Rel: July 12, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2171013

George Donald Clark, Jr.

v.

Rebecca Rutland Clark

Appeal from Montgomery Circuit Court
(DR-16-900095.01)

On Application for Rehearing

THOMPSON, Presiding Judge.

This court's opinion of April 19, 2019, is withdrawn, and the following is substituted therefor.

On February 28, 2017, Rebecca Rutland Clark ("the mother") filed in the Montgomery Circuit Court ("the trial court") a petition seeking to modify a judgment of the trial court that had divorced her from George Donald Clark, Jr. ("the father"). The parties' divorce judgment is not contained in the record on appeal, but the pleadings and testimony of the parties before the trial court indicate that that divorce judgment provided that the parties shared joint legal custody of their three minor children. Pursuant to the divorce judgment, the parties shared joint physical custody of the two older children, who are both boys, and the divorce judgment awarded the mother sole physical custody of the parties' youngest child, a daughter.[1]

[1]Although the parties refer to the award of custody of the daughter as vesting "primary physical custody" of the daughter in the mother, under § 30-3-151, Ala. Code 1975, that award constituted an award of sole physical custody to the mother. See Smith v. Smith, 887 So. 2d 257, 262 (Ala. Civ. App. 2003) ("[T]here is but one way to interpret a judgment that awards 'joint custody' with an award of 'primary physical custody' to one parent--such a judgment must be interpreted as awarding the parents joint legal custody and awarding one parent sole physical custody, the term used by [§ 30-3-151] to denote a parent being favored with the right of custody over the other parent, who will receive visitation.").

In her February 28, 2017, modification petition, the mother sought an award of sole physical custody of all three children, an increase in the father's periodic-alimony obligation, a determination that the father was in contempt for his alleged failure to comply with certain terms of a pendente lite order and the divorce judgment, and an award of an attorney fee. The father answered and counterclaimed, seeking an award of sole physical custody of all three of the parties' children, a modification of child support, to have the mother held in contempt for her alleged failure to pay certain amounts as required in the divorce judgment, and an award of an attorney fee.

The father also filed a motion requesting pendente lite relief, arguing that he had stored a horse trailer on property belonging to the mother's father but that the mother's father had refused to allow him to retrieve it. The father sought an order declaring his right to retrieve that trailer. The mother responded to that motion by arguing that the horse trailer had been a gift from the father to her. The trial court determined that it would rule on the father's motion during the final hearing in this action. On January 10, 2018,

the father filed an amended counterclaim, seeking, in addition to his earlier claims, the termination of his child-support obligation for the parties' oldest child, who had reached the age of majority in November 2017, and the termination of his periodic-alimony obligation because the mother had remarried.

The trial court conducted an ore tenus hearing on March 8, 2018. On March 30, 2018, the trial court entered a judgment in which it denied both parties' requests for a modification of child custody, granted the father's request that his periodic-alimony obligation be terminated, and modified the father's child-support obligation. In addition, the trial court found that each party was in arrears in reimbursing the other for certain child-related expenses. After offsetting those amounts, it awarded the mother a total of $7,103.47; in doing so, the trial court declined to hold either party in contempt for his or her failure to reimburse the other for those expenses. The trial court also determined that the father was entitled to possession of the horse trailer, and it ordered that the father turn over to the mother any remaining keepsakes and photographs in his

possession. The trial court denied the parties' other requests for relief.

The father filed a postjudgment motion on April 5, 2018, challenging several rulings of the trial court and the evidentiary support for those rulings. On April 20, 2018, the mother filed a postjudgment motion. On July 16, 2018, the trial court entered a postjudgment order. In that postjudgment order, in response to the relief requested by the mother, the trial court, among other things, altered the provision in the March 30, 2018, judgment concerning the father's child-support obligation. The trial court also addressed other matters that are not at issue on appeal. The father timely appealed.

The father first argues that the trial court erred in denying his claim seeking the modification of custody of the parties' two minor children, a son ("the son") and a daughter ("the daughter").[2]

> "Before we begin our analysis, we first consider the applicable standards of review. When this Court reviews a trial court's child-custody determination that was based upon evidence presented ore tenus, we

[2]As noted, supra, the parties' oldest child reached the age of majority during the pendency of this action.

> presume the trial court's decision is correct: '"A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong...."' Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993) (citations omitted). This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility. This opportunity to observe witnesses is especially important in child-custody cases. 'In child custody cases especially, the perception of an attentive trial judge is of great importance.' Williams v. Williams, 402 So. 2d 1029, 1032 (Ala. Civ. App. 1981)."

