier in this case that precluded the trial court from modifying the enforcement provisions of the divorce judgment to require the former husband to directly pay the retirement benefits owed to the former wife. ***Williams v. Williams,*** 29 ALW (2180981), 9/25/2020, Jefferson Cty., Donaldson; Edwards and Hanson concur; Moore concurs specially, with writing; Thompson concurs in the result, without writing,

21 pages. [ATTY: Appt: Jessica Johnson, Birmingham; Apee: Sahid Bahakel, Pelham]

FAMILY LAW: Division of Property--Retirement. CIVIL PROCEDURE: Jurisdiction--Collateral Attack. The parties were divorced in 2003. Pursuant to the divorce judgment, the former wife was awarded 50% of the former husband's 401(k) account valued as of the date of the judgment. Additionally, the trial court made a factual finding in the judgment of divorce that, at that time, the former husband's 401(k) retirement account had a value of $62,000. In 2018, the former wife filed a complaint asserting that neither party had prepared a Qualified Domestic Relations Order and that the plan administrator had contacted her and offered her $31,000. The former wife argued that the language of the divorce judgment is inherently ambiguous and that she should be awarded a sum from the former husband's retirement account which reflected "the pro rata appreciation in value" of the amount awarded to her. After a trial, the trial court entered a judgment awarding the former wife the amount of $81,783.28. After his postjudgment motion was denied, the former husband appealed. **Affirmed.** The former husband testified that he had taken his divorce decree to his employer's personnel office and instructed that the $31,000 awarded to the former wife be placed in a low-risk account. He believed that the former wife's share of $31,000 would have to be paid by him even if the market went sour. The former husband's retirement account statements from January 1, 2004 through March 31, 2004 reflect that 70% of the former husband's retirement account was in a money-market account and that 30% was invested in the stock market. Those percentages changed little over the next 12 years and in 2016, 61% of the former husband's retirement was held in a money-market account and 39% was invested in the stock market. The former wife presented testimony from an expert witness, Robert McLeod, who explained that a money-market account is a very low-risk investment that essentially keeps pace with inflation and rarely earns a positive rate of return. According to McLeod, if the former wife's $31,000 had been invested in an S&P 500 Index fund, the value as of September 2019 would have been $137,486.61. He further stated that the S&P Index fund would be appropriate for an average-risk investor and that a money-market account would be appropriate for a zero-risk investor. An equally weighted balance between an S&P 500 Index Fund and a money-market account would have yielded a current balance of $88, 246. The former husband presented testimony from a certified public accountant,

Bobby Shaw, who was qualified as an expert witness. He performed a calculation based on the actual returns on all funds held by the former husband in his 401(k) account and derived a balance of $81,783.28 as of September 2019. That amount was based off of what the $31,000 would be worth after taking the value of all the funds the former husband had invested, considering the beginning values, the contributions, some ending values over time and the returns made. (1) The former husband argued that because he had not accumulated funds in his retirement account for 10 years during the parties' marriage, the trial court lacked subject-matter jurisdiction to award the former wife any portion of his retirement account and, thus, he contends that the former wife lacked "standing" to enforce that aspect of the divorce judgment. Subject-matter jurisdiction involves a court's power to decide certain types of cases. However, errors in the application of the law by a trial court do not render a judgment void for lack of subject-matter jurisdiction. Here, the trial court's award of a portion of the former husband's retirement account might have been reversible error, but that error did not render the judgment void for lack of subject-matter jurisdiction. "Because any error committed by the trial court in awarding the former wife a portion of the former husband's retirement account was a question that was ripe for appeal upon the entry of the divorce judgment, the former husband's attempt to challenge that award in the present appeal amounts to an impermissible collateral attack upon the trial court's 2003 judgment of divorce." (2) The former husband next argued that because he placed the former wife's $31,000 share into a money market account and according to his expert witness, the interest earned on that amount would have only resulted in an award to the former wife of $39,442.83, the trial court erred by awarding her $81,783.28. Prior case law establishes that when a divorce judgment awards a spouse a percentage share of a variable asset and the award is silent with respect to market fluctuations in the value of the asset before the time of distribution, the judgment is inherently ambiguous. If the spouses are equally responsible for the delay in distribution, each spouse assumes a proportionate share of any subsequent gains or losses in the asset until such time as the share is distributed. The trial court in this case did not assign fault to either party with regard to the delay in the entry of the QDRO, nor did the divorce judgment make either party responsible for ensuring the issuance of a QDRO. Thus, each party should assume a proportionate share of any gains or losses until the former wife's share is distributed. (3) Finally, the former husband argued that the trial court erred by awarding the former wife $81,783.28 because Shaw's calculation takes into account post-divorce contributions and interest in the 401(k) account. The court disagreed, noting that

Shaw testified that he had used only the $31,000 awarded to the former wife in making his calculations. The judgment of the trial court is due to be affirmed. ***Nord v. Nord,*** 29 ALW (2190391), 10/16/2020, Tuscaloosa Cty., Moore; Thompson, Donaldson and Hanson concur; Edwards concurs specially; 26 pages. [ATTY: Appt: Janie Mangieri, Tuscaloosa; Apee: William Parsons, Tuscaloosa]

FAMILY LAW: Division of Property--Retirement. The parties were married for 21 years before the husband filed for divorce. At the trial of the divorce action, the husband testified that he began working for Mobile Gas Company ("MGC") in June 1979 and that he contributed to a 401(k) account for the 18-year period before he married the wife. After he married the wife, he continued to contribute to that 401(k) until he left his employment with MGC in October 2012. During the marriage, the parties borrowed funds from the husband's 401(k) on two occasions to pay marital debts. After he left MGC, the husband moved his 401(k) retirement account into an "IRA" account that was being held in the form of an annuity ("the annuity"). The amount rolled over from the 401(k) was $182,452.40 and a statement from that annuity indicated that there were $18,245.24 in "withdrawals/related charges." No evidence was introduced regarding the amount of the 401(k) account at the time of the marriage or the value of any contributions made by the husband to the 401(k) either before or after the marriage. The husband claimed that he did not know what the $18,254.24 withdrawal from the annuity had been for but surmised that it had to do with a "tax bill" from the distribution when the 401(k) was rolled into the annuity. The trial court entered a judgment awarding the wife one-half of the annuity. The husband filed a postjudgment motion and the court's opinion quotes extensively from a colloquy that took place during the hearing on the motion. Ultimately, the trial court denied the postjudgment motion but in so doing, the trial court explained that it believed that because the husband rolled over his 401(k) retirement into a new account, the money in that annuity became part of the marital estate, subject to division. The husband appealed. **Affirmed.** Ala. Code 1975, §30-2-51(b) provides that the marital estate includes any interest either spouse has acquired during the marriage in any retirement benefits. If a party asserts that his or her interest in any retirement benefits is excluded from the marital estate, he or she bears the burden of proving that fact and the value or amount of that excluded interest. "We pretermit any discussion of the husband's argument that the trial court erred to the extent that it determined that, under §30-2-51(b)(1), rolling over a 401(k)

retirement account into an individual retirement account during the marriage results in the owner-spouse's acquisition, receipt, accumulation, or earning of the 'underlying' interest in the 'retirement benefits' during the marriage because we need not address that issue." The court will affirm a trial court's judgment if it is supported on any valid legal ground. Here, the husband bore the burden of proving if any of his interest in the annuity was excluded from the marital estate and the value or amount of that excluded interest. He failed to do so. At the hearing on the husband's postjudgment motion, the husband argued that the ratio between his years of employment at MGC and the years of the marriage was sufficient to satisfy his burden of proof. In essence, he argued that the trial court could extrapolate the portion of the MGC retirement accrued during the marriage by a mathematical equation. The trial court rejected that argument and the appellate court agreed. The calculation that the husband proposed did not establish the value or amount of any premarital contributions. Accordingly, the judgment of the trial court is due to be affirmed. Judge Moore authored a special concurrence in which he agreed with the husband that the trial court erred in its legal conclusion that his retirement funds became wholly divisible when he rolled them over from his 401(k) retirement account into the annuity. However, he concluded that the trial court's error was harmless because the husband did not prove the value of the portion of the annuity that he was asserting should have been excluded from the marital estate. Therefore, the entry annuity was subject to equitable division. Judge Moore indicated that the "coverture-fraction method" propounded by the husband could have been successful if the husband had proved that he consistently contributed to his 401(k) throughout his entire employment for MGC; he did not do so. "Without that crucial evidence, the trial court could not determine what portion of the retirement funds in the annuity should be excluded from the marital estate." ***Saucier v. Saucier,*** 29 ALW (2190181), 11/5/2020, Baldwin Cty., Edwards; Thompson, Donaldson and Hanson concur; Moore concurs in the result, with writing, 19 pages. [ATTY: Appt: Carson Nicholson, Daphne; Apee: Robert Lusk, Fairhope]

IV. CHILD CUSTODY/ RELOCATION:

FAMILY LAW: Relocation. The parties were divorced in 2013. Pursuant to a settlement agreement that was incorporated into the divorce decree, the parties

were awarded the joint legal custody of their then one-year old child with the mother having sole physical custody. Four years later, the parties' divorce decree was modified and the father was awarded weekend visitation every other week from Thursday to Monday and on Wednesday evenings during the weeks after a weekend visitation. In 2020, the mother sent the father a letter notifying him that she intended to move from Elmore County to Fairhope. The father filed an objection to the mother's proposed relocation and a petition to modify custody. The trial court held a hearing on the father's objection but no testimony was taken at the hearing. On the same day, the trial court entered an order stating: "PDL, mother can move and change the child's school and move to Baldwin County." The father filed a petition for writ of mandamus. **Writ of mandamus granted.** The parties agree that the hearing held in this case was a pendente lite hearing and that a final hearing was scheduled for a later date. Therefore, mandamus review was appropriate. (1) The father argued that the trial court did not obtain jurisdiction over this matter because the mother's notification letter did not meet the requirements of Ala. Code 1975, §30-3-165(b), a part of the Alabama Parent-Child Relationship Protection Act ("the Act"). Specifically, the father argued that the notification letter did not include all of the information required in the notice to a noncustodial parent of a proposed relocation of a child from the child's principal residence. The father contends that this omission deprived the trial court of jurisdiction over the mother's proposed relocation. The court disagreed. Once a court acquires jurisdiction over a child pursuant to a divorce and decides custody, that court retains jurisdiction over custody until the child reaches the age of majority. The Act provides that a parent may relocate with a child after providing notice unless a person entitled to notice files a proceeding seeking an order to prevent the change of residence within 30 days after receipt of such notice. Additionally, a person entitled to custody of or visitation with a child may commence a proceeding objecting to the proposed relocation and may seek an order to prevent the change in principal residence. The court clarified that "it is the filing of the objection to a proposed move that invokes the jurisdiction of the trial court, not the letter to the noncustodial parent notifying the parent of the intended move." If the person required to give notice fails to do so or fails to provide the required information, the court shall consider the failure to provide such notice or information as a factor in making its determination. §30-3-168(a). "For a trial court to be able to consider the failure of proper notification in determining whether to permit a challenged relocation, it necessarily has to have jurisdiction over the matter." The mother's purported failure to provide the father with proper

notification of her intended relocation did not deprive the trial court of jurisdiction. (2) The father next argued that the trial court could not enter an order permitting the mother to relocate with the child because no evidence had been presented with regard to that issue. The Act provides that a trial court may grant a temporary order permitting the change in the principal residence of the child "if the court finds from an examination of the evidence presented at a hearing for temporary relief that there is a likelihood that on final hearing the court will approve the change of the principal residence of the child." §30-3-169.2(b). In this case, because no evidentiary hearing was held, the mother did not present any evidence from which the trial court could have found that the proposed restriction was in the child's best interest or that there was a likelihood that the court would approve the change of the principal residence of the child at a final hearing . "We agree with the father that the trial court's order permitting the mother to relocate with the child, even temporarily, was improper in the absence of an evidentiary hearing." The petition for writ of mandamus is due to be granted. ***Ex parte Fochtman, (Fochtmann v Fochtmann),*** 29 ALW (2190891), 9/11/2020, Elmore Cty., Thompson; Moore, Edwards and Hanson concur, Donaldson concurs specially, 15 pages. [ATTY: Pet: Keith Howard, Wetumpka; Resp: Clifford Cleveland, Prattville]

FAMILY LAW: Relocation--Custody--Child Support. CIVIL PROCEDURE: Jurisdiction--Filing Fee. When the parties married, the mother was on active duty in the United States Air Force Reserve. The child was born in 2014. Thereafter, the parties divorced in 2016 and the parties were awarded the joint legal and joint physical custody of the child. In 2017, the mother was deployed to Iraq for six months. The child lived with the father during that deployment. In May 2017, the parties entered into an agreement which was not filed in court. Pursuant to that agreement, the parties agreed to continue to share the physical custody of the child but the agreement provided that if either parent "mov[ed] out of logical distance to share said parenting plan, the mother will retain full legal and physical custody of the child." The father claimed that this provision was either not in the agreement when he signed it or that he didn't see it. In August 2017, the father filed a petition seeking to hold the mother in contempt and for a modification of child custody. The mother was served with the petition when she arrived home from her deployment. In February 2018, the mother filed an answer and a counterclaim. Thereafter, the mother notified the father that she intended to

relocate to San Antonio, Texas. Both parties had remarried and the child was 4 years old at the time of the modification hearing. The father and his extended family live in Autauga County. The mother testified that her brother-in-law and his family live in San Antonio and her extended family live in Oklahoma, about 4 hours away. The drive from Autauga County to San Antonio is about 12 hours. The mother had enrolled the child in a charter school in San Antonio and the mother had been hired as a nurse in a local hospital. The mother and her new husband had purchased a house in Texas and the mother had offered to allow the father, his new wife and their children to stay at their house when they wanted to visit the child. Text messages introduced into evidence between the parties indicated that the parties had had a contentious relationship since the divorce. The father was uncooperative when the mother sought to change her custodial time because of drill weekends with her reserve unit. In those text exchanges, the father used threatening and abusive language. Each party conceded that the other was a good parent. After a hearing, the trial court entered a judgment awarding the mother sole physical custody of the child, subject to the father's "free and liberal visitation". The mother's relocation request was granted. The father was required to pay $513 per month in child support. The father appealed. **Affirmed in part; reversed in part.** (1) The father claimed that the trial court did not have jurisdiction over the mother's counterclaim for custody because she did not pay a filing fee. Although Ala. Code 1975, §12-19-70 expressly provides that a docket fee must be paid when a plaintiff files a complaint, there is no express provision that a filing fee must be paid when a counterclaim is filed. In *Hudson v. Hudson,* 178 So.3d 861 (Ala. Civ. App. 2014)[ALW], the court held that the failure to pay a filing fee does not divest a trial court of jurisdiction over a counterclaim. In *Hudson,* the court noted that the father who challenged the trial court's jurisdiction did not raise that issue until after he received an adverse judgment. As a result, the court rejected that issue on appeal. Here, the mother does not dispute that she did not pay a filing fee when she filed her counterclaim for custody modification. However, as in *Hudson,* the father did not raise that issue at the trial court level. "Because the trial court's jurisdiction to consider a counterclaim is not affected by the mother's failure to pay a filing fee, and because this issue was not raised below, we will not consider this issue on appeal. (2) The court next addressed the relocation issue. The father argued that the mother failed to meet her burden of overcoming the presumption set forth in the Alabama Parent-Child Relationship Protection Act ("the Act"), Ala. Code 1975, §§30-3-160 through 169.10. The Act provides that the initial burden of proof falls upon the party seeking the change in

principal residence. If the party seeking the relocation meets the burden of proving that the change in residence is in the child's best interest, the burden then shifts to the nonrelocating party to demonstrate how the change in residence is not in the child's best interest. Seventeen nonexclusive factors are enumerated in the Act for consideration as to whether relocation should be granted. Here, because the mother has relocated to Texas and the child has reached school age, the prior joint custody schedule is now untenable. The mother testified about the benefits that would be afforded to the child if the relocation was granted, including a better school and coverage for the child's postminority education provided by her husband's military benefits in Texas. She offered evidence about her employment opportunities and the closer proximity that she now has to her family. Based on the text message exchanges between the parties, the trial court could have determined that the mother is more likely to preserve the relationship between the father and the child than would the father. Based on the ore tenus standard, the trial court's determination that the mother could relocate with the child is due to be affirmed. (3) Finally, the court considered the child support issue presented by the father. The record does not contain a CS-42 child-support guidelines form. Although a child support award may be affirmed even in the absence of such a form, in such cases the evidence must be sufficient to determine how the trial court reached its determination. Here, the record provides no such evidence. Accordingly, this portion of the trial court's judgment is due to be reversed. ***Stoddart v. Stoddart,*** 29 ALW (2190281), 8/14/2020, Autauga Cty., Thompson; Moore, Donaldson, Edwards and Hanson concur; 21 pages. [ATTY: Appt: Larry Sasser, Montgomery; Apee: Sebrina Martin, Montgomery]

FAMILY LAW: Child Custody--Modification. EVIDENCE: Hearsay. In 2004, the parties entered into an agreement pursuant to which the mother was awarded sole physical custody of their child, subject to certain visitation awarded to the father. The father was required to pay $352 per month in child support and the parties agreed to revisit that amount every two years. In 2017, the mother filed an action seeking to modify child support and to hold the father in contempt for failing to abide by the 2004 agreement ("the .03 action"). The father filed an answer and a counterclaim for contempt based on the mother's alleged failure to comply with visitation. In November 2017, the juvenile court increased the father's child support obligation and denied the parties' contempt claims. In 2018, the father filed a modification action ("the .04 action") in which he sought an

award of sole physical custody. The mother filed a counterclaim for contempt. After a trial, the juvenile court entered an order granting sole physical custody of the child to the father and ordered the mother to pay $388 per month in child support. It granted the mother's contempt claim and "sanctioned" the father by "losing child support payments for August, September and October 2018." The judgment entered in the .04 action on February 15, 2019 referenced the .03 action. After her postjudgment motion was denied by operation of law, the mother filed a notice of appeal in both the .03 and the .04 actions. Those appeals were consolidated. **Appeal dismissed; Affirmed in part; Reversed in part.** (1) The mother filed her notice of appeal in the .03 action based solely on the juvenile court's February 19, 209 judgment being wrongfully rendered in the .03 action. Because there is no justiciable controversy in the .03 action, the appeal filed in that action is due to be dismissed as being moot. (2) The child was 16 years old at the time of the trial and she confided in a neighbor that she had become sexually active and that the mother had beaten her with a belt. According to the mother, she had not spanked the child since the child was 13 years old. The child testified in accord with the mother's testimony. The child testified that she had become sexually active at age 15 and that she had engaged in sexual activity with 7 or 8 people. The father became aware of her conduct and tried to discuss with the mother his disfavor of the child's relationship with an 18 year old boy. The mother encouraged and facilitated that relationship. According to the child, the mother had become less restrictive with the child to deter the child from wanting to live with the father. The child testified that most of the students at the school where she attends while living with the mother are "all into bad stuff" or their parents are on drugs. The child expressed a desire for a fresh start and felt that she would be better served by living with the father. The child also testified that she did not want to attend her mother's church, which the father had labeled "cult-like." On appeal, the mother argued that the trial court had erred in allowing the neighbor to testify as to statements made by the child. Apparently, the father's attorney and the court believed that said statements were not hearsay because they perceived that the child was a party to the case. Although the child's statements did not qualify as an admission by a party opponent such that they were not hearsay, each of the statements recited by the neighbor were testified to by either the mother or the child. "Thus, the objectionable testimony by the neighbor was cumulative of other legally admitted evidence, and accordingly, any error in admitting those statements by the neighbor were harmless." (3) The mother next argued that the juvenile court erred by modifying custody. "We conclude that the juvenile court's finding that

material changes affecting the child's welfare had occurred are supported by the foregoing evidence regarding the mother's attempts to alienate the child from the father, the mother's failure to respond to the child's bad behaviors, the mother's concerning behavior, and the child's fear of the mother." Moreover, although a child's preference is not dispositive, the trial court did not err by affording much weight to the child's testimony regarding her well-being and the parents' contributions to same. (4) The mother next challenged the trial court's calculation of child support. The father concedes that the trial court's child support determination is not supported by the record on appeal. "Because we are unable to discern from the record how the juvenile court calculated the amount of child support it ordered the mother to pay to the father, we reverse the juvenile court's judgment establishing the child-support award and remand the case to the juvenile court to recalculate the mother's child-support obligation in compliance with the Rule 32 child-support guidelines and this opinion." ***J.H. v. N.H.,*** 29 ALW (2180464; 2180465), 2/7/2020, Covington Cty., Moore; Thompson, Donaldson, Edwards and Hanson concur, 29 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Division of Property--Alimony. EVIDENCE: Lay Opinion. Following a second application for rehearing, the Court's opinion of February 14, 2020 is withdrawn and the following is substituted therefor. The father filed a divorce complaint on January 23, 2018. In May 2018, the trial court entered an order awarding the mother the pendente lite custody of the parties' three children. The father was required to pay $2,000 per month in child support and pendente lite spousal support in the amount of $4,000 per month. Six weeks later, the trial court amended its pendente lite order to award the parties "shared custody". A few weeks later on August 9, 2018, the trial court amended its pendente lite order again to award physical custody of the children to the husband, with supervised visitation to the wife. The husband's pendente lite child support obligation was suspended. The wife was awarded unsupervised visitation in October 2018. After a trial, the trial court entered a judgment on November 2, 2018 in which it awarded the husband "primary" physical custody of the children. The wife was not ordered to pay child support and in that regard the trial court noted that the wife was receiving Social Security disability payments and that her "prospects for employment are marginal." The trial court ordered that the parties' marital residence be sold and that the equity be divided equally between the parties. The husband was awarded all interest in the business known as "I.M.O." and the

