REL: March 1, 2019
REL: May 24, 2019 As modified on denial of rehearing [by substitution of page 17]

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170729

Jessica Lynn Coburn Boyd

v.

John W. Boyd

Appeal from Mobile Circuit Court
(DR-16-901200.01)

HANSON, Judge.

Jessica Lynn Coburn Boyd ("the mother") appeals from a September 28, 2017, order and a December 1, 2017, judgment of the Mobile Circuit Court in which that court, among other things, found the mother in contempt of court; sustained the

objection lodged by John W. Boyd ("the father") pursuant to the Alabama Parent-Child Relationship Protection Act ("the APCRPA"), Ala. Code 1975, § 30-3-160 et seq., to the mother's relocation of their three children to Midland, Texas; modified the custody rights of the parties so as to award physical custody of the children to the father; and implicitly rejected the mother's constitutional challenges to the APCRPA. We dismiss the appeal as untimely filed as to the contempt order and affirm as to the remaining issues raised by the mother.

The record reveals that the mother and the father were previously married to one another and that three children, born in 2010, 2012, and 2014, were born of the parties' marriage. In November 2016, the Mobile Circuit Court entered a divorce judgment ratifying and affirming the parties' agreement, under which agreement the parties were awarded joint legal custody of the children, with the mother having physical custody subject to the father's visitation rights, including alternating-weekend visitation, holiday visitation, and visitation every Wednesday afternoon until 7:00 p.m. The divorce judgment further awarded the father the parties' marital home and required him to provide medical-insurance

coverage for the children. Finally, the divorce judgment contained provisions required under the APCRPA under which the mother, as a party having custody of minor children as to whom the father held visitation rights, was required to notify the father "of any change or proposed change of principal residence and telephone number or numbers of" the children by certified mail on or before the 45th day before the proposed change in residence; under those provisions, any failure by the mother as to notification of an intent to change the children's principal residence was specifically identified as a permissible consideration in any subsequent modification proceedings.

In May 2017, approximately six months after the entry of the divorce judgment, the father filed a pleading labeled as an "Objection" pursuant to the APCRPA to the mother's proposed relocation of the minor children to Midland, Texas. See generally Ala. Code 1975, §§ 30-3-169 & 30-3-169.1. Under the APCRPA, as we will discuss in greater detail herein, a person entitled to determine the principal residence of a child generally may change the child's principal residence after providing required notice thereof unless a person entitled to

notice files a proceeding seeking to prevent the proposed residence change within 30 days after receiving notice of the proposed change. In that pleading, the father averred, among other things, that he had a close relationship with the children that would be irrevocably harmed by the proposed relocation, that he was "very involved" in family functions with the children and participated in their extracurricular sports activities, and that all of the children's relatives lived in and around Mobile County and that no such family members lived in Midland, Texas. On June 2, 2017, the father filed a request to modify the custody provisions of the divorce judgment so as to award him physical custody of the children, asserting that there had been a material change in circumstances such that the custodial change sought therein would materially promote the health, safety, and welfare of the children and that the benefit of the change would outweigh any detriment. The trial court then ordered that the father's objection pleading and custody-modification request would be set for a subsequent hearing.

On August 18, 2017, the father filed a motion seeking a finding of contempt against the mother on the stated basis

that the mother had already relocated to Texas with the children without first obtaining court approval and that the mother was refusing to honor the father's visitation rights set forth in the divorce judgment; the father also sought an immediate return of the children to Alabama and an award of physical custody of the children pending the entry of a final judgment. After the mother had answered the allegations in the father's filings and a guardian ad litem had been appointed to represent the children, the trial court held an ore tenus hearing on the father's contempt motion on September 25, 2017, at which the parties testified. The trial court then entered an order on September 28, 2017, finding the mother in contempt for having willfully relocated the children to Texas despite the pendency of the father's objection and directing the mother to pay an attorney fee to the father in the amount of $1,500 "to purge herself from" the contempt finding; all other matters were reset for a final hearing in November 2017. Before this appeal, no appeal was taken from the September 28, 2017, order finding the mother in contempt.

The cause was tried over two days in November 2017, during which testimony was elicited from the mother, the

father, the parties' seven-year-old child, that child's Mobile County schoolteacher, a Mobile County educational paraprofessional who had worked with the parties' middle child during preschool, the mother's maternal grandmother, and an officer of the mother's Texas employer. On November 21, 2017, after the first trial date but before the second trial date, the mother filed a "Notice of Constitutional Challenge" to the APCRPA; further, pursuant to Ala. Code 1975, § 6-6-227, she sought leave to add the state attorney general as a party, which leave was granted, and the attorney general was added as a party.