Ex parte Fann, 810 So. 2d 631, 632–33 (Ala. 2001).

The parties' divorce judgment provided for differing custodial awards for the son and the daughter, and, therefore, the burden the father bore in seeking to modify custody was different for each child. The divorce judgment awarded the parties joint legal custody and joint physical custody of the son. Therefore, in order to modify physical custody as it pertained to the son, the father was required to present evidence of a material change in circumstances such that an award of sole physical custody to him would be in the son's best interests. Ex parte Blackstock, 47 So. 3d 801, 804-05 (Ala. 2009). The divorce judgment awarded the mother sole

physical custody of the daughter. In order to prevail on his claim seeking an award of sole physical custody of the daughter, the father was required to demonstrate that a material change of circumstances exists, that the change in custody would materially promote the child's best interests, and that the benefits of the change in custody would more than offset the inherently disruptive effect of uprooting the child. Walker v. Lanier, 180 So. 3d 39, 42 (Ala. Civ. App. 2015). See also Ex parte McLendon, 455 So. 2d 863, 865-66 (Ala. 1984).

The evidence is undisputed that the parties do not work together to parent the children and that they communicate only rarely. The father testified that he wanted a change in custody in order to spend more time with the daughter. Each party presented evidence concerning incidents that brought into question the other party's judgment. The mother presented evidence indicating that the son suffered an eye injury while playing baseball in the father's custody and that, immediately thereafter, the father left the child at the mother's house without communicating with her about that injury. The father presented evidence indicating that, on one

occasion, the mother had allowed an unsupervised, 15-year-old unlicensed driver to drive the son and the daughter a short distance to her home.

The mother presented evidence indicating that the son left the father's home without the father's knowledge and was discovered in the bedroom of the son's girlfriend. The father admitted that that incident occurred, and he stated that no similar incident had since occurred. The father alleged that the mother had left the son and the daughter home alone late at night on one occasion. The mother denied that allegation, and she stated that the children had been home with their older brother.

Thus, the evidence in the record was disputed, and it is the function of the trial court to resolve factual disputes. Wells v. Tankersley, 244 So. 3d 975, 982 (Ala. Civ. App. 2017) ("[T]he trial court, as the trier of fact, was in the best position to resolve the disputes in the evidence."). During the ore tenus hearing, each party also attempted to bolster his or her allegations against the other with references to the testimony of the parties' three children. At the beginning of the hearing, the trial court conducted in camera

interviews with each of the parties' children outside the presence of the parties. Those interviews were not transcribed, and neither party has submitted a Rule 10(d), Ala. R. App. P., statement of the evidence setting forth the content of the children's testimony. "[W]hen an in camera interview with a child is conducted by the trial court and no record is made of the interview, this court will presume that the interview supports the findings of the trial court." Reuter v. Neese, 586 So. 2d 232, 235 (Ala. Civ. App. 1991). It is the burden of the father, as the appellant, to ensure that the record contains sufficient evidence to warrant a reversal on appeal. Griffin v. Griffin, 159 So. 3d 67, 71 (Ala. Civ. App. 2014). Given the evidence in the record, together with the presumption that evidence heard by the trial court but not set forth in the record supports the trial court's judgment, we conclude that the father has failed to demonstrate on appeal that he met his respective burdens to warrant a change in custody of either child and that, therefore, he has failed to establish that the trial court erred in denying his claims seeking a modification of custody

of the son and the daughter. M.B. v. L.B., 154 So. 3d 1043, 1048 (Ala. Civ. App. 2014).

The father also argues that the trial court erred in its determination of child support. In its March 30, 2018, judgment, the trial court ordered the father to pay the mother $483 per month in child support. The trial court incorporated into its judgment the child-support forms required by Rule 32(E) of the Rule 32, Ala. R. Jud. Admin., child-support guidelines.

> "'A noncustodial parent's child-support obligation is governed by the mandatory application of Rule 32, Ala. R. Jud. Admin.; Smith v. Smith, 587 So. 2d 1217 (Ala. Civ. App. 1991). Rule 32(E), Ala. R. Jud. Admin., states that "[a] standardized Child Support Guidelines form and a Child Support Obligation Income Statement/Affidavit form shall be filed in each action to establish or modify child support obligations and [that those forms] shall be of record and shall be deemed to be incorporated by reference in the court's child support order." (Emphasis added.) The filing of the child-support-guidelines forms required under Rule 32(E) is mandatory. Martin v. Martin, 637 So. 2d 901 (Ala. Civ. App. 1994). This court has consistently held that the failure to file the required child-support-guidelines forms in compliance with Rule 32(E) where child support is made an issue on appeal is reversible error. Holley v. Holley, 829 So. 2d 759 (Ala. Civ. App. 2002); Gordon v. Gordon, 804 So. 2d 241 (Ala. Civ. App. 2001); and Martin v. Martin, supra.'"

