I. ALIMONY

FAMILY LAW: Alimony. The parties were married in 1991 and separated in May 2012 when the wife moved out of the marital residence. No divorce was filed until May 2014. The husband is an electrical engineer and a member of the Alabama Army National Guard. His annual income is $128,000. The wife dropped out of college after the parties' married and she was a stay-at-home mother after the parties' first child was born in 2006. At the time of trial, the wife was 45 years old and she worked at a fitness center at Redstone Arsenal. Her net pay was $1,300 per month. The wife testified that she had an extra lumber vertebra in her spine and that she needed surgery but that she had not undergone it so that she could continue to teach fitness classes. The wife also had low cortisol levels and a bulging disk. During the parties' separation, the husband paid the wife $1,400 per month in child support. The wife claimed that her monthly expenses totaled $4,702. The parties stipulated to a division of retirement and/or investment accounts, automobiles and personal property. After a hearing, the court awarded the parties joint custody of their two minor children. The husband was required to pay $1,418 per month in child support. The marital residence was ordered to be sold and the proceeds divided. No award of periodic alimony was made but the issue was reserved. The wife appealed, challenging the trial court's failure to award her periodic alimony. **Affirmed.** A party seeking alimony must first establish the standard and mode of living of the parties during the marriage. *Shewbart v. Shewbart*, 64 So.3d 1080, 1087 (Ala. Civ. App. 2010)[ALW]. In this case, the wife failed to present evidence regarding the standard of living during the marriage. Accordingly, the trial court did not err and its judgment is due to be affirmed. Judge Thompson dissented, noting evidence that was presented indicating that the parties' children attended private school, the parties had taken a family vacation to Disneyland and the parties had traveled for a second honeymoon in South Miami Beach. "From the totality of the evidence, I believe an inference can be drawn that the parties had a comfortable, but not extravagant, standard of living during their marriage of more than 20 years." ***Rodgers v. Rodgers,*** 25 ALW (2141052), 5/13/2016, Madison Cty., Thomas; Pittman and Donaldson concur; Moore concurs specially; Thompson dissents, with writing, 25 pages. [ATTY: Appt: Dinah Rhodes, Huntsville; Apee: Joan-Marie Sullivan, Huntsville]

FAMILY LAW: Alimony--Division of Property. APPEAL & ERROR: Preservation of Error. The parties were married for 43 years. At the time of trial, the husband was 60 years old and the wife was 62 years old. They had four children who ranged in age from 42 to 22 years old. The husband served in the United States Army. During his career, the wife moved with the husband, including three tours in Germany. The wife reared the children and did not work outside the home for most of the marriage. At the time of trial, the wife was employed as a manager at Wal-Mart earning $1,166 every two weeks. She testified that she was going to have to step down as manager and take a job as a sales associate because of health problems. The husband was employed as a Department of Defense employee and he also operated a tax-preparation business "on the side". His adjusted gross income, including his military retirement pay, was $160,000. The wife testified that during the marriage, she was able to buy "something pretty for the house." She also said that she paid for her own clothes and bought expensive purses. The husband used to buy her expensive perfume. The wife testified that if she were awarded $3,000 a month in periodic alimony, she "can still live the way I lived when [the husband] was with me." The parties had a residence that appraised for $147,700; it was subject to an indebtedness of $73,000. The trial court entered a judgment in which it awarded the husband the marital residence but ordered him to pay the wife $25,000, which the court found represented one-half of the equity that could be derived from the sale of the marital relationship. The trial court awarded the wife one-half of the husband's disposable military retirement pay as well as one-half of their joint investment account.

The husband received financial accounts totaling approximately $87,500 and the wife received accounts totaling $93,000. The husband was ordered to continue to pay the wife's health insurance coverage and $2,000 per month in periodic alimony. The husband appealed. **Affirmed.** The husband argued that the trial court erred in its award of periodic alimony because the wife had sufficient income and assets to pay the monthly expenses she had established at trial. In making its argument, the husband focused on the wife's monthly budget, her income and the assets she was awarded. "The husband's argument improperly reduces the determination of whether and how much a party is to receive as periodic alimony to a rigid mathematical calculation based strictly on the petitioning spouse's proven monthly expenses on the day of the trial." In this case, both parties were near retirement age and both were experiencing health problems. "The evidence suggests that the wife will be able to meet her postdivorce monthly expenses with her income and her share of the husband's military retirement account. However, being able to meet one's monthly expenses does not equate to being able to engage in the lifestyle--to the extent possible--that one had while married." The husband claimed that the trial court's award would financially cripple him. The husband testified that his expenses were $10,041 per month. However, the court could have concluded that those expenses were inflated. Further, he testified that after all his expenses were paid, he was left with "maybe $3,000." The Court concluded that substantial evidence existed to support the trial court's award of periodic alimony. (2) The husband also argued that the trial court erred in dividing his military retirement benefits. In its judgment, the trial court provided that the wife "shall remain the beneficiary" of the husband's military Survivor Benefit Plan ("SBP") and that the premium for that policy is to be deducted from the husband's gross military-retirement pay before that pay is divided between the parties. By requiring the husband to pay the SBP premium, the husband argues that the trial court effectively awarded the wife more than 50% of his military retirement. At trial, the husband told the court that the wife was entitled to remain as his SBP beneficiary. To the extent that the husband challenged the requirement that the wife remain as his beneficiary, that argument would constitute invited error. To the extent that he argued that the trial court's requirement that the premium for the SBP be deducted from his pay resulted in the wife receiving more than 50% of his military retirement, the husband does not explain how this is so, given that the premium payment is deducted before a division is made. Insufficient legal authority was cited for this proposition. (3) The Court further rejected the husband's argument that the provision regarding the division of military retirement pay was ambiguous based on the husband's failure to cite legal argument. Other arguments advanced by the husband with regard to the requirement that he furnish health insurance for the wife's benefit and that he secure his alimony obligation with a life insurance policy were also similarly unsupported. The judgment of the trial court is due to be affirmed. Judge Moore dissented, noting that the wife's budget indicated that she needed $4.070.12 in order to sustain her marital lifestyle. The wife was awarded $2,553 in military retirement benefits and she earned $1,683.39 monthly. Thus her total wages and retirement benefits exceeds her monthly expenses. "A trial court has not discretion to use alimony as a marriage-longevity award or as a means to equalize the postmarital income of the parties. In deciding otherwise, the main opinion seriously misconstrues alimony law and now establishes a dangerous precedent granting trial courts extraordinary and unwarranted discretion when awarding alimony well beyond that intended by the legislature when it enacted §30-2-51(a)." ***Knight v. Knight,*** 25 ALW (2150102), 7/29/2016, Madison Cty., Thompson; Pittman and Donaldson concur; Thomas concurs in the result, without writing; Moore concurs in part and dissents in part, with writing, 44 pages. [ATTY: Appt: Bill Hall, Huntsville; Apee: Fulton Hamilton, Huntsville]

FAMILY LAW: Alimony--Child Support--Modification--Attorney Fees. CIVIL PROCEDURE: Implied Consent. APPEAL & ERROR: Record. The parties were divorced in August 2009. By agreement, the former husband was designated to be their minor child's "primary residential custodian" but the parties alternated physical custody on a weekly basis. The parties further agreed that neither party would pay child support to the other. In addition, the former husband agreed to pay periodic alimony of $3,000 per month for a maximum of eight years. In September 2011, the former wife filed a petition to modify the divorce judgment. In that petition, the former wife asserted that the best interests of the child would be served if she was awarded sole physical custody. In June 2013, the trial court entered an order dismissing the case for lack of prosecution. Upon motion of the former wife, the case was reinstated. In September 2013, the former husband filed an answer and counterpetition. In that counterpetition, the former husband asserted that the child resided with him more than that specified in the divorce decree and that it was in the child's best interests for sole physical custody to be awarded to him. In January 2014, the former wife amended her petition to include a claim for modification of alimony. After a hearing, the trial court entered a final judgment in which it denied both parties' claims for modification of custody. The former husband was ordered to pay $3,000 per month in child support retroactive to the date that the former wife filed her initial petition in September 2011. The former husband was ordered to pay the $144,000 arrearage amount in 12 equal installments. The trial court also increased the former wife's alimony obligation to $5,000 per month to be paid "until terminated by operation of law." The former wife was permitted to continue to live in the parties' former marital residence until the minor child reaches the age of 21 and the former husband was required to pay $10,000 toward the former wife's attorney fee. After postjudgment motions were denied, the former husband appealed. **Affirmed in part; reversed in part.** (1) The former husband filed a motion to strike certain materials contained in the former wife's brief. The former wife included information related to the purchase of the residence where she currently lives ("the Manor Drive residence") but that information was not included in the record before the trial court. "It is well settled that 'this court is bound by the record, and it cannot consider a statement or evidence in a party's brief that was not before the trial court.' *M.V. v. W.W.*, 144 So.3d 366, 368 (Ala. Civ. App. 2013)[ALW]." Therefore , the motion to strike is granted. (2) The Court next addressed whether the trial court had the authority to enter an order permitting the former wife to remain in the Manor Drive residence until the child reached the age of 21. The former wife argued that the former husband purchased the Manor Drive residence for her and the child before the divorce judgment was entered. The former husband claimed that it was purchased after the divorce was entered and that the trial court did not have the authority to grant the former wife a leasehold interest in it. However, the Court cited conflicting testimony and noted that sufficient evidence was presented to support the trial court's conclusion that the Manor Drive residence was purchased before the divorce was entered. It then cited established case law which established that when a specific asset of the parties is not disposed of by the decree, the parties are left in the same position relative to that asset as they were in prior to the decree. *Smith v. Smith*, 892 So.2d 384, 389 (Ala. Civ. App. 2003)[ALW]. "Therefore, based on the testimony and the evidence presented, and I considering the needs and best interests of the child, the trial court could have concluded that the parties jointly owned the Manor Drive residence and could have reasonably fashioned the provision allowing the former wife to remain in the Manor Drive residence until the child reached the age of 21 in response to the testimony indicating that the former husband had threatened to evict the former wife and that the former wife would be unable to secure similar housing for the child." (3) The Court similarly rejected the former husband's argument that the trial court exceeded its authority in its order regarding the Manor Drive residence because the former wife never asked for the trial court to award her extended time in that residence. Again, the Court noted the testimony regarding this residence and concluded that the

issue was tried by the implied consent of the parties. (4) The Court next considered whether the trial court erred in increasing the former husband's periodic alimony obligation from $3,000 per month to $5,000 per month. The former husband argued that there was no evidence of increased need to support the award. The former husband earned $679,000 annually at the time of the divorce judgment; at the time of the modification hearing, his income had increased to $17 or $18 million annually. However, an increase in the payor spouse's income is not sufficient to warrant a modification of alimony without evidence that the payee spouse's corresponding financial needs had increased. *See Capone v. Capone*, 58 So.3d 1258, 1262 (Ala. Civ. App. 2010)[ALW]. The former wife based her change in circumstances primarily on the increase in her cost of living. However, "increased living expenses alone, without additional justification, do not constitute a 'material change in circumstances'" which are sufficient to justify an alimony modification. The former wife testified that she needed an additional $2,000 per month to meet her expenses but she did not specify the nature of those additional expenses. The former wife submitted a budget listing her expenses which totaled $3,197.92. However. some of those expenses were related to items for the child which should be covered by the child support award. "Because the former wife did not provide evidence to indicate that a material change in circumstances had occurred to warrant an increase in the former husband's periodic-alimony obligation, the judgment is reversed as to the modification of the former husband's alimony obligation." (5) The next issue addressed on appeal was the propriety of the trial court's child support award. At the time of trial, the former husband's monthly income was approximately $1.5 million while the former wife was unemployed. Both parties testified that the child's needs had increased as she got older. The former wife testified that she was unable to provide the child with the same standard of clothing the former husband provided and that she was financially unable to take the child on trips. She also testified that she asked the former husband for financial help to enroll the child in camps and extracurricular activities but he refused to help. "The trial court could have found that those circumstances justified a modification of child support, that the $3,000 monthly child-support obligation related to the reasonable and necessary needs of the child, and that the former husband had the ability to pay that obligation." (6) The former husband next argued that the trial court erred by making his child support obligation retroactive to the date of the filing of the former wife's petition. The former husband argued that the former wife is largely responsible for the delay between the filing of the petition and the entry of the final judgment. While the case was dismissed for failure to prosecute, the former wife claimed that her delay in prosecuting the case was due to the former husband's failure to comply with discovery requests. Moreover, the former husband filed two motions to continue the trial which resulted in a delay of 10 months. "In light of those circumstances, we cannot say that the trial court abused its discretion in ordering that the child-support award apply retroactively." (7) The trial court rejected the former husband's argument that the trial court was without authority to grant the retroactive award of child support because the former wife did not request it. It is within the trial court's discretion to grant a retroactive application of a request for child support and/or a modification of child support. (8) Finally, the former husband argued that the trial court erred by awarding attorney fees because he contended, insufficient evidence was presented to support such an award. The former wife testified about her attorney's hourly rate and the estimated number of hours the attorney expended. She further claimed that she was unemployed and unable to pay those fees. The Court affirmed the award of attorney fees, further noting that the former husband earned $1.5 million per month and that the litigation had been ongoing since 2011. ***Johnson v. Johnson,*** 25 ALW (2150283), 7/29/2016, Blount Cty., Donaldson; Thompson, Pittman and Moore concur; Thomas recuses herself, 26 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Alimony--Modification. The parties were divorced in 2004. Pursuant to the divorce judgment, the wife was awarded a portion of the husband's retirement benefits, $1,250 in periodic alimony and the husband was ordered to maintain a life-insurance policy naming the wife as beneficiary for as long as his periodic-alimony obligation continued. The husband appealed that portion of the judgment awarding the wife a portion of his retirement benefits and the Court of Civil Appeals reversed. *Wilson v. Wilson*, 941 So.2d 967, 970 (Ala. Civ. App. 2005)[ALW]. The record does not contain the divorce judgment entered after the appellate decision was released but the wife was awarded periodic alimony. In 2013, the husband filed an action in which he sought to modify his periodic alimony obligation (hereinafter referred to as "the .02 modification action." In that complaint, the husband alleged that he was about to retire and would suffer a decrease in income. He further alleged that the wife was employed and capable of supporting herself. During the course of the litigation in the .02 modification action, the wife filed a motion to have the husband held in contempt and for an award of sanctions for the husband's alleged abuses of discovery practices. In March 2014, the court entered a judgment in the .02 modification action in which it granted the wife's motion to hold the husband in contempt, awarded the wife an attorney fee and dismissed the husband's complaint because of his failure to comply with court orders. No appeal was taken from that judgment. One year later, the husband filed a petition to modify his alimony obligation. In that petition, the husband alleged that he had suffered a material change in his income because of his retirement from the military and that the wife was capable of supporting herself. At a hearing on that petition, the court refused to allow any evidence to be presented regarding events that had occurred before the March 2014 judgment. On November 4, 2015, the trial court entered a judgment in which it determined that the husband had failed to meet his burden of proof. It "dismissed" the father's petition and awarded the wife $5,000 as compensation for her attorney fees and costs. The husband appealed. **Affirmed.** (1) The husband argued that the trial court erred by limiting his presentation of the evidence to the period after the entry of the March 2014 judgment. The husband contends that an award of periodic alimony may be modified upon a material change of circumstances that has occurred since "the last award" of periodic alimony rather than since the most recent judgment on a claim pertaining to periodic alimony. The Court noted that pursuant to a line of cases which appears to have started with *Kiefer v. Kiefer*, 671 So.2d 710, 711 (Ala. Civ. App. 1995)[ALW], a trial court may modify an award of periodic alimony if the petitioner "proves that a material change of circumstances has occurred since the last award was made." However, other cases provide that periodic alimony may be modified if there has been a material change in circumstances "since the trial court's last judgment or order." "It is not clear to this court whether there is a split in authority, as the different caselaw would tend to suggest, or whether inexact language has been employed in some cases." The Court concluded that in an action seeking a modification of periodic alimony, "the burden is on the party seeking a modification of periodic alimony award to show the trial court that a material change in the parties' circumstances has occurred since the trial court's last judgment or order that addresses the issue of periodic alimony or a claim seeking a modification of a periodic-alimony obligation." In this case, the trial court properly limited the husband's presentation of the evidence to the period after the entry of the March 5, 2014, judgment. The judgment of the trial court is due to be affirmed. ***Wilson v. Wilson,*** 25 ALW (2150259), 10/21/2016, Montgomery Cty., Thompson; Pittman and Donaldson concur; Moore concurs in the rationale in part and concurs in the result, with writing, which Thomas joins, 26 pages. [ATTY: Appt: Terrie Morgan, Montgomery; Apee: James Minor, Montgomery]

FAMILY LAW: Division of Property--Alimony. The parties were married for 26 years. At the time of their divorce trial, the wife was 49 years old and the husband was 48 years old. The husband is a plant manager with a net monthly income of $10,123.10. He is eligible for bonuses. The wife had a degree in finance but had not been employed since she became pregnant with the first of the parties' three children in 1992. She had recently begun substitute teaching. The trial court entered a decree divorcing the parties, awarding the wife the sole legal and physical custody of the parties' only minor child, requiring the husband to pay $1,304 in child support, $3,000 per month in alimony for 24 months and $2,000 per month in alimony for an additional 24 months thereafter, dividing the parties' personal property and retirement accounts, and requiring the real property to be sold and the proceeds divided. After her postjudgment motion was denied, the wife appealed. **Affirmed.** (1) The trial court awarded the husband his pension. The wife challenged this award on appeal. Pursuant to Ala. Code 1975, §30-2-51(b), a trial court can apportion the present value of any current or future retirement benefits that a spouse may have a vested interest in on the date the action for divorce is filed. The spouse seeking an award of said retirement benefits must introduce evidence establishing the present value of those retirement benefits. In this case, there was evidence presented indicating the monthly pension benefit the husband will receive when he reaches age 65. However, there was no evidence introduced regarding the present value of the pension. Accordingly, the trial court did not err by declining to divide the husband's pension. (2) The wife next challenged the trial court's division of property and award of alimony. The husband represented that his gross monthly income is $10,123.10 per month and his expenses total $10, 481.01 per month. However, he included in his expenses $700 per month for one of the parties' children who is attending college but who had reached the age of majority. He also included $2,500 per month for child support and alimony and $1,000 per month toward his wife's debts. The husband was not required to pay any money towards the wife's debts and will have $10,185.01 in monthly expenses. The wife claimed that her monthly expenses totaled $4,992 per month. She requested alimony in that amount for ten years. At the time of trial, the parties had sold the marital home and received $99,537 in proceeds. They owned a beach condominium with $56,000 worth of equity. The parties had an Ameri-Trade account worth $36,439 which was divided equally between the parties and the wife was awarded 30% of the husband's 401(k) account which had a balance of $660,911. Based on other awards made, the Court concluded that the husband was awarded 62% of the marital property and the wife was awarded 38%. With regard to alimony, for the first two years, the awards of alimony and child support will cover all but $688 of the wife's and minor child's expenses. "The trial court could have determined that the wife could obtain part-time employment sufficient to cover that deficit." The trial court's division of property and award of alimony was not inequitable and the judgment of the trial court is due to be affirmed. ***Lyles v. Lyles,*** 26 ALW (2150551), 2/17/2017, Autauga Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur, 12 pages. [ATTY: Appt: Joshua James, Montgomery; Apee: Louis Colley, Prattville]