On December 1, 2017, the trial court entered a judgment sustaining the father's objection to the relocation of the children and changing physical custody of the children from the mother to the father. The mother filed a timely motion under Rule 59(e), Ala. R. Civ. P., to alter, amend, or vacate the judgment on December 22, 2017, and also filed an "Amended Notice of Constitutional Challenge" to the APCRPA in which she sought to incorporate by reference any additional constitutional arguments made in the mother's motion to alter, amend, or vacate. The father filed a motion to alter, amend,

or vacate on December 29, 2017, seeking certain changes in the wording of the judgment. The attorney general then filed a notice of appearance in the action. The mother and the father filed a joint motion on March 9, 2018, seeking to continue the scheduled hearings on their postjudgment motions and purporting to express consent, pursuant to Rule 59.1, Ala. R. Civ. P., to the extension of the time for ruling thereon beyond the 90th days after their filing dates; however, to the extent that their joint motion failed to indicate the consent of all parties (i.e., including the attorney general), that filing was ineffective to avoid the effect of the 90-day automatic-denial provision of that rule. See Fulghum Fibres, Inc. v. Stokes, 186 So. 3d 970, 973-74 (Ala. Civ. App. 2015) (discussing, among other authorities, HealthSouth Corp. v. Brookwood Health Servs., Inc., 814 So. 2d 267, 268 (Ala. Civ. App. 2000), and A.M.K. v. E.D., 826 So. 2d 889, 890 (Ala. Civ. App. 2002), both of which had involved state instrumentalities as additional parties whose consents had not been shown of record so as to avoid the effect of the 90-day denial provision of Rule 59.1).

Notwithstanding that lack of unanimous consent, the trial court scheduled a hearing on the parties' postjudgment motions for April 9, 2018, more than 10 days after the motions had been denied by operation of law, and the attorney general filed a brief in support of the validity of the APCRPA. Following that hearing, the trial court entered an order on April 30, 2018, purporting to grant certain aspects of the parties' postjudgment motions; however, we agree with the mother's view that that order, having been entered more than 90 days after the filing of the parties' postjudgment motions and in the absence of a valid unanimous consent of record to the enlargement of the 90-day period under Rule 59.1, was a nullity. See Fulghum Fibres, 186 So. 3d at 974 & n.3.

On May 3, 2018, the mother appealed from the trial court's December 1, 2017, judgment. That notice was timely as to that judgment because it was filed 35 days after the denial by operation of law of the later of the two postjudgment motions, i.e., the father's postjudgment motion filed on December 29, 2017, which was denied by operation of law on March 29, 2018. See Rule 4(a)(1), Ala. R. App. P. (specifying generally applicable 42-day appeal period); Rule 4(a)(3), Ala.

R. App. P. (tolling time for filing notice of appeal when postjudgment motions have been filed); and Roden v. Roden, 937 So. 2d 83, 85 (Ala. Civ. App. 2006) (holding that Rule 59.1 applies separately to each distinct timely filed postjudgment motion and that trial court has a full 90-day period to rule on each separate motion).

The mother, appearing through new counsel, raises four issues. We will initially address the first three issues presented by the mother in her brief on appeal, which each concern the correctness of the December 1, 2017, judgment sustaining the father's objection to the mother's relocation of the children to Midland, Texas, and awarding the father physical custody of the children. The mother asserts that the custody award is erroneous because the trial court purportedly failed to properly consider the mother's alleged conditional willingness to return to Alabama with the children in the event that the father's objection to the children's relocation was sustained; she also contends that several aspects of the APCRPA are unconstitutional and that the trial court erred in changing custody because, she says, the father did not meet

the custody-modification burden set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984).

In order to properly consider the correctness of the December 1, 2017, judgment, this court turns to the pertinent provisions of the APCRPA, which was adopted in 2003, and the record of the parties' actions in response thereto. The APCRPA, by its terms, "promotes the general philosophy in this state that children need both parents, even after a divorce." Ala. Code 1975, § 30-3-160; see also Ala. Code 1975, § 30-3-150 (adopting policy that "minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children").

The APCRPA requires that all child-custody determinations made after its effective date include the following provisions:

> "'Alabama law requires each party in this action who has either custody of or the right of visitation with a child to notify other parties who have custody of or the right of visitation with the child of any change in his or her address or telephone number, or both, and of any change or proposed change of principal residence and telephone number or numbers of a child. This is a continuing duty and remains in effect as to each child subject to the custody or visitation provisions of this decree until such child reaches the age of majority or becomes emancipated and for so long as you are

entitled to custody of or visitation with a child covered by this order. If there is to be a change of principal residence by you or by a child subject to the custody or visitation provisions of this order, you must provide the following information to each other person who has custody or visitation rights under this decree as follows:

> "'(1) The intended new residence, including the specific street address, if known.
>
> "'(2) The mailing address, if not the same as the street address.
>
> "'(3) The telephone number or numbers at such residence, if known.
>
> "'(4) If applicable, the name, address, and telephone number of the school to be attended by the child, if known.
>
> "'(5) The date of the intended change of principal residence of a child.
>
> "'(6) A statement of the specific reasons for the proposed change of principal residence of a child, if applicable.
>
> "'(7) A proposal for a revised schedule of custody of or visitation with a child, if any.
>
> "'(8) Unless you are a member of the Armed Forces of the United States of America and are being transferred or relocated pursuant to a non-voluntary order of the government, a warning to the non-relocating person that an objection to the relocation must be made within 30 days

> of receipt of the notice or the relocation will be permitted.
>
> "'You must give notice by certified mail of the proposed change of principal residence on or before the 45th day before a proposed change of principal residence. If you do not know and cannot reasonably become aware of such information in sufficient time to provide a 45-day notice, you must give such notice by certified mail not later than the 10th day after the date that you obtain such information.
>
> "'Your failure to notify other parties entitled to notice of your intent to change the principal residence of a child may be taken into account in a modification of the custody of or visitation with the child.
>
> "'If you, as the non-relocating party, do not commence an action seeking a temporary or permanent order to prevent the change of principal residence of a child within 30 days after receipt of notice of the intent to change the principal residence of the child, the change of principal residence is authorized.'"