Morrow v. Dillard, 257 So. 3d 316, 325–26 (Ala. Civ. App. 2017) (quoting Wilkerson v. Waldrop, 895 So. 2d 347, 348–49 (Ala. Civ. App. 2004)).

In its July 16, 2018, postjudgment order, the trial court ordered that the father pay the mother $336.40 per month in child support. However, the trial court did not attach to that order a CS-42 child-support form demonstrating the manner in which it reached that child-support determination. The father contends that that failure is error, and the mother, in her brief submitted to this court, agrees. See Morrow v. Dillard, supra. We note that an appellate court may affirm a child-support award, even if the required forms are not submitted by the parties or incorporated into the judgment, if the court is able to determine, based on the evidence in the record, the manner in which the trial court reached its child-support determination. Griffin v. Griffin, supra. In this case, however, this court has been unable to discern how the trial court reached the child-support award set forth in the July 16, 2018, postjudgment order. Therefore, we reverse the judgment as to that issue and remand the cause for the trial court to enter a child-support determination in compliance

with the Rule 32 child-support guidelines. Walker v. Lanier, 221 So. 3d 470, 474 (Ala. Civ. App. 2016).

The father next contends that the trial court erred in awarding the mother amounts to reimburse her for expenses for the children that were not covered by health insurance or that the parties were ordered to divide. In its March 30, 2018, judgment, the trial court noted that both parties had sought to hold the other in contempt for failing to reimburse him or her for expenses for the children that the parties were to share. The trial court determined, among other things, that the father had failed to reimburse the mother $7,844.22 for expenses for the children. The trial court ordered that other amounts not at issue in this appeal be offset against the amount it determined the father owed the mother, and it awarded the mother a judgment against the father.[3]

On appeal, the father does not contend that the trial court erred in its determination of the amounts that should be offset against the initial determination that he owed the mother $7,844.22. In other words, assuming that the initial

[3]In its July 16, 2018, postjudgment order, the trial court corrected that total arrearage amount with regard to the other amounts that are not at issue on appeal.

determination that he was responsible for reimbursing the mother $7,844.22 is correct, the father does not contend that the trial court's determination that the wife owed him $1,170.98 was erroneous or that the trial court's calculation of the total offset award was in error. However, the father does argue that the trial court erred in its initial determination that he owed the mother $7,844.22. The father argues that the evidence does not support that determination.

> "'When a trial court receives evidence ore tenus in a case involving a child support arrearage, its judgment is presumed correct and will not be reversed on appeal unless the judgment is plainly and palpably wrong. Rubrigi v. Rubrigi, 630 So. 2d 67 (Ala. Civ. App. 1993). The determination of an amount of child support arrearage and the disposition thereof is largely a matter left to the sound discretion of the trial court. Id.'"

Mullins v. Sellers, 80 So. 3d 935, 944 (Ala. Civ. App. 2011) (quoting Havard v. Havard, 652 So. 2d 304, 308 (Ala. Civ. App. 1994)).

The father first maintains that the evidence did not support the amount the trial court awarded the mother with regard to the parties' division of the costs of orthodontic treatment for the children. The father does not dispute the amount of the contract the mother executed with the

orthodontist for the son's treatment. However, the father states that the orthodontist's contract for the daughter required the payment of $5,255, while the mother's exhibit seeking reimbursement set forth a request that the father divide the sum of $5,005 with her for the cost of orthodontic treatment for the daughter. The error the father asserts is one in his favor, and, therefore, any error with regard to that argument is harmless. Rule 45, Ala. R. App. P.; Cash v. Mayo, 429 So. 2d 1092, 1094 (Ala. Civ. App. 1983).

The father also argues that the mother submitted receipts in support of the other amounts she sought to recover for expenses she paid for the children but that the mother did not submit proof that she had paid the amounts due, or a portion of them, under the orthodontic contracts. The mother testified that she did not receive bills from the orthodontist but that the staff informs her of the amounts still owed when she takes the children for orthodontic appointments. The father contends that, by failing to submit to the trial court receipts of payments she had made to the orthodontist, the mother has failed to prove her claim seeking reimbursement

from him for one-half the cost of orthodontic treatment for the son and the daughter.