FAMILY LAW: Alimony--Property Division--Attorney's Fees--Tax Dependency. The parties were married in 1990. They had four children, only one of whom had not reached the age of majority at the time of the divorce trial. The husband lives in Tennessee, where he teaches math and coaches football, earning approximately $4,299 per month. The husband began his teaching career in Alabama in 1987 and he contributed to a retirement account before the parties married. He retired from teaching in Alabama in 2012 and was earning $2,838 per month in retirement pay. The wife has a high school education. She was supposed to move with the husband to Tennessee in 2012 but then refused to do so. The wife homeschooled the children. The parties had not had marital relations since 2004. At the time of trial, the wife was working part-time. She tesified that she was earning approximately $600 per

month. The wife claimed that certain health problems precluded her from engaging in full-time employment. The wife testified that the husband viewed pornography and that this practice led to the parties divorce. The husband's parents deeded a parcel of property to him prior to the marriage. The parties' built a home on that property. The marital home appraised for $91,200; an outstanding indebtedness of $4,500 was owed on it. After a trial, the trial court entered a judgment awarding sole physical custody of the parties' child to the wife and requiring the husband to pay $755 per month in child support. The wife was awarded $650 per month in periodic alimony for 60 months. The wife was awarded the marital home and the husband was required to pay the outstanding balance owed on it. The wife appealed. **Affirmed in part; reversed in part.** (1) The wife challenged the trial court's division of property and award of alimony. She contended that the husband's superior earning capacity, her lack of employment during the marriage, her health, and the husband's conduct during the marriage weighed heaving in her favor with regard to the division of property and award of alimony. With regard to her health, evidence was presented that refuted the wife's testimony regarding her health, including the fact that in January 2013, she indicated that her back pain registered a "2" on a 10-point scale. Evidence was also disputed regarding the husband's conduct during the marriage. He testified that he only began viewing pornography after the wife discontinued having sex with him and that he had never met any of the women he had corresponded with online. The husband claimed that he did not want to homeschool the children and that the wife could have worked during the marriage. Moreover, his expenses exceeded his monthly gross income. The wife demonstrated a monthly deficit in her budget but she was awarded a larger amount of marital assets, including the marital residence. "Because the wife received a greater distribution of the marital estate than the husband and because of the additional considerations discussed with regard to the wife's argument on this issue, we cannot agree with the wife that the trial court's alimony award was inequitable." (2) The wife asserted that the trial court erred by refusing to require the husband to pay her attorney's fee. "Given the consideration above with regard to the distribution of property and award of alimony, we conclude that the trial court did not commit clear and palpable error in failing to award the wife attorney's fees." (3) In its judgment, the trial court provided that the husband was permitted to claim the child as his dependent on his income-tax returns. Pursuant to the Comment to Rule 32, Ala. R. Jud. Admin., it is assumed that the custodial parent will take the income-tax exemptions for the children in his or her custody. A trial court may provide otherwise, but in order to do so, it must state its reasons for deviating from Rule 32. Here, the trial court provided no such reasons. Therefore, this portion of the trial court's judgment is reversed and the case remanded for the trial court to enter a statement explaining its deviation from the guidelines or to amend its judgment to conform with Rule 32. (4) The wife argued that the trial court erred by denying her postjudgment motion without holding a hearing on it. Ala. R. Civ. P. 59 states that a postjudgment motion "shall not be ruled upon until the parties have had opportunity to be heard thereon." However, the wife failed to request a hearing on her motion and therefore, waived that right. The judgment of the trial court is due to be affirmed in part and reversed in part. ***Henderson v. Henderson,*** 26 ALW (2150495), 1/6/2017, Cullman Cty., Moore; Thompson, Pittman, and Donaldson concur; Thomas recuses herself, 27 pages. [ATTY: Appt: Charles Gorham, Birmingham; Apee: Silas Fuller, Cullman]

II. DIVISION OF PROPERTY

FAMILY LAW: Division of Property--Retirement. The parties were married in 1984. In 2013, the wife filed an action for a legal separation; the husband counterclaimed for divorce. Prior to the trial, the husband filed a "motion in limine" seeking to prohibit evidence regarding his retirement accounts and retirement income. That motion asserted that the husband had retired from Philadelphia Electric Company ("PECo") in 1990 and that his pension was not part of the marital estate under the provisions of Ala. Code 1975, §30-2-51(b). Pursuant to that code section, a trial court "may include in the estate of

either spouse the present value of any…current retirement benefits" under certain conditions including the condition that "[t]he parties have been married for a period of 10 years during which the retirement was being accumulated." The motion was set for hearing on the same day as the trial but the trial was continued. The attorney who filed the motion on the husband's behalf withdrew. After another attorney appeared on behalf of the husband, a trial took place. The husband testified at trial that he had worked for PECo for six years after the parties married. The trial court entered a judgment which divided the parties' real and personal property, ordered the husband to pay $425 per month as periodic alimony and awarded the wife one-half (1/2) of the husband's PECo retirement account. The husband filed a motion pursuant to Ala. R. Civ. P. 59(e) challenging the alimony award and division of retirement. The husband's postjudgment motion was denied by operation of law. The husband appealed. **Reversed.** On appeal, the husband argued that the trial court erred by awarding the wife any of his PECo retirement. The wife failed to refute that claim except to the extent that she claimed that the husband waived any objection to the introduction of financial information by his conduct at trial. "However, case law does not support the proposition that an objection to an award of retirement benefits as being contrary to law as set forth in §30-2-51(b) may not be asserted after trial, at the postjudgment stage." In this case, the husband put the trial court on notice of his position that a division of his retirement benefits would be contrary to law at various stages of the trial. Therefore, he preserved this issue for appellate review. Moreover, the Court held that there was merit to the husband's argument. The evidence was uncontraverted that the parties had only been married for 6 of the 28 total years that the husband had accrued PECo retirement. "A plain reading of subsection (b)(1) of §30-2-51 yields the conclusion that a trial court does not have the discretion to divide one party's retirement benefits incident to a divorce judgment unless the parties to the action have been married for a 10-year period during which the retirement benefits were accumulated." Accordingly, the trial court erred as a matter of law in awarding the wife any portion of the husband's retirement benefits. Because the alimony and property awards are so interrelated, the trial court's judgment as to the award of alimony to the wife must also be reversed. ***Colgan v. Colgan,*** 25 ALW (2150192), 7/22/2016, Lauderdale Cty., Pittman; Thompson, Thomas, Moore and Donaldson concur, 7 pages. [ATTY: Appt: Randall W. Nichols, Birmingham; Apee: Bethany Malone, Tuscumbia]

FAMILY LAW: Division of Property-Child Support. The parties had a child in 1996 while they were living together. During one of their separations, the husband married another woman but that marriage was brief. In December 2003, the parties married each other. The parties separated in 2012. The husband accused the wife of putting water in his gas tank and according to the wife, the husband told her that he was going to retrieve a shotgun from his father's house next door "to make sure you leave here." As the wife was leaving for work, the husband fired the shotgun several times, hitting her vehicle. The husband claimed that he fired a shot into the air. The wife never returned to the marital residence. Personal property that she asked to be given to her was ruined. At the time that the parties married, the wife owned her own house and the husband moved in with her. The house burned sometime in the mid-2000s. The wife received $109,769.14 in insurance proceeds and the wife used $30,000 for a down payment on the marital residence. She also purchased furnishings for the marital residence and paid $15,000 for the husband's truck. An additional $20,000 was placed in a joint bank account but the husband later moved the money to his own account. The husband made all payments on the marital residence since 2008. The wife valued the house at $185,000 and the husband valued it at $157,000; $131,000 was owed on the residence. The wife worked as a school nurse. In 2008, the husband earned $32,791. No form CS-41 "Child-Support-Obligation Income Statements/Affidavits" appear in the record. After a trial, the court awarded the marital residence to the husband but awarded the wife $40,000 for her share of the equity. The court divided the parties' personal property and awarded each his or her retirement account. The husband was ordered to pay $574 a month as child support for the two months that the child would remain a minor. He was also ordered to pay $3,688 for his share of the

child's college expenses while she was a minor. The divorce judgment awarded the wife an attorney's fee in the amount of "$_____." The husband's postjudgment motion was denied by operation of law. He appealed. **Affirmed.** The husband claimed that the division of marital property was inequitable. The court determined that there was approximately $55,000 worth of equity in the marital residence. It determined that the wife was entitled to $30,000 for her contribution to the down payment and that the remaining amount would be divided equally. "The evidence supports the trial court's valuation of the marital residence and the other figures it relied on in calculating the division of the equity in the marital residence." In making this determination, the Court noted the husband's conduct in firing a shotgun at the wife's car and destroying her personal property. The husband also asserted that the division of personal property was inequitable because the wife was awarded everything she requested. No evidence was adduced regarding the value of the personal property. Thus, there is no way that the appellate court could determine if the monetary division of property was equitable. The husband challenged the fact that the trial court adopted the wife's proposed judgment instead of his. However, he cited no authority that would indicate that a trial court cannot accept a proposed judgment drafted by one of the parties. Thus, he failed to demonstrate error in this regard. The husband argued that the trial court erred by awarding the wife an attorney fee. On appeal, the wife stated that she was not awarded any such fee. "We note that, under the doctrine of judicial estoppel, the wife cannot later take a position that is contrary to the position she asserts in this appeal." Therefore, the husband's argument has no merit. Finally, the husband challenged the trial court's order requiring him to pay a portion of the daughter's college expenses. He cited *Ex parte Christopher*, 145 So.3d 60 (Ala. 2013)[22 ALW 41-1], which precluded the requirement that a party be responsible for postminority college support. However, Ala. R. Jud. Admin. 32(A)(1)(c) provides that a trial court can deviate from the college-support guidelines to require payment of college expenses incurred prior to a child's reaching the age of majority. The expenses for which the wife sought reimbursement were all incurred during the daughter's minority. The judgment of the trial court is due to be affirmed. ***McCrimon v. McCrimon,*** 25 ALW 18-4 (2140893), 4/22/16, Shelby Cty., Thompson; Pittman, Thomas, Moore, and Donaldson concur, 25 pages. [ATTY: Appt: Jonathan Spann, Columbiana; Apee: John Head, Columbiana]

FAMILY LAW: Division of Property. The parties were divorced in 2015. The trial court ordered the husband to pay to the wife "an amount equal to one-half of the amount in his Retirement Systems of Alabama account as of the date of separation." It also required the husband to pay to the wife $20,000 representing her one-half of the equity in the marital home and requiring the husband to pay "the wife's car insurance that was due during the pendency of the divorce." The husband appealed. **Affirmed.** (1) The husband argued that the trial court erred in awarding the wife one-half of the value of his retirement account with the Employees' Retirement System of Alabama ("the RSA"). He argues that the RSA retirement account cannot be equitably divided under Ala. Code 1975, §36-27-28 which provides that benefits accrued or accruing to a person who is a member of the RSA are "exempt from any state or municipal tax and exempt from levy or sale, garnishment, attachment or any other process whatsoever and shall be unassignable…" In *Sockwell v. Sockwell,* 822 So.2d 1219 (Ala. Civ. App. 2001)[ALW}, the Court addressed a similar statute that applied to the Teachers' Retirement System of Alabama. In so doing, the Court concluded that while such a retirement account could be considered in dividing the parties' property, the trial court could not require that the account be liquidated. Here, the trial court did not order that the RSA account be liquidated. Instead, it required the husband to pay to the wife one-half of its value. "When a component of the parties' marital property cannot be actually divided, a trial court can order the spouse in whose name the property is vested to pay the other spouse the value of the latter's equitable share of that marital property as alimony in gross." *Hager v. Hager*, 293 Ala. 47, 54, 299 So.2d 743, 749 (1974). However, a trial court cannot do indirectly what it cannot do directly. Therefore, in order for such an award to be valid, the paying spouse must have the ability to pay the

alimony in gross from other resources without undue hardship. In this case, the husband did not demonstrate that he cannot pay the alimony-in-gross award through some other means. Accordingly, this portion of the trial court's order is due to be affirmed. (2) The husband next argued that the trial court erred in calculating the equity in the marital home. The wife testified that it was worth $145,000; the husband claimed that it was worth between $115,000 and $120,000. It was subject to a $99,000 mortgage. The court apparently determined that the value of the home was $139,000. Such a determination was within the province of the trial court. (3) Finally, the husband challenged the trial court's requirement that he pay for the wife's automobile insurance payments accrued during the pendency of the divorce. The wife stopped sending those bills to him in October 2014. The husband claimed that it was inequitable to require him to pay those bills because the wife failed to forward them to him. The trial court entered a pendente lite order requiring payment of that bill. If the order had conditioned payment on receipt of the bills from the wife, then the husband would not have a duty to reimburse her. However, the order did not contain such a requirement. While the wife should have sent the bills the husband, there is no evidence that he tried to elicit them from her. Moreover, the husband failed to cite specific authority for his argument. The judgment of the trial court is due to be affirmed. ***Kleinatland v. Kleinatland,*** 25 ALW (2150116), 5/13/2016, Baldwin Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur, 9 pages. [ATTY: Appt: Willburn Bolton, Jr., Foley; Pro se]

FAMILY LAW: Division of Property--Retirement. The parties were married in 1976. In 2014, the wife filed a divorce action. After a hearing, the trial court entered a judgment divorcing the parties on the ground of the husband's adultery. The marital residence and a vehicle were awarded to the wife and the husband was awarded two vehicles, a camper and a boat. In its judgment, the trial court awarded the wife "$70,000 of the vested balance of the husband's International Paper JP Morgan 401(k) Savings Plan." The husband was also ordered to pay the wife $1,750 per month as periodic alimony, to name the wife as a beneficiary on his pension and life insurance and to pay $4,000 of the wife's attorney's fees. The husband appealed. **Reversed.** In 1978, the husband began working at International Paper Company. As part of his employment, the husband enrolled in a "Retiree Medical Savings Program" and he was assigned an account ("the RMSP account"). Once he retired, the funds in the RMSP account could be used only to periodically pay for his health-insurance premiums. The wife acknowledged during her testimony that the RMSP account could not be divided. The RMSP account contained a "vested balance" of $7,784.74 and a total balance of $27,498.31. The husband also had a 401(k) savings plan with International Paper managed by JP Morgan Retirement Plan Services. The 401(k) had a balance of $119,566.84 at the time of trial. The husband argued that the trial court had awarded the wife more than one-half of his 401(k) savings plan in contravention of Ala. Code, 1975, §30-2-51(b). The parties both treated the RMSP account and the 401(k) as "retirement benefits." Although there were more benefits included in the husband's RMSP account, only those which were "vested" could be divided. The total of the vested retirement benefits was $127,351.58. The $70,000 award to the wife does indeed exceed 50% of those accounts. Accordingly, the judgment of the trial court is due to be reversed. Because the division of property and the award of alimony are interrelated, the portion of the divorce decree related to alimony is also due to be reversed. ***Sutton v. Sutton,*** 25 ALW (2150051), 8/19/2016, Lauderdale Cty., Moore; Pittman and Donaldson concur; Thompson concurs in the result, with writing; Thomas concurs in the result, without writing, 15 pages. [ATTY: Appt: Lindsey Davis, Florence; Apee: Cindy Schuessler, Florence]