wife was awarded $25,000 for her interest in that business. The wife was awarded 10% of the husband's 30% interest in another business known as "I.M.T." and the trial court further provided that if the Buy/Sell Agreement of that business did not allow for a transfer to the wife, then the husband was required to pay $75,000 to the wife for her interest. The husband owned an interest in a third company, "M.B.L." which generated approximately $3,000 per month in rental income. This asset was not addressed in the divorce judgment. The wife was awarded 40% of the husband's retirement account which had a balance of $362,722 and rehabilitative alimony in the amount of $4,000 per month for 120 months. After her postjudgment motion was denied, the wife appealed. **Affirmed in part;Reversed in part.** (1) The wife challenged the trial court's custody award. She argued that the trial court impermissibly permitted her minister to testify as to his observations of her. Ala. R. Evid. 505 prohibits the disclosure of confidential communications made to a clergyman. However, the minister could testify about his observations made outside any confidential communications. The children's school administrator was permitted to testify that she was "surprised" that the wife was displeased with the eldest child's test scores, which were above average. Ala. R. Evid. 701 permits a witness to testify as to opinions which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. The testimony of the school administrator fell within those parameters. A court-appointed psychologist testified that the wife suffered from a generalized anxiety disorder as well as a personality disorder. At trial, the wife's counsel objected to this testimony, noting that the psychologist was not appointed to make a psychiatric diagnosis of either party. The trial court noted that the psychologist had reviewed the wife's psychiatric records and that she had a sufficient foundation to render a diagnostic impression. "Given the sensitive nature of the child-custody inquiry, the trial court did not exceed its discretion in ruling that the diagnostic impression was relevant and that the probative value of the diagnostic impression exceeded any prejudice to the mother." As to the substantive issues surrounding custody, it was undisputed that the wife served as the children's primary caretaker because of the husband's work schedule. However, the parties separated because the wife falsely accused the husband of physically abusing one of the children and after the separation, she claimed that he had sexually abused the parties' two daughters. DHR investigated those allegations and found them to be "not indicated." The court-appointed psychologist testified that the mother's actions had contributed to the alienation of the children from the husband. The wife suffers from a variety of

mental-health problems and one expert opined that they were exacerbated by the divorce but had abated to some degree. Even if the wife's mental condition had improved "the trial court was not required to award her custody of the children based solely on her status as their former primary caregiver." Based on the evidence presented, the trial court did not err by awarding custody of the children to the husband. (2) The court next considered the property division and award of alimony. The wife argued that the husband received 90% of the marital assets. Insufficient evidence was presented regarding the values of the M.B.L. and I.M.O.. The wife argued that the husband's interest in M.B.L. was $288,000 based on an extrapolation of the purchase price and income received. However, the wife failed to cite any authority indicating that her method of valuation is a proper way to value the business. The husband was awarded a 27% interest in I.M.T. with the wife receiving a 3% interest but the husband testified that the only real asset of that business was a patent for a medical device that has yet to be approved by the United States Food and Drug Administration. In spite of the husband's argument that I.M.T. has no current cash value, I.M.T's accounting firm provided a calculated value of $290,000 per share. Moreover, the value of a business is equal to "the present worth of the future benefits of ownership." The court noted that the wife had contributed the entirety of proceeds that she had received from a lawsuit and that she had deposited her Social Security disability payments into the parties' joint checking account during the parties' marriage which were then used for the benefit of the parties. In addition, she made non-economic contributions by staying home with the children and managing the parties' finances. Here, it was unclear as to the value assigned by the trial court to M.B.L. and the classification of the value of I.M.T. used in formulating a property division. As a result, the portion of the trial court's judgment dealing with the property division is due to be reversed. Because alimony and the property divisions are interrelated, the alimony award is also due to be reversed. The judgment of the trial court is due to be affirmed in part and reversed in part. ***A.M. v. M.G.M.,*** 29 ALW (2180367), 05/08/2020, Mobile Cty., Moore; Edwards, Hanson and Donaldson concur; Thompson concurs in the result, without writing; , 33 pages. [ATTY: Appt: Thomas Nolan, Mobile; Apee: Randy Nichols, Birmingham]

FAMILY LAW: Child Custody--Visitation--Modification--Child Support. The parties were married in 1988. Three children were born during the marriage and the parties adopted five other children. In 2014, the parties' two oldest

children, H.E.H. and A.F.H., told the father that the mother, who was responsible for homeschooling the children, had engaged in corporal punishment that was excessive in both severity and frequency. The father sued the mother for divorce. The parties entered into a settlement pursuant to which the parties were to share the joint legal and joint physical custody of their children. The court-appointed counselor, T.L., was tasked with determining much of the terms, frequency and conditions of the mother's visitation with the children. The mother was not required to pay child support. In November 2017, the father filed a modification action seeking sole physical and sole legal custody of the children who were still minors. He requested a reduction in the mother's visitation time and an award of child support. The mother filed an answer and counterclaim seeking an order either increasing her visitation time or in the alternative, to award her sole physical and sole legal custody. At trial, the father introduced written discovery requests that were sent to the mother that contained requests for admission. When the mother did not respond to those discovery requests, the father filed a motion asking the trial court to deem admitted his requests for admission that had been electronically filed on November 24, 2014. The trial court entered an order stating that the father's motion to "deem admitted" his requests for admissions dated November 24, 2015 was granted. The father also sought to introduce an evaluation written by J.S.W., a psychologist who had been employed by the mother while the divorce action was pending. The mother did not object to the admission of the J.S.W. evaluation and it indicated that during the parties' marriage, the mother had engaged in abusive behavior towards the children. The J.S.W. evaluation opined that the mother had a personality disorder with compulsive, borderline and paranoid traits and recommended that the mother undergo residential psychological treatment. An evaluation performed by A.D.B., a licensed clinical psychologist, was admitted into evidence by the mother. The A.D.B. evaluation concluded that the J.S.W. evaluation was inaccurate. The mother admitted that she had used corporal punishment to discipline the children but denied that the punishment was as severe or as frequent as the three oldest children claimed. The mother was employed by a private nonprofit organization that provides child-development services to low-income families. She provides education to clients regarding parenting. Expert witnesses were called by both parties to support their respective positions. At the time of trial, the third youngest child was 12 years old, the second youngest child was 11 years old and the youngest child was 8 years old. In May 2019, the trial court entered an order awarding the father sole physical custody of the older three minor children. It held that the parties would exercise

the joint legal and joint physical custody of the three youngest children with the father having "primary residential custody." The trial court held that the mother was not a risk to any of the minor children but it ordered that the mother's visitation would remain supervised until September 1, 2019. The mother was ordered to pay $200 per month in child support. The father appealed. **Affirmed in part; reversed in part.** (1) The father argued that the trial court's modification judgment was internally inconsistent in that it vests the parties with the joint physical custody of the parties' three youngest children while also providing that the father would have "primary residential custody." "Based on existing caselaw, we will interpret the language of the modification judgment awarding the father 'primary residential custody' and awarding the mother standard visitation only as awarding the father sole physical custody of the three youngest children and awarding the mother visitation only with those children." (2) To the extent that the father challenged the trial court's award of joint legal custody of the parties' youngest children, the court noted that the original custody agreement contained such a provision. Therefore, the father had to prove that a material change in circumstances had occurred since the entry of the divorce judgment and that a modification of the award of joint legal custody was in the children's best interests. The father did not assert such an argument and therefore, did not establish a basis for the reversal of this portion of the modification judgment. (3) The court next considered whether the trial court erred by eliminating the requirement that the mother's visitation with the parties' three youngest children be supervised and to allow her to exercise standard visitation. "The mother's testimony and the absence of evidence indicating that she has engaged in activity placing the children at risk subsequent to the entry of the divorce judgment supports the trial court's findings that a material change in circumstances had occurred since the entry of the divorce judgment and that the mother was no longer a risk to the three youngest children..." (4)The trial court's determination of child support was due to be reversed. The only reason given by the trial court for a deviation from the guidelines established by Ala. R. Jud. Admin. 32 was that "the mother suffers under such necessitous circumstances that it is appropriate and proper to deviate from the Rule 32 guidelines." That conclusion is not accompanied by any findings of fact which are sufficient to justify a deviation. Moreover, based on prior precedent, the court also reversed the modification judgment insofar as it declined to award child support retroactive to the date that the father filed his modification action. The judgment of the trial court is due to be affirmed in part and reversed in part. ***B.C.H. v. M.H.,*** 29 ALW (2180776), 9/25/2020, Lee Cty., Donaldson;

Thompson, Moore, Edwards and Hanson concur; 30 pages. [ATTY: Appt: Robert Faulk, Prattville; Apee: Elizabeth Zweibel, Birmingham]

FAMILY LAW: Child Custody--Modification. The parties were divorced in 2017, Pursuant to an agreement which was incorporated into the divorce decree, the mother was awarded sole physical custody of their child and the father was afforded visitation which was to be supervised by the paternal grandmother or "an individual agreed upon by the parties." The agreement awarded the parties the joint legal custody of the child but in the event that the parties could not agree on any major decisions, the mother was designated as being "the tie breaker." In April 2018, the mother filed a modification action alleging that the father had exposed the child to an unsafe environment stemming from his use of illicit drugs and that he had abdicated his visitation rights to the paternal grandmother. The mother requested sole legal custody of the child and she wanted the paternal grandmother to be removed as an authorized person to supervise visitation. After a trial, the trial court entered a judgment awarding the mother sole legal custody of the child and removing the paternal grandmother as an authorized supervisor of visitation. The father appealed. **Affirmed.** (1) The father argued that the removal of the paternal grandmother as a supervisor was tantamount to a change in visitation and that the mother bore the burden of showing that there was a material change in circumstances and that the proposed change in visitation would serve the child's best interests. The court distinguished case law posited by the father in support of this argument and it further held that "we have not located other Alabama case law equating such a change with a modification of a party's visitation rights." Instead, the court held that a change in the identity of a visitation supervisor is a matter within the discretion of the trial court. The question then became whether an abuse of discretion took place in this case. Here, evidence was adduced that the paternal grandmother had filed criminal charges against the father for his purported theft of a watch from her home but then turned around and sought his release from his incarceration so that he could provide care for her. The paternal grandmother had filed other criminal and protection-from-abuse actions against the father and then dismissed them. The 69-year old grandmother also acknowledged that she suffered from end-stage kidney disease as well as cardiac problems. "Notwithstanding the evidence of these health conditions, the paternal grandmother opined that she was capable of resuming supervision of the father's visitation with the then six-and-a-half-year-old child." Based on the evidence in this case, the trial court did not err by concluding that the paternal grandmother should not continue as a designated supervisor of the father's visitation with the child." (2) The father next challenged the trial court's designation of the mother as the sole legal

custodian. In *Gallant v. Gallant,* 184 So.3d 387 (Ala. Civ. App. 2014)[ALW], the court construed a judgment whereby the parties were vested with equal responsibility regarding decision making authority regarding the children but the physical custodian was vested with final authority to make decisions if the parents were unable to agree. "This court, after considering the meaning of the term 'joint legal custody' in Alabama law (as defined in Ala. Code 1975, §30-3-151(2)), agreed in *Gallant* with the proposition that the physical custodian in that case had been made the *sole legal custodian* of the children because the parent entitled to visitation had not been afforded 'final authority over any aspect of the children's lives." The same is true in this case. Because the mother had final decision making authority pursuant to the final decree of divorce, she was the sole legal custodian of the child. That determination could not be challenged in this modification action. The court went on to hold that even if the legal-custody issue was properly before the court, the trial court did not abuse its discretion. The father argued that the mother did not demonstrate a "material change in circumstances" warranting a change in legal custody because she knew during the parties' marriage that the father had been addicted to controlled substances. "[W]hen an existing custody judgment is not the result of contested litigation, but is instead a product of an agreed settlement between custodial contestants, the material-change rule is no bar in a modification proceeding to consideration of facts and circumstances in existence at the time of the entry of the existing custody judgment." Here, the mother was not precluded from adducing evidence about the father's use of illicit drugs as a basis for seeking a change in the legal custody of the child. The judgment of the trial court is due to be affirmed. ***Rogers v. Hartsock,*** 29 ALW (2190029), 10/9/2020, Shelby Cty., Hanson; Thompson, Moore, Donaldson and Edwards concur, 17 pages. [ATTY Not listed]

V. VISITATION

FAMILY LAW: Settlement Agreements. CIVIL PROCEDURE: Postjudgment Motions. The parties were divorced in 2013. Pursuant to a settlement agreement which was incorporated into the divorce judgment, the parties were granted joint legal custody of their two minor children, J.A.W. and J.E.W., and the mother was awarded sole physical custody. Approximately 6 months after the divorce judgment was entered, the father filed a modification action seeking to increase his visitation time which was subsequently amended to include a contempt claim. The mother filed an answer and a counterclaim against

the father for contempt. In 2019, the parties filed a joint modification agreement which set forth the father's visitation and provided that "[The father] shall not force [J.A.W.] to visit. [J.A.W.'s] visitation shall be at her discretion; however, she is encouraged to participate." The trial court conducted a hearing shortly after the joint modification agreement was filed. The parties, their counsel and the guardian ad litem appointed to represent the children were present. A discussion ensued about the visitation provision regarding J.A.W. and the parties both indicated that they had reviewed the joint modification agreement and that it contained all the matters needed to resolve the matters before the trial court. The trial court entered a judgment on January 28, 2019 adopting the terms of the parties' joint modification agreement. On February 12, 2019, the father filed a motion to alter or amend the judgment. In that motion, he indicated that he misunderstood the visitation provision contained in the settlement agreement filed by the parties. Specifically, he asserted that he thought that he was retaining overnight visitation every other Sunday through Monday morning and that he thought that the parties had agreed that the pickup time for visitation would occur when school recessed rather than 6:00 p.m.. The trial court conducted a hearing and thereafter it denied the father's postjudgment motion but granted, ex mero motu, the father additional time with the parties' child, J.E.W.. The mother filed a postjudgment motion noting that no evidence was presented to justify the trial court's expansion of the father's visitation with J.E.W.. After a hearing, the trial court issued an order denying the mother's postjudgment motion. In said order, the trial court acknowledged that no testimony was presented prior to its issuance of the order granting the father additional visitation but it stated that it had a lengthy history with regard to the parties in this case. It expressed concern about the "lop-sided imbalance" between the time that the children spend with the mother and that which they spend with the father. It also explained that it had discerned an "unwillingness" on the mother's part to co-parent with the father. The mother appealed. **Reversed.** (1) The mother argued that the trial court lacked subject matter jurisdiction to enter its ex mero motu amendment because it had already denied the father's postjudgment motion. A trial court retains the power to correct any error in its judgment which comes to its attention while a party's Rule 59 motion is pending. However, when a trial court denies all pending postjudgment motions, the trial court lacks subject matter jurisdiction to enter any orders on noncollateral matters. In this case, both the amendment to the visitation schedule and the denial of the father's postjudgment motion were contained in the same order. "We do not consider the rulings to have been made separately for the

purpose of analyzing subject-matter jurisdiction." Therefore, the trial court did not lose subject matter jurisdiction before amending the judgment. (2) The mother next argued that the trial court erred by altering the parties' joint modification agreement without any supporting evidence. Agreements reached in divorce actions are as binding on the parties as any other contract. A trial court may adopt or reject such parts of an agreement reached by the parties as it deems proper as shown by the evidence. Here, the parties were deprived of the opportunity to present evidence on the visitation issue. Therefore, the trial court's judgment was due to be reversed and the trial court directed to either enter a judgment that is consistent with the parties' joint modification agreement or to conduct a hearing to allow the parties to present evidence on the issue of the father's visitation with J.E.W.. The mother's request for an attorney fee on appeal was denied but Presiding Judge Thompson dissented, opining that because the father had "reneg[ed]" based on his unilateral mistake and thereby caused the mother to engage in "additional, unnecessary litigation" the mother should have been awarded an attorney fee. Judge Thompson further dissented from the main opinion's instructions on remand and stated that the trial court should have been instructed only to reinstate the judgment incorporating the agreement of the parties. In so doing, he stated: "I know of no legal basis for permitting an evidentiary hearing at this point in the litigation." ***Williams v. Williams,*** 29 ALW (2190021), 8/14/2020, Montgomery Cty., Donaldson; Moore, Edwards and Hanson concur; Thompson concurs in part and dissents in part, with writing, 16 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Dependency--Visitation. EVIDENCE: Lay Opinion. The Houston County Department of Human Resources ("DHR") became involved with this case after the mother and her boyfriend had an altercation in front of the child. The child was placed in the home of a family friend ("the custodian") pursuant to a safety plan. In September 2019, DHR filed a petition seeking to have the child declared dependent. At trial, Charlotte Proffitt, a court-appointed special advocate, testified as well as the DHR caseworker. Evidence was adduced that the mother had tested positive for methamphetamine on two drug tests in July 2019 and October 2019. The child receives Social Security death benefits as the result of the death of her father but the mother failed to pay those benefits to the child or the custodian. The mother moved to Rhode Island in November 2019 and she told Proffitt that she needed to remain there "for her sobriety." Proffitt characterized

the mother's relationship with the child as emotionally abusive and manipulative. The mother had threatened suicide to Proffitt at least five times. She suffers from bipolar disorder. The trial court considered the evidence, declared the child to be dependent and awarded custody to the custodian. The mother was awarded supervised visitation "as agreed upon by the parties." The mother appealed. **Affirmed in part; reversed in part.** (1) The mother first challenged the trial court's finding of dependency. She argued that Proffitt's testimony was insufficient to establish clear and convincing evidence of dependency because Proffitt is not a mental health expert and DHR did not otherwise prove the mother's mental health diagnoses. Even though Proffitt is not an expert, her opinions were "(a) rationally based on her perception... and (b) helpful to a clear understanding of her testimony of the determination of a fact in issue", thereby satisfying the requirements of Ala. R. Evid. 701. Proffitt testified that the mother tried to control the child through emotional abuse. "One basis for concluding that a child is dependent is the parent's subjecting a child to 'abuse' which is defined to include 'harm or risk of harm to the emotional health, physical health or welfare of a child." The trial court could have concluded that emotional abuse was being meted out on the child and therefore, the juvenile court's finding of dependency is due to be affirmed. (2) With regard to the juvenile court's visitation order, it is well settled that allowing visitation to take place at the sole discretion of the custodian is error. Accordingly, this portion of the juvenile court's judgment is due to be reversed. ***J.C. v. Houston County Department of Human Resources,*** 29 ALW (2190404), 6/19/2020, Houston Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 13 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Jurisdiction--Child Support-Visitation. The father filed a divorce action in Tennessee. The mother filed an answer and a motion for *pendente lite* support. The Tennessee court entered a *pendente lite order* establishing visitation between the father and the parties' children on January 27, 2019. In the meantime, the mother filed a divorce action on January 22, 2019 in the Baldwin Circuit Court ("the trial court"). The father filed a motion to dismiss based on his argument that the Tennessee court had jurisdiction over the divorce. After it became aware of the Tennessee action, the Alabama court communicated with the Tennessee court to resolve the jurisdiction dispute. The trial court entered an order explaining that it had jurisdiction over the child custody issue. After a trial, the trial court entered an order awarding the mother sole physical

custody of the parties' children, subject to the father's specified schedule of visitation. The custody judgment made the party "receiving" the children responsible for transporting the children and it contained a "morality clause" which prohibits either party from having unrelated guests of the opposite sex in their respective homes overnight when the children are present. After the mother's postjudgment motions were denied, she appealed. **Affirmed in part; reversed in part.** Both parties appeared **pro se** at the trial. (1). The mother argued that the trial court erred by delaying ruling on the jurisdictional issue until after the mother completed a contempt sentence imposed by the Tennessee court for her failure to abide by the *pendente lite* orders entered by the Tennessee court. The mother acknowledged that there was no remedy for the trial court's purported error and the court pointed out that it cannot decide questions that are moot or that have become purely academic. Therefore, it refused to consider this issue. (2) The mother next argued that the trial court erroneously concluded that it lacked personal jurisdiction over the father to adjudicate child support. Under Alabama's version of the Uniform Interstate Family Support Act ("the UIFSA"), Ala. Code 1975, §30-3D-101 et seq., an Alabama court can exercise personal jurisdiction over a nonresident when various circumstances exist. The mother argued that the father has minimum contacts with Alabama because she and the father purchased real property in Alabama in 2017 and he frequently spent the night in that property. However, the mother's complaint alleged that the father is a resident of Tennessee and the deed to the subject property was not presented to the trial court until the mother filed her postjudgment motion. "The mother's tardy presentation of evidence on the issue in her postjudgment motion does not change our decision because the belated presentation of evidence that the mother could have produced at the jurisdictional conferences or at trial did not entitle the mother to a reopening of the evidence or a new trial." (3) The mother next argued that the father consented to jurisdiction under UIFSA by entering a general appearance in this action. The father filed a motion to dismiss and his objection to jurisdiction remained valid even though that motion was denied as to child custody and he appeared at trial. (4) With regard to the substance of the trial court's judgment, the mother argued that the trial court erred by not requiring the father to be responsible for all costs of transportation attendant to visitation. No evidence was presented regarding the parties' incomes until the mother filed an unverified postjudgment motion. "Thus, the record contains no evidence from which we could determine that the trial court erred by requiring each party to bear his or her cost of transporting the children to and from visitations or from which we could determine the parties' respective incomes."