However, the mother supported her claim for reimbursement for the orthodontic treatment by submitting copies of the contracts for the amounts she owes for the children's orthodontic treatment and by testifying in support of her claim. The mother presented evidence indicating that the children were receiving orthodontic treatment and that she regularly communicated with staff at the orthodontist's office concerning the outstanding bills. The father questioned the mother's failure to bring to the evidentiary hearing the receipts of her payments to the orthodontist. However, the father did not present any evidence indicating that the amounts set forth in the contracts were not owed or that there was any reason the trial court could not enforce its requirement that he contribute to the payment for orthodontic treatment for the parties' son and daughter. The father has also not cited this court to any authority for the proposition that expenses claimed for a child are not recoverable in the absence of receipts of payment, i.e., that other evidence is

not sufficient to show the amounts owed.[4] We cannot say that the father has demonstrated error with regard to this argument.

As a part of this issue, the father also argues that the trial court erred in ordering him to reimburse the mother for expenses related to counseling sessions for the children. The father points out that those expenses were incurred in 2016, before the entry of the parties' divorce judgment. The father claims on appeal that those expenses were not addressed in the divorce judgment. However, in her testimony, the mother answered in the affirmative a question asking: "[W]ere there also counseling expenses that were previously ordered as part of the divorce to be equally divided for [the counselor]?" The mother's testimony also indicated that the father had not paid those amounts for the children's counselor.

As indicated previously, the parties' divorce judgment is not contained in the record on appeal. The transcript indicates that the trial court referred to that judgment during the ore tenus hearing. Thus, the trial court had the

[4]The father raised this argument on application for rehearing, and, again, he failed to cite applicable supporting authority for the argument.

divorce judgment before it when it considered the parties' claims.[5]

> "'It is the duty of ... the appellant[] to demonstrate an error on the part of the trial court; this court will not presume such error on the part of the trial court.' G.E.A. v. D.B.A., 920 So. 2d 1110, 1114 (Ala. Civ. App. 2005). 'An appellate record cannot be factually enlarged or altered by factual allegations found in a party's brief.... The record on appeal must disclose the facts upon which the alleged error is founded before such an error may be considered by this court.' Grider v. Grider, 578 So. 2d 1363, 1364 (Ala. Civ. App. 1991)."

Board of Equalization & Adjustment of Shelby Cty. v. Shelby 39, LLC, 140 So. 3d 941, 944 (Ala. 2013).

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[5]On application for rehearing, the father acknowledges that the trial court obtained and referred to the parties' divorce judgment during the ore tenus hearing in this matter. He contends on application for rehearing that, because the trial court examined the divorce judgment during questioning concerning the issue of custody, this court should presume that the trial court did not reference the divorce judgment, during the hearing or afterwards, when the trial court considered the parties' arguments and fashioned its ruling. Thus, the father argues that this court should not presume that the trial court referred to the divorce judgment in deciding any issue other than custody and that we should instead presume that the trial court relied solely on the mediated settlement agreement that the parties submitted into evidence and that was apparently incorporated as part of the divorce judgment. The father has not cited any support for his contention, made for the first time on application for rehearing, that "[t]he trial court did not consider the terms of the divorce [judgment] regarding debts, only [sic] considered the terms of the divorce [judgment] regarding custody."

We must presume that the terms of the divorce judgment supported the trial court's determination that the mother was due to be reimbursed for the 2016 counseling sessions. Kaufman v. Kaufman, 22 So. 3d 458, 464 (Ala. Civ. App. 2007) ("[W]hen all the evidence before the trial court is not submitted to this court as part of the record on appeal, this court must presume that the evidence not before it was sufficient to support the trial court's judgment."). That presumption, together with the mother's testimony, supports the trial court's judgment with regard to this issue. The father has failed to demonstrate error with regard to his argument concerning the requirement that he reimburse the mother for the counseling sessions.

The father, to some extent, questioned the amounts, or the reasonableness of the amounts, claimed by the mother for some of the unreimbursed expenses of the children. However, the trial court awarded the mother the amount she claimed the father owed her for his portion of those unreimbursed expenses. Thus, it appears that the trial court found the mother's testimony credible.