FAMILY LAW: Child Support--Division of Property--Attorney Fees. The parties were divorced in 2014. Pursuant to the divorce judgment, the parties were awarded joint custody of their children. After a second trial on the remaining issues, the trial court imputed monthly income to the husband of $8,500 and $1,732 to the wife. The husband was ordered to pay $1,127 per month in child support and $3,673 in periodic alimony. The wife was awarded a $35,000 property settlement and the husband was awarded the marital residence. The wife was awarded a 50% share of J&S Investments, LLC and 20% of KRIP, LLC as well as a percentage interest in other businesses. The trial court further ordered that until the husband's stock or ownership interests were formally transferred to the wife, she was entitled to receive an amount equal to 67% of all direct or indirect distributions from such companies to the husband. Finally, the court stated that it had previously ordered the husband to provide to the wife as much for legal expenses as he himself had spent. The husband owed his attorneys $150,000 and therefore, the trial court awarded the wife $150,000 in attorney fees. The husband appealed. **Affirmed in part; reversed in part.** (1) The husband argued that he should not be required to pay child support because he was awarded periods of custodial time in excess of those anticipated by the Child Support Guidelines. Ala. R. Jud. Admin. 32(A)(1) states that shared physical custody or visitation rights in excess of those customarily ordered by the court can be a reason to deviate from the Child Support Guidelines. However, Rule 32 does not *require* such a deviation. Therefore, the trial court did not abuse its discretion by declining to deviate from the guidelines. (2) The husband also argued that the trial court erred by not imputing a higher income to the wife for child-support purposes. The wife testified that the last time that she had worked full time as a mortgage broker was in 2005 when she became pregnant with the parties' older child. She had recently become employed by a mortgage company but her hiring was dependent upon her passing a licensing exam. "Based on the foregoing, we cannot conclude that the trial court exceeded its discretion in declining to impute a higher income to the wife." (3) The husban also challenged the trial court's imputation of $8,500 of monthly income to him. Such a determination is left to the discretion of the trial court. "The husband's argument that he was not actually earning $8,500 a month misses the point that a trial court is given the discretion to impute income other than the actual income of a party." The husband did not argue that he was not voluntarily underemployed. Therefore, that issue was not properly preserved for appellate review. (4) The husband argued that the award of a 20% interest to the wife of KRIP, LLC was in error because that corporation is governed by an operating agreement that prevents transfer of any membership interest without the consent of the other members. KRIP is owned by the husband and Ryan Smith. Smith was not added as a party to the divorce and there is no evidence that he consented to the transfer of any of the husband's interest in KRIP. Ala. Code 1975, §10A-5A-1.09(a) provides that a limited liability company is bound by and may enforce the limited liability company agreement. Although there is no binding Alabama precedent regarding whether a trial court is bound by such an agreement in making an equitable division of assets in a divorce, the Court examined cases from other jurisdictions and concluded that "because the trial court's judgment dividing the husband's interest in KRIP fails to comport with the terms of the operating agreement of KRIP, the trial court erred in that regard." This portion of the trial court's judgment is due to be reversed. Because the issues of property division and alimony are interrelated, the judgment regarding periodic alimony is also due to be reversed. (5) Finally, the husband contended that the trial court's judgment awarding the wife a $150,000 attorney fee was in error because the trial court did not have any evidence as to the amount of the wife's attorney fees. Because the financial circumstances of the parties are undetermined as a result of the reversal of the property division and alimony award, this issue is also pretermitted. The judgment of the trial court is due to be affirmed in part and reversed in part. ***Whaley v. Whaley,*** 25 ALW (2150323), 8/26/2016, Lee Cty., Moore; Pittman,

Thomas and Donaldson concur; Thompson concur in the result without writing, 17 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Alimony in Gross. The parties married in 1988; they have three children, all of whom are adults. The husband began working construction in 2007 and as a result, they began living apart. In November 2014, the parties separated permanently, and the husband moved to Virginia. In May 2015, the husband filed a divorce complaint. After a trial, the trial court entered a judgment awarding the wife $5,000 in alimony in gross and $250 per month periodic alimony. The husband appealed. **Reversed.** The husband challenged the trial court's alimony-in-gross award. At trial, evidence was adduced indicating that the husband owns a 2011 Jeep Patriot which he purchased for $18,441; he owes $18,000 on it. He owns a 2002 Ford Explorer with a value of $1500. The husband owns some furniture and tools which he testified had a negligible value. In *Ex parte Dickson,* 29 So.3d 159, 162 (Ala. 2009)[ALW], the Supreme Court held that an alimony-in-gross award must be payable out of the payor's present estate as it exists at the time of divorce. In this case, the husband's estate at the time of divorce consisted of two automobiles, one which had little value and one which appeared to have no equity. He had some "cheap" furniture of indeterminate value, some tools of no value and some clothing and personal effects. "The trial court's award of $5,000 in alimony in gross is not supported by the evidence presented regarding the value of the husband's estate at the time of the divorce." Because the issues of property-division and alimony are interrelated, the case is reversed and remanded for the trial court to reconsider its awards of alimony in gross and periodic alimony. ***Pylant v. Pylant,*** 26 ALW (2150787), 2/10/2017, Jackson Cty., Thomas; Thompson, Pittman, Moore and Donaldson concur, 8 pages. [ATTY: Appt: Parker Edmiston, Scottsboro; Apee: F. Alonza Royal, Scottsboro]

FAMILY LAW: Division of Property--Alimony in Gross. The parties were married in 2003. In 2014, the husband filed a divorce complaint. After a trial, the court entered an order divorcing the parties and ordering the husband to pay the wife $20,000 in the form of a property settlement or alimony in gross. The divorce judgment provided that the husband could pay the wife either in one lump sum or in installment payments spanning a period of more than six years. After his postjudgment motion was denied, the husband appealed. **Reversed.** The husband was 74 years old at the time of the trial, has a third-grade education and is illiterate. He receives net monthly retirement benefits in the amount of $1,108 and net monthly Social Security benefits in the amount of $1,408. The husband has a seasonal "side job" offering deer-processing services. The wife claimed that the deer processing job "probably took in about" $28,000 to $30,000 per year. There was no proof of the value of this business. The wife asked the court to award her $25,000 in alimony in gross but conceded that the husband did not have "that kind of money" in his present estate. "The record does not contain sufficient evidence from which the circuit court could have inferred that the husband's present estate was valued at $20,000, much less a greater amount from which $20,000 could be equitably deducted. The judgment of the trial court is reversed and the case remanded to the trial court with instructions to strike that portion of the judgment that orders the husband to pay the wife $20,000 in alimony in gross. ***Johnson v. Johnson,*** 26 ALW (2150936), 3/3/2017, Lee Cty., Thomas; Pittman and Donaldson concur; Moore concurs in the result, without writing, Thompson dissents, with writing, 13 pages. [ATTY: Appt: James Sprayberry, Auburn; Apee: Thomas Melton, Opelika]

FAMILY LAW: Division of Property--Alimony. CIVIL PROCEDURE: Recusal. The parties married in 2009 but had lived together since 2003. However, there was no indication that they were common law married in the years before they were ceremonially married. Both of the parties have children from prior marriages, all of whom were adults. The husband was 55 years old at the time of the trial and the wife was 50 years old. The husband has worked as a truck driver for 30 years. His

gross annual income was approximately $68,000. He had a 401(k) with a value of $292,467.91. The husband purchased the property that became the marital residence in late December 1995. The fair market value of the house as listed by the husband on an exhibit was $90,000 and it was encumbered by a mortgage debt of approximately $52,000. The monthly mortgage payment was $648. The wife testified that she contributed $400 per month toward the mortgage payments from July 2003 until 2013 when she was involved in a motor-vehicle accident. She received a settlement of $58,000. The wife lost her job in November 2012 and the husband expressed dissatisfaction that she did not return to work. The wife claimed that she had back pain and was disabled. The husband claimed that the parties had only had sex three times in the three years leading up to the divorce trial. The wife disputed this testimony, claiming that they had sexual relations about once a week even after the husband filed for divorce. The wife discovered that the husband had been "sexting" another woman. The husband denied any sexual contact. The wife did not want the divorce and evidence was adduced that the husband had given her mixed signals about his intention to go through with it. The parties went hunting, fishing and camping together. They talked about the future and purchased items to decorate the house. The trial court entered a divorce based on the ground of the irretrievable breakdown of the marriage, "largely extending from the Husband's unwillingness to truthfully consider reconciliation, although he has deceived the Wife at times into thinking he would." The court noted that the husband displayed "little if any credibility." The court awarded the marital residence to the wife but required the husband to continue to pay the mortgage. The wife received a minivan, a camper, a boat and other personal property. The husband was awarded two trucks, a boat (valued at $32,000) another boat, a motorcycle, the ATV, $6,000 in savings, $5100 in tax refunds and other property. He was also awarded his 401(k) account. The husband was ordered to pay the wife $10,000 as alimony in gross and $856.50 each month in periodic alimony. He was also required to pay the wife's COBRA health-insurance premiums for 18 months. The husband appealed. **Affirmed.** (1) The parties were only married for seven years so the husband's 401(k) account was not subject to division. Ala. Code 1975, §30-2-51(b). Accordingly, the marital residence was the parties' largest single asset, even though it had been purchased by the husband 13 years prior to the marriage. "The record is silent as to the value of much of the property divided between the parties." Relying largely on its decision in *Combs v. Combs,* 4 So.3d 1141 (Ala. Civ. App. 2008)[ALW], the Court concluded: "because the parties failed to introduce evidence of the value of most of the assets….we are unable to conduct a meaningful review of whether the property division is equitable." The property division is due to be affirmed. (2) The husband did not argue that the wife failed to demonstrate a need for periodic alimony. Any such argument is now waived. The financial obligations imposed upon the husband for the benefit of the wife total $1,929.36 per month. His net monthly pay is $4,505. The husband claimed monthly expenses of $2,339. Even after making the requisite payments to or on behalf of the wife, he will be left with $237 per month. Accordingly, the Court rejected the husband's argument that he would be financially crippled by the alimony award. (3) The husband contends that the trial judge should have recused himself because he allegedly told the husband's counsel: "You might want to speak with your client, and if he still wants a divorce I'm going to hit him hard financially." The comment was allegedly made after the trial of the case. However, the alleged comment does not appear in the record on appeal. The husband's attorney did not attach an affidavit to her recusal motion nor did she seek to supplement the record. Statements in briefs are not evidence. "Thus, the husband's assertions regarding the statement allegedly made by the trial judge cannot be the basis for reversal of the trial court's denial of the motion to recuse." The judgment of the trial court is due to be affirmed. ***Cameron v. Cameron,*** 26 ALW (2150546), 11/10/2016, Lee Cty., Thompson; Pittman, Thomas, Moore and Donaldson concur, 17 pages. [ATTY: Appt: Connie Jo Cooper, Phenix City; Apee: Kenneth Funderburk, Phenix City]

FAMILY LAW: Division of Property. The parties were divorced in March 2008. Pursuant to a settlement agreement that was incorporated into the decree of divorce, the wife was awarded the marital residence, with all the household furnishings, fixtures and appliances. The agreement also provided that the husband would pay the wife $350 each week toward three fixed debts owed to CitiFinancial Corporation, LLC ("CitiFinancial") which consisted of the loan secured by the home mortgage, an automobile loan and a personal loan and one fixed debt to another entity. As each of the four debts was paid off, the husband's obligation to the wife was to decrease by the amount of the monthly payment owed as to that debt. In addition, the husband was to pay the wife $250 per week "as permanent and continued alimony." Over time, the husband paid off three of the four fixed debts, leaving only the balance on the loan secured by the mortgage on the marital residence. The husband made the loan payments directly to the lending entities rather than to the wife. In 2014, the husband stopped making the monthly home-loan payments. The wife testified that in April 2014 she received a telephone call from CitiFinancial advising her that the payments were "months behind" and that CitiFinancial was going to foreclose on the marital residence if payments were not made. The wife said that she contacted the husband about making the payments and he told her he did not have the money. The wife then made a payment of $261 to CitiFinancial. The husband then told the wife that he would no longer make the payments. The wife refinanced the property with a loan through the Alabama Teachers Credit Union ("ATCU") so that she could afford to make the monthly house payment. When asked if he agreed to the refinance, the husband testified "I told her to do what she had to do because I couldn't make the payment no more." The payoff to CitiFinancial at the time of the refinance was $23,546. The wife borrowed an additional $7,409 to pay personal debt. The wife filed a petition requesting the court to require the husband to pay the pro rata share of the loan which was attributable to the outstanding balance owed to CitiFinancial. At trial, the husband admitted that he still owed $23,546 pursuant to the terms of the divorce judgment. The trial court denied the wife's petition. The wife appealed.
Reversed. Because the facts of this case are not disputed, the Court reviewed the case de novo. The parties agree that the husband's obligation to pay off the loan secured by the mortgage constituted a property settlement that was not subject to modification. The Court held that it did not matter if the mortgage obligation was owed to CitiFinancial or ATCU. "The wife still has a mortgage payment that, under the terms of the parties' settlement agreement and the divorce judgment, the husband is obligated to make until the house is paid for in full. By excusing the husband from that obligation, and thereby allowing him to avoid payment of $23,546.76, the trial court improperly modified the property settlement agreed upon by the parties." The Court further noted that the trial court's order "essentially reward[ed]" the husband for failing to abide by the terms of the divorce judgment. "If we were to affirm the trial court's judgment, we would be establishing an inequitable precedent." The judgment of the trial court is due to be reversed. ***Reneman v. Reneman,*** 26 ALW (2150882), 2/24/2017, Etowah Cty., Thompson; Pittman, Thomas, Moore and Donaldson concur, 13 pages. [ATTY: Appt: Stewart Burns, Gadsden; Apee: John Floyd, Gadsden]

III. CHILD SUPPORT

FAMILY LAW: Division of Property—Child Support-Attorney Fees. CIVIL PROCEDURE: Postjudgment Motion. The opinion of July 15, 2016 is withdrawn and the following is substituted therefor. This divorce case began eight years ago and has been the subject of multiple appeals. In *Dubose v. Dubose,* 172 So.3d 233 (Ala. Civ.App. 2014)("*Dubose III"*)[ALW], the Court of Civil Appeals reversed the issue of child support and the division of property with regard to certain items that the husband contended belonged to his father. It also affirmed the award of an attorney fee to the wife but it reversed that portion of the trial court's judgment ordering the husband to pay "all attorney fees." On remand, the trial court was directed to take evidence regarding the amount and reasonableness of the wife's attorney fees and to establish a specific sum that the husband was required to pay. On remand, the trial court divided the disputed property, awarded the wife $11,500 toward her attorney fees and ordered the husband to pay $645 per month in child support. After the husband's postjudgment motion was denied, he appealed. **Affirmed in part; reversed in part.** (1) The husband argued that the trial court erred by denying his postjudgment motion without first affording him a hearing. Generally, a movant who requests a hearing on his or her postjudgment motion is entitled to a hearing. The failure of the court to conduct such a hearing is error. However, that error is harmless if there is no probable merit to the motion. Therefore, the Court examined each issue raised by the husband to determine if it had probable merit. (2) The husband argued that the trial court's finding that a 90-horsepower tractor and a backhoe were marital property subject to division is not supported by the evidence. Specifically, the husband argued that both were farm vehicles belonging to his father, Melton. Melton testified that the husband had purchased the 90-horsepower tractor in November 2005 for $50,671 and that the husband had given that tractor to Melton in 2006. Melton testified that the husband wanted to "write off" the tractor. Melton also testified that in May 2008, the husband "turned the backhoe over in the creek." Melton hired someone to pull it out and paid $9,000 for the repairs. The bill of sale indicates that ownership of the backhoe was transferred from the husband to a limited liability company in Melton's name. In a divorce action, a trial court cannot divide property legally titled to a third party who is not joined in the divorce action. *Roubicek v. Roubicek,* 246 Ala. 442, 449, 21 So.2d 244, 251 (1945). "Based on the evidence before us, we cannot say that there is no probable merit to the husband's assertion that Melton is the owner of the tractor or the backhoe, such that he was not entitled to a hearing on the postjudgment motion raising this argument." (3) The Court next addressed the child support award. The wife was earning $70,000 per year. In calculating child support, the trial court imputed monthly income of $5,000 to the wife and "a minimum of $6,300" to the husband. The wife filed a CS-41 form a few weeks after the trial in which she listed her income to be that which the trial court used on the CS-42. The husband's challenge to the trial court's calculation of child support has merit. The trial court should have used the wife's actual income for purposes of calculating child support. The trial court could have imputed income to the husband, even though he qualified for Social Security disability benefits. However, no evidence in the record supports a finding that he could earn $6,300 per month. Accordingly, there was probable merit to the husband's postjudgment motion with regard to child support. The case is remanded for the trial court to hold a hearing on that issue. The dissent noted that although the husband claimed that he was disabled and unable to work, after his alleged injury he campaigned for and won a circuit court judge's election. He was later disbarred. From 2005 through 2008, deposits of over $2,000,000 were made into the husband's bank account. Judge Thompson and Judge Thomas opined that non-income producing assets should be considered in making a child support calculation. (3) The husband challenged the trial court's award of an $11,250 attorney fee to the wife. Factors to be considered in awarding an attorney fee include: the financial circumstances of the parties, the parties' conduct, the results of the litigation, and the trial court's knowledge and experience as to the

value of the services performed by the attorney. Here, the husband had been in violation of numerous discovery orders and had been in contempt throughout the divorce proceeding. The husband argued that an award of attorney fees was improper because the wife failed to demonstrate a financial need for the award. After *Dubose III*, the award of an attorney fee became the law of the case; the only issue was the amount of those fees. The total amount of the wife's attorney fees was $49,813. "Based on the record before us, the trial court could have reasonably believed that the husband's conduct during the litigation unnecessarily prolonged the matter or increased litigation costs, including attorney fees." ***Dubose v. Dubose,*** 25 ALW (2150021), 9/30/2016, Clarke Cty., Per curiam; Pittman and Donaldson concur; Thompson concurs in part and dissents in part, with writing; Thomas concurs in part and dissents in part, with writing, Moore concurs in part and concurs in the result in part, and dissents in part, with writing, 51 pages. [ATTY: Appt: James Gaines, Magnolia Springs; Apee: Lynn McConnell, Fairhope]