Ala. Code 1975, § 30-3-166. The parties' November 2016 divorce judgment contained these provisions.

The APCRPA provides that, except when disclosure of information regarding a proposed change of principal residence of a child or a party with custodial or visitation rights is judicially excused in the interest of health or safety, see Ala. Code 1975, § 30-3-167, a person having the right to establish the principal residence of a child must provide

notice of any proposed change in the child's principal residence to all other persons entitled to custody of or visitation with that child. See Ala. Code 1975, § 30-3-163. That notice must include all the items numbered (1)-(7) set forth in § 30-3-166 (quoted above), as well as a warning to the nonrelocating person that an objection to the proposed relocation must be made within 30 days after receipt of the notice, see Ala. Code 1975, § 30-3-165(b). Under the APCRPA, the giving of notice of a proposed relocation of a child will authorize the proposed relocation "unless a person entitled to notice files a proceeding seeking a temporary or permanent order to prevent the change of principal residence of a child within 30 days after receipt of such notice." Ala. Code 1975, § 30-3-169 (emphasis added). If advance notice consistent with the APCRPA's requirements is not given, "the court shall consider the failure to provide such notice or information as a factor in making its determination regarding the change of principal residence of a child," as "a factor in determining whether custody or visitation should be modified," and as "a factor for ordering the return of the child to the former residence of the child if the change of principal residence of

a child has taken place without notice." Ala. Code 1975, § 30-3-168(a).

In this case, the record reveals that the mother, on approximately May 11, 2017, sent the father a letter ("the mother's first relocation letter") indicating her intent to change "our address" (i.e., the address of the mother and the children) to a particular address in Midland, Texas, on June 6, 2017, but proposing that the father host the children for visitation from June 5-July 23, 2017. The mother's first relocation letter did not contain all of the seven items set forth in § 30-3-166 and specified as required in the divorce judgment or any statement notifying the father of his obligation to object within 30 days. Six days later, on May 17, 2017, the mother sent a second letter to the father ("the mother's second relocation letter") that discussed her receipt of a job opportunity in Texas purportedly having the potential to increase her income and employment-related fringe benefits, listed the addresses for the schools proposed for the older children to attend, and revising her proposed pickup date for the children to July 26, 2017. The mother's second relocation letter did not contain a statement notifying the father of his

right to object to the proposed relocation of the children within 30 days.

Under the APCRPA, a person entitled to custody of or visitation with a child may commence a proceeding objecting to the proposed change in principal residence of the child so as to seek an order preventing the relocation; such a proceeding must be filed within 30 days of the receipt of notice of the proposed change in principal residence of the pertinent child unless the court in which the proceeding is brought extends the time for commencing the action. See Ala. Code 1975, § 30-3-169.1(a) and (c). In such a proceeding, the trial court is empowered, based upon the facts of the case, to enter an order either "granting the objection to the change or proposed change of principal residence of the child," "denying the objection to the change or proposed change of principal residence of a child," or providing for "any other appropriate relief." Ala. Code 1975, § 30-3-169.3(b). Notwithstanding the omissions in the mother's first relocation letter and the mother's second relocation letter, the father sent the mother a letter dated May 20, 2017, indicating his disagreement with the proposed relocation of the children; timely initiated the

instant judicial proceeding on May 23, 2017, in which he objected to the proposed relocation of the children; and sought modification of the children's custody on June 2, 2017, all of which occurred within the 30-day period following the sending of the mother's first relocation letter (and, necessarily, occurred within 30 days of the father's receipt of that letter).

As previously noted, the father later filed a motion on August 18, 2017, seeking, among other things, an order directing the mother -- who was alleged to have already relocated with the children to Midland, Texas, and to have thereafter refused the father visitation with the children -- to return the children to Alabama. The APCRPA specifically allows a trial court to enter a "temporary order ... ordering return of a child to the former residence of the child if a change of principal residence has previously taken place without compliance with" the APCRPA and, in considering whether to do so, permits that court to take into account whether "[t]he child already has been relocated without notice, agreement of the parties, or court approval." Ala. Code 1975, § 30-3-169.2(a) and (a)(3). At the September 25,

2017, hearing on the father's August 18, 2017, motion, the mother testified that she had relocated to Texas on June 6, 2017; that, one week later, she had driven back to Mobile with the children for two weeks of visitation with the father; that she had driven back to Mobile with the children for an additional two-week visitation period in late July and early August; that she had returned to Texas with the children via airplane "because traveling two days in a car with three kids gets tiring"; and that she had not allowed any visitation with the father after August 5, 2017. The record additionally does not indicate that the mother sought or obtained any temporary order permitting her actual relocation of the children to Texas during the course of the proceedings. See I.L.C. v. J.D.B., 203 So. 3d 88, 92 (Ala. Civ. App. 2016) (relocation is, under APCRPA, a pertinent custody-modification factor).