This portion of the trial court's judgment is due to be affirmed. (4) The mother asserted that the trial court erred by granting the father visitation on designated weekends until 6:00 p.m.. She alleged that the trip between the parties' respective residences takes 8 hours and that the children will not return home until 2:00 a.m.. The trial court imposed its standard "out-of-town" visitation schedule but did not take into account the distance between the parties' homes. "Although we do not necessarily find fault with the trial court's having a standard order like that imposed by the trial court in the present case, we note that the mother raised valid concerns in her second postjudgment motion and at the postjudgment hearing regarding the nearly eight-hour travel time and the fact that the children would not arrive home until well after midnight on certain Mondays or Tuesdays and would have to attend school later those same mornings." Accordingly, this portion of the trial court's judgment is due to be reversed. (5) The mother next sought the removal of the trial court's morality clause. She asserted that the morality clause infringed upon her constitutional and fundamental right to make child-rearing decisions. However, the mother failed to raise those constitutional issues at the trial court level and they are waived. (6) The court examined its rationale in prior cases regarding morality clauses with regard to a visiting parent and found them instructive in this case. "We have explained that 'in visitation cases [involving alleged indiscreet conduct of a parent] there should still be evidence presented to show that the misconduct complained of is detrimental to the child.' *Jones v. Haraway,* 537 So.2d 946, 947 (Ala. Civ. App. 1988). The record in the present appeal contains no evidence indicating that the mother's conduct was indiscreet or detrimental to the children." This portion of the trial court's judgment is due to be reversed. ***Davis v. Davis,*** 29 ALW (2190220), 7/24/2020, Baldwin Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 38 pages. [ATTY: Appt: Pro se; Apee: Pro se']

FAMILY LAW: Visitation--Grandparent Visitation. The father and the mother are the unmarried parents of the child who was born in January 2011. The mother , who had sole custody of the child, died in March 2014. Shortly after the mother's death, the maternal grandmother filed a dependency action. In May 2014, the juvenile court entered a pendente lite order granting the father custody of the child and granting the grandmother visitation. In May 2015, the juvenile court held that the child was not dependent but granted sole custody of the child to the father and his wife and granted visitation to the grandmother. The grandmother appealed and the father cross-appealed. Because the record was not adequate for

appellate review, the case was transferred to the circuit court. In August 2017, the grandmother filed a motion in circuit court to voluntarily dismiss the dependency proceeding and that motion was granted by the circuit court on August 28, 2017. On September 7, 2017, the grandmother filed a complaint seeking visitation with the child pursuant to the Grandparent Visitation Act, Ala. Code 1975, 30-3-4.2. A trial took place in September 2018 during which the grandmother testified that the child and the mother had lived with her prior to the mother's death. During the dependency hearings, the grandmother visited with the child on the second and fourth weekend of each month from May 2014 to January 2017. The father claimed that the child was upset after some visitations because he alleged that her family had said some bad things about the father to the child. The father testified that he and the grandmother have an adversarial relationship. However , both the father and his wife also acknowledged that they did not oppose the grandmother having "limited" visitation with the child. The trial court entered an order granting the grandmother visitation with the child, without stating any findings of fact. In *K.J. v. S.B.,* [Ms. 2180098, June 28, 2019] ___ So.3d ___, ___ (Ala. Civ. App. 2019)[ALW], the Court of Civil Appeals reversed and remanded the cause for the trial court to make specific written findings of fact. On July 17, 2019, the trial court entered another judgment granting the grandmother visitation rights with the child. The father appealed. **Reversed.** Section 30-3-4.2(e)(2) of the Grandparent Visitation Act requires proof that the loss of a significant and viable relationship with the grandmother would harm the child. "'Proof that a grandparent has a close, beneficial relationship with a child is not equivalent to proof that the child will suffer harm if that relationship is limited or terminated' and 'evidence of a beneficial relationship alone fails to rebut the presumption in favor of a fit parent's decision." *Ex parte McElrath,* 258 So.3d 364, 369 (Ala. Civ. App. 2018)[ALW]. Moreover, visitation with a grandparent cannot be imposed over the objection of a parent unless clear and convincing evidence is presented as to all factors set forth in §30-3-4.2(e). Here, the record lacks any evidence to show that the child would suffer harm without a relationship with the grandmother. Accordingly, the judgment of the trial court is due to be reversed. ***K.J. v. S.B.,*** 29 ALW (2180912), 4/10/2020, Jefferson Cty., Donaldson; Thompson, Moore, Edwards and Hanson concur, 13 pages. [ATTY: Appt: Ginette Dow, Bessemer; Apee: A. Edward Fawwal, Bessemer]

FAMILY LAW: Grandparent Visitation. The maternal grandparents filed an action in probate court seeking grandparent visitation with their grandson who was 15 years old at the time. Their petition was filed pursuant to Ala. Code 1975, §26-10A-30 which is part of the Alabama Adoption Code. In their petition, the maternal grandparents alleged that their daughter, who was the mother of the child, had died in 2003 and that the father's subsequent wife ("the adoptive mother") had adopted the child. The maternal grandparents asserted that their visitation time with the child had markedly decreased and that the lack of a relationship with the maternal grandparents constituted a risk to the health and welfare of the child. The father and the adoptive mother filed a motion to dismiss the maternal grandparents' action, or in the alternative, sought entry of a summary judgment. The probate court denied that motion and the father and the adoptive mother ("the petitioners") filed a petition for writ of mandamus. **Writ of mandamus granted in part and dismissed in part.** (1) Pursuant to Section 30-3-4.2, a grandparent can seek visitation with a grandchild whose parents are divorced or when a parent of the child has died. Such a claim must be filed in circuit court. However, Section 30-3-4.2 specifies that the statute does not apply if the child is the subject of an intrafamily adoption action. In such cases, the action for grandparent visitation must be filed in the probate court in compliance with Ala. Code 1975, §26-10A-30. In this case, the petitioners argued that the probate court does not have jurisdiction to consider an award of grandparent visitation pursuant to §26-10A-30 in an action filed against a "natural parent" of the child such as the father in this case. The adoptive mother lacks standing to assert this argument given that she is not a natural parent. As to the father's jurisdictional challenge, the father contends that the grandparents' claim is governed by §30-3-4.2 and must be asserted in the circuit court. In its written opinion, the court traced the history of grandparent visitation rights in Alabama. In so doing, it noted the current standard set forth by the legislature in §30-3-4.2 which requires a showing of clear and convincing evidence that, without court-ordered visitation by the grandparent, the child's emotional, mental or physical well-being has been or could be jeopardized. The evidentiary burden for grandparent visitation under §26-10A-30 is lower than that set forth in §30-3-4.2. Therefore, the father argued that the legislature did not intent for §26-10A-30 to govern an action against him that seeks an award of visitation with his natural child. This is a case of first impression. Based on the statutory language employed in both of the subject statutes, the court concluded: "there is no language in §30-3-4.2 or in §26-10A-30 that provides a grandparent 'standing' to assert a claim seeking grandparent visitation from a natural parent

under §26-10A-30. Therefore, the probate court erred by denying that part of the motion to dismiss pertaining to the maternal grandparents' claim against the father and the petition for writ of mandamus is due to be granted as to that claim." Judge Moore authored a dissent in which he opined that §30-3-4.2(i)(1) confers exclusive subject-matter jurisdiction to the probate courts over cases falling under §26-10A-30.He also distinguished between the concepts of "standing" and "subject matter jurisdiction. "As explained above, standing tests whether the person seeking relief is a proper plaintiff not whether the person denying the right to relief is a proper defendant." Here, the maternal grandparents had standing under §26-10A-30 to "vindicate their own personal rights against those persons they claim are suppressing those rights, including the father." Nothing in the language of §26-10A-30 limits the cause of action for grandparent visitation solely to claims against stepparents and other listed relatives. "Because the maternal grandparents have 'standing' in both the legal and colloquial sense of the word, the probate court does not lack subject-matter jurisdiction to adjudicate the underlying case naming the adoptive mother and the father as defendants." Judge Edwards concurred in the dissent. ***Ex parte R.D. (F.S. and D.S. v. R.D.),*** 29 ALW (2190533), 6/12/2020, Jefferson Cty., Thompson; Donaldson and Hanson concur; Moore dissents with writing, which Edwards joins, 38 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Grandparent Visitation. In 2016, the Jefferson Juvenile Court determined that the child was dependent and awarded custody to the maternal grandmother. At that time, both of the child's parents were deceased. In February 2017, the paternal grandmother instituted an action in the circuit court against the maternal grandmother in which the paternal grandmother sought to establish grandparent visitation pursuant to the Grandparent Visitation Act, ("the GVA"), Ala. Code 1975, §30-3-4.2. The maternal grandmother filed a motion to dismiss the action which was denied by the trial court. Thereafter, the circuit court entered an order in July 2019 in which it awarded the paternal grandmother pendente lite grandparent visitation pending a trial to be held in January 2020. The maternal grandmother filed a petition for writ of mandamus. **Writ of mandamus granted.** The maternal grandmother argued that pursuant to the language of the GVA, the statute only applies to conflicts regarding visitation between grandparents and parents. The maternal grandmother asserts that because she is only the child's legal custodian and not her parent, the GVA does not apply in this case. The GVA does not define the term "parent". Based on the rules of statutory construction and

the common law from which the GVA was derogated, the court concluded: "a fair reading of the GVA and a consideration of the uses of the term 'parent' throughout it, indicate that the legislature intended the term 'parent' to refer to a person who is a natural parent or an adoptive parent of the grandchild at issue." The GVA creates a cause of action in which a grandparent may seek visitation rights from a parent of his or her grandchild. Such a right was not present at common law. "The creation of that cause of action was within the purview of the legislature, and this court is bound to strictly construe the statute so as to give effect to only those rights the legislature expressly created." The maternal grandmother demonstrated a clear, legal right to the relief that she has requested and the petition for writ of mandamus is due to be granted. Judges Moore and Donaldson both authored dissents. Judges Moore and Donaldson opined that although the GVA requires a petitioner to be a 'grandparent" as defined in the statute, it does not expressly provide that the respondent must be a "parent". He further noted that the GVA authorizes an action for grandparent visitation when the marital relationship between the parents has been "severed by death or divorce" or when an action to terminate the parental rights of both parents has been filed. In such cases, the action for grandparent visitation rights would not be filed against the parents, lending credence to the conclusion that the GVA authorizes actions for grandparent visitation against nonparents as well. ***Ex parte S.H. (K.G. v. S.H.),*** 28 ALW (2180892), 10/11/2019, Jefferson Cty., Edwards; Thompson and Hanson concur; Moore and Donaldson dissent, with writings, 20 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Grandparent Visitation. In 2018, the maternal grandmother filed a petition for grandparent visitation rights pursuant to the Grandparent Visitation Act ("the GVA"), Ala. Code 1975, §30-3-4.2(f). After a trial, the juvenile court entered a judgment on June 18, 2019 denying the maternal grandmother's petition. She appealed. **Reversed.** Ala. Code 1975, §30-3-4.2(f) provides that the court "shall make specific written findings of fact in support of its rulings." No such findings were made in this case and therefore, the juvenile court's judgment is due to be reversed. The fact that the maternal grandmother did not file a postjudgment motion alerting the juvenile court of its error is not fatal to her appeal because Ala. R. Civ. P. 52(a) states that when required by statute, a trial court must make specific findings of fact. "By including the requirement in subsection (f) of the GVA requiring a trial court to make specific findings of fact,

the legislature clearly intended to impress upon the trial courts the importance of weighing all the factors set forth in the GVA and of informing this court of the reasoning behind its decision for purposes of facilitating meaningful appellate review." An omission of these findings of fact in grandparent visitation cases is reversible error, regardless of whether that omission is first brought to the attention of the trial court through a postjudgment motion. The judgment of the juvenile court is due to be reversed. ***S.J. v. A.B. and D.B.,*** 29 ALW (2180797), 1/10/2020, Calhoun Cty., Moore; Thompson, Donaldson and Hanson concur; Edwards concurs in the result, without writing, 5 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Visitation--Modification. CIVIL PROCEDURE: Due Process--Implied Consent. The father filed a complaint in juvenile court seeking unsupervised visitation with his daughter who is in the custody of J.W. and C.W. ("the custodians"). The father had previously been awarded supervised visitation with the child to occur every other week for a period of 1.5 hours at a private visitation center ("the visitation center"). The father had been participating in visitation at the visitation center for approximately five years. However, in May 2019, the visitation center terminated the father's right to visit there based upon his violation of the visitation center's rules. Apparently, the father got upset when the visitation supervisor corrected him about asking a personal question of the child. The record indicates that the father had suffered a brain injury at some point in the past and that he had a history of mental-health and substance abuse issues. In support of his claim for unsupervised visitation, the father presented the testimony of Dave Walker, a licensed psychologist. According to Walker, the father had suffered from major depressive disorder that was in full remission after treatment and continued use of prescribed medication. Walker opined that the father suffered from no pathology that would bar visiting with his 11-year old daughter. C.W. testified that the child did not want to visit with the father and that she had to make her attend visits. She claimed that the child had been very upset after the last visit in May 2019 but acknowledged that she could not recall the last time that she had taken the child to her counselor. The child testified that the visits with her father were "fun sometimes" but also "kind of boring." After the trial, the juvenile court denied the father's request for unsupervised visitation and terminated the father's existing visitation with the child. The father appealed. **Reversed.** (1) The father bore the burden of proving a material change in circumstances necessitating a change in the existing visitation award and that his requested change in visitation

was in the best interest of the child. The father did not make an argument supported by legal authority on appeal that he presented sufficient evidence to warrant a modification and therefore, he waived any such argument. (2) With regard to the termination of his existing visitation, the father argued that he was denied due process because the custodians never requested that his visitation be terminated and he did not receive notice of such a claim. Although the custodians did not file a counterclaim, that issue was raised during the trial by questions posed by the father's attorney. Where an issue that is not pleaded by a part is tried before the trial court without an objection by another party, that issue is deemed to have been tried by the implied consent of the parties. Ala. R. Civ. P. 15(b). (3) The father next argued that the record does not contain sufficient evidence to support the juvenile court's termination of his visitation. The law presumes that it is in the best interest of the child to have complete and unrestricted association with his or her parents. A trial court can restrict visitation but in so doing, it must balance the rights of the parents with the child's best interests to fashion a visitation award that is tailored to the facts of the case. An order that prohibits any visitation by a parent with his or her child will be carefully scrutinized. Here, testimony was presented that the father became angry with the visitation supervisor but there was no evidence adduced that indicated that his behavior "escalated to include profane language or a physical altercation either in or out of the presence of the child." The court noted that the father had previously been awarded supervised visitation which apparently took into account his mental health issues and the juvenile court in this modification action stated that those mental-health issues had improved so that could not serve as a reason for terminating the father's visitation. From the juvenile court's remarks, it appears that the reason visitation was not ordered was because the visitation center had terminated its relationship with the father. "Upon our careful scrutiny of the juvenile court's judgment, we must conclude that the evidence simply does not support the determination that 'the termination of [the father's supervised] visitation is essential to protect the child's best interests'." The judgment of the juvenile court is reversed and the father's supervised visitation is reinstated. In a footnote, the court recognized that it could not force the visitation center to supervise the father's visits but it encouraged that parties to find an alternate supervisor or alternate location. ***C.B. v. J.W. and C.W.,*** 29 ALW (2190369), 10/30/2020, Lee Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 20 pages. [ATTY: Not listed-confidential]

VI. CHILD SUPPORT

FAMILY LAW: Child Support: The father and the mother were divorced in April 2015. The divorce judgment incorporated an agreement of the parties pursuant to which the parties were awarded the joint legal and joint physical custody of their minor children. The father was required to pay $4,000 per month in child support but the child support provision contained in the agreement stated that the father's child support obligation would be reduced by one-third as each child reached the age of majority, enrolled in college and/or became self-supporting. In June 2017, the mother filed a contempt petition asserting that the father had failed to pay child support since October 2016. The father filed an answer and a counterclaim for modification of his child support obligation. After a hearing, the trial court reduced the father's child support obligation to $2,840 per month and it awarded the mother a child support arrearage of $36,000. After the father's postjudgment motion was ruled upon, he filed an appeal.

Court's Analysis: The parties combined gross monthly incomes exceeds the uppermost level of the schedule set forth in Ala. R. Jud. Admin. 32. Therefore, the trial court was required to consider two factors in its determination as to whether the father's child support obligation should be modified: (a) the reasonable and necessary needs of the children and (b) the father's ability to pay. Other factors could be considered by the trial court at its discretion. The trial court is not required to set forth its child-support calculations when the child support guidelines do not apply. The mother received income from a limited liability partnership established by her family ("the RLLP"). In its judgment, the trial court stated that it had considered the parties' incomes in its child support modification decision but that it had determined that the income of the RLLP, a pass-through entity, attributed to the mother but not actually paid to her should not be used as a basis for reducing the father's child-support obligation. "Because the mother and the father's combined adjusted gross income exceeded the uppermost level of the Rule 32 schedule, Alabama law did not require the trial court to consider the mother's income in determining whether to modify the father's child-support obligation, and it did not require the trial court to calculate the father's child-support obligation in the manner required by Rule 32(C)(2) for parents whose combined adjusted gross income falls within the Rule 32 schedule."

The trial court did not abuse its discretion by basing its modification on less than all of the mother's income. The father does not challenge the trial court's

consideration of the needs of the children. Moreover, he does not argue that he lacks the financial ability to pay $2,840 per month in child support. In his application for rehearing, the father argued that this case involved a matter of first impression with regard to including income derived from a party's minority participation in a partnership for child support purposes. "We have concluded that, under the circumstances of this particular case and current law, the trial court was not required to consider any of the mother's income in calculating the father's child support obligation." As a result, the court declined to address what it considered to be a moot issue.

Special Concurrence: Judge Moore authored a special concurrence and explained that while he agreed that the trial court's judgment was due to be affirmed, he did not concur with the majority's conclusion that the mother's income was not required to be considered in this case. "...I disagree with the main opinion insofar as it concludes that the trial court was limited solely to consideration of the children's needs and the ability of the father, the obligor parent, to pay when deciding whether to modify the father's child-support obligation." With regard to the issue of whether the RLLP distributions should have been included as income to the mother, Judge Moore cited prior precedent and opined that such determinations are a matter for the trial court's discretion.