FAMILY LAW: Child Support--UIFSA. The State of Alabama, on behalf of Y.R.S. ("the mother"), filed a petition seeking to hold the father in contempt for nonpayment of child support in compliance with a 2006 California child support order. The State attached a certified copy of the California order to its petition, as well as a certified copy of the payment record maintained by the California Department of Child Support Services. On August 10, 2015, the juvenile court, through a referee, registered the California order and found the father in contempt. It then appointed counsel to represent the father. After a rehearing, the juvenile court confirmed the referee's findings, ordered the father incarcerated for 10 days and directed the father to pay at least $10,000 in order to be released from jail. The father appealed. **Affirmed.** (1) The father argued that the juvenile court lacked jurisdiction to enforce the California child-support order because the order was not registered in Alabama at the time that the contempt proceedings were initiated. Ala. Code 1975, §30-3D-101 et seq., a part of the Uniform Interstate Family Support Act ("the UIFSA") sets forth the procedure for registering a foreign child support order. At the time of filing, Alabama law mandated "strict compliance" with the registration procedures set forth in UIFSA. In *Ex parte Reynolds*, [Ms. 2150414, May 20, 2016] ___ So.3d ___, ___ (Ala. Civ. App. 2016)[ALW], the Court overruled those cases that required "strict compliance" and instead, held that "substantial compliance" was sufficient. When substantive law is changed while a case is on appeal, it will generally be applied to that case. "Therefore, in the present case, this court must determine if the State 'substantially complied' with §30-3D-602(a)." In this case, the State achieved substantial compliance. The court further complied with Ala. R. Civ. P. 70(A) in its treatment of the contempt issues by notifying the alleged contemnor of the hearing and the consequences of failing to appear and by appointing counsel to represent him. (2) The father argued that his due-process rights were violated by adjudicating him in criminal contempt of court. However, he failed to make that argument to the juvenile court and therefore, waived it. (3) Finally, the father argued that the juvenile court improperly incarcerated him for nonpayment of a debt in contravention of Art. I, §20, Ala. Const. 1901. That constitutional provision is inapplicable to cases involving the nonpayment of child support. *Dolberry v. Dolberry*, 920 So.2d 573, 578 (Ala. Civ. App. 2005)[ALW]. The judgment of the trial court is due to be affirmed. ***J.M.S. v. State of Alabama ex rel. Y.R.S.,*** 25 ALW (2140950), 6/10/2016, Jefferson Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur, 11 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Support. The parties were divorced in 2001. Pursuant to the decree of divorce, the mother was awarded sole custody of the parties' minor child and the father was ordered to pay $598 per month in child support. On July 12, 2013, the mother filed a complaint to modify the child-support obligation of the father ("the child-support action"). Shortly thereafter, the father filed an answer and counterclaim for a change in the custody of the child ("the custody action"). The clerk assigned separate civil action numbers to the two cases and the record contains no order consolidating the cases. The case was set for trial on January 27, 2014 but it was continued on four different occasions at the request of the father and one additional time at the request of the mother. In the meantime, the mother filed requests for an "instanter" order increasing the father's child-support obligation; the trial court did not grant those requests. After a trial on September 2, 2015, the trial court entered identical judgments in the child-support action and the custody action increasing the father's child support obligation to $780, effective September 1, 2015 and denying the father's counterclaim for custody. The mother appealed. **Affirmed.** The mother argued that the trial court erred by failing to make the increase in the father's child support obligation retroactive to the date of the filing of her complaint. The father contends that the mother failed to preserve this issue for appellate review. When a case is tried without a jury and the court entered a judgment without findings of fact, a party who claims that the judgment is not supported by sufficient evidence must file a postjudgment motion in order to preserve that issue for appellate review. *New Props., LLC v. Stewart,* 905 So.3d 797, 801-02 (Ala. 2004)[ALW]. In this case, the mother asked that any modification to the father's child support obligation be applied retroactively. In its judgment, the trial court specifically stated that the modification would be effective on September 1, 2015 forward. "That determination constitutes a sufficient finding that the increase in the father's child-support obligation would not be payable retroactively from the date the mother filed her complaint." Therefore, the mother was not required to file a postjudgment motion to preserve that issue for appellate review. (2) Generally, Alabama has a "sound policy favoring retroactivity in most cases." *Bayliss v. Bayliss,* 575 So.2d 1117, 1121-22 (Ala. Civ. App. 1990). This is true because parties generally should not be penalized for the length of time that ensues as a result of litigation. *Id.* However, in this case, the mother failed to present sufficient evidence from which a retroactive calculation of child support could be made. She demonstrated that the father's income at the time of trial was $8,583 and that in June 2014, his income was $8,333. However, she failed to prove what the father's income was at the time that the action was filed. Further, the mother testified that when she filed the complaint, she was working part-time but by the time of trial, she was working full-time. She failed to present evidence as to when she obtained full-time employment. "Therefore, we cannot conclude that the trial court exceeded its discretion in declining to award the increase in the father's child-support obligation retroactive to the date of the filing of the mother's complaint." The judgment of the trial court is due to be affirmed. ***Cummings v. Cummings,*** 25 ALW (2150063), 7/22/2016, Mobile Cty., Moore; Pittman, Thomas and Donaldson concur; Thompson concurs in the result in part and dissents in part, with writing, 7 pages. [ATTY: Appt: Andrew Jones, Mobile; Apee: Thomas Nolan, Jr., Mobile]

FAMILY LAW: Child Support--Disability. In August 2013, the Alabama Department of Human Resources ("DHR") brought a contempt petition on behalf of the mother in which it sought to establish the child-support arrearage owed by the father to his child, T.R.. A trial took place on March 3, 2016 relating to the father's expected receipt of disability benefits from which he could pay sums toward his arrearage. The father had been left disabled after sustaining injuries in an accident. He had been awarded Supplemental Security Income ("SSI") benefits from the Social Security Administration. He receives $700 per month in SSI benefits and he was awarded a $2,000 lump-sum payment of retroactive SSI benefits in January 2016. He is due to receive two more lump sum payments in the future: one for

$2,000 and another for $6,000. The juvenile court entered a judgment on March 3, 2016 in which it determined that the father's child-support arrearage was $12,252.50. It ordered that the father pay $750 from the SSI benefits that he had already received, $750 after he received the second lump-sum installment and $2,523 from his third installment. The father was required to pay $100 per month from his monthly SSI payments toward the remainder of his arrearage. The order specifically states that the father must make this payment or suffer incarceration for contempt. The father appealed. **Reversed.** SSI benefits are exempted from the definition of "gross income" contained in Ala. R. Jud. Admin. 32(B)(2)(b). 42 U.S.C. §407(a) provides that Social-Security benefits are not subject to "execution, levy, attachment, garnishment, or other legal process…" In this case, the father's SSI benefits are not being directly attached or garnished. Instead, the father faces contempt if he fails to use a portion of those benefits to satisfy his child support arrearage. "Thus, we must consider whether an order compelling payment of a child-support arrearage under threat of contempt is an attempt to reach SSI benefits through 'other legal process' in violation of §407(a)." Other jurisdictions have concluded that orders requiring payment of SSI benefits under pain of contempt fall into this category. The Court concurred in this rationale. In so doing, it noted that if the father has assets other than his SSI payments, those can be used to satisfy his child support obligations. The judgment of the trial court is due to be reversed. ***J.W.J. III v. Alabama Department of Human Resources, ex rel. B.C.,*** 25 ALW (2150564), 8/19/2016, Lee Cty., Thomas; Thompson, Pittman, Moore and Donaldson concur, 11 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Support--Modification. The mother and the father were married in 2006 and two children were born during the marriage. They were divorced in 2013. Pursuant to an agreement of the parties which was incorporated into the divorce judgment, the father was ordered to pay $350 per month in child support. The father agreed to this obligation even though he claims that he was unemployed when the divorce was entered. The father obtained employment shortly thereafter but he injured his back in 2014 and has not worked since. The father filed a workers' compensation claim but it had not been adjudicated at the time of this child support modification action. In 2015, the father filed a petition seeking the suspension or modification of his child support obligation based on this inability to work. After the hearing, the trial court entered a judgment denying the father's petition based on "lack of proof." The father appealed. **Reversed.** The father claimed that the material change in circumstances that warranted the modification in this case was the difference between being unemployed and able to work and being unemployed and physically unable to work. The Court agreed. "As the judgment is written, this court is unable to determine what the trial court concluded the father failed to prove, i.e., whether he failed to prove that he is unable to work, whether he failed to prove that he does not have sufficient income from any source to pay child support…whether he failed to prove the existence of a material change in circumstances, or whether he failed to prove any other ground that would justify denying the modification petition." Thus, the case is due to be reversed and remanded to the trial court for it to consider the father's ability to pay child support and to enter a judgment accordingly. The Court also instructed the trial court to consider whether the modification should be retroactive to the date that the father filed his petition. ***Lackey v. Lackey,*** 25 ALW (2150221), 8/19/2016, Calhoun Cty., Thompson; Pittman, Thomas, Moore and Donaldson concur, 8 pages. [ATTY: Appt: Jake Matthews, Jr., Anniston; Apee: Ronald Held, Anniston]

FAMILY LAW: Division of Property--Child Support. APPEAL & ERROR: Invited Error. The trial court entered an order awarding the parties the joint legal custody of their minor child. The divorce judgment provided that "placement" of the child would be with the mother every Sunday through Friday and with the father every weekend. The father was required to pay $500 per month as child support and the parties were ordered to alternate claiming the child as his or her tax dependent. The father was awarded all interest in the parties' restaurant but he was also ordered to pay to the wife $22,000 in monthly installments. The mother appealed. **Affirmed in part; reversed in part.** (1) The mother argued that the trial court erred by awarding the father visitation with the child every weekend. However, at the trial, the mother testified that she wanted the father to exercise visitation "consistent" with what he had been exercising pendente lite, which included every weekend. A party may not predicate an argument on reversal on "invited error", that is, error into which he has led or lulled the court. Because the mother indicated during the trial that she wanted the father to have visitation in the same manner as he did pendente lite and the court awarded him that visitation, no reversible error exists. The wife claimed that she misunderstood what she was asked at court because of a language barrier. However, she failed to raise that issue at the trial court level and therefore, that argument is waived. (2) With regard to the trial court's award of child support, the father operates a restaurant formed by the parties as a closely held corporation. The father claimed that his gross monthly income was $3,850 per month. Ala. R. Jud. Admin. 32(B)(3) provides that for purposes of determining income from a closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required to produce this income. Here, the father used the business checking account to pay for his cellular telephone service, his monthly rent, his monthly bankruptcy plan payments, his gambling debts and gifts for his girlfriend. The father denied making payments from his business account for rent and his bankruptcy payments. He claimed that he used his cellular phone for business. Therefore, those expenses could be excluded from the father's gross income. However, he admitted that he did buy gifts for his girlfriend and that he had paid for gambling debts with money from the business account. Those expenditures totaled $16,862.46 and this amount should have been included in the father's income. This portion of the trial court's judgment is due to be reversed. (3) The mother challenged that portion of the trial court's order allowing the father to claim the minor child as a tax dependent in alternate years. Given the reversal of the child support award, the Court pretermitted discussion of this issue. (4) The mother argued that the trial court's property division was inequitable. The father was awarded the restaurant, which the parties stipulated was worth $25,000. However, the father was required to pay the mother $22,000 for her interest in the restaurant. No values were established as to other property awarded to the parties. "Based on the lack of that critical financial information, this court cannot conclude that the wife received an unfair portion of the marital estate…" This portion of the trial court's judgment is due to be affirmed. ***Sutchaleo v. Sutchaleo,*** 26 ALW (2150785), 1/20/2017, Calhoun Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur, 14 pages. [ATTY: Appt: Joseph Maloney, Jacksonville; Apee: Shaun Quinlan, Anniston]

FAMILY LAW: Child Support--Contempt. The parties were divorced in 2012. The divorce judgment incorporated an agreement of the parties wherein the mother was awarded sole physical custody of the parties' three minor children and the father was ordered to pay $1,191.67 in monthly child support. The father was awarded visitation every other week from Friday until the following Wednesday as well as certain holiday and summer visitation. At the time of the divorce, both parties were living in New Market. In May 2013, the mother moved to Tennessee and the father moved to Georgia. The father subsequently moved from Georgia to Auburn. Because of the difficulties in maintaining the existing visitation schedule, the parties negotiated an amended settlement agreement which provided that the husband would have visitation every other weekend and every other week during the summer. The father's child support obligation increased to $1,950 per month. The husband

executed the settlement agreement and gave it to the mother to be signed and filed but she never did so. The parties began operating under the amended settlement agreement in the summer of 2013. In 2014, the father discovered that the amended settlement agreement had never been filed. In September 2014, he filed a petition for modification. The mother filed a counterclaim for contempt for failure to pay child support. The father stopped paying child support in May 2015. He testified that, per the advice of his attorney, he believed that the amended settlement agreement was void and therefore, he was entitled to a credit for the overpayment of child support. After a trial, the court entered a judgment in February 2015 adopting the amended settlement agreement and concluding that the father had accrued a child support arrearage from May 2015 through January 2016 in the amount of $16,575. The trial court modified the father's child support obligation from the date of the judgment forward to $928.56 per month. The trial court also modified the father's visitation to include six consecutive weeks of summer visitation. After postjudgment motions were filed, the trial court entered an amended judgment providing that during the father's six-week summer visitation period, he would not be required to pay child support. The mother appealed. **Affirmed in part; reversed in part.** (1) The mother claimed that the trial court erred by not including all of the father's income in calculating his child support obligation. The father claimed that his monthly income was between $2,400 and $2895. However, his bank records indicated deposits that exceeded that amount. The father testified that he received rental income but that said income was offset by expenses. Moreover, his present wife contributed to their household expenses. "The trial court, in the present case, could have concluded that some of the father's deposits were related to the income of the father's wife and his rental income, which he also had expenses associated with." Based on the ore tenus standard, this portion of the trial court's judgment is due to be affirmed. (2) The mother next argued that the trial court erred by failing to award her interest on the child-support arrearage. "A trial court with jurisdiction over proceedings to enforce an earlier child-support judgment is without authority to waive the imposition of statutorily imposed postjudgment interest upon such payments." *T.L.D. v. C.G.*, 849 So.2d 200, 2014 (Ala. Civ. App. 2002)[ALW]. This portion of the trail court's judgment is due to be reversed. (3) Finally, the mother argued that the trial court erred by failing to hold the father in contempt for his nonpayment of child support. Both civil and criminal contempt require a showing that the offending party's conduct was "willful." "Considering that, before the entry of the judgment under review, the parties' amended settlement agreement was never ratified by the trial court and that the father testified that his attorney had advised him that he had a credit toward his child-support obligation, the trial court could have properly concluded that the father's nonpayment was not willful." The judgment of the trial court is due to be affirmed in part and reversed in part. ***Collins v. O'Neil,*** 26 ALW (2150767), 1/27/2017, Lee Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur, 12 pages. [ATTY: Appt: Thomas L. Davis, Birmingham; Apee: Jacquelyn, Tomlinson, Montgomery]

FAMILY LAW: Child Support-Modification. The parties were divorced in 2001. Pursuant to the divorce judgment, the father was required to pay $923 per month in child support. At the time of the divorce, the father's gross monthly income was $5,833 and the mother's gross monthly income was $1,213. At the time of the divorce, the father was employed by Ready Mix Concrete Company ("RMC") earning $73,000 annually. The father filed a petition to modify his child support obligation in 2013. At a hearing on his petition, the father testified that RMC went out of business and thereafter, he began his own trucking business. He sold that business and then went to work for the man who bought it from him. He eventually lost that job seven years before the hearing. He claimed that because of the economy, he was unable to find work and that his new wife and mother supported him financially. At the time of the modification hearing, the father was managing a liquor store. The liquor store is owned by a limited liability company of which the father's wife is the sole member. His wages from the liquor store in 2013 were $21,915. The parties' child was 17 years old at the time of the modification hearing.

He testified about the costs of his extracurricular activities. The trial court denied the father's petition to modify child support. The trial court's judgment contained no findings of fact. The father appealed. The Court of Civil Appeals reversed, holding that the father had established that there had been a material change in circumstances. *Cook v. Sizemore*, [Ms. 2150158, June 17, 2016] ___ So.3d ___, ___ (Ala. Civ. App. 2016)[ALW]. It remanded the case and directed the trial court to enter a judgment making clear whether it intended to impute income or whether it believed that the evidence presented warranted a deviation from the child-support guidelines. *Id.* at ___. On remand, the trial court entered a judgment finding that the father was voluntarily underemployed and it imputed income to him at the amount of his former employment. It denied his request for a modification of child support. The father appealed. **Reversed.** (1) The father argued that the trial court erred by finding him to be voluntarily underemployed and by imputing income to him. The evidence demonstrated that the father had owned his own trucking company, that he had managed 40 to 50 people and that he had made decisions "relevant to the allocation of resources." He has a four-year college degree in law enforcement. He admitted that he had not filed for unemployment nor had he submitted any resumes. "From that evidence, the trial court could have reasonably concluded that the father's work experience and skills were transferable to positions outside of the cement-trucking industry." It could also have determined that his attempts to find employment which provided income commensurate to that which he had previously earned were "wholly inadequate." The trial court did not abuse its discretion by determining that the father was voluntarily underemployed. (2) The trial court did, however, fail to apply the child-support guidelines set forth in Ala. R. Jud. Admin. 32 in determining the amount of the father's child support. The mother conceded that fact on appeal. Even if the father's income was determined to be that which he earned at the time the original divorce action was filed, the child support calculation computes to $670.29 instead of the $923 per month that he was previously ordered to pay. Accordingly, the judgment of the trial court is due to be reversed. ***Cook v. Sizemore,*** 26 ALW (2150905), 1/13/2017, Geneva Cty., Thompson; Pittman, Thomas, Moore and Donaldson concur, 13 pages. [ATTY: Appt: Bryant Williams, Ozark; Apee: Charles Reese, Daleville]