The APCRPA provides that, "[i]n determining whether a proposed or actual change of principal residence of a minor child should cause a change in custody of that child, a court may take into account all factors affecting the child." Ala. Code 1975, § 30-3-169.3(a). The APCRPA enumerates the

following 17 specific nonexclusive factors to be considered as to the question of modification of custody:

> "(1) The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate with the child and with the non-relocating person, siblings, and other significant persons or institutions in the child's life.
>
> "(2) The age, developmental stage, needs of the child, and the likely impact the change of principal residence of a child will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
>
> "(3) The increase in travel time for the child created by the change in principal residence of the child or a person entitled to custody of or visitation with the child.
>
> "(4) The availability and cost of alternate means of communication between the child and the non-relocating party.
>
> "(5) The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
>
> "(6) The preference of the child, taking into consideration the age and maturity of the child.
>
> "(7) The degree to which a change or proposed change of the principal residence of the child will result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child.

"(8) The extent to which custody and visitation rights have been allowed and exercised.

"(9) Whether there is an established pattern of conduct of the person seeking to change the principal residence of a child, either to promote or thwart the relationship of the child and the non-relocating person.

"(10) Whether the person seeking to change the principal residence of a child, once out of the jurisdiction, is likely to comply with any new visitation arrangement and the disposition of that person to foster a joint parenting arrangement with the non-relocating party.

"(11) Whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the change of principal residence of the child and the child, including, but not limited to, financial or emotional benefit or educational opportunities.

"(12) Whether or not a support system is available in the area of the proposed new residence of the child, especially in the event of an emergency or disability to the person having custody of the child.

"(13) Whether or not the proposed new residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, which does not have an adequately functioning legal system, or which otherwise presents a substantial risk of specific and serious harm to the child.

"(14) The stability of the family unit of the persons entitled to custody of and visitation with a child.

> "(15) The reasons of each person for seeking or opposing a change of principal residence of a child.
>
> "(16) Evidence relating to a history of domestic violence or child abuse.
>
> "(17) Any other factor that in the opinion of the court is material to the general issue or otherwise provided by law."

Id. Importantly, however, the APCRPA contains the following pertinent additional section regarding the presumptions and burden of proof applicable thereunder:

> "In proceedings under [the APCRPA] unless there has been a determination that the party objecting to the change of the principal residence of the child has been found to have committed domestic violence or child abuse, there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of a child. The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party."

Ala. Code 1975, § 30-3-169.4.

Not surprisingly, the contentions and evidentiary presentations of the mother and the father in the trial court focused upon the foregoing statutory factors, presumption, and burden of proof. The trial court's judgment determined, in light of the law and the evidence, that the father's objection to relocation should be sustained and that he should have

prospective physical custody of the children subject to visitation rights of the mother. The trial court did not detail its findings of fact or conclusions of law, and it is therefore impossible for this court to conclusively ascertain which of the many factors specified by the legislature motivated that court's judgment, much less whether the trial court determined that the mother did not meet her initial burden of proof or whether, in the alternative, the evidence adduced by the father defeated the mother's rebuttal efforts. Those omissions, however, do not prevent appellate review, as this court noted in Bates v. Bates, 103 So. 3d 836 (Ala. Civ. App. 2012):

> "'[The APCRPA] does not require the trial court to make specific findings of fact in its judgment, see Clements v. Clements, 906 So. 2d 952, 957 (Ala. Civ. App. 2005), and, in the absence of specific findings of fact, "'this court must assume that the trial court made those findings necessary to support its judgment.'" Id. (quoting Steed v. Steed, 877 So. 2d 602, 603 (Ala. Civ. App. 2003)).'
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> "Pepper v. Pepper, 65 So. 3d 421, 426 (Ala. Civ. App. 2010). ...
>
> "'[W]here a trial court receives ore tenus evidence, its judgment based on that evidence is entitled to a presumption of correctness. See Scholl v. Parsons, [655

> So. 2d 1060 (Ala. Civ. App. 1995)]. "The presumption of correctness is based in part on the trial court's unique ability to observe the parties and the witnesses and to evaluate their credibility and demeanor." Littleton v. Littleton, 741 So. 2d 1083, 1085 (Ala. Civ. App. 1999). This court is not permitted to reweigh the evidence on appeal and to substitute its judgment for that of the trial court. Somers v. McCoy, 777 So. 2d 141 (Ala. Civ. App. 2000); see also Ex parte Perkins, 646 So. 2d 46 (Ala. 1994).'
>
> "Clements v. Clements, 906 So. 2d 952, 959 (Ala. Civ. App. 2005)."