The case is styled: ***Young v. Young,*** 29 ALW (2180190), 2/7/2020, Lee Cty., Donaldson; Thompson concurs; Moore concurs in the result, with writing; Hanson concurs in the result, without writing; Edwards recuses herself, 28 pages. [ATTY: Appt: Ashley Penhale, Montgomery; Apee: Stephanie Pollard, Auburn]

FAMILY LAW: Paternity--Child Support. The State of Alabama filed two child support actions on behalf of the mother with respect to three minor children. The first case involved child support for the two older children, A.I.N, who was born in July 2014 and E.E. who was born in March 2017. The second case involved child support for the youngest child, A.G.W. who was born in May 2018. The mother's former husband was named as the father of all three children. The former husband filed a request for genetic testing regarding A.I.N.. The trial court entered genetic testing orders as to all three children. The results of those tests excluded the former husband as the biological father of all three children. The State filed motions to dismiss both actions whereupon the trial court appointed a guardian ad litem to represent the interests of the children. The former husband

failed to appear at the trial of these actions although his counsel appeared and questioned the witnesses. At that trial, the mother testified that she and the former husband were married and lived together in Pennsylvania when the oldest child, A.I.N., was born. The parties had separated by the time that E.E. was born. The parties' subsequent divorce judgment which was entered in Pennsylvania does not mention the children. Testimony was adduced regarding dependency proceedings which had taken place in Jefferson County regarding the two older children. Evidence was presented that the former husband had participated in those proceedings and had requested custody and visited with the two older children. The trial court subsequently entered two judgments determining that the former husband was obligated to pay child support and setting the child support amount at $763 per month. After his postjudgment motions were denied, the former husband appealed. **Affirmed in part; reversed in part.** (1) The former husband first argued that the trial court did not have the discretion to deny his request to declare him not to be the father of the three children because of the fact that he was clearly excluded by the genetic testing. In disposing of this issue, the Court noted that the legislature has determined that "parentage is, in the law, not always...a mere matter of cells and tissues." Instead, Ala. Code 1975, §26-17-608 recognizes the doctrine of "paternity by estoppel". Under this doctrine "if a presumed father seeks to disprove his paternity, a trial court could deny the man's claim on what amounts to equitable grounds" after consideration of, among other things, "possible harm to the child" and "the length of time a man has acted in the role of the child's father." In this case, evidence was presented that A.I.N. had lived with the former husband and that the former husband had visited with her during the dependency proceedings. Moreover, the former husband had fully participated in the dependency proceedings as the father of the A.I.N. and he acknowledged her on her birthdays and at Christmas. The former husband only changed his position with regard to paternity after the mother sought child support. Based on this evidence, the trial court could have determined that the former husband was estopped to deny that he was the father of A.I.N. and that it would be inequitable to allow him to sever that relationship. The trial court's determination that the former husband owed a duty of child support for A.I.N. is due to be affirmed. (2) With regard to the two younger children, the record indicated that the youngest child was born 31 days prior to the date upon which the parties were divorced. Moreover, that child was not the subject of dependency proceedings. "Thus, none of the former husband's conduct warranting a finding of estoppel with regard to A.I.N. could properly be deemed directed toward A.G.W. such that a court could

properly determine that A.G.W. and the former husband ever had a genuine father-child relationship apart from the mere presumption of parentage arising from the subsequent termination of the marriage of the mother and the former husband." The trial court's imposition of a duty of support as to this child is due to be reversed. (3) E.E.'s situation "presents a closer question." No evidence was presented that E.E. ever lived with the former husband. When the former husband visited with the two older children during the dependency proceeding, he showed affection to A.I.N. but not to E.E.. No evidence was presented that the former husband and E.E. had ever established a parent-child bond or that disproving the former husband's paternity of E.E. would have any harmful effect on E.E.. The trial court's imposition of a child support obligation with regard to E.E. is also due to be reversed. ***D.N. V. State of Alabama ex rel. C.G.,*** 29 ALW (2180810; 2180811), 6/26/2020, Calhoun Cty., Per curiam; (2180810—Thompson, Moore, Edwards and Hanson concur; Donaldson concurs in the result, without writing); (2180811—Thompson, Moore, Edwards and Hanson concur; Donaldson concurs in part and dissents in part, with writing), 23 pages. [ATTY: Appt: Elma Walton, Anniston; Apee: Theodore Copeland, Anniston]

FAMILY LAW: Contempt--Child Support. The parties were divorced in 2017. At the time of the divorce the parties had two minor children: one who was 18 years old and the second who was almost 17 years old. In the divorce judgment, the husband was required to pay $1,137 per month in child support. The divorce judgment also included a provision whereby Rhodes Properties LLC was to be dissolved and the real properties held by that entity were to be sold and the proceeds divided equally. The wife was further awarded one-half of any proceeds that the parties received from a Deepwater Horizon/BP claim. In 2018, the wife filed a contempt action in which she alleged that the husband had received the BP settlement but had failed to give the wife her share. She further alleged that the husband had sold the three properties owned by Rhodes Properties LLC but for an inadequate price and that he had engaged in "self-dealing." Finally, she asserted that the husband had failed to pay the amount of child support ordered in the divorce judgment. At trial, the husband testified that he had hired a real-estate company to sell the real properties and that after the properties sold, he did not immediately disburse to the wife her share because Rhodes Properties LLC had yet to be dissolved. The husband claimed that he believed that he was responsible for dissolving Rhodes Properties LLC and that he had expended $36, 428 of his own

money to pay Rhodes Properties' expenses during his management and dissolution of that entity. He repaid that amount to himself before disbursing money to the wife. With regard to the allegation regarding child support, the husband testified that the parties' older child turned 19 in September 2018 and that he began paying half of the child support amount awarded to the wife thereafter. He explained that he paid the older child's college expenses. Regarding the BP settlement, the husband received a check in the amount of $301,161 in December 2017. He gave the wife $84,325 of that amount, which he claimed was her share after deduction of income taxes. During the pendency of the action, the trial court ordered the husband to pay to the wife an additional $66,255. After hearing the evidence, the trial court entered an order finding that the husband was in contempt for charging the wife for his expenses regarding Rhodes Properties and it ordered him to pay her an additional $46,539. He was also found in contempt for failing to pay the full child support amount. The trial court awarded the wife a $15,000 attorney fee. The husband appealed. **Affirmed in part; reversed in part.** (1) The husband argued that the trial court erred by holding him in contempt regarding the division of the properties because he contends that the divorce judgment was ambiguous. Specifically, he challenged the fact that the subject provision does not specify whether the proceeds to be divided are "net" or "gross." "Civil contempt" is a willful, continuing failure or refusal of a person to comply with a lawful order. The subject provision specifically states that the husband is responsible for the management of the three properties during the dissolution process and that he "shall be responsible for the payment of any debts on said property." "Regardless of the husband's 'understanding and interpretation' of the divorce judgment, it is clear from the contempt judgment that the trial court did not believe that, in deducting a portion of the sales to recoup money he said he paid towards Rhodes Properties' expenses…the husband was in compliance with the requirements that the proceeds of the sale of the properties be divided equally between the parties." (2) With regard to the contempt finding surrounding the husband's failure to pay the full child support amount, the husband stated that he simply made an "error in judgment" when he stopped paying the full amount and that there was no evidence of bad faith on his part. It is well-settled that a parent may not unilaterally reduce court-ordered child support payments when the court order does not provide for such a reduction or when the court order does not designate a specific amount for each child. Here, the husband did not seek a modification of his child support obligation nor did the divorce judgment provide for an automatic reduction when the older child reached the age of majority. The trial court did not err by holding

the father in contempt on this issue. (3) The husband argued that the trial court erred by failing to consider money he provided to the children outside of his court-ordered child support and to give him a credit against his child support arrearage. The trial court apparently refused to consider evidence of the amounts that he had paid to the older child while he was in college but still a minor or evidence of money spent on the younger child while he was in the father's custody because the father had filed a separate child support modification action. Claims for child support arrearage may be offset by amounts of money expended by the obligated parent when the child is in his or her custody as long as those amounts were for items that are "essential to basic child support." Accordingly, this portion of the trial court's judgment is reversed and the case remanded for the trial court to take evidence as to the nature and amount of support that the husband may have provided to the children aside from his court-ordered obligation. (4) Finally, the husband challenged the imposition of the $15,000 attorney fee. The court noted that the husband "consistently 'interpreted' [the divorce judgment] in a manner that favored him" and pointed to his failure to divide the BP settlement and his unilateral child support reduction as evidence of his contempt. It affirmed the trial court's award of attorney fees. Further, it awarded the wife a $4,000 attorney fee on appeal. Judge Moore authored a dissent, which was joined by Judge Edwards, in which he opined that the finding of contempt regarding child support was in error. The dissent pointed out that the husband had written the wife a letter informing her of his intent to reduce his child support and he directed his attorney to inform the trial court of his intentions. The dissent acknowledged that although a parent may not unilaterally reduce his or her child support obligation when a child reaches the age of majority "to the average layperson exercising common sense, it would seem that when one of two children reaches the age of majority so as to no longer be eligible for child support, child support should be reduced by one-half the court-ordered amount to cover the remaining minor child." Although there was certainly evidence presented with regard to the husband's non-compliance with the child support order, there was no evidence of willful disobedience of that order. "The record does not show any bad-faith intent on the part of the father in regard to supporting the children." ***Rhodes v. Rhodes,*** 29 ALW (2180928), 5/1/2020, Baldwin Cty., Thompson; Donaldson and Hanson concur; Moore concurs in part and dissents in part, with writing, which Edwards joins, 25 pages. [ATTY: Appt: Robert Lusk, Fairhope; Apee: Stephen Johnson, Fairhope]

VII. PATERNITY

Family Law: Paternity This appeal involves actions for dependency and custody. The child who is the subject of these actions was born in November 2011. In May 2012, Ru.D. ("the alleged paternal grandmother") filed a dependency action ("the dependency action"). A pendente lite order was entered granting custody to the alleged paternal grandmother. The alleged paternal grandmother served the mother, the mother's husband and the alleged father with a summons and her complaint. In July 2012, the mother's husband filed a motion to dismiss the dependency action, asserting that he had been married to the mother since 2003, that the child was born during the marriage and that he was persisting in his presumption of paternity. The juvenile court denied the motion to dismiss but entered an order stating that the mother's husband is the "presumed father" and directing that all future pleadings be served upon him. In 2014, the mother filed a petition seeking custody or visitation. The juvenile court treated that as a new action ("the custody action") and granted her pendente lite visitation with the child. In December 2014, the alleged father appeared in both the dependency action and the custody action and counsel was appointed for him. He requested genetic testing and the juvenile court granted that motion. No such testing was performed, however. In May 2015, the mother filed a motion in the dependency action asking the juvenile court to hold the alleged paternal grandmother in contempt for refusing to permit visitation. A trial took place in August 2015 in both the dependency and the custody actions. At the outset of the trial, the mother's husband stated that he was persisting in his presumption of paternity. The juvenile court judge then indicated that he was dismissing the alleged father as a party, indicating that under the law, the mother's husband's claim to paternity "trumps all other rights." The juvenile court did not enter a written judgment in either case until May 2017 when it determined that the child was dependent and it awarded custody to the alleged paternal grandmother. After her postjudgment motions were denied, the mother appealed. In *S.S. v. R.D.*,258 So.3d 340 (Ala. Civ. App. 2018)[ALW], the court determined that the mother had appealed from a nonfinal judgment in the dependency action because the juvenile court had not ruled upon her dependency claim, had not dismissed the alleged father as a party and had not ruled upon paternity. The court also reversed the judgment in the custody action and remanded the case for the juvenile court to determine if, after 21 months, the child was currently dependent.

On remand, the alleged father filed a renewed motion for genetic testing in both cases and a motion requesting the juvenile court to adjudicate the paternity of the

child. He sought an evidentiary hearing. The mother's husband did not appear in the proceedings after the issuance of the court's initial opinion. In 2019, the juvenile court conducted a second trial in both actions. The juvenile court noted that a pending motion for DNA testing was pending but stated that because the mother's husband had previously maintained that the child was his, "he has a presumption that I can't upset." The juvenile court proceeded to take testimony and thereafter, it entered identical judgments in both actions in which it acknowledged that the mother's husband is not the biological father of the child but concluded that he is the presumed father who is persisting in that status. It dismissed the alleged father as a party. The juvenile court determined that the child was dependent and it awarded custody to the alleged paternal grandmother. The mother and the alleged father appealed. ***Reversed:*** Pursuant to Ala. Code 1975, §26-17-204(a)(1), a part of the Alabama Uniform Parentage Act ("the AUPA"), when a woman gives birth to a child during a marriage, her husband is the presumed father of that child. If the husband, as the presumed father, persists in his status as the legal father of the child, no one may maintain an action to disprove it. Here, the juvenile court noted that the mother's husband had pronounced his intent to persist in his presumption of paternity in 2012 and 2015 and it held that it was "stuck" because of those pronouncements. However, the Alabama Comment to Section 26-17-607 states that "[o]nce the presumed father ceases to persist in his parentage then an action can be brought." The court distinguished the supreme court's holding in *Ex parte Presse,* 554 So.2d 406 (Ala. 1989), noting that the *Presse* court specifically stated that its holding was based on the facts of that case, wherein the mother's husband/presumed father had forged a "significant and long-standing father-child relationship with the child." "Accordingly, a husband of a mother of a child born during the marriage 'persists in his status as the legal father of a child' within the meaning of §26-17-607(a) by actively claiming his rights as a father, by consistently discharging his legal responsibilities to and for the child, and by committing to continuing to do so." The court directed trial courts to focus on a presumed father's conduct toward a child when assessing if the presumed father is persisting in his presumption of paternity "and not rest its conclusion solely on a formal statement made by the husband in court." In this case, the mother's husband never made a claim to custody or even visitation. He never challenged the juvenile court's initial finding of dependency or its award of custody to the alleged paternal grandmother. "At the very least, the alleged father presented a genuine controversy as to whether the mother's husband was persisting in his status as the legal father of the child. We,

therefore, conclude that the juvenile court erred in dismissing the alleged father as a party to the dependency action and the custody action without first affording him an evidentiary hearing to prove that the mother's husband was not persisting in his status as the legal father of the child." ***Dissent:*** Judge Hanson concurred in the result but dissented from the majority opinion's rationale. In so doing, he opined that trial courts should not weigh evidence regarding a presumed father's interactions with a child as compared to the putative father. "Rather, under the progeny of *Ex parte Presse,* only slight evidence of a presumed father's intent to persist in claiming the status so presumed will suffice..." The case is styled ***R.D. v. S.S.,*** [Ms. 2180650, May 22, 2020] ___ So.3d ___ (Ala. Civ. App. 2020).

FAMILY LAW: PATERNITY In November 2018, the alleged father filed a petition seeking to assert paternity to a child who had yet been born. The mother filed a motion to dismiss in which she alleged that on November 14, 2018 , she had married Z.A.F. ("the husband"). The child was born on December 26, 2018. The child's birth certificate listed the husband as the child's father. The husband filed an affidavit in which he testified that he was the father of the child and that he "adamantly persisted in his status" as the legal father of the child. In April 2019, the alleged father filed an unsworn response in which he asserted that he and the mother had been in a dating relationship from February 2018 until August 2018 and that the mother acknowledged that he was the biological father of the child. He asserted that he and the mother had celebrated a "gender reveal" in July 2018 but that in November 2018, the mother began refusing to have any contact with him. At a hearing on a motion to change venue, the alleged father stated that the mother's marriage to the husband took place four days after he told her that he intended to seek DNA testing. He asserted that the husband had been living with another woman until October 2018. The alleged father claimed that he had held himself out to the be the father of the child prior to the child's birth. A hearing was held on the mother's motion to dismiss but no testimony was taken. On May 23, 2019, the juvenile court entered a judgment dismissing the alleged father's petition. After his postjudgment motion was denied by operation of law, the alleged father appealed. **Affirmed.** (1) The alleged father challenges the juvenile court's failure to grant his request for an evidentiary hearing. The alleged father argues that he was entitled to present evidence that he was also the presumed father of the child and that the juvenile court should have weight the competing presumptions. The juvenile court held a hearing on the motion to dismiss but no transcript of that

hearing is included in the record on appeal. Therefore, the father did not demonstrate that he was denied an evidentiary hearing. Moreover, the father did not raise the issue of a denial of an evidentiary hearing in his postjudgment motion and therefore, waived that argument. Moreover, the alleged father is mistaken in his contention that an evidentiary hearing was necessary for the juvenile court to resolve the "conflicting presumptions" as to who is the child's legal father under the Alabama Uniform Parentage Act ("the AUPA"), Ala. Code 1975, §26-17-101 et seq.. The alleged father supports his contention that he is a presumed legal father of the child by referring to Act No. 2019-189, Ala. Acts 2019 ("the Act") wherein the Alabama Legislature imposed a near-total ban on abortions. The alleged father contended that under the Act, the Legislature "set out that as early as within weeks a fetus has a heartbeat and should be recognized as viable." However, the alleged father failed to fully develop this argument and the court refused to consider it further, noting that if it did, it would run afoul of Ala. R. App. P. 28 and "create an unfair and untenable position for the appellee who has addressed the issues argued by the appellant." The court also stated that prior precedent is contrary to the alleged father's position, citing *Ex parte Presse,* 554 So.2d 406 (Ala. 1989) wherein the Supreme Court clearly stated that an alleged father lacked standing to assert his paternity of a child when the mother's husband/presumed father persisted in his presumption of paternity. (2) The alleged father asserted that the AUPA violates his constitutional right to "direct and participate in the upbringing of the child." He maintains that the AUPA violates "due process" rights of biological fathers to assert their parental rights. "The specific facts of this case are regrettable, and they demonstrate a possible equal-protection issue inherent in the current state of this area of the law. However, the alleged father failed to develop a cogent legal argument to support his assertion that his constitutional rights were violated, and he failed to cite any legal authority to support his contention." The judgment of the juvenile court is due to be affirmed. Judge Moore dissented, holding that the alleged father did not have a duty to assert in his postjudgment motion that the juvenile court erred by refusing to hold an evidentiary hearing because it involved a pure question of law. Further, Judge Moore opined that based on the language of the AUPA, the legislature intended that a paternity action cannot be maintained when a child has only one presumed father who persists in his status as the legal father of the child but where, as here, there are arguably two presumed fathers, this Code section does not apply. The issue of whether a man may become a presumed father based on prebirth conduct has not been addressed by Alabama courts. "I cannot agree that the juvenile court

correctly dismissed the action as a matter of law based on *Ex parte Presse* when the AUPA expressly provides that the decision should be based on the facts of the case as set forth in the evidence." ***Z.W.E. v. L.B.,*** 29 ALW (2180796), 6/5/2020, Jackson Cty., Thompson; Donaldson and Hanson concur; Moore dissents, with writing; Edwards dissents, with writing, 45 pages. [ATTY: Appt: Sheri Stallings, Centre; Apee: Joan-Marie Sullivan, Huntsville]

FAMILY LAW: Paternity. The mother filed a complaint for divorce against J.R. in which she alleged that a child had been born during her marriage to J.R. ("the divorce action"). In January 2019, the Chilton Circuit Court awarded J.R. custody of the child pendente lite. The mother amended her pleadings in the divorce action and asserted that the child was not born during the parties' marriage. It appears that the child was born in 2005 and that the mother and J.R. were married in 2009. Thereafter, the mother filed an action in the Shelby Circuit Court against D.L.B. alleging that D.L.B. was the biological father of the child ("the custody action"). J.R. moved to intervene in the custody action. J.R. then filed a motion to dismiss the custody action based on the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, §30-3B-101 et seq.. In January 2020, the guardian ad litem appointed to represent the child filed a motion to dismiss the custody action, asserting that J.R. is the presumed father pursuant to the Alabama Uniform Parentage Act ("the AUPA"), Ala. Code 1975, §26-17-1 et seq. because J.R. and the mother were married in 2009 and because J.R. executed an Affidavit of Paternity as to the paternity of the child in 2015. J.R. was added to the child's birth certificate and the guardian ad litem asserted that J.R. has held the child out to be his natural child and established a significant parental relationship with the child. The Shelby Circuit Court held a hearing on the guardian ad litem's motion to dismiss. J.R. was present at the hearing but was not permitted to speak because his motion to intervene had yet to be ruled upon. No testimony was presented at the hearing. The next day, J.R.'s motion to intervene was granted and the motion to dismiss was denied. The guardian ad litem filed a petition for writ of mandamus. **Writ of mandamus denied.** If the presumed father persists in his presumption of paternity, neither the mother nor any other individual may maintain an action to disprove paternity. Ala.Code 1975, §26-17-607(a). However, the trial court must hold an evidentiary hearing on the issues whether there is a presumed father who has persisted in his presumption of paternity. No such evidentiary hearing took place in this case. "Therefore, we conclude that the guardian ad

litem's petition for the writ of mandamus is premature and, thus, that there has been no showing of a clear legal right to the issuance of a writ of mandamus directing the Shelby Circuit Court to dismiss the custody action at this time." ***Ex parte William Dunn (In re: C.R.R. v. D.L.B.),*** 29 ALW (2190360), 3/20/2020, Shelby Cty., Moore; Donaldson, Edwards and Hanson concur; Thompson concurs in the result, with writing, 10 pages. [ATTY: Pet: William Dunn, Birmingham; other attorney names marked "confidential").