FAMILY LAW: Child Support--Division of Property. APPEAL & ERROR: Waiver. The parties were married in 2002. The wife filed a complaint in April 2014 seeking a divorce, custody of the children, child support, alimony and a division of property. The wife requested that the trial court appoint a guardian ad litem to protect the interests of the children because she contended that the husband had been inappropriately involving them in the divorce litigation. The trial court granted that request and required each party to deposit a $750 retainer for the guardian ad litem's services. After a trial, the court entered an order requiring each party to pay $7,387.50 to the guardian ad litem for her services. The parties submitted payment and the trial court entered a judgment awarding the parties the joint legal custody of their children. The wife was named as the "primary" physical custodian and the husband was ordered to pay $1,500 per child each month as child support. He was also ordered to pay $1,000 per month in periodic alimony. After postjudgment motions were filed, the trial court entered an amended judgment of divorce in which it awarded the husband all of his retirement accounts and awarded the wife $100,000 as alimony in gross. The husband appealed. **Affirmed.** (1) The husband argued that the trial court erred by appointing a guardian ad litem and by requiring him to pay a portion of her fee. However, the husband failed to develop a "meaningful argument" in support of this assertion and therefore, that issue was waived. Moreover, the husband did not argue to the trial court that it had erred by ordering him to pay a portion of the guardian ad litem's fee. "This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and the arguments considered by the trial court." *Andrews v. Merritt Oil Co.*, 612 So.2d 409, 410 (Ala. 1992){ALW]. (2) The husband next argued that the trial court erred by failing to follow the child-support guidelines set forth in Ala. R. Jud. Admin. 32. In its judgment, the trial court ordered the

husband to pay $1500 per month per child for their support. The court noted that this award was not determined by application of the child support guidelines established in Rule 32 as the husband's income exceeds the child support guidelines. The husband contended that the child support award was not supported by sufficient evidence regarding the children's needs or his ability to pay. The wife testified that the average monthly cost of running the household was $3,000-$5,000. The husband's credit card statements support a conclusion that the parties' monthly expenses averaged at least $3,000. With regard to the husband's ability to pay, the husband was a professional writer. In 2013, the parties claimed an annual income of $20,658. The wife was not employed during the marriage. The parties draft Form 1040 for 2014 showed a gross income of $155,050, an amount that included wages, dividends, capital gains and income from an S corporation. The wife also testified that when she turned 50 in April 2015, she had obtained unrestricted access to funds totaling $220,000 that had previously been held in trust through a fund created by her parents. From 2009 through 2012, the husband was paid $700,000 which he put into retirement and investment accounts. The combined balance of those accounts was $1,231,873. The husband had also borrowed $846,168 from this father. A trial court can consider the resources of the parents, not simply their income, for child support purposes. The trial court did not abuse its discretion in its award of child support. (3) Finally, the husband challenged the trial court's award of $100,000 to the wife as alimony in gross. The husband claimed that his business accounts were his separate property. However, revenue that he received from his writing endeavors was placed into those accounts during the marriage. One of his retirement accounts was created during the marriage and it had a balance of $145,333. He contributed $58,351 to an investment account during the marriage. "Thus, the trial court could have concluded that the total value of the contributions that the husband had made to his retirement and investment accounts with income that had been produced during the marriage was approximately $203,684 in February 2015." The husband contended that the marital home which was awarded to the wife had a value of $500,000. If the $220,000 that the wife received in trust funds is taken into consideration, then her estate was worth $820,000 (after receipt of the $100,000 alimony in gross award). The husband had large credit card debts during the marriage which were paid by his father. "In other words, although the husband testified that the $700,000 sum that he had earned during the parties' marriage, had 'for the most part' been used to pay the family's living expenses, the trial court could have determined that the husband's father had actually historically borne much of that financial burden, thereby allowing the husband to substantially dispose of the $700,000.00 sum in an manner that he saw fit, including in a manner from which he would reap the sole benefit after the parties were divorced." The judgment of the trial court is due to be affirmed. ***Thomson v. Shepard,*** 25 ALW (2150566), 12/9/2016, Jefferson Cty., Thomas; Thompson, Pittman and Donaldson concur; Moore concurs in part and dissents in part, with writing, 38 pages. [ATTY: Appt: William Mills, Birmingham; Apee: Stephen Arnold, Birmingham]

FAMILY LAW: Child Support. The parties were divorced in 2008. Primary physical custody of the children was awarded to the father. The parties agreed that the mother would not be required to pay child support because she only maintained part-time employment at the time of the divorce. In August 2010, the State of Alabama, on behalf of the father, filed a petition to modify the divorce judgment. That petition was assigned case number DR-07-9.02 ("the child support case"). In December 2010, the mother filed a pleading containing a petition for contempt and a request to modify visitation. The pleading was assigned case number DR-07-9.03 ("the custody-modification case"). Before the trial court held a hearing in either case, the mother filed an "Emergency Motion for an Immediate Change in Custody" in the custody-modification case. She alleged that the father had physically abused the children. The trial court consolidated the cases and received evidence at three hearings held between July 2012 and September 2013. On May 5, 2014, before the trial court had entered judgments in the two cases, the mother filed a "Renewed Ex-parte Motion for Custody." In that motion, the mother claimed

that, since the conclusion of the trial, she had received new evidence indicating that the father had committed domestic violence. There is no indication that a hearing was held on that motion. On June 4, 2014, the trial court entered judgments in both the child-support case and the custody-modification case. It denied the State's request for child support and awarded the parties the joint physical custody of the children. It did not require either party to pay child support. The father appealed both judgments. In *Walker v. Lanier*, 180 So.3d 39 (Ala. Civ. App. 2015) ("*Walker* I"), the Court of Civil Appeals reversed the trial court's judgments. In the custody-modification case, the Court held that it could not determine whether the trial court applied the correct standard set forth in *Ex parte McLendon*, 455 So.2d 863 (Ala. 1984). The child-support judgment was reversed because child support was dependent on the custody arrangement. In July 2015, the trial court awarded the father "sole physical custody" of the children. The court stated in that order that child support would be addressed by a separate order. The mother did not appeal from the custody-modification order. In November 2015, the father filed a motion in the trial court seeking entry of a judgment in the child support case. In December 2015, nine months after *Walker I* was released, the father filed a petition for writ of mandamus seeking an order from the appellate court directing the trial court to enter a judgment in the child support case. The Court of Civil Appeals granted mandamus relief. *Ex parte Walker*, [Ms. 2150270, February 12, 2016] __ So.3d ___, ___ (Ala. Civ. App. 2016)("*Walker II*")[ALW]. On February 29, 2016, the trial court entered a judgment in the child support case and the mother was required to pay $507 per month in child support. The trial court did not grant the father's request for retroactive support. He appealed. **Reversed.** (1) The trial court has discretion as to whether to make a child support obligation retroactive to the date the petition to modify was filed. In this case, the trial court stated that it was denying the father's request to make child support retroactive because the parties had stipulated that the mother would not have to pay child support until she obtained full time employment. However, the evidence was undisputed that the mother had been employed full time since before the divorce judgment was entered. Because the trial court's rationale was faulty, the Court reversed its judgment. It noted, however, that it was not making the determination that the child support be retroactively applied. Rather, it was requesting the court to reconsider its ruling. (2) The father also challenged the amount of child support awarded to him. The record contains several "Child Support Guidelines" forms (Form CS-42) that were submitted by the parties but the court never completed one. It was impossible to determine from the record how the court arrived at the amount of $507 per month. Accordingly, the judgment is reversed. ***Walker v. Lanier,*** 25 ALW (2150542), 9/30/2016, Lauderdale Cty., Thompson; Pittman, Thomas, Moore and Donaldson concur, 12 pages. [ATTY: Appt: Dinah Rhodes, Huntsville; Apee: Jenny Behel Thigpen, Florence]

FAMILY LAW: Child Support--Division of Property. The parties were married in 2007. They had two children during the marriage. The wife filed a complaint for divorce in 2015 and in October 2015, the trial court awarded pendente lite custody of the children to the wife. It did not, however, award the wife pendente lite child support. The husband was formerly employed as a police officer and then went to nursing school. The wife worked, earning approximately $20,000 per year and she paid the parties' living expenses while the husband attended nursing school. In January 2011, the husband completed nursing school. The husband worked at a local hospital until April 2013 when he started working as a traveling nurse and went to California. For a short period of time, the husband was unemployed during that job transition and the wife testified that she paid the parties' expenses, including the husband's child support obligation from a prior marriage. The husband worked in California for 13 weeks and then he returned and worked in Mobile. The wife and children moved out of the marital residence in June 2015 and lived with her parents. The wife claimed that the husband only provided her with $60 for support of the children after the parties separated. The husband did not appear to dispute that testimony. The marital residence was purchased in 2012 for $134,000. The husband made the mortgage payments. When the parties separated, they agreed to take out a home-equity loan. The net proceeds from that loan

were approximately $21,000. The parties intended to use that money for improvements to the home and plastic surgery for the wife. Instead, it was placed in the wife's attorney's trust account. The wife testified that the house was worth $180,000; the husband testified that it was worth $160,000 to $170,000. The house was encumbered with $157,000 worth of debt. In the divorce judgment, the wife was awarded "primary physical custody" of the children and the husband was required to pay $759.78 per month in child support. The parties were ordered to split the proceeds from the home equity loan. The husband was awarded the marital residence but the court ordered him to refinance it. After her postjudgment motion was denied, the wife appealed. **Affirmed in part; reversed in part.** (1) The wife challenged the trial court's award of the marital residence to the husband. The wife's own testimony established that the house had no more than $23,000 in equity. Based on the husband's valuation, the marital residence had only $3,000 in equity. Comments made by the trial court during the postjudgment motion hearing suggest that there was almost no equity in the marital residence. Accordingly, the trial court's disposition of same was not plainly and palpably wrong. (2) The wife also asserted that the trial court erred by failing to make the husband's child support obligation retroactive. The Court cited several cases in which it has held that parental support is a fundamental right of all children and the failure to require a noncustodial parent to pay child support while a divorce action is pending or to make a child support obligation retroactive is reversible error. See *Pate v. Guy*, 942 So.2d 380 (Ala. Civ. App. 2005)[ALW]. Accordingly, the trial court's failure to award retroactive child support in this case is due to be reversed. ***Yokley v. Yokley,*** 26 ALW (2150814), 3/3/2017, Mobile Cty., Pittman; Thompson, Thomas, Moore and Donaldson concur, 18 pages. [ATTY: Appt: C. David Boone, Mobile; Apee: no brief filed]

IV. CHILD CUSTODY/VISITATION

FAMILY LAW: Child Custody. The parties were divorced in April 2015. The mother appealed the award of sole physical custody of the parties' daughter to the father. **Affirmed.** The mother argued that the trial court erred by refusing to continue the week on/week off custody arrangement that the parties had been operating under while the case was pending. A trial court is not bound by a pendente lite custody arrangement, which is temporary in nature and which was not based on the evidence fully presented at trial. *See Ex parte Bland*, 796 So.2d 340, 343-44 (Ala. 2000)[9 ALW 25-6]. In this case, the parties live in different cities and the child has to attend two different day care facilities. Evidence was adduced that the child experienced problems with the pendente lite custody arrangement. Accordingly, the trial court did not exceed its discretion in declining to award the parties joint physical custody. The judgment of the trial court is due to be affirmed. ***Anderson v. Anderson,*** 24 ALW 50-6 (2140629), 12/4/15, Elmore Cty., Moore; Thompson, Pittman, Thomas, and Donaldson concur, 6 pages. [ATTY: Appt: Jacqueline Austin, Wetumpka; Apee: Keith Howard, Wetumpka]

FAMILY LAW: Child Custody. In 2014, the father filed a petition to modify custody, visitation, and child support. After a trial, the court granted the father sole physical custody of the child. The mother appealed. **Affirmed.** The mother argued that the father failed to meet the burden of proof set forth in *Ex parte McLendon*, 455 So.2d 863 (Ala. 1984). In this case, evidence was adduced that the mother and her boyfriend were under the influence of drugs in the presence of the child on several occasions, that the mother had neglected to give the child her prescribed medications to the detriment of the child's health, and that the mother's boyfriend had spanked the child to the point of causing bruises. The mother admitted that the father is a great father. Based on this evidence, the judgment of the trial court is due to

be affirmed. ***A.O. v. E.L.K.,*** 24 ALW 50-9 (2140635), 12/4/15, Montgomery Cty., Moore; Thompson, Pittman, Thomas, and Donaldson concur, 5 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody--Modification. The parties were divorced in 2011. Pursuant to the divorce judgment, the mother was vested with sole physical custody of Ch.C., who was 12 years old, and C.C., who was 5 years old. Shortly after the divorce was entered, the mother began cohabitating with her paramour. In August 2012, the father filed a petition seeking modification of custody. He alleged that the children had told him that they had been physically abused by the mother and her paramour and that the mother's paramour had sexually abused them. After an emergency hearing, the trial court transferred physical custody to the father. The mother filed an answer, counterclaim and petition for contempt. She alleged that her automobile had been repossessed due to the father's failure to make the required payments, that the father had failed to provide proof that he had named the children as his beneficiaries on his life-insurance policy, and that the father had refused to provide the mother with the address where he exercised visitation with the children. While the case was pending, the mother filed a motion for contempt alleging that the father had failed to allow her to exercise Thanksgiving visitation with C.C. At the final hearing, both children testified. Their testimony was taken under seal and is not part of the record. The parties lived in different school districts. Ch.C. remained in the mother's school district because she was involved in extracurricular activities. C.C. had been moved to an elementary school in the father's school district. The father found inappropriate text messages on Ch.C.'s telephone but the mother did not support his efforts to discipline Ch.C. as a result. Ch.C. testified that the father had told her and her sister to lie about various things. She wanted to live with the mother. C.C. testified that she wanted to live with the father. She told her counselor that if she had to live with the mother that she would either kill herself or run away. The mother testified that the alleged molester had moved out of her house and that she had not had any physical contact with him although she had exchanged text messages with him. At the conclusion of the hearing, the court announced that Ch.C. would be permitted to live with the mother. It recessed the trial to allow C.C. to undergo a psychological evaluation. A year later, the court entered a final judgment vesting custody of C.C. with the father and physical custody of Ch.C. with the mother. The contempt claims were ultimately resolved. The mother appealed. **Reversed.** Because the mother had previously been granted custody, the father was required to meet the standard set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). The fact that he had exercised temporary custody of the children for over two years prior to a final judgment being entered did not negate this burden. *McCulloch v. Campbell,* 60 So.3d 909, 916 (Ala. Civ. App. 2010)[ALW]. The mother asserted that because the father's petition to modify rested primarily on the children's alleged abuse by her paramour and because the mother no longer lived with the paramour, there were no changed circumstances to warrant a modification. Although evidence was presented indicating that no criminal action was taken against the paramour and that a DHR investigation did not reveal any wrongdoing on the part of the paramour, C.C. testified that she did not feel safe in the mother's house and she told her counselor that she would run away or commit suicide if she had to live with the mother. However, it is unclear as to what standard the court employed in this case in making its custody determination. Therefore, the judgment of the trial court is due to be reversed and the case remanded for the trial court to apply the *McLendon* standard to the evidence received and to enter an appropriate judgment. ***Cochran v. Cochran,*** 25 ALW (2140721; 2140722), 4/29/2016, Mobile Cty., Donaldson; Thompson, Pittman and Thomas concur; Moore concurs in the result, without writing, 24 pages. [ATTY: Scott Hunter, Fairhope; Apee: Michael Murphy, Mobile]

FAMILY LAW: Child Custody. CIVIL PROCEDURE: Judgment on Partial Findings. APPEAL & ERROR: Attorney Fees. The parties were divorced in 2009. Pursuant to the divorce judgment, the parties were awarded joint legal and joint physical custody of their minor child. In June 2014, the mother notified that father that she intended to relocate with her new husband to Vicksburg, Mississippi. The father filed an objection to the proposed relocation and a petition to modify custody. The mother filed a counterclaim in which she also sought custody. The parties resolved that case and pursuant to that agreement, the mother was awarded primary physical custody of the child. The agreement further specified that the mother and the child were permitted to relocate to Vicksburg. The order was entered on October 6, 2014. On December 4, 2014, the father filed a petition to modify custody. A hearing on that petition was held on February 11, 2015. The only witness called to testify was the parties' 9-year old child . After the father rested his case, the mother moved for a "judgment as a matter of law," arguing that the father failed to meet the requirements of *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). The trial court denied that motion. Six months later, the trial court granted custody to the father. The mother appealed. **Reversed.** (1) The mother argued that the trial court erred by failing to grant her "judgment as a matter of law." Because this was a non-jury case, said motion is properly referred to as a motion for a "judgment on partial findings." Ala. R. Civ. P. 52(c). In reviewing the denial of this motion, the Court must consider the evidence that was before the trial court at the time that the motion was made. Here, the child testified that she liked her school in Alabama, that she had difficulty making friends at her new school in Mississippi and that she missed her extended family in Alabama. She acknowledged that she wanted to live with her father. However, the child also testified that she was doing well in school, that she was active in her church and that she is taking gymnastics. She was exercising regular visitation with the father. Although a child's desire with regard to a custody modification is a factor that may be considered by the trial court, the child's wishes, standing alone, may not be determinative of a custody decision. *Glover v. Singleton,* 598 So.2d 995, 996 (Ala. Civ. App. 1992). In this case, the father did not present sufficient evidence to demonstrate a material change in circumstances. Further, he failed to show that the child's best interests would be materially promoted by a change in custody. Accordingly, the trial court erred by denying the mother's Rule 52(c) motion and its judgment is due to be reversed. (2) The Court denied the mother's request for an attorney fee on appeal because she failed to file an itemized statement which is required pursuant to the Informational Filing Notice that was sent to her by the clerk. (3) Judge Thompson authored a special concurrence in this case wherein he noted that a child should not be called upon to express a preference as to which parent he or she wants to live with and urged trial courts to "exercise its parens patriae role in protecting the child from the stresses of believing that he or she might influence the outcome of a custodial dispute between his or her parents and to consider whether the child is sufficiently mature to testify and whether allowing the child to testify serves the child's best interests." ***Reeves v. Fancher****,* 25 ALW (2140925), 5/20/2016, Dallas Cty., Per curiam; Pittman, Thomas and Donaldson concur; Thompson concurs specially; Moore concurs in the result, without writing, 21 pages. [ATTY: Appt: Tina Moon, Prattville; Apee: Rickman Williams, Selma]