103 So. 3d at 842.

In this case, we agree with the father that substantial evidence supported a finding on numerous grounds specified in the APCRPA so as to warrant a judgment in favor of the father's objection and against the relocation of the children. The father testified that, until the children had relocated to Texas, he had been involved in the educational endeavors of the older children, such as securing a waiver for them to attend a better school (at which their grades had improved); participating in parent-teacher conferences and attending social events involving those children; and coaching the middle child's soccer and t-ball teams and participating with the oldest child in her equestrian lessons. Not only did the

mother's unilateral relocation of the children to Texas result in the cessation of those activities, but it also imposed a large travel burden upon the children with respect to visitation with the father (requiring either air travel or, more often, two-day car trips) and totally uprooted them from existing peer friendships and relationships with maternal and paternal relatives, including the father's grandmother, the mother's maternal uncles and aunt, and the mother's maternal grandmother (who formerly kept the children multiple times per week and who, at trial, emotionally described the children as being her "world"). In contrast to the presence of the father, his fiancée, and numerous collateral relatives of the children in Mobile, the only potential support system available in Texas that could readily be identified from the record, apart from paid helpers, was the presence in the mother's home of her paramour, with whom the mother had entered into a relationship during the month after the parties' divorce.

The father's testimony revealed that the mother, after relocating with the children to Texas, had limited the father's telephonic contact with the children to a biweekly

basis and had told the father that his ability to visit with the children would be dependent upon his willingness to dismiss this relocation-objection action, from which the trial court could have drawn negative inferences regarding the mother's willingness while in Texas to thwart the father's relationships with the children and his future exercise of visitation rights. Any such negative inferences arguably would have only been intensified by the trial court's consideration of audio recordings of heated telephone conversations involving the father and the mother after the mother's relocation (which were conducted in the presence of at least one of the children) in which the mother stated that she "had the reins" as to the children, asserted that she was in complete control of all of the father's contact with the children and that she would always have that control, indicated that she was considering hiring a private investigator to track the father and his fiancée, and stated that the father was "more than welcome to move to Texas." The father further introduced text-message transcripts in which the mother admitted that she had decided not to allow the father any visitation with the children while they were

present in Mobile for the September 25, 2017, hearing because of the father's initiation of litigation regarding the children's relocation and opined that the father "ha[d] to learn how to play nice in the sand box."

Of course, not all the grounds enumerated in § 30-3-169.3(a) favored the father. The mother's testimony revealed that her financial circumstances had improved markedly as a result of her having relocated to Texas. Whereas the mother formerly worked irregular hours as a dispatcher for wages of approximately $30,000 per year in Mobile, she testified to earning a salary of $80,000 per year plus receiving medical, transportation, continuing-education, and retirement benefits as a fuel-transportation general manager in Texas. That said, the mother admitted during cross-examination that she had not participated in any employment interviews while she was living in Mobile. The mother also opined that the school district in which she had enrolled the children during their relocation was superior to the Mobile school district. Finally, the mother, in response to questions from her trial attorney, stated that she "would have to move back to Mobile" if the trial court did not allow her to live in Texas with the

children -- a statement that the mother's appellate counsel portrays in her brief as indicating an "intent to return" that could have been considered as a nonenumerated factor under Ala. Code 1975, § 30-3-169.3(a)(17).

Notwithstanding the existence in the record of some evidence favoring relocation of the children, the trial court in this case weighed all the evidence and determined that the children should be returned to Mobile County from Texas. Contrary to the thrust of the mother's first argument on appeal regarding the effect of her (apparently grudging) willingness to return to Mobile, neither the APCRPA nor caselaw considering, interpreting, or applying the APCRPA requires that a trial court, in response to a parent's profession of a conditional intent to restore the status quo ante after having already uprooted children at issue, must disregard all other evidence deemed by our legislature to be material to questions of relocation and custody. In particular, Pierce v. Pierce, 884 So. 2d 855 (Ala. Civ. App. 2003), cited as authoritative by the mother notwithstanding the intervening enactment of the APCRPA, is distinguishable on its facts because the mother undisputedly did not "undo" her

relocation during the pendency of her postjudgment motion, and Marsh v. Smith, 67 So. 3d 100 (Ala. Civ. App. 2011), simply recognized the trial court's discretion to maintain an existing joint-physical-custody arrangement because a proposed (but not executed) relocation was blocked from taking effect. Finally, although a majority of this court concluded in Pepper v. Pepper, 65 So. 3d 421, 427 (Ala. Civ. App. 2010), that "an implicit presumption" exists under the APCRPA "that no material change in circumstances exists if the relocating parent is not permitted, by temporary order or by final judgment, to change the principal residence of the children," the APCRPA explicitly allows an actual unilateral relocation of children in a manner contrary to its provisions regarding advance notice to be considered as a factor in determining whether custody should be modified and/or whether to order the return of those children, see Ala. Code 1975, § 30-3-168(a).

For similar reasons, we reject the mother's third argument, i.e., that the father failed to satisfy the custody-modification burden set forth in Ex parte McLendon. Because the mother previously had been granted sole physical custody of the children, the trial court was required to apply the

McLendon standard to the father's custody-modification request.

> "In situations in which the parents have joint legal custody, but a previous judicial determination has granted primary physical custody to one parent, the other parent, in order to obtain a change in custody, must meet the burden set out in Ex parte McLendon.... See Scholl v. Parsons, 655 So. 2d 1060, 1062 (Ala. Civ. App. 1995). The burden set out in McLendon requires the parent seeking a custody change to demonstrate that a material change in circumstances has occurred since the previous judgment, that the child's best interests will be materially promoted by a change of custody, and that the benefits of the change will more than offset the inherently disruptive effect resulting from the change in custody. Ex parte McLendon, 455 So. 2d at 866."