VIII. CIVIL PROCEDURE

CIVIL PROCEDURE: Venue--Motion to Dismiss--Right to Hearing. APPEAL & ERROR: Mandamus Review. The alleged father filed a paternity action in the Bessemer Division of the Jefferson Juvenile Court on April 2020. A hearing was set for August 20, 2020. On July 20, 2020, the alleged father filed a motion requesting that the mother produce the child for paternity testing before the August hearing. The juvenile court granted that motion and ordered the mother to present the child for DNA testing on July 30, 2020. The mother filed a "motion to quash service…motion to dismiss and motion to transfer for improper venue." She attached an affidavit to her motion in which she averred that she lives in Hoover, that she had not been personally served with the alleged father's complaint and that no legal papers had been left at her residence. On the same day that the mother filed her motion, the juvenile court denied it. In that order, it stated that if the mother did not appear for DNA testing the next day, that law-enforcement officers would be sent to her home. The juvenile court also indicated that it would consider the venue issue after DNA testing was complete. Thereafter, both the juvenile court judge and the alleged father acknowledged that venue was improper in the Bessemer Division. The mother failed to appear for the DNA testing and the juvenile court issued an order directing the juvenile-court clerk to issue a failure-to-appear warrant for the mother's arrest. The mother filed a petition for writ of mandamus. **Writ of mandamus issued.** (1) The mother did not assert an argument about the venue issue until she filed her brief in support of her petition for writ of mandamus which was filed more than 14 days after the entry of the juvenile court's July 29, 2020 order. A court of improper venue should not order substantive relief when the action is due to be transferred. Thus, the juvenile court clearly erred when it ordered paternity testing after it concluded that venue was

improper in the juvenile court. "Notwithstanding that error, however, we will not address the issue of venue because of the mother's failure to timely raise that issue by including it in her mandamus petition." (2) With regard to the issue involving service of process, a petition for writ of mandamus is generally not an appropriate vehicle by which to review the denial of a motion to quash service of process. However, appellate courts are permitted to review by extraordinary writ, even in the face of a clear prohibition of its usage, where the issue or issues presented also raised matters of substantial importance. Because the juvenile court issued a writ of arrest and ordered the mother to be held without bond, the court concluded that other issues involved in this petition are of "substantial importance." In this case, the mother is not asking the court to issue a writ ordering the juvenile court to quash service. Rather, she seeks a writ ordering the juvenile court to hold a hearing on her motion to quash as set forth in Ala. R. Civ. P. 12(d). This issue has not been considered often by the Alabama courts. However, federal courts, in dealing with the federal counterpart to Rule 12(d) have not required an oral hearing. Moreover, Ala. R. Civ. P. 78 allows for the disposition of some motions without an oral hearing. In fact, that rule specifically states that "unless there is a request for oral hearing, the court may enter an order denying a motion to dismiss without oral hearing." Here, the mother's motion to quash and her motion to dismiss were combined into one motion and she requested an oral hearing thereon. "Based on Rule 12(d) and Rule 78, the mother was entitled to an oral hearing before the juvenile court ruled on the mother's motion to dismiss. Thus, the mother has established a clear, legal right to the hearing she seeks." ***Ex parte H.E.O., (M.B.F. v. H.E.O.),*** 29 ALW (2190809), 10/16/2020, Jefferson Cty., Edwards: Thompson, Donaldson and Hanson concur; Moore concurs in the result, without writing, 13 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Division of Property--Modification--Jurisdiction. The parties were divorced in December 2019. The divorce judgment incorporated an agreement of the parties wherein they agreed that the former marital residence would be listed for sale. The parties further agreed that they would divide the sale proceeds or that the former wife would have the option to buy out the former husband by paying one-half of the equity in the property using an appraisal. The divorce judgment further stated that the parties would divide their personal property as well as the mortgage payments that they received from their daughter. The former husband was awarded a 2009 Hyundai Sonata and a 1977 Chevrolet

Camaro; the former wife was awarded a 2006 Volkswagen. On February 17, 2020, the former husband filed an action claiming that the former wife was in contempt of the divorce judgment by failing to list the property for sale, by failing to divide the parties' personal property, by failing to allow him to pick up the 1977 Chevrolet Camaro and by continuously harassing him. The former wife filed an answer and counterclaim for contempt, asserting that the former husband had failed to divide the mortgage payments made by the parties' daughter, had failed to agree to a realtor to list the marital residence for sale, had harassed and intimidated her and had failed to divide the parties' financial accounts as ordered. The action was referred to mediation. On April 30, 2020, the parties filed a mediated settlement agreement, signed by both parties and their attorneys. The mediated settlement agreement provided that the former wife would be awarded the marital residence and that she would pay the former husband the sum of $129,000 for his equity interest. The former husband was to be assigned the parties' interest in two mortgages given to them by their daughter and the mediated agreement specified personal property to be awarded to the former husband. On May 5, 2020, the trial court entered an order noting that more than 30 days had elapsed since the entry of the Final Decree of Divorce and directing the parties to provide authority with regard to the basis for the trial court's jurisdiction to modify the property settlement contained in the original decree. The former husband filed a response in which he argued that the mediated settlement agreement did not modify the divorce judgment but instead, clarified ambiguities. In the alternative, he argued that the mediated settlement agreement was a valid contract which was enforceable. The trial court entered an order holding that it lacked subject-matter jurisdiction to provide the requested relief and it denied the former husband's motion to approve the mediated settlement agreement. The former husband filed a petition for writ of mandamus. **Writ of mandamus granted in part and denied in part.** In *Oliver v. Oliver*, 431 So.2d 1271, 1272-73 (Ala. Civ. App. 1983)[ALW], the parties' divorce judgment required the former husband to pay the former wife $500 per month in alimony, 25% of all of his future net pay raises and one-third of his net retirement pay. The 1975 divorce judgment further provided that if the former wife remarried, the award of alimony would be reduced by 50% and completely terminate one year later. In 1981, the former husband sought to terminate his alimony obligation based on the former wife's remarriage. The former wife sought an alimony arrearage. After a hearing, the trial court held that the former wife had agreed to a reduction in alimony in 1978. The former wife appealed and the court affirmed the trial court's judgment, noting that while a court may not modify or amend a final

divorce judgment, the parties may do so. "Any right held by a party, whether by judgment or otherwise, may be the subject of contract to alter, exchange, waive, sell or satisfy." *Id.* at 1274. In this case, the former husband argued that the mediated settlement agreement is a valid contract between the parties that may be enforced by the trial court. The court agreed, holding: "...a trial court retains subject-matter jurisdiction to enforce an agreement between former spouses regarding the division or disposition of property awarded in a divorce judgment even if that agreement could be considered a modification of the award made by the court." The trial court erred by refusing to consider enforcing the mediated settlement agreement on the ground that it lacked subject-matter jurisdiction. However, the determination as to existence and the terms of a valid contract are disputed by the former wife. Those issues are not proper for mandamus relief inasmuch as mandamus may not be used to control or review the exercise of a trial court's discretion, except in cases where there has been a demonstrated abuse of discretion. "To the extent the former husband requests that this court direct the trial court to grant his petition to enforce the mediated settlement agreement, we deny the petition for writ of mandamus." ***Ex parte Hoye (Hoye v. Hoye),*** 29 ALW (2190834), 10/23/2020, Madison Cty., Moore; Thompson, Donaldson, Edwards and Hanson concur, 16 pages. [ATTY: Pet: Jay E. Emerson, Jr., Huntsville; Resp: Steven Andrews, Athens]

APPEAL & ERROR: Final Judgment. CIVIL PROCEDURE: Default Judgment. FAMILY LAW: Child Support. The mother filed a complaint in circuit court seeking to determine the custody of her three children. She alleged that Juan Quiroz ("the father") was the father of the children and that he was named on each child's birth certificate. The father filed an answer and a counterclaim for divorce in which he alleged that the parties had been married in August 2007. He also sought custody of the children as well as child support and the trial court entered a pendente lite order in which it awarded the mother and the father alternating weeks of physical custody. The trial court set the matter for final hearing on November 26, 2019. The father and his counsel appeared for the November 26th hearing but neither the mother nor her counsel appeared. The trial court entered a divorce judgment in which it awarded custody of the children to the father, awarded the mother visitation at the discretion of the father and ordered the mother to pay $4,500 in attorney fees to the father's counsel. The next day, the mother, through her counsel, filed a motion to set aside the divorce judgment. In that motion, the

mother's counsel explained that he had confused the divorce action with a pending protection-from-abuse ("PFA") action between the parties and had inadvertently calendared the date of the hearing on the divorce action based on the hearing date for the PFA. After a hearing on that motion, it was denied. The mother appealed. **Appeal dismissed.** The court held, ex mero motu, that the default judgment was not a final judgment and therefore, it pretermitted any discussion as to whether the divorce judgment should be set aside. However, in a footnote, it reiterated long standing precedent which favors the setting aside of default judgments entered in divorce actions, particularly those involving child custody. In this case, the father requested an award of child support in his counterclaim. The trial court neglected to order the mother to pay child support. "Where a party has requested child support and the trial court's purported judgment contains no conclusive assessment of the child-support obligation, the trial court has not completely adjudicated the matters in controversy between the parties." Because no final judgment was entered, the divorce judgment is not capable of supporting an appeal and it is due to be dismissed. ***Quintana v. Quiroz,*** 29 ALW (2190288), 6/19/2020, Chilton Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 6 pages. [ATTY: Appt: Alberto Osorio, Birmingham; Apee: Angie Mayfield, Clanton]

FAMILY LAW: Parental Rights. CIVIL PROCEDURE: Abatement. This is a termination of parental rights case. At the time of the termination hearing, the children were 9 and 11 years old. The parents and the children lived in North Carolina until 2016 when they moved to Alabama. In Alabama, the family lived in a camper. In March 2017, the Calhoun County Department of Human Resources ("DHR") received reports that the mother had "cut" herself. The children were taken into protective custody and at the time, DHR workers noticed that the camper was dirty and crammed with liquor bottles. The mother and the father attended family counseling and although individual counseling was offered to both parents, the father refused to attend, stating that he did not need it. The father submitted to a hair follicle test that was positive for opiates, oxycodone and hyrocodone. Although the father maintained full-time employment while the children were in foster care, he never paid any child support. After the children were taken into protective custody, the mother and the father moved repeatedly between motels In the fall of 2017, they were living in a tent near a Walmart store. They then lived in a stranger's basement. The father admitted that he could not provide a home for the children. The DHR worker assigned to the case testified

that the parents refused services and had not maintained contact with DHR. The parents preferred that custody be awarded to a maternal aunt of the children, M.O.H.. M.O.H. is married to the mother's brother, M.H. ('the uncle") who has an extensive criminal history. M.O.H. and the uncle have been separated for 13 years and M.O.H. denied having contact with him. M.O.H. lives in North Carolina and when the North Carolina Department of Social Services ("NCDSS") contacted M.O.H. to conduct a home evaluation, M.O.H. refused to allow the workers to come into her home. Later, M.O.H. contacted DHR and said that she had since moved and would like to be considered as a placement. NCDSS approved the home. M.O.H. traveled to Alabama to visit with the children and on one of those visits, she fell asleep and the DHR worker who had picked her up from the office was unable to awaken her. M.O.H. testified that she had a "brain infection" and she remained in an Alabama hospital for three days before returning to North Carolina. M.O.H. has back problems for which she takes Percocet. She was also diagnosed with anxiety, depression and congestive heart failure. The children are in a therapeutic foster home because the 11 year old has attachment disorder and the 9 year old has attention deficit disorder. Counselors for the children testified that it would not be in the children's best interests to be removed from their current placement. The juvenile court terminated both parents' parental rights. The mother and father appealed. While the appeal was pending, the mother died. **Mother's appeal-Dismissed; Father's appeal--Affirmed.** (1) With regard to the mother's appeal, the court was called upon to determine the effect that her death had on that appeal. It is well-settled that the appeal of a judgment awarding monetary damages does not automatically become moot upon the death of a party. But here, there is no monetary award; instead, the mother's appeal implicates only personal rights. In *C.J. v. T.J.,* 225 So.3d 115 (Ala. Civ. App. 2016)[ALW], the court considered whether an appeal from a judgment terminating the parental rights of a mother was rendered moot when the mother died during the pendency of the appeal. The court determined the appeal was not automatically mooted because the termination of parental rights judgment implicated the rights not only of the deceased mother, but also of the child. The court dismissed the appeal with instructions to the juvenile court to determine whether the termination of the mother's parental rights remained in the child's best interests given any property interests that might have arisen as a result of the mother's death. Here, the court entered an order requiring the juvenile court to consider whether any property rights in favor of the children might exist because of the mother's death. The juvenile court held a hearing and concluded that the mother had a negligible work

history and that she died from natural causes so that possibility of any benefits for the children or litigation potential was negligible. In the mother's brief on appeal, her counsel does not challenge the juvenile court's determination that the children would have no inheritance or property rights as a result of the mother's death. "We conclude that, given the issues raised in the brief filed on behalf of the mother, the mother's appeals are mooted by her death, and this court lacks jurisdiction over the appeals." (2) With regard to the father's appeal, the father challenged the sufficiency of the evidence surrounding the termination of his parental rights. He provided no support for the children and he did not have lodging for the children in spite of the fact that he was employed earning $15 per hour. The father had failed to participate in reunification services and he was given ample opportunity to adjust his circumstances to meet the needs of the children but failed to do so. The trial court did not err by determining that sufficient evidence existed warranting a termination of the father's parental rights. (3) The father further argued that the juvenile court erred by determining that there were no viable alternatives to the termination of parental rights. The father argued that M.O.H. was willing to serve as a placement for the children. However, her willingness and the approval of her home is not determinative of her viability as a relative placement for the children. M.O.H. suffers from a myriad of health concerns that "call into question her ability to meet the children's needs and to deal with their behavioral issues." The judgment of the juvenile court with regard to the termination of the father's parental rights is due to be affirmed. ***M.H. v. Calhoun County Department of Human Resources,*** 29 ALW (2180986; 2180987; 2181048; 2181049), 6/5/2020, Calhoun Cty., Thompson; Donaldson, Edwards, and Hanson concur; Moore concurs in the result, without writing, 39 pages. [ATTY: Not listed-confidential]

TORTS: Parental Immunity--State-Agent Immunity. In 2013, the Department of Human Resources ("DHR") removed AC and his two siblings from their home after receiving reports that Arnold Curry was physically abusing the children. DHR placed the children with Becky Van Gilder and DHR obtained legal custody of the children. DHR employee Kristi Kelley was assigned to be the caseworker for the children, and in accordance with DHR policy, drafted the initial Individualized Service Plan ("ISP"), setting forth DHR's plans and goals for the family. Van Gilder was told at placement that AC suffered from sickle cell anemia. Van Gilder states that she was told it was important for AC to stay hydrated, and that if over the counter pain medication did not alleviate any complained-of pain, or if he

complained of chest pain, or if he had a temperature of over 101 degrees, she should seek emergency medical treatment. Kelley also attended at least some of AC's medical appointments and visited the children on at least a monthly basis over the next several months. In May 2013, Van Gilder had to go out of state. She arranged for Susan Moss, another licensed foster parent, to care for AC and his siblings while she was gone. For two days in a row, AC complained of a stomach ache, but stated he felt better after taking medication. He did not complain of any discomfort over the next two days, but on the day after that, the day Van Gilder returned, one of AC's siblings alerted Van Gilder that AC was in pain and crying. Van Gilder took him to the hospital, where he was admitted. Two days later he died of respiratory failure. In 2015, Curry instituted a wrongful death suit against Van Gilder and Kelley, alleging that their negligence and wantonness led to AC's death. In 2017, Van Gilder and Kelley filed separate motions for summary judgment. Van Gilder argued that any claim for negligence was barred by the doctrine of parental immunity and that Curry had presented no evidence that she acted wantonly. Kelley argued that she was entitled to parental immunity as well as State-agent immunity. The trial court denied both motions without stating its rationale for doing so. The defendants petitioned for a writ of mandamus. **Writs of mandamus granted in part and denied in part.** Under Alabama law, there was no question that the doctrine of parental immunity barred Curry's wrongful-death claim against Van Gilder to the extent that claim was based on alleged negligence, but not to the extent it was based on alleged wantonness. The Court then pointed out that Van Gilder's argument that there was no evidence that she acted wantonly was not appropriate for mandamus review. The Court's mandamus review in cases such as this is limited to determining only whether immunity applies. "Whether there is substantial evidence to support Curry's allegation of wantonness is a decision for the trial court to make, and its decision is not reviewable at this stage of the litigation by mandamus petition." Turning to Kelley's argument, the Court stated that because DHR stands in loco parentis to foster children, DHR employees should be able to assert the parental immunity doctrine as a defense to claims of simple negligence by foster children. Because the parental immunity doctrine did not bar Curry's wantonness claims, however, the Court considered whether Kelley was entitled to State-agent immunity as set forth in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000)[ALW]. Kelley contended that she established a claim to immunity as her conduct came under the third ground of the test set forth in *Cranman:* "(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for

performing the duties and the State agent performs the duties in that manner ...." The Court noted, however, that *Cranman* also provides that a State agent shall not be immune from liability when she acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law. Here, the Court found that Curry identified evidence indicating that Kelley violated DHR's ISP policy by failing to conduct the required 30-day ISP review and by failing to complete a more thorough ISP in conjunction with that review. "Thus, under our caselaw, Kelley did not establish that she was entitled to a summary judgment in her favor on the basis of State-agent immunity." The Court accordingly held that Curry's negligence claims were barred by the doctrine of parental immunity, but that he could proceed with his claims based on allegations of wantonness. ***Ex parte Kelley (In re: Curry v. Kelley),*** 28 ALW (1170988); 11/15/2019, Montgomery Cty., Per curiam; Bolin, Shaw, Bryan, Sellers, Mendheim and Stewart concur; Parker, Wise and Mitchell concur specially, 44 pages. [ATTY: Pet: Robert E. LeMoine, Birmingham; Resp: Felicia Brooks,Montgomery]

CIVIL PROCEDURE: Guardian ad Litem--Attorney Fees. In 2012, Sandra Shinaberry's automobile rear-ended an automobile being driven by Sherri Guy. Guy's three minor children and a minor stepchild were in the car. The children were treated for soft tissue injuries. The children, by and through their parents, sued Shinaberry and her insurer. In April 2015, a settlement was reached. In May 2015, Mark Wilson was appointed as guardian ad litem for the children for the purpose of determining if the settlement was fair to the children. Wilson sought permission to have a physician examine one of the children. Email exchanges also revealed that Wilson failed to communicate with the attorneys for the children for nine months. In October 2016, Shinaberry filed a motion to enforce the settlement or, in the alternative, to appoint a new guardian ad litem. In January 2017, the court held a hearing on the motion and decided to hold the motion in abeyance pending a rescheduling of the *pro ami* hearing. In January 2018, a final *pro ami* hearing was held. The circuit court subsequently entered an order approving the settlement, which awarded a total of $15,230 to the children after their counsel was paid a fee of $4,470 and the medical expenses were satisfied. Wilson was awarded $8,000 for his services based on his affidavit that he worked 32 hours at a rate of $250 per hour. Shinaberry filed an objection to the amount of Wilson's fee. After a hearing, the circuit court reduced Wilson's fee to $7,750 because he appeared by telephone

at one of the hearings. Shinaberry appealed. The Court of Civil Appeals affirmed without an opinion and Shinberry petitioned the Supreme Court for a writ of certiorari. **Reversed.** Rule 17(d), Ala. R. Civ. P. governs the use and compensation of guardians ad litem in civil cases and requires the assessment of a reasonable fee for his or her legal services. Rule 17(d) does not provide guidance on how to establish a guardian ad litem's fee, but the Court has applied criteria that may be considered when determining the reasonableness of an attorney fee: (1) [T]he nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8)whether a fee is fixed or contingent; (9) the nature and length of the professional relationship; (10) the fees customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances. *Pharmacia Corp. v. McGowan*, 915 So. 2d 549 (Ala. 2004)[ALW]. The Court explained that it defers to the trial court's judgment in an attorney fee case, because it presided over the entire litigation. Nevertheless, the Court stated that a trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee.