FAMILY LAW: Child Custody--Modification. The parties were divorced in 2010. They were awarded joint legal and joint physical custody of their minor child. In 2012, the parties modified the divorce judgment by agreement and the father was awarded sole physical custody of the child and the mother was ordered to pay $700 per month in child support. In 2013, the mother filed a petition to modify her child support obligation alleging that her income had decreased because she had surrendered

her pharmacy license. The father filed an answer and counterclaim for contempt. He later filed a request that the mother's visitation be supervised. The mother filed an amended petition seeking a modification of custody. After a pendente lite hearing, the trial court ordered that the child spend seven days with one parent and seven days with the other. The written order containing this ruling was entered on November 18, 2014. After a final hearing, the court entered an order on August 12, 2015 making final its previous pendente lite award of joint custody of the nine-year-old child to the parties. The father appealed. **Reversed.** At trial, evidence was adduced that the mother had surrendered her pharmacy license after testing positive for alcohol and prescription drugs for which she did not have a prescription. She is remarried and her husband has two children from a prior marriage. He travels to Miami for ten days each month when he exercises custody of those children. The mother admitted that she and her husband were "swingers" prior to the pendente lite hearing but claimed that they had since ceased that activity. The mother had been in rehabilitation in 2007 because she was taking prescription opiates that she had stolen from a pharmacy where she was employed. In 2013, the State Board of Pharmacy ordered the mother to undergo a 12-week program and a 6-month stay at a halfway house but she chose not to complete the program. Instead, she surrendered her license. The mother admitted that she continued to drink alcohol "occasionally" and sometimes did so in the presence of the minor child. The child's guardian ad litem went to the mother's home for a random visit and found the mother drinking a glass of wine. Both the mother and the father testified about communication problems between them. Conflict existed between the mother and the father's new wife. Because the father had sole physical custody, the mother was required to meet the burden set forth in *Ex parte McLendon*, 455 So.2d 863 (Ala. 1984). As a result, the mother had to show that material changes that affect the child's welfare had occurred since the last modification order and that the benefits of a change in custody would outweigh the inherently disruptive effect of such a change. The mother admitted that the child was doing well in school and had no behavioral problems. She did not identify any areas in which she contended that the father was not properly caring for the child. Rather, she argued that she had improved her own situation by no longer abusing prescription medications. "Although we applaud the mother for the improvements in her circumstances, those improvements are not sufficient to warrant a change in custody under the *McLendon* standard." The judgment of the trial court is due to be reversed. In a special concurrence, Judge Donaldson noted that while there is no requirement that a trial court enunciate its reasons for making a change in custody it is helpful for appellate review and should be articulated by the trial court in the order modifying physical custody. ***J.K.M. v. T.L.M.,*** 25 ALW (2150067), 6/10/2016, Lee Cty., Thompson; Pittman, Thomas and Moore concur; Donaldson concurs specially, 21 pages. [ATTY: Not listed-confidential]

FAMILY LAW: Child Custody-Modification. APPEAL & ERROR: Timeliness. In December 2015, the mother filed a petition seeking to modify custody of her two minor children. Approximately five years earlier, the mother had agreed to transfer custody of the children to the children's maternal grandmother. In 2014, the Madison Circuit Court ("the trial court") had presided over a modification action that resulted in the maternal grandmother maintaining custody of the children. On June 1, 2016, the trial court entered a judgment awarding custody of the children to the mother. On June 13, 2016, the trial court entered an order requiring the maternal grandmother to coordinate a transfer of custody of the children within seven days of its order and it provided that the maternal grandmother would be held in contempt if she failed to comply with that order. The maternal grandmother appealed on June 20, 2016. On June 27, 2016, the maternal grandmother filed an emergency motion in which she stated that after custody of the children had been transferred to the mother, the mother had been arrested for felony possession of a controlled substance. After a hearing, the trial court entered an order on August 14, 2016 in which it found that the maternal grandmother had willfully failed to comply with its earlier

order and it ordered the maternal grandmother to pay the mother $300 to reimburse the mother for the costs of traveling to the maternal grandmother's house to transfer custody. . **Dismissed in part; reversed.** (1) The maternal grandmother challenged the August 14, 2016 order. However, the maternal grandmother did not appeal from that order and therefore, the Court of Civil Appeals did not have jurisdiction to consider any argument pertaining thereto. Any part of the appeal regarding the August 14, 2016 order is due to be dismissed. (2) The maternal grandmother also argued that the trial court utilized the incorrect custody-modification standard. In a custody dispute between a parent and a non-parent, the parent has a prima facie right to custody over the nonparent. *Ex parte Terry,* 494 So.2d 628 (Ala. 1986). However, this presumption does not apply when a parent voluntarily forfeits his or right to custody to a nonparent. *Ex parte G.C.,* 924 So.2d 651, 656 (Ala. 2005)[ALW]. When a parent has voluntarily relinquished custody to a nonparent, the parent must meet the custody standard set forth in *Ex parte McLendon,* 455 So.2d 863 (Ala. 1984). In this case, the trial court did not set forth the standard it applied in reaching its custody decision. However, during a hearing on the maternal grandmother's postjudgment motion, the trial court stated that it had determined that the change in custody would serve the children's best interests. "It is clear from the evidence that the mother had relinquished custody of the children to the maternal grandmother. Accordingly, in order to regain custody of the children, she was required to meet the *McLendon* standard. The trial court erred in modifying custody based on 'the best interests of the child' standard.'" Accordingly, the judgment of the trial court is due to be reversed. ***Wynn v. Steger,*** 25 ALW (2150789), 10/28/2016, Madison Cty., Thompson; Pittman and Donaldson concur; Thomas and Moore concur in the result, without writings, 9 pages. [ATTY: Appt: Marcus Helstowski, Huntsville; Apee: Pro se]

FAMILY LAW: Child Custody--Child Support. The parties were married in 2012. The mother filed a divorce action and in December 2015, the trial court entered a pendente lite order which set forth the father's "periods of physical custody" of the parties' child and ordered him to pay $400 per month as child support. After a trial, the court entered an order awardind the parties joint legal and physical custody of the child and requiring the father to pay $458 per month as child support. The mother appealed. **Affirmed in part; reversed in part.** (1) The mother challenged the trial court's award of joint physical custody. Pursuant to Ala. Code 1975, §30-3-152, various factors are to be considered by a court when faced with a decision as to whether joint custody is appropriate. At trial, the mother testified that she was living with her mother and stepfather and that she had been the child's primary caretaker. The mother claimed that after the pendente lite order was entered and the child began spending time with each party separately, that the child's behavior had deteriorated and that it had been "really hard on him." The father called the mother "dumb-dumb" and "ignorant" while in the child's presence. He had viewed pornography during the marriage. The mother claimed that the parties lacked the ability to cooperate with one another. She admitted that the father is a good father to the child, that he loves the child and that he takes good care of the child when he is with him. The father acknowledged making mistakes during the marriage and testified that he had become more involved in the child's care after the divorce action was filed than he had been during the marriage. "Because we are 'charged only with determining whether the evidence was sufficient to support the trial court's judgment' and not with determining whether there was a sufficient basis for a different judgment than that entered by the trial court, we conclude that the trial court acted within its discretion in awarding joint legal and physical custody of the child and that its judgment was not plainly and palpably wrong such that it warrants reversal." (2) The mother also challenged the trial court's calculation of child support. A CS-42 prepared by the trial court indicated that the father's child support obligation should be $713.34 per month; he was ordered to pay $458. The trial court did not set forth any reason for a deviation. Accordingly, this portion of the trial court's judgment is due to be reversed. ***Hyche v. Hyche,*** 25 ALW

(2150774), 12/2/2016, Walker Cty., Thomas; Thompson, Pittman, Moore and Donaldson concur, 19 pages. [ATTY: Appt: James Beaird, Jasper; Apee: Jonathan Hood, Jasper]

FAMILY LAW: Visitation. In May 2014, the mother filed a petition to establish paternity for a son and daughter who were born out of wedlock in 2007 and 2009 respectively ("the children"). She included a claim for custody, visitation and child support. The mother also has an older daughter from a prior relationship ("the mother's daughter"). The father stipulated to paternity and he was adjudicated to be the biological father of the children. After a hearing, the trial court entered a judgment awarding the mother sole physical and sole legal custody of the children. The trial court awarded the father visitation pursuant to the court's standard schedule but provided that the mother could refuse the father's visitation if she believes that he is under the influence of drugs or alcohol or if he is placing the children in an unsafe environment or a place of danger ("the refusal provision"). The father appealed the refusal provision of the trial court's judgment. **Affirmed.** At trial, the mother testified that she and the father had lived together from 2007 until 2013. Before they began living together, the father had been convicted of selling cocaine. While in the father's care, the parties' son was burned and injured his arm. Several instances of domestic violence had taken place between the mother and father. A private investigator testified that he has smelled marijuana in the father's apartment when he served him with the mother's petition in May 2014. The father testified that when he found out that the mother's daughter was not his child, he reacted by drinking heavily. "In light of the evidence presented, we cannot conclude that the trial court's determination in that regard was unreasonable." The father argued that the refusal provision could allow the mother to unjustifiably withhold his visitation if she is "mistaken or vindictive." However, the mother testified that she wanted the father to have regular visitation and no evidence was presented that she would vindictively withhold visitation from him. "Therefore, the father's concerns in that regard are speculative in nature, and the trial court would be the proper forum to address such concerns if and when they come to fruition." Judge Moore dissented, holding that the trial court impermissibly awarded the father visitation subject to the discretion of the mother based on vague and subjective discretionary standards. ***Watkins v. Lee,*** 26 ALW (2150748), 1/6/2017, Morgan Cty., Per curiam; Thompson, Pittman and Donaldson concur; Thomas concurs specially; Moore dissents, 26 pages. [ATTY: Appt: Buddie Brown Jr., Decatur; Apee: Julia Roth, Decatur]

FAMILY LAW: Custody--Dependency. The child was born in 2006. In 2009, the Marshall County Department of Human Resources (“DHR”) removed the child from the custody of the mother. The father returned from Florida where he had been living and secured supervised visitation with the child in the fall of 2010. Late in 2010, the father was granted unsupervised visitation and had a total of five visits. In January 2011, after returning from a visit with the father, the child complained to the foster father that the father had “hurt her butt.” The father was later charged with sexual abuse, but those charges were dropped after he successfully submitted to a polygraph examination. In 2014, the father filed a petition seeking custody of the child. After an initial hearing, the father was granted supervised visitation. After another hearing in January 2105, physical custody was to be placed with the father in June 2015. Prior to that date, DHR moved for an evidentiary hearing, alleging that the child was not prepared to transition to the home of the father. In July 2015, the juvenile court entered an order stating that physical custody of the child would be returned to the father no later than July 27, 2015, and ordering continued counseling. DHR appealed that order to the Court of Civil Appeals. The Court agreed with DHR that the record lacked evidence that the child’s best interest would be served by placing her in the custody of the father without further transitioning. On remand, the juvenile court entered an order that included increasingly longer periods of visitation. In May 2016, DHR filed a motion for an emergency order to cease visitation. The motion alleged that for the second time, the child had injured herself in an attempt to avoid visitation with the father, and that she continued to assert that

the father had sexually abused her when she was younger. The motion was supported by a report from Lois Petrella, a psychologist, which concluded that the transition from foster care to the father's custody would be detrimental to the child's health and safety. The juvenile court denied the motion and denied a motion DHR had filed to stay impending visitation. DHR again sought relief in the Court of Civil Appeals but that Court held that because it had earlier affirmed the award of custody of the child to the father, that award was now the law of the case. While that mandamus petition was pending, DHR filed a motion in the juvenile court to set aside the custody order, alleging there had been a material change in circumstances. The Court of Civil Appeals denied DHR's petition for a writ of mandamus and DHR petitioned the Supreme Court for a writ of mandamus. **Writ of mandamus issued.** The Court first noted that the Court of Civil Appeals erred as to its conclusion that the juvenile court was not free to alter the custody determination upon motion of a party and that DHR had to file a new action in order to present evidence that arose after the original order. The Court explained that unlike many types of cases, dependency proceedings often involve a series of appealable dispositional custody orders. *S.P. v. E.T.*, 957 So. 2d 1127 (Ala. Civ. App. 2005)[ALW]. The Court then found that the materials before it raised a substantial question as to whether the father could communicate with and control the child in a manner sufficient to ensure her safety upon the transfer of custody to him. It also noted that no evidentiary hearing was conducted on the matters raised in DHR's emergency motion. Given the allegations made by DHR and the contents of the report by Petrella, the Court held that the juvenile court could not conclude that the concerns raised by DHR and Petrella could be ignored as a matter of law. The Court stated that the juvenile court should have scheduled a hearing so that it could properly evaluate any evidence DHR might have presented as to the alleged change in the child's circumstances after the entry of the prior order. The juvenile court's order transferring legal and physical custody of the child to the father was vacated. ***Ex parte Marshall County Department of Human Resources (In re: Marshall County Department of Human Resources v. J.V.),*** 26 ALW (1151039); 3/31/2017, Marshall Cty., Murdock; Stuart, Bolin, Parker, Shaw, Main, Wise and Bryan concur, 28 pages. [Atty. not listed-confidential]

V. CIVIL PROCEDURE/EVIDENCE

EVIDENCE: Psychotherapist-Patient Privilege. FAMILY LAW: Child Custody. Dr. Barbara Johnson, a clinical psychologist, petitioned this court for a writ of mandamus directing the trial court to vacate an order denying Johnson's motion to quash a subpoena calling for Johnson to produce records regarding her treatment of T.C., a minor child. The former wife and former husband were divorced five years ago. In October 2015, the former wife filed a mandamus petition requesting a modification of custody. The former husband issued a third-party subpoena to Johnson directing her to provide copies of records relating to her treatment of the child. Johnson filed a motion to quash the subpoena, based on the psychotherapist-patient privilege. The trial court denied that motion. **Writ of mandamus granted.** The psychotherapist-patient privilege can be found at Ala. Code 1975, §34-26-2. It is also recognized by the Alabama Rules of Evidence. Ala.R.Evid. 503. Johnson contends that the child in this case has not waived the privilege and therefore, she is not required to produce the requested records. Ala.R.Evid. 503(d)(5) provides an exception to the psychotherapist-patient privilege for "relevant communications offered in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure." A child is not considered to be a party to a custody-modification action. *Jones v. McCoy,* 150 So.3d 1074, 1081 (Ala. Civ. App. 2013)[ALW]. The Advisory Committee's Notes also suggests that the exception is intended to apply when the mental state of the person seeking custody, not the mental state of the child who is the subject of the custody dispute, is at issue. "In noting that the rationale for the exception is based on the idea that the person seeking

custody has placed his or her own mental state at issue, the Advisory Committee's Notes also tend to refute any suggestion that the child's records should be disclosed because they may be relevant to the mental state of the former wife or the former husband, i.e., the parties to the custody action." The trial court erred by denying Johnson's motion to quash and the writ of mandamus is due to be granted. ***Ex parte Johnson (V.C.R. v. B.C.),*** 25 ALW (2150835), 9/9/2016, Shelby Cty., Pittman; Thompson, Thomas, Moore and Donaldson concur, 6 pages. [ATTY: Pet: James Pino, Pelham; Resp: Ramona Morrison, Columbiana]

FAMILY LAW: Pendente Lite Order--Child Support--Alimony . APPEAL & ERROR: Interlocutory Appeal--Final Judgment. The Court's opinion issued on January 20, 2017 is withdrawn and the following is substituted therefor. The parties were married for over 20 years. They had two children. During the marriage, the husband played for the NBA for 11 years and earned $40 million. The wife does not have a college degree and never worked during the marriage. Evidence was presented that the husband had committed adultery. In her verified complaint, the wife requested that the trial court enter an ex parte temporary restraining order awarding her custody of the children, $6,000 per month child support and $10,000 per month in alimony. The trial court entered a pendente lite order granting that requested relief. The husband failed to pay any pendente lite alimony or child support. The husband spent over $1 million during the parties' separation and the wife testified that she had heard that the husband had secret accounts that she was not able to locate. At the time of trial, the parties had a Prudential Annuities Service Account valued at $2.2 million and a Polaris Platinum II Awards Annuity with an estimated value of $91,000. Both of these accounts were awarded to the wife. The wife was awarded sole physical and legal custody of the children and the husband was required to pay $2,500 in child support. He was also ordered to pay $1,000 per month in alimony. The court held that the husband was $320,000 in arrears for pendente lite child and spousal support but held that it was going to "defer" on the payment of that arrearage contingent upon "the manner in which the parties comply with all of the other provisions in this order." The husband appealed. **Reversed.** (1) The husband argued that the judgment was not final because the trial court declined to provide for the manner of the payment of the arrearage. The Court rejected this argument, noting that the trial court had clearly established the amount of the arrearage. "That judgment may be collected by 'any…process for collection of the judgment, such as garnishment.' " *State ex rel. Walker v. Walker,* 58 So. 3d 823, 827-28 (Ala. Civ. App. 2010)[ALW]. Therefore, the Court determined that the judgment was final. (2) The husband challenged the validity of the pendente lite order and as a result, argued that the judgment based on the support arrearage was due to be set aside. Ordinarily, a party may not raise issues pertaining to the propriety of a pendente lite support order in the appeal of a final divorce judgment. *Morgan v. Morgan,* 183 So.3d 945, 966 (Ala. Civ. App. 2014)[ALW]. The proper vehicle for appellate review of a pendente lite order is a petition for writ of mandamus. In this case, however, the husband argued that the pendente lite order was void mand could be attacked "at any time." In resolving this issue, the Court pointed to *Nichols v. Nichols,* 46 Ala. App. 67, 238 So.2d 186 (Ala. Civ. App. 1970). In that case, the husband in a divorce action was ordered to pay $150 per month in pendente lite child support and alimony. No evidence was taken before the order was entered. In its final judgment, the court found the husband to be in contempt of the pendente lite order and it awarded the wife an arrearage of $2,250. The husband appealed. The Court held that it could review the entry of the pendente lite order because the trial court included the judgment of pendente lite alimony and child support in its final order. It then determined that the pendente lite order, the contempt citation and the final judgment were all entered without due process and it reversed the judgment. In *Ex parte Williams,* 474 Sp/2d 707 (Ala. 1985), the father obtained an ex parte restraining order preventing the mother from taking the child out of Alabama and awarding temporary custody of the child to the father during the pendency of the case. The mother removed the child to Georgia and the trial court found her to be in contempt of court. It

vested custody of the child with the father and denied the mother all visitation rights. The Supreme Court held that the mother could not be deprived of custody without due process. It further held that the trial court had violated Rule 65(b) by awarding ex parte relief in the absence of a verification by the father that there was a clear threat of irreparable and immediate injury. The Court reversed not only the restraining order but the final judgment modifying custody and denying the mother visitation rights. In this case, the final judgment awarding the mother $320,000 is based on the September 2013 ex parte pendente lite order. The father's appeal parallels the situations presented in *Ex parte Williams* and *Nichols.* The Court cautioned that these opinions should be interpreted narrowly. However, "the validity of an ex parte pendente lite order may be reviewed on appeal when a trial court enforces the order in its final judgment." Here, the husband argued that the wife did not allege in her complaint that immediate or irreparable injury warranting ex parte relief existed and her attorney did not certify in writing any efforts made to give notice to the husband of the emergency relief requested. Moreover, the husband maintained that the trial court violated Rule 65(b) by failing to endorse the pendente lite order with the date and hour of issuance and by failing to set the matter for hearing as soon as practicable. In this case, the wife requested immediate ex parte relief from the trial court in order to obtain pendente lite alimony and child support. Such an "unusual request" must comply with Rule 65(b). The wife filed her complaint approximately nine months after the parties' separated. The wife verified that she needed financial support from the husband but she did not alleged facts sufficient to justify a conclusion that she or the children were in danger of immediate and irreparable injury if they did not receive the support without first giving the husband an opportunity to be heard in opposition. As the husband correctly noted, the wife's attorney did not certify in writing the efforts taken to notify the husband of the claim for expedited ex parte relief or explain the reasons why such notice should be excused. Based on these deficiencies, the husband was denied due process. "Accordingly, we hold that the September 2013 ex parte pendente lite order is void and that the trial court could not have enforced that order." That portion of the divorce judgment awarding the wife $320,000 in past due child support and alimony is due to be reversed. (3) With regard to the amount of child support ordered, no evidence was presented regarding the parties' incomes or the needs of the children. The parties lived off of their investments but there was no evidence regarding the amount of that income. Accordingly, this portion of the trial court's judgment is due to be reversed and the case remanded for the trial court to take additional evidence and to enter a child support order in compliance with Rule 32. The Court noted that the court has the discretion to make the child support award retroactive to the date the complaint for divorce was filed. (4) Finally, the husband argued that the trial court erred by awarding alimony without receiving evidence that the wife needed alimony. The Court agreed. "Without any evidence indicating that the wife will be unable to meet her needs absent an award of alimony, we conclude that the trial court exceeded its discretion in awarding periodic alimony." Moreover, because the award of alimony and the division of property are interrelated, the Court also reversed the property division. ***Person v. Person,*** 26 ALW (2150225), 4/7/2017, Crenshaw Cty., Moore; Pittman, Thomas and Donaldson concur, Thompson concurs in the result, without writing, 32 pages. [ATTY: Appt: Charles Dunn, Birmingham; Apee: Wiliam King, Luverne]