Dean v. Dean, 998 So. 2d 1060, 1064–65 (Ala. Civ. App. 2008); see also Clements v. Clements, 906 So. 2d 952, 958–59 (Ala. Civ. App. 2005) (adoption of the APCRPA did not preempt the application of McLendon). However, our standard of appellate review in this context is deferential:

> "'When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), wherein this Court, quoting

Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993), set out the well-established rule:

> "'"'Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989), and Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow. Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990); Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985).'"'"

"'It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous. See the cases collected at 3 Ala. Digest 2d Appeal & Error § 846(5) (1993).

"'....

"'Neither the Court of Civil Appeals nor this Court is allowed to reweigh the evidence in this case. This case, like all disputed custody cases, turns on the trial court's perception of the evidence. The trial court is in the better position to evaluate the credibility of the witnesses ... and the trial court is in the better position to consider all of the evidence, as well as the many

> inferences that may be drawn from that evidence, and to decide the issue of custody.'"

Ex parte Patronas, 693 So. 2d 473, 474-75 (Ala. 1997) (reversing this court's judgment of reversal as to a custody modification; quoting Ex parte Bryowsky, 676 So. 2d 1322, 1324-26 (Ala. 1996)).

Before the enactment of the APCRPA, our supreme court endorsed the view that "a change of residence is ... one factor for the court to consider in making a change-of-custody decision" governed by McLendon. See Ex parte Murphy, 670 So. 2d 51, 53 (Ala. 1995). However, as we have noted, our legislature, in enacting the APCRPA, has mandated that trial courts "determining whether [an] ... actual change of principal residence of a minor child should cause a change in custody of that child" must consider the 17 nonexclusive factors listed in Ala. Code 1975, § 30-3-169.3(a); moreover, § 30-3-169.4 provides for a generally applicable rebuttable presumption "that a change of principal residence of a child is not in the best interest of the child," and a majority of this court held in Marsh v. Smith, 37 So. 3d 174, 177-78 (Ala. Civ. App. 2009), that the APCRPA abrogated the common law such that a change in a child's residence from Alabama to another

state must now be considered a material change in circumstances under the McLendon standard.

As we have noted, under § 30-3-169.3, the trial court could properly have taken into consideration the continued presence in Mobile County of the father, the children's peers, and the children's extended family, including historically important caregivers such as the mother's grandmother and the father's mother, and compared that with the dearth of relations that could serve as resources in Texas. Further, under the APCRPA, the trial court, in determining whether to change physical custody, could also have considered the fact of the mother's unilateral relocation of the children to Texas despite her having failed to provide the father notice of his right to initiate an action objecting to the relocation of the children. See Ala. Code 1975, §§ 30-3-165(b)(8) & 30-3-168. Finally, although mere visitation disputes between parents are not deemed sufficient to warrant a change in physical custody, the mother's recorded statements made to the father could properly have been deemed sufficient to permit an inference that the mother was, at least, attempting "to interfere with the child[ren]'s relationship with the [father] by minimizing

contact between them" so as to warrant a change in custody (Nelson v. Maddox, [Ms. 2170605, Aug. 17, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018)).

Having concluded that the trial court's judgment of December 1, 2017, complied with both the APCRPA and McLendon, we finally turn to the mother's constitutional challenges to the APCRPA that may have been preserved for appellate review. At the time that the trial court entered its December 1, 2017, judgment, the sole constitutional arguments that had been presented to that court were contained in the mother's November 21, 2017, "Notice of Constitutional Challenge." To the extent that the mother sought to expand upon those arguments in her amended notice, which was filed after that judgment had been entered, the trial court was under no duty to consider those expanded arguments, and the denial of the mother's postjudgment motion by operation of law before a hearing could be held indicates that those arguments were not, in fact, considered by the trial court. See Aramini v. Aramini, 220 So. 3d 322, 333 (Ala. Civ. App. 2016) (appellate court need not presume that the trial court considered a new argument made in a postjudgment motion when the motion is

denied without explanation), and Alabama Forest Prods. Indus. Workmen's Comp. Self-Insurer's Fund v. Harris, 194 So. 3d 921, 925 (Ala. Civ. App. 2014) (holding that trial court did not consider new argument presented for first time in postjudgment motion because trial court had allowed the postjudgment motion to be denied by operation of law). It is beyond cavil that an appellate court cannot consider arguments raised for the first time on appeal but is, instead, restricted "to the evidence and arguments considered by the trial court." Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992).

The mother's "Notice of Constitutional Challenge" asserted simply that any presumption contained in the APCRPA against the propriety of her relocation with the children violated constitutional guarantees of rights to travel, as well as rights to due process and to equal protection, and also posited that the APCRPA was overbroad, arbitrary, or unreasonable. To the extent that the mother, through new appellate counsel, has sought to innovate upon those arguments by asserting new "vagueness" and "unfairness" challenges to the APCRPA and to assert arguments that this court should espouse presumptions and burdens of proof completely contrary

to those specified by our legislature in the APCRPA, consideration of those matters is foreclosed by Andrews, supra.