Here, Wilson failed to itemize the services he performed in his limited role in this personal injury case in which the minors suffered no long-term injuries. Wilson stated that he spent 32 hours working on this case; however, he failed to provide the parties and the court with a report giving his recommendation, nor did he indicate how he spent those 32 hours or with whom he spoke or what he reviewed as part of his evaluation. He delayed the parties' settlement by failing to communicate with the parties' attorneys for a nine-month period. It also appeared that Wilson took on tasks that were either unnecessary or outside his limited role, and that his fee was almost twice the damages awarded to the minor plaintiffs and almost twice the fee awarded to the attorneys who represented the plaintiffs. "As this Court stated in *Peebles v. Miley*, 439 So. 2d 137, 143 (Ala. 1983), we agree with the admonition of the American Bar Association that 'a fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.' Such is the case here." ***Ex parte Shinaberry (In re: Shinaberry v. Wilson),*** 29

ALW (1180935); 7/31/2020, Shelby Cty., Bolin; Parker, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart and Mitchell concur, 16 pages. [ATTY: Appt: Steven Colclough, Birmingham; Apee: Joshua Arnold, Columbiana]

APPEAL & ERROR: Stay. In May 2016, Raya Greenberger filed an action against Slocumb Law Firm. LLC ("Slocumb") alleging that Slocumb had violated the Alabama Legal Services Liability Act, Ala. Code 1975, §6-5-570 et seq.. A default judgment was entered and subsequently vacated after Slocumb filed a motion. Greenberger was given 30 days from October 14, 2018 to perfect service. On March 1, 2019, Greenberger filed a renewed motion for default judgment stating that a process server served an employee at Slocumb's Auburn office on October 18, 2018. A new default judgment was entered against Slocumb and a motion to reconsider filed by Slocumb was denied. Slocumb appealed. After the motion to reconsider was denied, Greenberger propounded postjudgment interrogatories on Slocumb. The trial court entered an order compelling Slocumb to respond to those interrogatories on November 22, 2019. On December 5, 2019, Slocumb filed a motion to reconsider the order compelling it to respond. The trial court denied the motion to reconsider on December 19, 2019. Slocumb filed a petition for writ of mandamus on January 3, 2020. **Writ of mandamus denied.** Slocumb asserts that because it had already filed a notice of appeal when the order to compel was entered, the trial court lacked jurisdiction to enter that order. In resolving this issue, the court noted that Slocumb failed to file a supersedeas bond or a motion for stay of execution of the judgment in connection with the appeal. If an appeal is taken without the posting of a supersedeas bond, the appellee's right to enforce the judgment is not suspended during the appeal and the trial court must allow "whatever measures are necessary for the execution of the judgment." This includes postjudgment discovery which is collateral to the judgment from which the appeal was taken. "Slocumb has failed to demonstrate that it has a clear legal right to have vacated the order compelling it to respond to the postjudgment discovery." The petition for writ of mandamus is due to be denied. *Ex parte Slocumb Law Firm, LLC (Greenberger v. Slocumb Law Firm, LLC),* 29 ALW (2190297), 3/13/2020, Thompson; Moore, Edwards and Hanson concur; Donaldson recuses himself, 13 pages. [ATTY: Pet: Morgan Chappell, Montgomery; Resp: Yuri Linesky, Tuscaloosa]

APPEAL & ERROR: Mandamus. FAMILY LAW: Alabama Parent Child Relocation Act--Modification. CIVIL PROCEDURE: Servicemembers' Civil Relief Act. The parties were married and had a child in 2007. In 2012, they were divorced by a Tennessee judgment. In January 2018, the Tennessee court entered a modification order. Pursuant to that modification order, the mother was designated as the "Primary Residential Parent" and the father was afforded visitation that includes extended periods during the child's summer vacations. The modification order also contains a notice for parental relocation. The father is a servicemember in the United States Army. In February 2018, the father moved to Ft. Rucker, Alabama. The mother remarried a man who is also in the U.S.Army and in July 2018, the mother moved with the child and her husband to Ft. Rucker. In September 2019, the father moved to North Carolina. In December 2019, the mother filed a petition to register the Tennessee Court's divorce judgment as amended by the modification order ("the Tennessee judgment") and a petition to enforce the foreign judgment. In her petition, the mother alleged that her husband had received military orders requiring him to relocate to Germany for a duty assignment, that she had provided the father with notice of her intent to relocate, that the father had not responded, that the parties' divorce judgment required the parties to promptly execute written instruments to carry out the terms of the judgment and that the father had failed to consent to an application for a passport for the child. The mother sought an order compelling the father to sign the child's passport application. The father filed an answer in which he consented to the registration of the Tennessee judgment "for purposes of enforcement." He admitted that he had received notice of the relocation from the mother but stated that he had filed an objection to the proposed relocation in Tennessee. He further requested that the trial court deny the mother's proposed relocation with the child. The mother filed a motion to compel the father's consent to the passport application. The father sought to stay the proceeding under the Servicemembers' Civil Relief Act, 50 U.S.C. § 3901 et seq. ("the SCRA"). In his motion to stay, the father explained that he was being deployed to Kuwait. The mother filed a motion seeking an order to allow her to unilaterally apply for a passport for the child. On February 10, 2020, the trial court granted that motion and thereafter, it entered an order authorizing the child to travel with the mother outside the country. The mother filed a motion to withdraw her motion to compel, asserting that the issue raised in that motion was now moot. In that motion, the mother specifically indicated her willingness to stay the proceedings while the father was deployed. The trial court entered an order denying the mother's motion to withdraw her

motion to compel. Thereafter, the father filed a motion seeking an injunction prohibiting the mother from relocating to Germany with the child. The next day, the trial court conducted a hearing on the pending motions. On February 14, 2020, the trial court entered an order finding that the Tennessee judgment had not been "domesticated" and therefore, the trial court did not have jurisdiction to address the issue of relocation. The trial court set aside its February 10, 2020 order regarding the application for a passport for the child, stayed the proceedings pursuant to the SCRA and ordered that the child could not leave the country until the stay was lifted and the Tennessee judgment was domesticated. The mother filed a motion to reconsider and on February 28, 2020, the trial court granted the mother's motion to reconsider and set aside the February 14, 2020 order. In its order, the trial court allowed the mother to temporarily relocate until the stay was lifted. The father filed an "Emergency Motion to Alter, Amend or Vacate" the February 28, 2020 order. The trial court denied that motion on March 9, 2020. On May 19, 2020, the mother filed a "Motion to Lift Stay and Motion for Emergency Hearing." In that motion, the mother asserted that she was scheduled to move on May 31, 2020, that the father had returned from his deployment, and that the father had asserted that he was going to exercise his summer visitation. The father acknowledged that the stay was due to be lifted but filed a separate motion seeking to compel the mother to permit his summer visitation. On May 21, 2020, the trial court entered an order requiring the parties to attend mediation. After motions were filed by both parties, the trial court entered an order the next day in which it temporarily suspended the father's visitation and reiterated its order that the parties mediate. On May 29, 2020, the father filed a petition for writ of mandamus. **Petition dismissed in part and denied in part.** (1) The father argued that he was entitled to an immediate stay under the SCRA when he filed his motion on February 3, 2020 and that any orders entered by the trial court between February 3, 2020 and May 19, 2020, when the mother filed her motion to lift the stay, should be vacated. The mother asserts that the father's mandamus petition was untimely filed as to those orders. Ala. R. App. P. 21(a)(3) provides that a petition for writ of mandamus shall be filed within a reasonable time. The presumptively reasonable time for filing a petition seeking review of an order shall be the same time as that for filing an appeal. Here, the father sought to challenge orders of the trial court entered on February 7, 2020, February 10, 2020, February 28, 2020 and March 9, 2020. His mandamus petition was filed on May 29, 2020, more than 42 days from the entry of these orders. The court rejected the father's argument that his military deployment constituted good cause for the delay in filing his mandamus petition.

"Although, in other contexts, a party's military deployment could constitute good cause for filing a petition outside the presumptively reasonable period, the materials submitted to this court establish that the father, through counsel, filed a motion for an injunction on February 13, 2020 and a motion to alter, amend or vacate on February 28, 2020." Therefore, the father has not established good cause for the court to consider his arguments. (2) The father also sought a writ of mandamus directing the trial court to vacate the May 22, 2020 order that temporarily suspended his visitation. According to the father, the trial court erred by entering this order without holding an evidentiary hearing. However, the father did not cite any legal authority in support of this argument as required by Ala. R. App. P. 28(a)(10). The petition for writ of mandamus is due to be denied in part and dismissed in part. ***Ex parte Pirner (Hawkins v. Pirner),*** 29 ALW (2190644), 8/21/2020, Dale Cty., Donaldson; Thompson and Hanson concur; Moore concurs in the result, with writing; Edwards concurs in the result, without writing, 20 pages. [ATTY: Pet: Christopher Kaminski, Enterprise; Resp: M. Adam Jones, Dothan]

CIVIL PROCEDURE: Service--Default Judgment. APPEAL & ERROR: Mandamus. In 2017, the father was awarded the sole physical custody of the parties' two children. In May 2018, the mother filed a form entitled "Petition to Modify" in which she did not specifically request a change in the custody of the children, but rather, requested that the trial court assist in enforcing her visitation and communication with the children pursuant to the 2017 judgment. In November 2018, the trial court entered an order noting that service had not been perfected on the father and ordering the mother to take action within 14 days or the action would be dismissed. The mother filed a printout from the United States Postal Service web site indicating that on May 29, 2018, a package had been delivered to "Hutto, Texas" and that the package had been left with an unnamed individual. On June 5, 2019, the mother filed a motion for a default judgment. After a hearing, the trial court entered a default judgment awarding the mother sole legal and sole physical custody of the children. The trial court reserved jurisdiction over the issue of child support. The trial court's default judgment was entered on September 30, 2019. On October 30, 2019, the father filed a motion to set aside the default judgment which was denied on November 27, 2019. On December 12, 2019, the father filed a verified motion for relief from the default judgment arguing that he had not been properly served. That motion was denied and the father filed his notice of appeal on December 23, 2019. **Writ of**

mandamus granted. (1) The September 30, 2019 default judgment was not a final judgment because it reserved the issue of child support. However, the court decided to treat the appeal from the interlocutory default judgment as a petition for writ of mandamus. Although a petition for writ of mandamus must generally be filed within 42 days of the entry of the order being challenged and although the father's notice of appeal was filed more than 42 days after the default judgment was entered, the court can consider jurisdictional challenges that are filed outside the 42-day presumptively reasonable period for filing a petition for writ of mandamus. (2) Failure of proper service under Ala. R. Civ. P. 4 deprives a trial court of jurisdiction and renders any subsequent judgment void. When the service of process is challenged as being improper, the burden of proof is on the plaintiff to show that the service of process was effectuated correctly and legally. Rule 4(i)(2)(B)(ii) states that an attorney or party who attempts service by certified mail must "upon mailing…immediately file with the court an 'Affidavit of Certified Mailing of Process and Complaint.'" Service by certified mail is deemed complete and the time for answering runs from the date of delivery to the named addressee or the addressee's agent as evidenced by the signature on the return receipt. The record in this case does not contain an Affidavit of Certified Mailing of Process and Complaint nor a signed return receipt. The mother submitted a tracking form from the United States Postal Service but that form only indicates that certified mail was perfected somewhere in "Hutto, Texas"—no specific street address is listed. The mother pointed out that the trial court forwarded a copy of the complaint to the father's Texas attorney in July 2019 but generally, there is no legal authority which provides for process service on a defendant's attorney. (3) The mother claimed that the father waived service. An argument as to insufficient or improper service may be waived if it is not raised in the first responsive pleading. Moreover, a general appearance by a party either in person or by an attorney waives any objection to service of process. However, in this case, the father hired an Alabama attorney to appear at the default judgment hearing but he did not arrive until after the hearing had concluded. The father's attorney then filed a motion to set aside the default judgment on the basis that the trial court lacked subject matter jurisdiction, "An appearance by an attorney for the sole purpose of objecting to the jurisdiction of the court is not considered a general appearance." (4) Not only is the default judgment entered by the trial court void based on invalid service of process, it is also void because it deprived the father of due process. The mother did not specifically request a modification of custody. Although the mother's pleading was styled "petition to modify", that title, standing

alone, was not sufficient to apprise a reasonable person that a change in custody was being requested. Accordingly, the petition for writ of mandamus is due to be granted and the trial court is directed to vacate its void default judgment. ***Ex parte Jenkins (Steele v. Jenkins),*** 29 ALW (2190272), 8/14/2020, Montgomery Cty., Moore; Donaldson, Edwards and Hanson concur; Thompson concurs specially, 14 pages. [ATTY: Pet: Sebrina Martin, Montgomery; Resp: Lawrence Johnson, Birmingham]

CIVIL PROCEDURE: Service of Process--Publication. In April 2012, James Cochran was riding his motorcycle when he struck a horse that had entered the road. Cochran suffered significant injuries. Cochran retained attorney James Shelnutt to pursue legal remedies against any responsible parties. They ultimately concluded that the horse had come from a farm that extended into both Calhoun and Cherokee Counties and was owned by Pilar Engelland ("Pilar"). Shelnutt had telephone conversations wth Pilar, her son Jorge, and Jerry Coley, who was leasing the farm from Pilar at the time of the accident. In April 2014, Cochran sued Pilar and Coley. Coley was served, and the claim against him was eventually dismissed with prejudice. In July 2016, Cochran moved the trial court for permission to serve Pilar by publication under Rule 4.3, Ala. R. Civ. P. Cochran supported his motion with an affidavit from one of his attorneys, alleging that upon information and belief, Pilar avoided service and that her whereabouts were unknown. The trial court granted Cochran's motion, and notice was published in a local newspaper for four consecutive weeks. Thereafter, the trial court entered a default judgment in his favor and against Pilar in the amount of $2,000,000. After Cochran obtained a writ of execution and had it delivered to Pilar at her home in Florida. Pilar moved to set aside the default judgment under Rule 60(b)(4), Ala. R. Civ. P. She specifically argued that she had taken no action to avoid service and that Cochran had not exercised reasonable efforts to locate her. Jorge testified that while Pilar had moved to Florida to live with him and they had moved several times, they had always notified the revenue commissioners in both Calhoun and Cherokee County of their change of address to ensure they received property tax notices for the farm. Shelnutt testified that he searched Alacourt and "several" Web sites looking for contact information for Pilar unsuccessfully. He conceded, however, that he never tried to contact Pilar or Jorge again by telephone. The trial court set aside the default judgment. Pilar filed an answer and a motion for summary judgment, which the trial court granted. Cochran appealed. **Affirmed.** Rule 4.3(a)(2) provides

generally that a defendant "who avoids service of process" may be served by publication. Rule 4.3(d)(1) requires a plaintiff seeking to effect service by publication to submit an affidavit to the trial court "averring facts showing such avoidance," and Rule 4.3(c)reiterates that this affidavit "must aver specific facts of avoidance" and cautions that "[t]he mere fact of failure of service is not sufficient evidence of avoidance." The affidavit submitted by Cochran to support his motion requesting service by publication contained only a conclusory statement that, "[u]nder information and belief, [Pilar] avoided service." That statement does not meet the requirements of Rule 4.3, and Alabama appellate courts have universally held similar statements to be an insufficient basis upon which to request service by publication. The Court held it could not find the conclusory statement in the motion for service by publication — that [the defendant] was avoiding service — sufficient to satisfy the requirement of Rule 4.3(d)(1). It also stated that there was testimony from which the trial court could have found that Pilar had not avoided service. "For these reasons, we hold that service by publication was not proper in this case and that the trial court correctly set aside the default judgment against Pilar in March 2017." ***Cochran v. Engelland,*** 29 ALW (1180216); 1/10/20; Calhoun Cty., Mitchell; Parker, Wise and Stewart concur; Bolin, Shaw, Bryan, Sellers and Mendheim concur in the result, 12 pages. [ATTY: Appt: George D. Varner, Jr., Rainbow City; Apee: F. Michael Haney, Gadsden]

CIVIL PROCEDURE: Default Judgement - Service By Publication J.B. ("the stepfather") filed petitions in probate court seeking to adopt his three stepchildren. The petitions named C.S. ("the father") as the father of the children and contained his address in Oregon. Thereafter, the stepfather filed an "Affidavit of Petitioner Perfecting Service"("the service affidavit"). In that affidavit, the stepfather asserted that the whereabouts of the father were unknown and that he had exhausted all means to locate him. He further stated that if an address was known to him, that his attorney had attempted service by certified mail. The record does not contain any orders permitting service by publication but each record contains an affidavit from the publisher of The Oregonian newspaper, indicating that notice of each of the adoption proceedings was published in that newspaper ("the publication affidavits").

On February 27, 2018, the probate court entered a final adoption judgment in each action. On July 18, 2018, the father filed a motion in each case seeking relief from

the adoption judgments pursuant to Ala. R. Civ. P. 60(b). He asserted that he had not received notice of the adoption proceedings but that the mother was aware of his address in Oregon. The probate court denied the father's motions. In its order, the probate judge noted that the father had admitted to living at the address where two separate attempts at service by certified mail were made. The father appealed.

Appellate Court's Analysis: The statement of the evidence approved by the probate court pursuant to Ala. R. App. P. 10(d) indicates that the father testified at the Rule 60(b) hearing that the mother knew his address, that she had served him at that address previously with regard to child support matters, that he had attended one of the children's sporting activities in Alabama in November 2017 while the adoption petitions were pending and that he had been working in another state on the majority of the dates that delivery of the certified mail had been attempted. Both the father and his girlfriend testified that The Oregonian is not in circulation in the area where the father resides. Ala. R. Civ. P. 4.3(d)(2) requires that service by publication be made in a newspaper of general circulation in the county of the defendant's last known residence. "It is generally held that for a publication to be considered a newspaper of general circulation within the meaning of a statutory provision, and therefore to be qualified to publish legal notices, it must contain items of general interest to the public, such as news of political, religious, commercial or social affairs." 24 A.L.R. 4th at 825. "Thus, by using the term 'newspaper of general circulation' in Rule 4.3(d)(2), our supreme court must have meant that the newspaper in which a notice must appear is a newspaper that is read by the general public and that presents newsworthy articles relating to affairs of interest to the general public." Based on the evidence and the definition contained above, The Oregonian is a newspaper of general circulation.

However, Rule 4.3(d)(2) further requires that service by publication must be made in a newspaper of general circulation which is published in the county of the defendant's last known residence. If no newspaper of general circulation is published in the county of the defendant's last known location, then publication shall be made in a newspaper of general circulation published in an adjoining county. The fact that The Oregonian has a "general circulation" in Oregon is not sufficient to demonstrate that it was a proper newspaper in which to publish the notice for service by publication. "The relevant inquiry is whether The Oregonian is published in the county of the father's residence." No such evidence was adduced in this case. The stepfather bore the burden of proving that the father was properly served. "Accordingly, we conclude that the evidence does not support the

conclusion that the father was properly served by publication, and the adoption judgments are therefore void." The judgments of the probate court are due to be reversed. ***C.S. v. J.B.,*** 29 ALW (2180604; 2190605; 2180606), 3/20/20, Jefferson Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 22 pages. {ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Venue. The mother and the father are the unmarried parents of two children. In August 2019, the mother filed a petition for protection from abuse against the father in the Dale Circuit Court ("the PFA action"). On the same day, the Dale Circuit Court entered an order granting the mother the temporary custody of the children. On September 8, 2019, the father commenced an action in the Houston Circuit Court ("the trial court") seeking custody of the children ("the custody action"). The mother filed a motion to change the venue of the custody action, arguing that pursuant to Ala. Code 1975, §6-3-2, venue was not proper in Houston County because she and the children were residents of Dale County. At a hearing on the mother's motion, the mother testified that she had moved to Houston County with the children in 2013 and that she resided there until sometime in August 2019. At that time, the mother and the children moved to the maternal grandmother's house because of the father's alleged abuse. The mother claimed that her move to Dale County was permanent and that she did not intend to return to Houston County. The trial court denied the mother's motion to transfer venue and she filed a petition for writ of mandamus. **Writ of mandamus denied.** Section 30-5-3(c), a part of the Protection from Abuse Act, provides that a petition for a protection order may be filed in the following locations: (a) where the plaintiff or defendant resides; (b) where the plaintiff is temporarily located if he or she has left his or her residence to avoid further abuse; (c) where the abuse occurred or (d) where a civil matter is pending before the court in which the plaintiff and the defendant are opposing parties. The mother asserts that this Code section controls the venue of the custody action but she failed to adequately explain her argument. Instead, the applicable Code section is Ala. Code 1975, §6-3-2 which governs venue of equitable actions. It states that such actions are to be commenced in the county where the defendant resides. For purposes of determining venue, the terms "residence" and "domicile" are synonymous. . "The terms denote the place where the person is deemed in law to live and may not always be the place where the person is actually dwelling." Based on the ore tenus standard, the trial court's determination that the mother's

residence was in Houston County at the time that the custody action was initiated controls the outcome of this appeal. The petition for writ of mandamus is due to be denied. ***Ex parte L.B. (C.P. v. L.B.),*** 29 ALW (2190291), 3/6/2020, Houston Cty., Donaldson; Thompson Edwards and Hanson concur; Moore concurs in the result, without writing, 15 pages. [ATTY: Pet: Charles Reese, Daleville; Resp: Shannon Rash, Dothan]

CIVIL PROCEDURE: Venue-Transfer. APPEAL & ERROR: Mandamus. The alleged father filed a paternity petition in the Blount Juvenile Court. After a hearing, the Blount Juvenile Court entered an order awarding the alleged father pendente lite visitation with the child. In its order, the Blount Juvenile Court sua sponte found that since the mother and the child both live in Jefferson County, the paternity action was due to be transferred to the Jefferson Juvenile Court. After the case was transferred, the mother filed an objection to venue. The Jefferson Juvenile Court entered an order on August 29, 2019 concluding that Blount County was the proper venue and it purported to transfer the action back to the Blount Juvenile Court. The alleged father filed several motions in the Blount Juvenile Court including a request that the action be set for trial on the paternity and custody issues. The mother also filed a request in the Blount Juvenile Court for a trial setting. The Blount Juvenile Court did not act on any of the motions filed and the alleged father filed a petition for writ of mandamus seeking a writ ordering the Blount Juvenile Court to set the action for trial. **Writ of mandamus denied.** "Although the alleged father's petition would normally have merit, in this particular instance we cannot compel the Blount Juvenile Court to set the alleged father's paternity and custody action for trial." Once the transferor court has granted the motion to transfer the case and the file has been sent to the transferee court, the transferor court cannot then change its mind and set aside its transfer order. Moreover, the trial judge of the transferee court may not consider a motion to retransfer the case to the county in which it was originally filed. The aggrieved party's sole remedy is to file a petition for writ of mandamus . Here, neither party sought a writ of mandamus regarding the transfer of the action from Blount County to Jefferson County. The Jefferson Juvenile Court lacked jurisdiction to rule upon the mother's objection to venue, and therefore, its order transferring the case back to Blount County was void. Technically, the alleged father's action is still pending in the Jefferson Juvenile Court. Because the Blount Juvenile Court does not have the authority to hold a trial on the alleged father's petition, the petition for writ of

mandamus is due to be denied. ***Ex parte R.K.S. (R.K.S. v. M.S.T.),*** 29 ALW (2190651), 7/31/2020, Blount Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur; 6 pages. [ATTY: Not listed-confidential]