ESTATES & TRUSTS: Administration. CIVIL PROCEDURE: Recusal. As discussed in *Ex parte Adams*, 168 So. 3d 40 (Ala. 2014) [ALW] (Adams I"), Clifford Cleveland ("Cleveland") died in March 2014. His will named Louis Colley and Raymond Adams as coexecutors. The primary beneficiaries of the will were Cleveland's children, Chip and Minor. Colley resigned as executor and Chip moved the circuit court to substitute him in Colley's place. The circuit court did so. Adams objected, arguing that under Alabama law, the sole remaining executor takes full authority to act for the estate and there was no authority for appointing another co-executor. The court noted Adams' objection, but took no further

action. Adams petitioned for a writ of mandamus. In *Adams I*, the Court noted that because Adams filed his petition before the trial court actually refused to remove Chip as coexecutor, it declined to grant mandamus relief at that time. After remand, Adams filed a motion that the trial court rule on several pending motions and moved that the trial judge recuse himself. The trial court ordered Chip's removal as coexecutor and set an evidentiary hearing. After a hearing, the court denied the motion to recuse, held that Chip and Minor held no property of the estate, but granted Adams the opportunity to inspect, denied Adams' motion for sanctions against Chip and Minor, noted that Chip's motion to prohibit Adams from hiring a CPA and attorney was moot because the court had granted it, but Adams had hired such professionals anyway, and denied Chip's motion for damages for Adams' alleged breach of fiduciary duty. Chip subsequently filed a motion for a preliminary injunction preventing Adams from selling the estate's ownership interest in River Plantation, LLC ("RPL"). The trial court granted the injunction pending the determination of the estate's solvency. Adams filed a petition for a writ of mandamus relating to the trial court's rulings after the evidentiary hearing (No. 1140732), and appealed the trial court's entry of the preliminary injunction (No. 1141293). **No. 1140732, Writ of mandamus denied; No. 1141293, Reversed.** The Court noted that the trial court's order appeared to have granted Adams sufficient access to the estate property at issue and noted that the request to hire professionals was moot in light of the fact that Adams had already done so. As such, the relief requested as to those two issues was denied as moot. As to Adams' argument that he was entitled to have sanctions imposed against Chip and Minor, the Court stated he had an adequate remedy by means of direct appeal. As to the issue of recusal, the Court noted that Adams' allegations of bias on the part of the trial judge stemmed largely from the trial court's alleged failure to rule on Adams' motions. "As reflected in the trial court's June 2015 order, however, those motions have now largely been disposed – and not all adversely to Adams." Moreover, the Court pointed out that a mere failure to rule on pending matters was easily distinguishable from the severe actions found in the cases that Adams relied on. The Court did acknowledge there was evidence suggesting the trial court's possible exasperation with or antagonism toward Adams and/or his counsel. There was no evidence, however, that this hostility or bias arose from a personal source. A judicial bias will not disqualify a trial judge from hearing a case. See *Whisenhant v. State*, 555 So. 2d 219 (Ala. Crim. App. 1988). The Court noted that the trial judge's alleged incidents of unprofessional behavior remained troubling, it appeared that the trial judge, to some extent had heeded its prior admonitions in *Adams I*. As such, the Court held that Adams failed to demonstrate a clear legal right to an order requiring the trial judge to recuse himself. The Court then addressed the preliminary injunction issued by the trial court. Pursuant to Rule 65, Ala. R. Civ. P., it is mandatory that a preliminary injunction order give reasons for the issuance of the injunction, that it be specific in its terms, and that it describe in reasonable detail the act or acts sought to be restrained. *Stephens v. Colley*, 160 So. 3d 278 (Ala. 2014)[ALW]. Here, the Court found the order sufficiently specific as to the enjoined conduct, but that it did not contain the requisite explanation for the issuance of the injunction. See Rule 65(d)(2), Ala. R. Civ. P. The given explanation: "pending a determination of the Estate's solvency," was wholly insufficient, and required reversal of the trial court's order, regardless of the potential underlying merit. ***Ex parte Adams (In re: Estate of Clifford Wayne Cleveland, deceased),*** 25 ALW (1140732); 5/6/16, Autauga Cty., Shaw; Moore, Stuart, Bolin, Parker and Main concur; Bryan concurs specially; Murdock concurs in the result; Wise recuses herself, 36 pages. [ATTY: Pet: Chad Bryan, Montgomery; Resp: Rob Riddle, Prattville]

CIVIL PROCEDURE--Recusal. The husband filed a divorce complaint in December 2015. Custody of the parties' two minor children is at issue. In April 2016, the trial court granted the wife's ex parte motion for a protection-from-abuse order against the husband. Thereafter, the husband filed a counterpetition for a protection-from-abuse order against the wife. On or about May 4, 2016, the parties reached an agreement pursuant to which the trial court vacated the ex parte protection-from-abuse order,

dismissed the husband's counterpetition and entered a restraining order purportedly prohibiting either party from contacting the other party. The case was set for a status conference on May 10, 2016. On May 9, 2016, the judge assigned to the case, Judge Gilbert Self, received an unsolicited telephone call at his residence from Dr. Janet Womack, the superintendent of the Florence City School system and a nonparty to the underlying divorce case. Dr. Womack inquired as to the status of the protection-from-abuse order. Dr. Womack also discussed with Judge Self the wife's alleged communications with teachers, school administrators, and/or adult chaperones who were at that time accompanying students, including one of the parties' children, on a school trip in Washington, D.C.. At the status conference which took place the next day, Judge Self informed the parties that he had received a telephone conference from a nonparty about the case. The evidence is disputed as to whether Judge Self disclosed the name of the individual who made the contact at the May 10 hearing. On the same day as the status conference, the wife filed a notice of intent to serve on Dr. Womack subpoenas for the production of documents and for the taking of Dr. Womack's deposition upon written questions. On May 12, 2016, Judge Self entered a pendente lite order granting the parties joint physical custody of the children. On May 16, 2016, Dr. Womack filed a motion to quash the subpoenas. In that motion, Dr. Womack explained that while the parties' child was on the Washington, D.C. trip, the wife contacted school personnel and represented that the court had ordered that the husband was not allowed to contact the child and that that order had been violated by the posting of pictures of the child. Judge Self entered an order granting Dr. Womack's motion to quash the subpoenas. On June 22, 2016, the wife filed a motion requesting that Judge Self recuse himself. At a hearing on that motion, Judge Self explained that Dr. Womack had called him but that she did not say anything derogatory about the wife or the husband to him. The wife's former attorney testified that, at that hearing, Judge Self indicated that he was concerned about the wife's mental stability. She claimed that Judge Self did not disclose the name of the person who had contacted him and because of that fact, she filed the notice of the taking of Dr. Womack's deposition upon written questions. Judge Self indicated that he found that deposition notice to be harassing and "marginally ridiculous." Judge Self did not recall making any statements about the wife's mental stability and pointed out that he had already met with her when he issued the ex parte protection-from-abuse order. He explained that any impression of the wife was formed at that time and not from anything that Dr. Womack stated. Judge Self denied the wife's motion to recuse. The wife filed a petition for a writ of mandamus. **Writ of mandamus denied.** When determining if recusal is warranted "[t]he test is whether 'facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge.'" *Ex parte George,* 962 So.2d 789 791 (Ala. 2006)[ALW]. Canon 3.A.(4), Alabama Canons of Judicial Ethics provides that a judge cannot consider ex parte communications in a pending proceeding. "Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter." However, an ex parte conversation "without more, might not be sufficient to require a trial judge's disqualification. The party seeking the trial judge's recusal must present sufficient evidence showing that the trial judge has been biased or prejudiced by the ex parte communication 'such that "a reasonable person knowing everything that the [trial] judge knows would have a 'reasonable basis for questioning the [trial] judge's impartiality.'" *S.J.R. v. F.M.R.*, 984 So.2d 468, 472 (Ala. Civ. App. 2007)[ALW]. In this case, it is undisputed that the conversation between Judge Self and Dr. Womack constitutes an ex parte communication. Therefore, the question to be answered in this mandamus action is whether a reasonable person would conclude that the ex parte communication has caused Judge Self to be biased or prejudiced. Judge Self stated at the recusal hearing that his conversation with Dr. Womack was brief and that no disparaging remarks were made about either party. "Judge Self appropriately and promptly, i.e., the following day at the status conference, informed all parties and the guardian ad litem of his telephone conversation with Dr. Womack and reported to them the substance of that conversation." Moreover, the wife failed to show that she had been materially prejudiced by the ex

parte communication. The wife argued that Judge Self's order quashing the wife's subpoenas to Dr. Womack indicate that he was biased against her. "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice." *Hartman v. Board of Trs. of the Univ. of Alabama*, 436 So.2d 837, 841 (Ala. 1983). The wife failed to establish a clear legal right to an order of recusal and accordingly, the petition for writ of mandamus is denied. ***Ex parte Crawford (Crawford v. Crawford),*** 25 ALW (2150868), 10/14/2016, Lauderdale Cty., Donaldson; Thompson, Pittman, Thomas and Moore concur, 22 pages. [ATTY: Pet: Dinah Rhodes, Huntsville; Resp: Leigh Daniel, Huntsville]

CIVIL PROCEDURE: Standing--Sealed Record. CIVIL PROCEDURE: Judgment. APPEAL & ERROR: Mandamus--Timeliness. Michael Gentry ("the father") and his wife, Whitney were the parents of three children. Whitney died in February 2014. In August 2016, the maternal grandmother and the maternal stepgrandfather filed a complaint seeking an award of visitation with the minor children pursuant to Ala. Code 1975, §30-3-4.2. On that same day, the paternal grandfather and the paternal stepgrandmother filed a similar complaint. The actions were consolidated. The father moved to dismiss the actions but the trial court denied that motion. A guardian ad litem, who was appointed to represent the children, filed a "cross claim" against the father. The cross-claim contained three counts: a request for a judgment declaring that the children have a liberty interest in familial association with their extended family and two identical counts requesting an injunction requiring the father to permit continued association between the children and their extended family. The father filed a motion to dismiss the "cross claim." The trial court orally granted the father's motion to dismiss counts two and three but denied the motion as to count one. On December 1, 2016, the trial court entered an order directing the circuit court to "place this entire case UNDER SEAL." No reason was given for this action nor had any party moved for such relief. No hearing was held on the issue of sealing the record but at a hearing on the motion to dismiss the cross claim, the judge apparently stated that the cases should be sealed because they involved minor children and that embarrassment or irreparable harm could occur. The father filed a petition for writ of mandamus. **Writ of mandamus dismissed in part; denied in part and granted in part.** (1) The father sought mandamus relief of the trial court's order denying his motion to dismiss as it pertained to the maternal stepgrandfather and the paternal stepgrandmother whom he argued, were not "grandparents" as that term is defined in Section 30-3-4.2(a)(1). The order from which the father seeks mandamus relief in this regard was entered on October 3, 2016. A mandamus petition must be filed within a presumptively reasonable time. Ala. R. App. P. 21(a)(3) provides that the presumptively reasonable time is that which is permitted for an appeal to be filed. In this case, the father filed his mandamus petition more than 42 days after the October 3, 2016 order was entered. However, a mandamus petition which challenges the subject-matter jurisdiction of the court can be raised at any time. *Ex parte J.B.*, [Ms. 2151005, November 18, 2016] ___ So.3d ___, ___ (Ala. Civ. App. 2016)[ALW]. The father argued that the stepgrandparents lack "standing" to bring their action. Standing implicates subject-matter jurisdiction. However, the Court disagreed that this mandamus petition involved a standing issue. "Our supreme court has indicated, in two plurality opinions, that a majority of the supreme court recognized in *Ex parte BAC Home Loans Servicing, LP*, 159 So.3d 31, 46 (Ala. 2013)[ALW], that the concept of standing should be confined to public-law cases." Instead, the father is challenging either the stepgrandparents' capacity or he is claiming that they are not real parties in interest. Neither of these challenges involves subject-matter jurisdiction. Therefore, the father's challenge to the October 3, 2016 order is untimely and it is due to be dismissed. (2) The father next challenges the trial court's oral denial of his motion to dismiss the cross-claim asserted by the guardian ad litem. An oral order is not valid. Ala.R. App. P. 58. "Because no lawful or valid order of the trial court has been rendered or entered regarding the father's motion to dismiss the guardian ad litem's 'cross claim,' the father has no order from which to seek relief." This portion of the

father's mandamus petition is due to be denied. (3) The third issue addressed by the Court was whether the trial court was justified in sealing the court record. In resolving this issue, the Court quoted extensively from *Holland v. Eads*, 614 So.2d 1012 (Ala. 1993)[ALW] in which the Court concluded that if a motion to seal is filed, a hearing must be conducted. Thereafter, the trial court should not seal the court record except upon a written finding that the moving party has proved by clear and convincing evidence that the information sought to be sealed: (a) constitutes a trade secret or other confidential commercial research or information; (b) is a matter of national security; (c) promotes scandal or defamation; (d) pertains to family matters such as divorce, child custody or adoption; (e) poses a serious threat of harassment, exploitation, physical intrusion or other particularized harm to the parties or (f) poses the potential for harm to third person who are not parties to the litigation. In this case, the court's order sealing the record contained no written findings. Moreover, the trial court failed to hold a hearing at which the parties could argue their respective positions. Accordingly, the writ of mandamus is due to be granted. The Court further explained that "[a]ny order sealing any portion of the record must contain written findings in compliance with *Holland* that clear and convincing evidence supports a conclusion that the relevant 'privacy interest (as set out in *Holland*) rises about the public interest in access'." ***Ex parte Gentry (Schillaci v. Gentry),*** 26 ALW (2160155), 1/27/2017, Jefferson Cty., Thomas; Thompson, Pittman, Moore and Donaldson concur, 19 pages. [ATTY: Pet: William Bradford, Mountain Brook; Resp: Wendy Crew, Birmingham]

CIVIL PROCEDURE: Counterclaim--Amendment. FAMILY LAW: Division of Property--Divorce. The parties were married in 1988. In April 2015, the husband filed a complaint requesting that the trial court award him a divorce and to order "a fair and equitable division of all property acquired by the parties during the marriage." The wife filed an answer but she did not assert a counterclaim. The trial of this action began in June 2016. The husband was the first witness called to testify and he was questioned by his counsel about the value of the marital assets and he testified as to how he would like the trial court to divide those assets. On cross-examination, the husband objected when the wife's counsel questioned him about one of his retirement accounts. As the basis for the objection, the husband pointed out that the wife had not filed a counterclaim. A discussion then ensued, the case was continued and the parties were directed to file legal memorandum as to whether the wife should be allowed to amend her answer to assert a counterclaim. The wife filed a motion seeking leave to amend her answer. Alternatively, the wife argued that "issues tried by implied consent should be treated as if they were raised in the pleadings." The trial court denied the wife's motion. The wife filed a petition for writ of mandamus. **Writ of mandamus granted in part and denied in part.** Mandamus relief is appropriate when a trial court acts outside of its discretion in denying a party leave to amend a pleading. Ala. R. Civ. P. 13(f) provides that when a pleader fails to assert a counterclaim through "inadvertence, or excusable neglect" or "when justice requires", the pleader may seek leave of court to assert the counterclaim. "We agree with the wife that she should be allowed to amend her answer to assert a counterclaim for her equitable share of the parties' marital property." The husband requested an equitable division of marital property. He testified about the values of same. The wife should have been permitted to amend her answer and assert a claim to that property. As for the wife's claim for alimony, under Rule 15(b), if an unpleaded issue is not tried by the express or implied consent of the parties "it is incumbent on the objecting party to show that the introduction of the evidence pertinent to issues not raised in the pleadings would in some way prejudice the objecting party's case." *Tounzen v. Southern United Fire Insurance Co.*, 701 So.2d 1148, 1150 (Ala. Civ. App. 1997)[ALW]. The wife argued that the husband had knowledge throughout the litigation that she was seeking alimony. She filed motions with the trial court in which she sought temporary pendente lite spousal support. "Regardless of whether the husband anticipated a claim for alimony, it is clear to this court that he has proceeded throughout this

litigation at least with the understanding that the equitable division of the marital property was an issue that would be resolved at trial." The husband "essentially concedes" that he was prepared to present evidence regarding an equitable property division. "That same evidence is also relevant to alimony." The husband did not demonstrate that he would be prejudiced if the wife were allowed to assert a counterclaim for alimony and her delay, in and of itself, was not a sufficient ground to deny her leave. The petition for writ of mandamus is due to be granted as to the alimony and property division claims. However, inasmuch as the wife failed to demonstrate a clear legal right to file a formal amended answer requesting attorney fees, her petition is denied in that regard. Moreover, the court declined to express an opinion that a counterclaim is simply not required in order for a defendant in a divorce case to make a claim for division of property, alimony or attorney's fees. ***Ex parte Cato (Cato v. Cato),*** 25 ALW (2150950), 12/2/2016, Jefferson Cty., Pittman; Thompson, Thomas and Donaldson concur; Moore concurs in the result, without writing, 20 pages. [ATTY: Pet: Kathryn Gentle, Birmingham; Resp: Charles Dunn, Birmingham]