Turning to the primary issue of claimed unconstitutional interference by the APCRPA with parental rights of travel, we would note the binding effect of our previous decision in Meadows v. Meadows, 3 So. 3d 221 (Ala. Civ. App. 2008). In that case, which involved a parental custody dispute incident to a divorce action, the evidence revealed that the pertinent child's mother relocated with the child from Calera, Alabama, to Schaumburg, Illinois, during the pendency of the action. 3 So. 3d at 223. The trial court, in entering a final judgment of divorce as amended, awarded physical custody of the child to the mother conditioned on her returning to Alabama and remaining no more than 60 miles from Shelby County. 3 So. 3d at 225. On appeal from that judgment, the mother asserted that the territorial restriction in the custody judgment was "an impermissible infringement on her" constitutional right to travel. Id.

In Meadows, a majority of this court noted that the historic power of an Alabama trial court to impose a

territorial restriction as to a minor child's residence location "arises from [the court's] position as parens patriae over the children whose custody is in question," id., and we further relied upon, among other cases, our decision in Cohn v. Cohn, 658 So. 2d 479 (Ala. Civ. App. 1994), in which we had upheld a judicial restriction on a mother's relocation of the children outside Etowah County and had rejected that mother's challenges to the propriety of that restriction, deeming unpersuasive the mother's argument that that child-residence restriction placed an unreasonable or unconstitutional restriction on her right to obtain employment in, and to relocate to, another Alabama county because "[t]he territorial restriction applie[d] to the children's residence, not to the mother's residence." 658 So. 2d at 482.

The majority opinion in Meadows opined that Cohn's reasoning as to the validity of territorial restrictions placed upon residences of minor children[1] "remain[ed] viable today" and was

> "supported by our legislature's enactment of both the joint-custody statute, codified at Ala. Code

[1]Cohn was abrogated by T.L.D. v. C.G., 849 So. 2d 200 (Ala. Civ. App. 2002), on a wholly separate ground.

> 1975, § 30-3-150 et seq., which embodies our state's policy that 'children have frequent and continuing contact with [their] parents,' § 30-3-150, and the [APCRPA], codified at Ala. Code 1975, § 30-3-160 et seq., which embodies our state's philosophy that 'children need both parents, even after a divorce, established in § 30-3-150.' § 30-3-160. Section 30-3-169.4 requires that the trial court presume that the change in the principal residence of a child is not in that child's best interest, and § 30-3-169.3 lists numerous factors for a trial court to consider when a custody determination is warranted under circumstances involving the possible change of the principal residence of a child, be it in a proceeding brought to challenge a proposed relocation, § 30-3-169.1, or in a proceeding involving an original child-custody determination. § 30-3-169.7."

3 So. 3d at 227 (footnote omitted). Thus, we agree with the position of the attorney general that, in light of Meadows and Cohn, we are bound by the principle that state-imposed restrictions (whether of a judicial nature, as in a territorial restriction regarding a child's residence contained in a judgment, or a legislative nature, as in the presumption in favor of child stasis under the APCRPA) operate on the right to change the residence of a minor child and not upon the physical custodian's right to relocate so as to impinge a custodian's own travel rights. Accord Bisbing v. Bisbing, 230 N.J. 309, 336-37, 166 A.3d 1155, 1170-71 (2017) (holding that custodian's constitutional right to travel was

not infringed by New Jersey statute barring removal from that state of children of divorced parents without both parents' consent absent a showing of "cause" that constitutional travel rights do not prohibit states from imposing some legal consequences on a person's entering or leaving the jurisdiction, and that a trial court can protect the noncustodial parent's visitation rights and the children's interest in maintaining a close relationship with the noncustodial parent by constraining the custodial parent's right to relocate the children without violating that parent's due-process right to travel).

To be sure, the legal analysis utilized by this court in Meadows and Cohn is not universally employed. For example, some American jurisdictions permit challenges by custodial parents to child-residential-relocation restrictions on a theory that the custodial parents' relocation rights are chilled by such restrictions. See Jaramillo v. Jaramillo, 113 N.M. 57, 64, 823 P.2d 299, 306 (1991), and In re Marriage of Ciesluk, 113 P.3d 135, 142 (Colo. 2005). In Meadows, however, Judge Moore, in a special writing, responded to that line of

cases by indicating an additional rationale supporting the imposition of relocation restrictions in this context:

> "The father and the child share reciprocal fundamental constitutional rights to association with one another. See Fredman [v. Fredman, 960 So. 2d 52, 56 (Fla. Dist. Ct. App. 2007)]; see also McQuinn v. McQuinn, 866 So. 2d 570, 573 (Ala. Civ. App. 2003) ('We note that although the mother, not [the] father, is the primary physical custodian of the children, the father's fundamental right to direct the care, control, and association of his children is no less fundamental and protected than the right of the mother to do the same.'); and Jackson v. Jackson, 999 So. 2d 488, 494 (Ala. Civ. App. 2007) (Moore, J., with Pittman and Thomas, JJ., concurring in the result) ('The children have a fundamental right to free association with their mother.'). Hence, the noncustodial parent and the child have a compelling interest in assuring that their fundamental constitutional rights are not unduly impaired by the custodial parent's choice of residence. If the state has any compelling interest in the matter, it is in preserving the familial relationship between the father and the child. See Soohoo v. Johnson, 731 N.W.2d 815, 822 (Minn. 2007) (holding that a state has a compelling interest in promoting relationships among those in recognized family units). It is that interest that a trial court is required to balance against the mother's right to travel when deciding whether to employ a territorial restriction."