CONSTITUTIONAL LAW: Legislation. CIVIL PROCEDURE: Garnishment. Renter's Realty ("Renter's") prevailed in an unlawful detainer action against Ieisha Smith in the district court. A judgment was entered on December 22, 2016 against Smith in the amount of $5,145. Smith did not appeal that judgment. In May 2017, Renter's filed a process of garnishment and a writ of garnishment was issued to Smith's employer. Smith filed a motion to stay the garnishment, a verified declaration and a claim of exemption. Although the district court initially granted a stay, it later reinstated the writ of garnishment. Smith appealed to the circuit court. Smith and Renter's each filed trial briefs in the circuit court regarding the constitutionality of Ala. Code 1975, 6-10-6.1 which states that wages are not personal property for the purposes of exemption from garnishment. The circuit court denied Smith's claim for exemption. Smith appealed and the court remanded the case to the circuit court because the attorney general had been served with notice of Smith's constitutional challenge but had not been given an opportunity to respond. The circuit court was instructed to render a valid judgment of the issue of the constitutionality of §6-10-6.1. *Smith v. Renter's Realty,* [Ms. 2180304, July 12, 2019] ___ So.3d ___ (Ala. Civ. App. 2019) ("*Smith I*"). On remand, the attorney general's office waived any right to be heard on this matter. The circuit court held a hearing after which it determined that §6-10-6.1 was unconstitutional. Smith appealed but the court dismissed that appeal, noting that Smith did not have an adverse ruling from which to appeal. *Smith v. Renter's Realty,* [Ms. 2180304, Oct. 4, 2019] ___ So.3d ___, ___ (Ala. Civ. App. 2019)("*Smith II*"). However, Renter's also timely appealed from the circuit court's judgment. **Affirmed.** Section 204 of the Alabama Constitution states that the personal property of any resident, up to $1,000, shall be deemed exempt from execution. Since the Alabama Supreme Court's decision in *Enzor v. Hurt,* 76 Ala. 595 (1884), the meaning of "personal property" has encompassed "everything which is the subject of ownership." "By any objective standard, 'wages, salaries, or other compensation of a resident,' §6-10-6.1(a), constitute personal property." The legislature does not have the authority to alter or amend the constitution merely by enacting a law that is contrary to the dictates of the constitution. "We agree with the circuit court's determination that the legislature's effort to redefine 'personal property' in §204

was an impermissible 'overreach' and that §6-10-6.1is, therefore, unconstitutional." The judgment of the circuit court is due to be affirmed. ***Renter's Realty v. Smith,*** 29 ALW (2181042), 1/10/2020, Madison Cty., Per curiam; unanimous, 12 pages. [ATTY: Appt: Michael Godwin, Montgomery; Apee: Farahbin Majid, Birmingham]

CIVIL PROCEDURE: **Recusal.** In February 2019, Lawler Manufacturing Co., Inc. sued Delmas and Sandra Lawler-- two alleged former employees. The case was assigned to Presiding Circuit Judge Chad Woodruff. Judge Woodruff subsequently realized he had a conflict of interest and entered an order recusing himself from consideration of the case and entered a separate order appointing Jeb Fannin, a district court judge, to hear the case as an ex officio circuit judge. Delmas moved the court to order Lawler Manufacturing to continue to operate the business in the usual and customary manner in which it had been conducted prior to litigation. This included authorizing the shipment of an order from China that had been placed earlier. Judge Fannin granted the motion. Lawler Manufacturing moved to dissolve the order. Judge Fannin denied the motion and Lawler Manufacturing appealed. **Transfer Order Vacated; Appeal Dismissed.** The Court first pointed out that in *Ex parte Jim Walter Homes, Inc.*, 776 So. 2d 76 (Ala. 2000)[ALW], it considered whether a presiding judge, who had recused himself pursuant to the Canons of Judicial Ethics from presiding over a case had the authority to appoint his successor. The Court held that a presiding judge who recuses himself from a case does not have authority to appoint his successor, stating that he or she can take no further action in that case, not even the action of reassigning the case under Rule 13, Ala. R. Jud. Admin. The Court concluded that for such a judge to make the reassignment would be contrary to Canon 3(C), because the impartiality of the reassignment might reasonably be questioned. The Court thus held, in accordance with *Ex parte Jim Walter Homes*, when Presiding Judge Woodruff disqualified himself from this case, he no longer had authority to appoint his successor or to enter the order appointing Judge Fannin. The Court therefore vacated Judge Woodruff's order appointing Judge Fannin. The Court then explained that because Judge Fannin never had jurisdiction over the case, his orders were void. Because a void judgment will not support an appeal, the appeal was dismissed. ***Lawler Manufacturing Co., Inc. v. Lawler,*** 29 ALW (1180889); 3/27/2020, Talladega County, Bolin; Parker, Wise, Sellers and Stewart concur, 7 pages. [ATTY: Appt: Charles A. Dauphin, Birmingham; Aple: Charles P. Gaines, Talladega)

CIVIL PROCEDURE: Postjudgment Motion--Jurisdiction. In 2016, a police officer with the Town Creek Police Department stopped Vanessa Thompson. She was arrested on various charges and her automobile was seized. Shortly thereafter, the State of Alabama filed a complaint seeking the forfeiture of the automobile. The complaint alleged that the automobile was used to facilitate illegal-drug activity. Thompson filed an answer. After a hearing, the trial court entered a judgment on November 29, 2017 in favor of the State on its forfeiture claim. Thompson appealed and on September 18, 2018, the Court of Civil Appeals affirmed the judgment, without an opinion. In March 2019, Thompson filed a motion pursuant to Ala. R. Civ. P. 60(b)(4) and (6). In her motion, Thompson argued that the forfeiture of her automobile was an excessive punishment under the Eighth Amendment. The trial court held a hearing on that motion in April 2019. On July 29, 2019, Thompson filed a motion in the trial court requesting a ruling on her motion and a notice of appeal. In August 2019, the trial court entered an order purportedly denying Thompson's Rule 60(b) motion. **Appeal dismissed.** The court determined , *ex mero motu*, that it did not have jurisdiction to consider this appeal. An appeal can only be taken from a final order. An order denying a Rule 60(b) motion is a final, appealable order. However, in this case, Thompson filed her notice of appeal before the trial court entered the order purportedly denying her Rule 60(b) motion. Ala. R. App. P. 4(a)(5) provides that a notice of appeal filed after the entry of a judgment but before the disposition of a postjudgment motion filed pursuant to Rule 50, 52, 55 and 59 shall be held in abeyance until all such motions are ruled upon. It shall then become effective upon the date of disposition of the last such motion. However, a motion filed pursuant to Ala. R. Civ. P. 60(b) is not included in the list of motions that are to be held in abeyance pursuant to Rule 4(a)(5). In this case, Thompson prematurely filed her notice of appeal before the trial court ruled upon her Rule 60(b) motion. That notice of appeal divested the trial court of jurisdiction. "Because the notice of appeal divested the trial court of jurisdiction, its order purportedly denying Thompson's Rule 60(b) motion is a nullity, and the motion is still pending in the trial court." In addition, Thompson's appeal was not taken from an appealable order. Therefore, the appeal is due to be dismissed. ***Thompson v. State of Alabama ex rel Errek Jett, District Attorney of Lawrence County,*** 29 ALW (2180977), 8/28/2020, Lawrence Cty., Donaldson; Thompson, Moore, Edwards and Hanson concur, 10 pages. [ATTY: Appt: Pro se; Apee: Errek Jett, Moulton]

CIVIL PROCEDURE: Postjudgment Motions-Successor Judges. The husband filed this divorce action in 2017 and it was assigned to Judge Anita Kelly, who presided over the initial stages of the case. However, Judge Kelly became disqualified because the Judicial Inquiry Commission initiated a complaint against her. The case was reassigned to the presiding judge of the Montgomery Circuit Court, Judge Johnny Hardwick. After a bench trial, Judge Hardwick entered a final judgment of divorce in which he awarded the wife sole physical custody of the child, divided the marital property and debts and found the husband in contempt for failing to comply with a previously entered pendente lite order. The husband filed a postjudgment motion in which he requested a hearing. Judge Kelly, who had been reinstated to judicial service, denied that motion. The husband appealed. **Order vacated.** The husband argued, in part, that the trial court erred in denying his postjudgment motion because Judge Kelly, who did not preside over the trial, did not certify her familiarity with the record as required by Ala. R. Civ. P. 63. Pursuant to that rule, a successor judge who is hearing a postjudgment motion must review that part of the record which is raised in the postjudgment motion. Because there is no indication from the record that Judge Kelly ever reviewed a transcript or recording of the trial proceedings in this case, the judgment of the trial court denying the postjudgment motion is due to be reversed. The court further pointed out that there was no indication as to why Judge Hardwick did not consider the postjudgment motion. In a footnote, it pointed out that pursuant to Rule 63 (and the Advisory Committee Notes to the federal counterpart to that rule), a judge's withdrawal from a proceeding after a trial has commenced should be based on "compelling reasons" and that the reasons for the substitution should be stated on the record. Therefore, based on the record, it could not "perceive any current impediment to Judge Hardwick's ruling on the postjudgment motion." ***Gordon v. Gordon,*** 29 ALW (2180430), 5/22/2020, Montgomery Cty., Hanson; Thompson, Moore and Edwards concur; Donaldson recuses himself, 8 pages. [ATTY: Appt: John Bush, Montgomery; Apee: Katie O'Mailia, Montgomery]

CIVIL PROCEDURE: Witness Interview - HIPAA In August 2019, Rhonda Brewer and her husband Charlie, sued Dr. Curt Freudenberger and Sportsmed Orthopedic Surgery and Spine Center, P.C. (collectively "the defendants"), asserting claims of medical malpractice based on injuries Rhonda allegedly

suffered during the course of a surgical procedure. Before discovery, the defendants moved for the entry of a "qualified protective order" pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Among other things, the defendants' motion sought to allow the parties' attorneys to request ex parte interviews with Rhonda's treating physicians. The Brewers objected, arguing that defense counsel's interviews with Rhonda's treating physicians would violate both HIPAA and the Alabama Rules of Civil Procedure. The trial court entered an order that prohibited defense counsel from conducting ex parte interviews with Rhonda's treating physicians unless they gave her counsel 10 days written notice and the opportunity to attend. The defendants petitioned for mandamus review. **Writ of mandamus issued.** The Court noted that mandamus review was appropriate in this case because the trial court's protective order involved a disregard of the work product privilege. The Court explained that relevant to medical malpractice cases, the "Privacy Rule" within HIPAA permits a health care provider to disclose protected health information in the course of a judicial proceeding pursuant to a court order. Under the Privacy Rule, a "qualified protective order" is an order of a court or a stipulation by the parties that (1) prohibits the use or disclosure of protected health information "for any purpose other than the litigation or proceeding for which such information was requested" and (2) requires the return or destruction of the information at the end of the litigation. The Court further noted that the definition in the Privacy Rule of "health information" includes oral information; thus, it is widely accepted that, by its terms, HIPAA covers oral interviews. See 45 C.F.R. § 160.103(e) (2016). "We conclude that the federal Privacy Rule does not negate long-standing Alabama law allowing ex parte interviews with treating physicians; rather, it merely superimposes procedural prerequisites by requiring defense counsel to obtain a valid HIPAA authorization or, in this case, a court order complying with the provisions of 45 C.F.R. § 164.512(e)." Finally, the Court found there was no federal preemption issue in this case. Although the Privacy Rule expressly preempts any "contrary" state law, there is no preemption when privacy protections afforded by a state are more stringent than HIPAA's regulations. 45 C.F.R. § 160.203. A state law is "contrary" to HIPAA only if a health-care provider would find it impossible to comply with both the state and federal requirements or if the state law stands as an obstacle to the accomplishment of HIPAA's purposes. The Court pointed out that there is no statutory law or Rule of Civil Procedure prohibiting a litigant's ability to conduct ex parte interviews with the opposing party's treating physicians. The Court thus directed the trial court to vacate its order to the extent that it imposed

conditions upon defense counsel's ex parte interviews with Rhonda's treating physicians. ***Ex parte Freudenberger (In re: Brewer v. Crestwood Medical Center, LLC),*** 29 ALW (1190159); 6/30/20, Madison Cty., Sellers; Bolin concurs; Mendheim and Mitchell concur specially; Shaw, Wise, Bryan and Stewart concur in the result; Parker dissents, 29 pages. [ATTY: Pet: Jeffery Todd Kelly, Huntsville; Resp: Bruce Jones McKee, Birmingham]

FAMILY LAW: Divorce--Jurisdiction. The parties were married in India in 2009. They came to the United States so that the husband could pursue his education and eventually, he secured a visa permitting him to live and work in the United States. He is employed by Alabama State University as a researcher. The husband was originally working in Alabama pursuant to an "H-1B1" visa, which he said permitted him to live and work in the United States for one year. His visa had been renewed several times. At the time of the motion hearing, he had applied for a "green card" which would allow him to live and work in the United States for a 10-year period. The husband admitted that he had yet to decide if he wanted to apply for United States' citizenship and explained that he had to have held a green card for four or five years before he could seek citizenship. The husband filed for divorce in February 2019 and at that time, his wife had returned to India. The trial court entered a judgment determining that it lacked jurisdiction to divorce the parties. The husband appealed. **Reversed.** When the defendant in a divorce case is not a resident of the State of Alabama, the plaintiff must establish that he or she is a "bona fide resident" of Alabama in order for an Alabama court to have jurisdiction over the divorce action. Ala. Code 1975, §30-2-5. For purposes of Section 30-2-5, residence is the same thing as domicile. In order to prove domicile, two elements are required: (a) one's physical presence in the chosen place of residence, and (b) an accompanying intent to remain there, either permanently or for an indefinite length of time. "The fact that the husband is present in Alabama on a visa or work permit as he awaits anticipated approval of his green-card application does not prevent him from establishing domicile in this state." In this case, the husband has resided in Alabama since 2015, he is employed here and he apparently intends to remain employed in Alabama given his visa renewals. "Thus, the overall tenor of the husband's testimony was that he desired and intended to remain in Montgomery indefinitely to continue in his current employment and associated research at Alabama State University, even to the point of seeking to become a legal permanent resident." The judgment of the trial court is due to be

reversed. ***Sahu v. Sahu,*** 29 ALW (2180946), 4/3/2020, Montgomery Cty., Edwards; Thompson, Moore, Donaldson and Hanson concur, 9 pages. [ATTY: Appt: Jonathan Morris, Birmingham; Apee: Sebrina Martin, Montgomery]

FAMILY LAW: Jurisdiction--Divorce--Child Custody. The parties were married in 2009 and lived in South Carolina until March 29, 2019 when the father relocated to Alabama for new employment. The mother and the children moved to Alabama in August 2019. The father filed a divorce action in Alabama on September 26, 2019. The mother filed a motion to dismiss the action for want of subject matter jurisdiction. In that motion, the mother's attorney alleged that the mother and the children had relocated to Tennessee on September 25, 2019. On October 3, 2019, the trial court entered an order requiring the mother to return to Alabama with the children and specifying that the parties would share joint pendente lite custody of the children. The mother filed a "motion to alter, amend or vacate" the pendente lite order. A hearing took place on October 16, 2019 during which the mother testified that she intended for Alabama to be her place of residence and she had obtained an Alabama nursing license. However, the marriage deteriorated after the move and she relocated to Tennessee to be near her family. During the hearing, the father and the trial court concluded that any jurisdictional defect could be cured by the filing of a new divorce action. At the close of the hearing, the trial court orally ordered the mother to return to Alabama with the children. On that same day, the father filed a new divorce action which was assigned case number DR-19-900325. The trial court entered a pendente lite order in that case which required the children to be returned to Alabama and awarded the parties joint physical custody. The mother filed a motion to strike the complaint filed in DR-19-900325 and she subsequently filed a motion to dismiss. She reasserted her argument that the trial court lacked subject matter jurisdiction over her and further asserted, for the first time, that the trial court lacked jurisdiction over the custody issues. The trial court denied the motion to dismiss and the mother filed a petition for writ of mandamus. **Writ of mandamus granted in part and denied in part.** (1) The mother fails to properly argue that the trial court did not obtain jurisdiction over that part of the father's complaint seeking a divorce. "Given the lack of an argument on that issue and the high burden required to demonstrate a right to a writ of mandamus, we decline to analyze the issue of whether the mother was domiciled in or was a resident of Alabama." Regardless, Ala. Code 1975, §30-2-5 allows a trial court to exercise

subject matter jurisdiction over the marital res if the plaintiff has been a bona fide resident of Alabama for six months before the complaint is filed. It is undisputed that the father lived in Alabama for six months prior to filing his action in DR-19-900325. "Accordingly...we conclude that the mother has not demonstrated a clear legal right to a writ of mandamus requiring the trial court to dismiss that part of the father's action...pertaining to the divorce between the parties." (2) The mother next argued that the trial court lacked subject matter jurisdiction over the issues of child custody and visitation. The Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, §30-3B-101 et seq. applies. It provides that an Alabama court has jurisdiction to make an initial child custody determination if this state is the home state of the child at the time that the action was commenced. The term "home state" means that the child has lived in this state for at least six months prior to the commencement of the action. However, the trial court was never presented with the issue of whether it had subject matter jurisdiction of the custody issues under the UCCJEA. "The trial court, and not this court, is the appropriate forum to make a factual determination regarding whether it could properly exercise jurisdiction over custody issues under §30-3B-201 of the UCCJEA." The mother's petition is granted in part and the trial court is directed to conduct whatever proceedings are necessary to determine whether it, or a court of another state, has jurisdiction over the child-custody claims under the UCCJEA. (3) The mother argued that the trial court violated her due-process rights by entering its pendente lite order in DR-19-900325. The pendente lite order was entered on the same day that the father filed his action. The mother was as not afforded notice that the trial court would consider this issue prior to the entry of its order. The mother's petition for writ of mandamus is due to be granted as to this issue and the trial court directed to conduct a hearing, complete with notice and due process to the mother, if it first determines that it has jurisdiction under the UCCJEA. ***Ex parte Cate (Cate v. Cate),*** 29 ALW (2190161), 2/21/2020, Cullman Cty., Thompson; Moore, Donaldson and Hanson concur; Edwards concurs in part and dissents in part, with writing; 31 pages. [ATTY: Pet: Steven Smith, Cullman; Resp: Matthew Carter, Cullman]

FAMILY LAW: Child Custody--Jurisdiction. The opinion released on October 4, 2019 is withdrawn and the following is substituted therefor. In June 2019, Terry Potts filed a complaint against Yaditxza Vega-Lopez ("the mother") seeking custody of R.I.P. ("the child"). Potts alleged that he is the natural father of the

child and that the mother was a resident of Georgia. According to Potts, the child had lived in Alabama for 4 of the 6 months preceding the filing of this action. The trial court entered an order granting Potts the "temporary custody" of the child. An attorney for the mother entered a limited appearance for the sole purpose of contesting jurisdiction. The mother filed a motion to dismiss, arguing that the trial court lacked personal jurisdiction over her because the only contact that she had with Alabama was that the child occasionally visited with Potts in the state. The mother also argued that the trial court lacked subject-matter jurisdiction. At a hearing on the motion to dismiss, Potts testified that he had moved to Alabama in early December 2018 , that the child had been primarily living with him and that he filed his complaint at least six months after his move. Potts presented no evidence to show that the child had been abandoned or neglected. The trial court denied the motion to dismiss. The mother filed a petition for writ of mandamus. **Writ of mandamus granted.** In order to make an initial child-custody determination, a trial court must have subject matter jurisdiction pursuant to Ala. Code 1975, 30-3B-201 and it must also have personal jurisdiction over the affected parties. Personal jurisdiction over a nonresident is governed by Ala. R. Civ. P. 4.2 and it must comply with the due process constraints contained in the Alabama and United States Constitutions. The Due Process Clause of the Fourteenth Amendment permits a forum state to subject a nonresident defendant to its courts only when that defendant has sufficient "minimum contacts" with the forum state. The critical question in such an analysis is whether the contacts are such that the nonresident defendant "should reasonably anticipate being haled into court" in the forum state. Here, Potts did not allege in his complaint or present any evidence that the mother had any contacts in Alabama except that the child purportedly lived here. "Where a child resides, however, does not determine personal jurisdiction in custody proceedings." Because the trial court lacked personal jurisdiction over the mother, it did not have authority to make an initial custody determination. The mother also challenged the trial court's exercise of temporary emergency jurisdiction pursuant to Ala. Code 1975, §30-3B-204. However, it does not appear that the trial court intended to exercise such jurisdiction. It entered an ex parte order awarding Potts "temporary jurisdiction." If it was doing so under the emergency jurisdiction portion of the UCCJEA, then it would be required to immediately communicate with the Georgia court in which the custody proceedings had been initiated. It did not do so. Further, there must be a showing that the child was abandoned or that an emergency exists in which it is necessary for the court to intervene to protect the child from mistreatment or abuse.