FAMILY LAW: Adultery--Child Custody--Child Support-Attorney Fees. EVIDENCE: Child's Testimony--Objection. The mother appealed a divorce judgment which divorced her from the father on the ground of adultery, awarded custody of the parties' child to the father, ordered the mother to pay child support and ordered the mother to pay certain fees for the child's guardian ad litem and a portion of the father's attorney fees. **Affirmed in part; reversed in part.** (1) The mother challenged the trial court's grant of a divorce based on the ground of adultery. A court may only divorce parties for adulterous conduct that precedes the filing of a divorce complaint. *Morgan v. Morgan,* 183 So.3d 945, 955 (Ala. Civ. App. 2014)[ALW]. In this case, the father did not allege adultery. He testified that before the mother filed the divorce complaint, he had seen her talking with Jamie Gamble at some of the child's baseball games. The divorce was filed on November 27, 2012. The mother denied any sexual conduct before filing the complaint. She gave birth to a child fathered by Gamble on December 29, 2013 and gave birth to another child fathered by Gamble on December 10, 2014. "The record contains undisputed evidence indicating that the mother cohabitated with and engaged in sexual intercourse with Gamble after the filing of the divorce complaint, but the record contains insufficient evidence of any similar adulterous conduct before that date." This portion of the divorce judgment is due to be reversed. (2) The mother contends that with regard to its custody award, the trial court impermissibly limited the testimony of the child. The child was 10 years old at the time of the trial. The mother notified the court that she intended to call the child to testify about the father taking the child's money and selling the child's toys. The court disallowed any testimony about the father taking the child's property because it reasoned that it would call into question who actually owned the property and if taking the property was a proper disciplinary measure. The mother's attorney indicated that she expected that the child would have testified that the father had sold the child's bicycle and kept the proceeds of the sale and had sold video games that belonged to the child. The father testified that he had sold a bicycle that he had given to the child in order to purchase a new bicycle. On appeal, the mother argued that she intended to use the child's testimony to demonstrate that the father lacked sufficient financial means to properly care for the child. However, the mother did not argue that point at court and therefore, that argument cannot be considered on appeal. The trial court did not abuse its discretion by excluding that portion of the child's testimony. (3) The mother next challenged the fact that the trial court overruled her objections to a line of questioning by the guardian ad litem regarding her post-filing relationship with Gamble. The objection was not timely made. In addition, trial counsel objected on the grounds of "badgering". On appeal, the mother asserted that such evidence was irrelevant. "When the grounds of an objection are stated, this impliedly waives all other grounds for the objection to the evidence; and the objecting party cannot predicate error upon a ground not stated in the trial court, but raised for the first time on appeal."

Nichols v. Southeast Prop. Mgmt., Inc., 576 So.2d 660, 662 (Ala. 1991)[ALW]. (4) The mother also argued that the trial court erroneously relied on the fact that the mother had engaged in a sexual relationship with Gamble to deny her custody. In order to deprive a parent of custody because of his or her act of adultery, there must be evidence that the adultery had a "direct bearing on the welfare of the children." *J.H.F. v. P.S.F.*, 835 So.2d 1024, 1029 (Ala. Civ. App. 2002)[ALW]. The trial court determined that the mother was "unfit" for custody and it cited various events which had taken place to support its finding. Among those factors was the fact that Gamble had spent the night with the mother while the child was present, that Gamble had an extensive criminal history and that the mother had had two children with Gamble. "To the extent that it may be construed as considering that relationship, the judgment shows that the trial court considered not just the fact of the relationship but also that it concentrated on the effects of that relationship on the best interests and welfare of the child." Gamble had multiple felony convictions. The mother allowed Gamble to assume caregiving for the child and had allowed the child to ride in an automobile being driven by Gamble, which led to an automobile accident that Gamble fled, leaving the child alone. This portion of the trial court's judgment is due to be affirmed. (5) The Court next considered whether the trial court erred in failing to find the father to be voluntarily unemployed for purposes of calculating child support. During the marriage, the father had suffered an on-the-job injury and received workers' compensation benefits. He had since then obtained part-time employment. His hours and wages had increased since he began that employment. "Considering the fact that the father is apparently successfully endeavoring to receive more hours and more pay at his current employment, we cannot conclude that the trial court erred in not finding the father voluntarily underemployed." (6) With regard to the guardian ad litem fee imposed upon the mother, the mother filed a motion to appoint a guardian ad litem for her then unborn child in October 2013. The trial court appointed a guardian ad litem for both that child and the parties' child. Each party was ordered to deposit $3,087.75 to the guardian ad litem. The father paid his portion but the mother did not. Her mother tendered payment after the court refused to commence payment in the absence of that payment. The guardian ad litem then submitted a bill in the amount of $6,043.75. No final order was entered with regard to that bill. The interlocutory order requiring the mother to pay $3,087.75 is appealable. When considering if a guardian ad litem fee is reasonable, the court should use the same criteria as are applicable to awards of attorney fees in general. "Based on the record before us, we cannot conclude that the trial court exceeded its discretion in awarding the guardian ad litem a fee of $6,172.50 or in ordering the mother to pay $3,087.50." (7) The mother was ordered to pay $15,000 towards the father's attorney fees. The trial court did not articulate its reasons for ordering the mother to pay this amount. The mother earns $1,650 in gross monthly wages. "[T]he mother would have to sacrifice the entirety of her after-tax income for a substantial part of a year just to pay that award, assuming she could forego her other financial obligations, including the support of her children. It would be inequitable to allow the mother to be subjected to such a heavy financial burden without a clearer understanding of the trial court's basis for the award." This portion of the trial court's judgment is reversed and the case remanded for the trial court to articulate its reasons and to consider decreasing the award. ***Turner v. Turner,*** 25 ALW (2141027), 5/20/2016, Jefferson Cty., Moore; Pittman and Donaldson concur; Thompson and Thomas concur in the result, without writings, 24 pages. [ATTY: Appt: Mariellen Morrison, Birmingham; Apee: Denise Pomeroy, Birmingham]

FAMILY LAW: Visitation. CIVIL PROCEDURE: Postjudgment Motion. APPEAL & ERROR: Sufficiency of the Evidence. The parties were divorced in 2011. The judgment of divorce incorporated an agreement of the parties whereby the mother was awarded sole physical custody of the parties' child and the father was required to pay child support and one-half of any uncovered medical expenses. The parties' agreement further provided that if any major decision regarding the minor child required the father to pay money in addition to child support, the parties had to agree to same in

advance. In 2014, the mother filed a petition seeking to terminate the father's visitation with the minor child based on allegations that the father had sexually abused the child. The father filed an answer and counterclaim seeking to gain sole physical and sole legal custody of the child. The mother filed an amended complaint seeking to hold the father in contempt for failing to pay certain private-school and extracurricular expenses of the child. At trial, the father testified that he had moved out of the marital home shortly after the child was born. The mother then filed for divorce. While the divorce was pending, the maternal grandmother testified that she had observed the father sticking his tongue out in the direction of the child's vagina while he was changing a diaper. Based on those allegations, the father had supervised visitation for three months while the Department of Human Resources ("DHR") investigated. The allegations were found to be not indicated and the trial court reinstated unrestricted visitation to the father. When the child was six months old, the mother noticed bruising on the child's elbow when the father returned her from visitation. The mother took the child to the emergency room and the doctor found bruising on the child's groin area. DHR investigated and found that child abuse was not indicated. Once the parties agreed to a divorce in 2011, they had an amicable relationship. During the Thanksgiving holiday in 2014, the mother claimed that the child began showing symptoms of distress and she did not want to visit with the father. According to the mother, the child disclosed that she had been sexually abused by the father. The next day, the mother reported the allegations to DHR and Niki Whitaker, the director of Baldwin County's Child Advocacy Center, conducted a forensic interview of the child. During the interview, the child said that the mother had told her what to say. Whitaker testified that she could not determine if abuse had occurred and recommended a six-week forensic interview. That interview never took place. Jane Agee, a social worker for DHR, interviewed the parents. She eventually entered a disposition report stating that she was "unable to complete" the investigation. Agee testified that she had entered that finding because she was unable to find creditable evidence to support whether sexual abuse had or had not occurred. The mother consulted with Dr. Bridget Smith, a licensed psychologist, who spent approximately ten hours with the child. Dr. Smith testified that the child had disclosed that the father had subjected her to inappropriate sexual touching. She did not think that the child's allegations had been fabricated. The father denied having touched the child inappropriately. The father admitted that he viewed pornography but denied that he did so while the child was visiting him. The father admitted that he had been discharged from the United States Navy due to his having a personality disorder which he described as "shyness." With regard to financial issues, the father acknowledged having agreed to pay for expenses for the child which were agreed to by the parties. He admitted that he agreed to paying for one-half of the child's private school tuition and one-half of her gymnastics and piano lessons. The father ceased making payments after he was served with the modification petition because he said that his money was being used to pay for litigation costs. After the trial, the court entered a judgment denying both parties' petitions to modify and declining to hold the father in contempt for failing to pay private school tuition and extracurricular expenses. The mother filed a postjudgment motion but then withdrew it and appealed. **Affirmed in part; reversed in part.** (1) The mother argued that the trial court erred by allowing the father to resume visitation without limiting the visitation to daytime supervised visitation. The trial court did not make specific findings of fact regarding its visitation determination. The mother filed a postjudgment motion in which she argued that the evidence did not support the trial court's judgment. However, she withdrew that motion without receiving a ruling. "By withdrawing that motion, the mother retracted her argument that the judgment was not supported by sufficient evidence." "In effect, the withdrawal amounted to a waiver of any objection based on the alleged insufficiency of the evidence." Apparently, the mother had filed her notice of appeal while her postjudgment motion was pending but the appeal was held in abeyance. The mother then sought a stay from the appellate court when the trial court denied a similar motion. The Court of Civil Appeals held that it could not grant a stay because the appeal was not yet pending. Thereafter, the mother withdrew her postjudgment motion. The Court pointed out that the mother could

have filed for mandamus review of the trial court's denial of her motion to stay while the postjudgment motion was pending. (2) "Out of an abundance of caution", the Court still addressed the propriety of the trial court's judgment regarding visitation. "One aspect of the evidence indicates that the mother had previously interfered with the father's visitation in violation of a court order, that the mother had indicated that she did not want the father to have unsupervised visitation, and that the mother had leveled an unproven allegation of sexual abuse against the father during the divorce proceedings in order to deny him that visitation. Given that context, the trial court could have viewed the latest charge of sexual abuse, which arose just before an extended unsupervised-visitation period between the father and the child, skeptically." (3) The trial court did err by not requiring the father to contribute to the private school tuition and extracurricular expenses. The father admitted that he had agreed to contribute toward same but in its judgment, the court determined that the father had not "agrred to pay in advance" for said expenses. "When the material facts are established by undisputed evidence, a judgment based on a factual finding inconsistent with the undisputed evidence cannot stand on appeal." This portion of the trial court's judgment is due to be reversed. ***T.G.F. v. D.L.F.*****,** 26 ALW (2150607), 2/10/2017, Monroe Cty, Moore: Donaldson concurs; Pittman concurs in the result, without writing; Thomas concurs in part and dissents in part, with writing, which Thompson joins, 63 pages. [ATTY: Appt: Kelli Day, Montgomery; Apee: Charles Johns, Brewton]

APPEAL & ERROR: Mandamus-Timeliness. FAMILY LAW: Visitation--Due Process. This is a dependency/custody case. In 2016, the mother and A.G.("the custodian") entered into an agreement whereby the other was granted supervised visitation of the children for a minimum of two hours per week. The agreement further provided that "the parties shall remain calm and shall have no discord in the presence of the…children." This agreement was ratified by the court. After a hearing in September 2016, the custodian and the mother entered into an agreement to expand the mother's visitation up to four hours per week until the next hearing date on October 27, 2016. However, in response to a motion to continue filed by the custodian and a request to immediately suspend the mother's visitation, the juvenile court entered several interlocutory orders on October 21, 2016 that added the Blount County Department of Human Resources ("DHR") as a party, required DHR to supervise all visitation between the mother and the children, limited the mother's visitation to two hours per week and set a new review date for February 23, 2017. The mother filed "motions to set aside" the interlocutory orders and then filed a mandamus petition 33 days after the entry of the juvenile-court orders that she challenges. **Writ of mandamus issued.** (1) The Court first addressed the timeliness of the mother's mandamus petition. Ala. R. App. P. 21(a)(3) provides that a petition for an extraordinary writ be filed "within a reasonable time." The presumptively reasonable time is the same as the time for taking an appeal. If a mandamus petition is filed outside that presumptively reasonable time, it should be accompanied by a statement of good cause as to why it should be considered. The presumptively reasonable time for filing a petition for mandamus challenging a juvenile court's decision is 14 days. In this case, the mother did not file within that time nor did she submit a statement of good cause. However, in *Ex parte K.R.*, [Ms. 1141274, March 25, 2016] ___ So.3d ___ (Ala. 2016)[ALW], the Alabama Supreme Court addressed the merits of a challenge to the lawfulness of a probate court's order and in so doing stated: "in situations in which a petition for the writ of mandamus challenges the subject-matter jurisdiction of the court in which the challenged interlocutory order was rendered, the petition need not timely invoke the jurisdiction of the appellate court." The Court applied that holding to this case and noted that the mother contended that she failed to receive notice or due process before her visitation rights were implicated. These arguments go to the power of the juvenile court to enter these orders and therefore, the mother's mandamus petition "warrants consideration of the merits, notwithstanding the mother's noncompliance with Rule 21(a)(3), Ala. R. App. P." (2) As to the merits of the mother's petition, a party having visitation rights has an accompanying procedural due-process right to notice of a proceeding to deprive

that party of visitation rights and either a right to a predeprivation hearing or to a postdeprivation hearing "as expeditiously as possible." *Ex parte C.T.,* 154 So.3d 149, 152-53 (Ala. Civ. App. 2014)[ALW]. In this case, it appears that the mother was deprived of same. Accordingly, the petition for writ of mandamus is due to be granted. ***Ex parte M.F.B., (In re: Matter of E.B. and Matter of G.B.),*** 26 ALW (2160136), 1/13/2017, Blount Cty., Per curiam; Thompson and Moore concur; Pittman concurs specially, which Thomas and Donaldson join, 7 pages. [ATTY: Not listed-confidential]

VI. CONTEMPT

FAMILY LAW: Contempt--Modification. The parties were divorced in 2004. Pursuant to an agreement of the parties that was incorporated into the divorce judgment, the mother was awarded the sole physical custody of the children and the father was ordered to pay child support. The father also agreed to pay private school tuition for the parties' children. The mother agreed to be responsible for activity fees, books and uniforms. In 2012, the father filed a petition seeking to modify custody of C.G.P.. The mother filed an answer and counterclaim in which she asked that the father be held in contempt for failing to pay child support and certain medical expenses. The father filed a counterclaim alleging that the mother had failed to pay for "activity fees, books, uniforms and meals" related to the children's private school. He alternatively argued that the provision requiring him to pay private school tuition had been rendered void because the mother had not enrolled the children in private school for the 2008-09 school year. The father also filed a motion to modify his visitation with J.G.P.. The trial court entered an order finding the father to be in contempt for failing to pay child support and his portion of the children's medical expenses and found the mother to be in contempt for failing to pay the children's educational expenses. The trial court applied "an offset for the benefit of each party for what the other owes, [,finding] that neither party owes the other any monies…as a result of their contemptuous behavior." The mother appealed. **Reversed.** An agreement which is incorporated into a divorce judgment cannot be modified without approval of the trial court. "However, although a party will not be relieved of his or her obligations under a divorce judgment without approval of the court, evidence of an agreement of the parties will suffice to prove an absence of 'contemptuous behavior in failing to comply with the judgment of divorce.'" *Hollis v. State ex rel. Hollis,* 618 So.2d 1350, 1351 (Ala.Civ. App. 1992)[ALW]. In this case, the father testified that the mother declined to enroll the children in private school for one year. Upon their re-enrollment, the father agreed to pay all of the expenses associated with the children's attendance. "Because it is undisputed that the parties were operating under an informal agreement, we conclude that the mother's behavior in failing to pay the expenses at issue was not contemptuous." That portion of the trial court's judgment is due to be reversed. (2) The mother also argued that the trial court erred by offsetting the amount that she owed for the children's activity fees, uniforms and books against the amount the father owed for child support. In *Caswell v. Caswell,* 101 So.3d 769 (Ala. Civ. App. 2012)[ALW}, the Court reversed a trial court's judgment which awarded a father a credit for the mother's share of the child's extracurricular activities against his child support arrearage. In so doing, the court held that the obligation to pay for extracurricular activities was "separate and distinct" from the father's obligation to pay child support. Such is the case here. The mother's obligation to pay certain private school expenses is "separate and distinct" from the father's obligation to pay child support and accordingly, it was error to offset one against the other. The judgment of the trial court is due to be reversed. ***Paulk v. Paulk,*** 26 ALW (2150236), 8/12/2016, Mobile Cty., Moore; Thompson, Pittman, Thomas and Donaldson concur; 10 pages. [ATTY: Appt: W. Gregory Hughes, Mobile; Apee: James D. Brooks, Mobile]