Meadows, 3 So. 3d at 236–37 (Moore, J., concurring in the result) (emphasis added).

This state's legislature, perhaps alone among American legislative bodies, endorses a philosophy that deems minor

children to need "frequent and continuing contact with" fit noncustodial parents such that a proposed relocation of those minor children by their physical custodian is, prima facie, not in their best interest. Ala. Code 1975, § 30-3-150; see also §§ 30-3-160 & 30-3-169.4. The APCRPA envisions that a custodial parent can rebut that presumption by demonstrating to the trial court, through proof of the factors specified therein, that the proposed relocation is, in actuality, in the best interest of the children at issue. Conversely, a noncustodial parent may adduce evidence tending to "rebut the rebuttal," i.e., to show that the legislative presumption is correct, and, in an appropriate case, that the conduct of a parent following an award of physical custody in failing to give timely and proper notice of a proposed relocation, or in simply moving the parties' children without leave, constitutes sufficient grounds for reopening the question of which parent should have physical custody. Cf. S.B. v. Lauderdale Cty. Dep't of Human Res., 142 So. 3d 716, 719 (Ala. Civ. App. 2013) ("A child-custody judgment can always be modified when material facts unknown at the time of the prior custody judgment impact the welfare of the child.").

For the foregoing reasons, we perceive no infringements by the APCRPA upon any travel rights of custodial parents such as the mother, nor any violations of due process or equal protection, in placing on a party who seeks to move minor children from their previous residence the initial burden of showing that the move will foster the children's best interest. Further, the APCRPA is neither arbitrary nor unreasonable in imposing that initial burden upon a would-be relocating custodial parent, for social-science research is now revealing the effects of separation of minor children from noncustodial parents. See Matthew M. Stevenson et al., Associations Between Parental Relocation Following Separation in Childhood and Maladjustment in Adolescence and Young Adulthood, 24 Psychol. Pub. Pol'y & L. 365, 365 (2018) (reporting results of longitudinal study of children of divorced parents and concluding that "[l]ong-distance separation from biological fathers" before the age of 12 years "was linked in adolescence and young adulthood to serious behavior problems, anxiety and depression symptoms, and disturbed relationships with [multiple] parental figures (i.e., biological fathers, mothers, and stepfathers)"). We

see no reason why the legislature of this state must opt for a "pound of cure" in the form of treatment for symptoms that may arise in the aftermath of unilateral relocation in lieu of the APCRPA's "ounce of prevention" requiring that a proposed relocation of minor children affirmatively be shown to be in their best interest.

Finally, we reject the mother's contention that the trial court unconstitutionally applied the APCRPA in this case. At the close of the September 25, 2017, hearing before which the trial court entered its September 28, 2017, order directing the children to be returned to Alabama from Texas, the trial court expressly noted on the record that "it's a rebuttable presumption that the children should not leave Mobile County," and that court requested all the parties to submit "a breakdown of the factors associated with the relocation statute as to why it's in the best interest of the children to stay with [the father] or to go back with [the mother]." As much as the mother might have preferred otherwise, there is nothing in the APCRPA requiring the trial court to afford priority to any one statutory factor, such as increased "financial ... benefit or educational opportunities" (Ala.

Code 1975, § 30-3-169.3(a)(11)) above any other pertinent factor in assessing the best interest of the children.

The mother contends in her fourth issue that the trial court's September 28, 2017, order finding her in contempt is due to be reversed by this court. Under Rule 70A(g)(2), Ala. R. Civ. P., an adjudication of contempt is immediately reviewable by appeal if the contemnor is not being held in custody. However, the mother did not file a postjudgment motion directed to that order within 30 days of the entry thereof so as to toll the time for seeking appellate review of that order, and she did not appeal from that order within 42 days of its entry. We therefore conclude that, as to that order alone, the appeal is untimely so as to mandate dismissal of the mother's appeal. See Moultrie v. Wall, 143 So. 3d 128, 135 (Ala. 2013).

Based upon the facts and authorities set forth herein, the December 1, 2017, judgment of the trial court is affirmed. The appeal is dismissed to the extent that review is sought of the September 28, 2017, contempt order. The father's and the mother's requests for awards of attorney fees on appeal are denied.

APPEAL DISMISSED IN PART; AFFIRMED.

Moore and Edwards, JJ., concur.

Donaldson, J., concurs in the rationale in part and concurs in the result, with writing.

Thompson, P.J., concurs in the result, without writing.

DONALDSON, Judge, concurring in the rationale in part and concurring in the result.

I concur with the main opinion, except for that portion referencing "social-science research," ___ So. 3d at ___, because the findings and conclusions in the referenced social-science research were not submitted as evidence in the trial court.