Although Potts made some allegations of inappropriate conduct on the mother's part in his complaint, at the hearing on the motion to dismiss, Potts presented no evidence to support those allegations and in fact, testified that he had allowed the child to stay with the mother and actually transported the child to the mother during custody exchanges. "Therefore, there was no basis for the trial court to exercise temporary emergency jurisdiction pursuant to §30-3B-204 (a)..." ***Ex parte Vega-Lopez (Potts v. Vega-Lopez),*** 28 ALW (2180831), 12/20/2019, DeKalb Cty., Donaldson; Thompson, Moore and Hanson concur; Edwards concurs in the result, without writing, 20 pages. [ATTY: Pet: Emily Mauck, Birmingham; Resp: Stephen Bussman, Ft. Payne]

FAMILY LAW: Jurisdiction-Child Custody. The father serves in the United States Air Force. The parties were married in 2015 and the father had lived in Alabama for about a year, having been stationed at the Gunter Air Force Base in Montgomery. The mother had moved to Alabama and was working as a registered nurse at a Montgomery hospital. The child was born in Montgomery on February 14, 2017. The mother and the child moved to Ohio in September 2018. The father was preparing to deploy to Africa. The mother claimed that the father was going to separate from the Air Force in September 2019 but the father claimed that he was going to reenlist and would be stationed at Gunter Air Force Base. In May 2019, the father picked up the child in Ohio and returned to Alabama without the wife's knowledge or consent. On May 20, 2019, the husband filed a complaint for divorce in Montgomery County. The wife filed a motion to dismiss, asserting that Alabama lacked subject matter jurisdiction because Alabama was not the child's home state under the Uniform Child Custody Jurisdiction Enforcement Act, Ala. Code 1975, §30-3B-101 et seq.. On June 24, 2019, the mother filed a complaint for divorce in Ohio. The trial court denied the mother's motion to dismiss. The mother filed a petition for writ of mandamus. **Writ of mandamus denied.** Section 30-3B-201 sets forth the circumstances pursuant to which an Alabama court can make an initial child custody determination. It is undisputed that until the father was deployed, Alabama was the child's home state. The father testified that the mother's move to Ohio with the child was temporary. "A period of temporary absence of the child or any of the mentioned persons is part of the period of six consecutive months immediately before the custody proceeding commences." Because the evidence was disputed as to the child's absence from the state of Alabama, substantial evidence supported a determination that Alabama

remained the child's home state. The petition for writ of mandamus is due to be denied. ***Ex parte Butcher (Butcher v. Butcher),*** 28 ALW (2190060), 12/6/2019, Montgomery Cty., Thompson; Moore, Donaldson, Edwards and Hanson concur, 12 pages. [ATTY: Pet: Nicholas Jones, Montgomery; Resp: Jerry Blevins, Montgomery]

FAMILY LAW: Child Custody--Child Support--Modification. CIVIL PROCEDURE: Pleadings--Admissions--Burden of Proof. The parties were divorced in 2013. The divorce judgment awarded the father the sole physical custody of the parties' older child, R.M., and awarded the mother sole physical custody of the parties' younger child, L.M.. Neither party was required to pay child support. In May 2018, the mother filed a petition to modify child support, alleging that the parties' older child had reached the age of majority and requesting that the father be required to pay child support for the parties' younger child, who was still a minor. The father filed a petition to modify custody and to modify his periodic-alimony obligation. He also requested that the trial court hold the mother in contempt for failing to pay certain medical expenses for the child. The two actions were consolidated and after the mother rested her case regarding child support, the father moved for a judgment as a matter of law. The trial court granted that motion and dismissed the mother's child support action. Thereafter, the father presented claims regarding his claims for joint custody and termination of alimony. The trial court refused to terminate the father's alimony obligation but awarded him joint physical custody of the parties' youngest child. After the mother's postjudgment motion was denied, the mother appealed. **Affirmed in part; reversed in part.** (1) In order to prevail on his custody modification claim, the father had to meet the burden imposed by *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). In so doing he was required to show that material changes which affect the child's welfare have occurred and that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting the child. The child was 16 years old and has autism. The mother testified that it was extremely difficult to parent the child and that she wanted to move to California where her family lived. The father was concerned that the child was not progressing and had become obese while in the mother's custody. He thought that the child required additional therapy and he had started taking course work so that he could provide that therapy himself. Based on the ore tenus standard, sufficient evidence existed to support a change in custody. (2) The mother challenged the trial court's dismissal of her child support action. The father filed a motion for a

judgment as a matter of law, arguing that the mother had failed to prove that she had been awarded sole physical custody of the younger child and that she had not demonstrated a material change in circumstances. However, the father alleged in his modification petition that the mother had been awarded sole physical custody of the child and the mother admitted that allegation when she filed her answer. "A fact admitted in the pleadings need not be proven by another party." *City of Dothan v. Eighty-Four West, Inc.,* 738 So.2d 902, 903 n.1 (Ala. Civ. App. 1999)[ALW]. Therefore, the mother did not need to present evidence that she was awarded sole physical custody. With regard to the mother's required showing that a material change in circumstances had occurred, the court has previously held that when the parties exercise split-custody and one of the children reaches the age of majority, a material change in circumstances has occurred. *Cox v. Cox,* 218 So.3d 1215, 1218-19 (Ala. Civ. App. 2016)[ALW]. "Therefore, we conclude that the mother proved a material change in circumstances, and, thus, the trial court should not have dismissed her child-support action." The judgment of the trial court is due to be reversed and the case remanded for the trial court to consider the mother's child support claim. ***Machado v. Machado,*** 29 ALW (2190068; 2190069), 10/16/2020, Madison Cty., Moore; Thompson, Donaldson, Edwards and Hanson concur, 11 pages. [ATTY: Appt: David Coates, Huntsville; Apee: Bill G. Hall, Huntsville]

IX. PROFESSION OF LAW

Legal Profession: Attorney Discipline John Giardini was admitted to practice law in Alabama in 1990. At one point he was employed as an Assistant District Attorney in Mobile County and in that position, he was primarily tasked with the prosecution of child sexual abuse cases. The record indicated that between 2008 and 2009, while working in that capacity, Giardini began communicating online and by telephone with persons who either were (or were representing themselves to be) underage girls. The conversations were extremely sexually graphic.

In December 2008, Special Agent Paul Roche of the FBI undertook a sting operation under which he posed in a chat room as a 15 year old female named Diana. The conversations became increasingly sexually graphic and the two made plans to meet. They began having telephone conversations in which Roche used a device to make his voice sound like that of a teenaged girl. As their discussions

regarding sex continued, Giardini asked Diana about her sexual preferences, her pubic hair, and her past sexual experiences, which included explicit descriptions of oral sex and orgasms. Giardini assured Diana that he would not be mad at her regarding her past sexual experiences, that she could tell him anything, and that, regardless of what she told him, he would not think she was promiscuous. Giardini then encouraged Diana to engage in masturbation. Despite encouraging "Diana" to meet him, and despite the fact that they had been in relatively continuous communication for approximately four months by that time, around April 2009, Giardini apparently became concerned about their conversations being discovered and encouraged her to keep their correspondence secret. Despite that, during telephone conversations, Giardini engaged in graphic sexual dialogue with Diana, including instructing her to perform sex acts, describing her performing sex acts on himself, and stating "you will do what I tell you to do." In another telephone conversation, Giardini again, in great detail, instructed Diana to touch herself in a sexual manner. Giardini was eventually arrested and formally charged as a result of his conversations with Diana. Apparently, those charges were dismissed because at the time that the conversations occurred, the law regarding electronic solicitation of a child required that the victim be an actual child. In August 2013, the Alabama State Bar ("the Bar") also filed formal charges alleging that Giardini had violated the Alabama Rules of Professional Conduct. In 2014, Giardini contacted the director of the Alabama Lawyer Assistance Program ("ALAP"), who recommended that Giardini undergo an evaluation at Pine Grove Behavioral Health and Addiction Services in Hattiesburg, Mississippi ("Pine Grove"). After being discharged from that facility, Giardini continued to work with a therapist and agreed to submit to periodic drug and alcohol testing. In January 2015, in a hearing before Panel I of the Disciplinary Board of the Alabama State Bar ("the Board"), Giardini pleaded guilty to the charges against him. Nonetheless, a hearing proceeded for the purpose of determining Giardini's punishment. After hearing testimony from a few witnesses, including Giardini himself, the Board found that Giardini violated Rule 8.4(a), Ala. R. Prof. Cond., which prohibits an attorney from violating the Rules of Professional Conduct; Rule 8.4(d), Ala. R. Prof. Cond., which prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice; and Rule 8.4(g), Ala. R. Prof. Cond., which prohibits an attorney from engaging in any other conduct that adversely reflects on his or her fitness to practice law. The Board issued an order noting that "[t]here was evidence in the transcriptions that [Giardini] had had explicit sexual conversations with at least one other 15 year old and, on numerous other occasions, with females who

were 17-18 years old." It further noted that, although Giardini called several character witnesses who "made statements about [his] ability to practice law," none of the witnesses had actually read the transcripts of the chat-room conversations and the conversations with "Diana" provided by the FBI. Finally, the order concluded that, although Giardini testified that what he had been doing was wrong, he "showed very little remorse" and that several "aggravating factors" were found, including: "dishonest or selfish motive, a pattern of misconduct, multiple offenses, vulnerability of victim, and substantial experience in the practice of law." Giardini was suspended from the practice of law for three years. At the conclusion of his suspension, Giardini filed a petition for reinstatement. He bore the burden of proving by clear and convincing evidence that he was morally qualified to practice law and that his reinstatement would not be detrimental to the integrity and standing of the Bar or the administration of justice, and would not be subversive to the public interest. Rule 28 (c), Ala. R. Disc. P. Giardini presented several character witnesses, including the director of ALAP, former coworkers, a retired judge and his therapist. None of the witnesses had read the transcripts of his internet chats with the underage females. Giardini also testified on his own behalf, and explained that he thought that he had become "desensitized" to some things as a result of his work as a sex-crimes prosecutor. Panel III of the Board, with one member dissenting, entered an order granting the petition for reinstatement. The Bar appealed. ***Reversed***: The Court found, in light of Giardini's prior misconduct and the evidence he presented at the reinstatement hearing, that the Board's finding that Giardini's reinstatement will not be detrimental to the integrity and standing of the Bar or the administration of justice and will not be subversive to the public interest is clearly erroneous. Specifically, Giardini had sexually explicit conversations with girls who indicated that they were as young as 15 years old, during which he asked them about their sexual activities and preferences; importantly, he encouraged those minors to acquire webcams, exchange pictures, and hide their activity from their parents. He engaged in extremely sexually charged conversations discussing graphic acts of erotic behavior. The Court placed particular emphasis on his long term efforts to groom, manipulate and seduce "Diana", who Giardini believed was 15 years old. "Contrary to the panel's findings based on testimony by those ignorant of the conduct predicating the suspension, reinstating a former child-sex-crimes prosecutor to the practice of law after he engaged in the above-described sexually related conduct with children would be 'detrimental to the integrity and standing of the Bar or the administration of justice, and ... subversive to the public interest.'" Justice Sellers authored a dissent in

which he opined that "even in the worst case, there is a path for reinstatement [to the Bar] that places the burden on the disciplined lawyer to show remorse, to seek education and treatment, and to present evidence of a transformation in lifestyle to be worthy of the privilege of practicing law in this State and representing clients before our courts." The dissent pointed to the testimony of Giardini's therapist, who opined that the conduct in which Giardini engaged was "an isolated incident." The dissent further objected to the majority opinion's inclusion of the actual text of conversations between Giardini and others, including "Diana", and cautioned that publishing these lurid and detailed conversations "has the real possibility of causing further damage to the public good by focusing on a lurid past and ignoring any hope of redemption and any consideration of a more current personal depiction of someone who has tried to change." ***Alabama State Bar v. Giardini,*** 29 ALW (1180248); 5/8/20, Shaw; Parker, Wise and Bryan concur; Bolin and Shaw concur specially; Mitchell concurs in the result; Sellers and Mendheim dissent; Stewart recuses herself, 59 pages. [ATTY: Appt: Roman A. Shaul, Montgomery; Apee. Michael E. Upchurch, Mobile]

LEGAL PROFESSION: Attorney Discipline-Disbarment. Edward May was admitted to the Alabama State Bar in 1980. In 2014, he entered a guilty plea with the Bar for failure to employ proper trust accounting procedures in violation of the Rules of Professional Conduct and was suspended from the practice of law. That suspension was put in abeyance for a probationary period. In 2018, however, after May violated the terms of the probationary period for the third time, the Disciplinary Board of the Alabama State Bar ("the Board") suspended May from the practice of law for 91 days. May did not seek reinstatement after that period so he remained suspended. While he was suspended, May represented parties in two separate legal matters. Although May did not request compensation for his work in either matter, he also did not disclose to the parties he represented or to the opposing parties that he had been suspended from the practice of law. In January 2019, the Bar filed charges against May for violating Rule 5.5 (Unauthorized Practice of Law) and Rules 8.4(d) and (g) (Misconduct) of the Alabama Rules of Professional Conduct. After a hearing, the Board found May guilty of violating those rules. The Bar then asked the Board to disbar May in accordance with the guidelines in Standards 6.11 and 8.1 of the Alabama Standards for Imposing Lawyer Discipline. In imposing the appropriate discipline for May, the Board considered aggravating and mitigating factors, as required by Standard 3.0(d). The

Board found five of the aggravating factors listed in Standard 9.22: (a) prior disciplinary history; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; and (i) substantial experience in the practice of law. The Board also found two of the mitigating factors listed in Standard 9.32: (b) an absence of a dishonest or selfish motive and (l) remorse. Based on those findings the Board issued an order disbarring May. May appealed. **Affirmed.** The Court stated that it need not discuss the Board's reliance on Standard 6.11 because the Board's disbarment order was supported by Standard 8.1(a), which states: "Disbarment is generally appropriate when a lawyer: (a) Intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession ...." The Court agreed with the Bar's argument that May's violations injured the public and the legal system, to which he owed ethical duties. " By participating in more than one legal matter while he was suspended, May knowingly breached those ethical duties to the detriment of the public and the legal system, making him subject to disbarment under Standard 8.1(a)." The Court also found that the Board properly found the existence of mitigating factors and also properly concluded that those factors were outweighed by the applicable aggravating factors, thus supporting the Board's decision to disbar May under Standard 8.1(a). ***May v. Alabama State Bar,*** 29 ALW (1180570); 6/5/20, Mitchell; Parker, Bolin, Shaw, Wise, Bryan, Sellers, Mendheim and Stewart concur, 10 pages.[ATTY: Appt: Edward E. May, Birmingham; Apee: Jeremy W. McIntire, Montgomery]

LEGAL PROFESSION: Contempt In August 2018, Chase Dearman, an attorney, was representing James Wright at Wright's probation revocation hearing. Dearman began to object to Wright's probation officer testifying about an alleged narcotic drug found in Wright's home. The judge stated that the Alabama Rules of Evidence do not apply in probation revocation hearings and refused to allow Dearman to state an objection for the record. When Dearman persisted in his attempts the judge had him removed from the courtroom. That same day, the judge issued an order finding Dearman in direct contempt of court per Rule 33.1(b)(1), Ala. R. Crim. P., and stating that he would take no further action at this time, but that any further outbursts could result in sanctions. Dearman filed a motion requesting that the circuit court vacate its order and requested a hearing on the matter. The circuit court denied the motion and Dearman appealed to the Court of Criminal Appeals. The Court of Criminal Appeals remanded the matter to the

circuit court and ordered it to hold a hearing in compliance with the mandates of Rule 33.2(b), Ala. R. Crim. P. On remand, the circuit court conducted a hearing, after which it entered an order stating that Dearman was found in direct contempt because the court was of the opinion that his actions were a challenge to the court's authority, which required prompt punishment. On return to remand, the Court of Criminal Appeals affirmed the circuit court's decision, and Dearman petitioned the Supreme Court for certiorari. **Reversed.** The Court found that the circuit court's decision was in conflict with *Hawthorne v. State*, 611 So. 2d 436 (Ala. Crim. App. 1992). There, the attorney had used expletives in the courtroom. The Court found that while the attorney's conduct was unprofessional, the record was devoid of any evidence that "immediate" action was essential to prevent diminution of the court's dignity and authority before the public. Here, while the circuit court made its position clear that the Rules of Evidence did not apply to probation revocation hearings, it was unclear if Dearman was attempting to object to that particular ruling. The only objections on the record were to the ability of the probation officer to testify about narcotics and that the district court had found no probable cause in the case. The circuit court allowed Dearman to make no objection whatsoever. "As did the Court of Criminal Appeals in *Hawthorne*, we conclude in the present case that the record is devoid of any evidence that Dearman's conduct 'disturb[ed] the court's business' and that "immediate action [was] essential to prevent diminution of the court's dignity and authority before the public.' Rule 33.1(b)(1). The evidence before us indicates that Dearman, by trying to make an objection on the record to preserve the issue for appellate review, was simply trying to engage the court in the business before it, not detract from it." ***Ex parte Dearman (In re: Dearman v. State of Alabama),*** 29 ALW (1180911); 6/26/20, Mobile Cty., Mendheim; Parker, Bolin, Wise, Bryan, Sellers, Stewart and Mitchell concur; Shaw concurs in the result, 20 pages. [ATTY: Pet: William K. Bradford, Birmingham; Resp: Cecil Gordon Brendle Jr., Montgomery]

CIVIL PROCEDURE: Law-of-the-Case. LEGAL PROFESSION: Disqualification. APPEAL & ERROR: Mandamus--Waiver. The parties were divorced in 2015. In 2019, the father filed a petition to modify his child support and life-insurance obligations under the divorce decree. The father was represented by Scott Harwell. The mother filed a motion to disqualify Harwell from representing the father, asserting that Harwell had represented the mother in her previous divorce that was finalized in 2003. As a result, the mother claimed

that she had disclosed confidential and private information to Harwell. According to the mother, the trial court had previously disqualified Harwell from representing the mother in the original divorce action and in a subsequent contempt action in 2015. In 2017, Harwell, on behalf of the father, had filed a civil complaint against the mother alleging identity theft, invasion of privacy, conversion, negligence and the tort of outrage. The civil action was settled through mediation and although a motion was pending in that civil action to disqualify Harwell, the parties agreed to a modification of the divorce action as part of the settlement of the civil action. Harwell filed that modification in a largely ministerial capacity and the trial court ratified the parties' agreement on the same date. In the case currently on appeal, the trial court granted the mother's motion to disqualify Harwell and the father filed a petition for writ of mandamus. **Writ of mandamus denied.** (1) The mother argued that the petition for writ of mandamus should be denied based on the law-of-the-case doctrine. Under that doctrine, "whatever is once established between the same parties in the same case continues to be the law of that case, so long as the facts on which the decision was predicated continue to be the facts of the case." The mother did not raise her law-of-the-case argument at the trial court level. However, a petition for writ of mandamus may be denied if the order under review is correct and supported by any valid legal ground, even one not argued in the trial court. *Ex parte C.T.B., Inc.,* 782 So.2d 188, 191 (Ala. 2000)[ALW]. Therefore, the mother did not waive this argument. (2) The father does not dispute that Harwell was disqualified by the trial court from representing the father in the original divorce action and again in a subsequent action to enforce that divorce judgment. The father admits that he intentionally did not seek review of those orders. The law-of-the-case doctrine has been applied by the court in divorce modification actions. None of the material facts that supported the 2015 disqualification orders have changed. Although Harwell challenges the factual bases for the trial court's rulings, the law-of-the-case doctrine precludes relitigation of not only the legal, but also the factual, bases for Harwell's disqualification. (3) The father argued that the mother waived her right to seek disqualification of Harwell by failing to object to his representation of the father in the 2018 modification action that followed the settlement of the civil action. A former client may waive his or her right to object to his or her former attorney's representation of an adverse party in subsequent litigation. However, the facts relating to the 2018 litigation do not show that the mother voluntarily and knowingly relinquished her right to object. "We conclude that, as a matter of law, the law-of-the-case doctrine applies to disqualify Harwell from representing the father in the underlying case."

The petition for writ of mandamus is due to be denied. ***Ex parte Fipps, (Fipps v. Fipps),*** 29 ALW (2190628), 8/7/2020, Jefferson Cty., Per curiam; Moore and Hanson concur; Thompson concurs specially; Donaldson and Edwards concur in the result, without writings; 16 pages. [ATTY: Pet: Michael Scott Harwell, Birmingham; Resp: Laura Montgomery Lee, Birmingham]

PROFESSION OF LAW: Judges. Attorney Perry Hall represented a homeowners association and individual homeowners in a lawsuit against the developer of a subdivision. After Hall filed a motion to dismiss certain counterclaims asserted against his clients, the circuit court entered an order demanding that Hall "provide a copy of this order and a copy of Ala. R. Civ. P. Rule 19, as well as a copy of [the motion to dismiss] to [his homeowner clients], along with a letter explaining how Rule 19 works, apologizing for the invectives and sheer puffery used in this frankly scandalous pleading." Hall filed a petition for a writ of mandamus. **Petition dismissed.** The Court noted that it need not address Hall's petition because in the interim the circuit court had vacated its order. As a result the petition was moot. The Court did point out, however, that a judge is expected to maintain the decorum and temperance befitting his office and should be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity. " Canon 2.B., Canon 3.A(3), Canons of Judicial Ethics. The Court further noted that the Canons of Judicial Ethics have the "force and effect of law" and that it expected "the circuit court to faithfully comply with the Canons at all times in its interaction with the litigants and attorneys who appear before it." ***Ex parte Hall (In re: Briargrove Homeowners Association, Inc. v DMIH, LLC),*** 29 ALW (1180976); 11/6/2020, Mobile Cty., Mitchell; Parker, Bolin, Wise, Bryan, Mendheim and Stewart concur; Shaw and Sellers concur in the result, 4 pages. [ATTY: Pet. William Perry Hall, Mobile; Resp: Robert Justin Shorer, Daphne]