> ""[T]his contested evidence, taken in context, exemplifies the reason for the ore tenus

> presumption, 'that is, that the trial court is in the ... position of discerning the demeanor and other like intangibles which do not transfer so readily in a transcript.' Shepherd v. Shepherd, 531 So. 2d 668, 671 (Ala. Civ. App. 1988). Stated another way, 'the deference given to the trial court by the ore tenus rule is, in part, due to the trial court's unique position to see and/or hear something that may not be apparent on the face of the written record.' Willing v. Willing, 655 So. 2d 1064, 1068 (Ala. Civ. App. 1995) [(Thigpen, J., concurring in part and dissenting in part)]. See Dobbins v. Dobbins, 602 So. 2d 900, 901 (Ala. Civ. App. 1992) ('The reason for the ore tenus rule is [well established], i.e., that the trial court had the opportunity to observe the witnesses as they testified, to judge their credibility and demeanor, and to observe what this court cannot perceive from a written record.')."

Ex parte Fann, 810 So. 2d at 638.

Given the record on appeal, we cannot say that the father has demonstrated that the trial court erred in determining the amount of unreimbursed expenses that he owed the mother. Mullins v. Sellers, supra.

The father also contends that the trial court lacked jurisdiction to award certain photographs and keepsakes accumulated during the marriage to the mother. The father argues that those items of personal property were not addressed in the divorce judgment. He correctly points out that the trial court lacked jurisdiction to modify its

property division after 30 days from the date of the divorce judgment. Matthews v. Matthews, 608 So. 2d 1386, 1388-89 (Ala. Civ. App. 1992). In Matthews v. Matthews, supra, the husband argued that, because certain items of personal property were not specifically awarded to the wife in a divorce judgment, those items could not be awarded to her in a later judgment that, he contended, impermissibly modified the property settlement set forth in the divorce judgment. This court examined the applicable provisions of the divorce judgment at issue, which "awarded the wife all property determined elsewhere in the judgment to be part of the wife's separate estate and awarded her all her personal effects and jewelry not specifically set forth in the judgment." Matthews v. Matthews, 608 So. 2d at 1389 (emphasis omitted). This court concluded:

> "When ruling on the parties' motions regarding ownership of the disputed items in its judgment of October 7, 1991, the trial court indicated that it did not consider ownership of these items to be in dispute at the time the divorce judgment was entered and that it had therefore not specifically addressed the items in that judgment. By holding that the wife's division of the contested items was equitable, the trial court effectively found that the items claimed by the wife were her personal property at the time of the divorce.

> "We conclude that the trial court's award of the disputed property to the wife was consistent with the terms of the divorce judgment and was not, therefore, a modification of the property settlement. Further, because the trial court's exercise of discretion in implementing the terms of the divorce judgment was not plainly and palpably erroneous, we affirm the judgment of the trial court as to this issue. Robbins v. Robbins, 537 So. 2d 964 (Ala. Civ. App. 1988)."

608 So. 2d at 1389.

In this case, the terms of the divorce judgment were before the trial court, but that divorce judgment is not before this court.[6] Thus, the father has failed to demonstrate on appeal that that part of the trial court's judgment pertaining to the keepsakes and photographs is an impermissible modification of the divorce judgment, rather than an implementation of the provisions of the divorce judgment. See Jardine v. Jardine, 918 So. 2d 127, 131 (Ala. Civ. App. 2005) ("[A] trial court has the inherent authority to interpret, implement, or enforce its own judgments."); see

[6]The father argues on application for rehearing that the "divorce judgment [was] not presented to the trial court regarding this issue" and that the trial court only considered the parties' mediated settlement agreement with regard to this issue. For the reasons set forth in note 5, supra, we conclude that the father cannot prevail with regard to this argument.

also Goree v. Shirley, 765 So. 2d 661, 662 (Ala. Civ. App. 2000) ("[I]t is well settled that the appellant has the burden of ensuring that the record on appeal contains sufficient evidence to warrant a reversal.").

The father's final argument is that the trial court erred in denying his request for an award of an attorney fee based on the mother's failure to respond to certain discovery requests. The father points out that, after the mother failed to comply with a trial court's order compelling her response to outstanding discovery requests, the trial court entered an order granting the father's motion for sanctions. In that order, the trial court stated that it would determine an award of an attorney fee at the final hearing. In its March 30, 2018, judgment, the trial court ordered that the parties be responsible for their own attorney fees and that any other requests for relief were denied. Thus, that judgment constituted a determination that the father was not entitled to an amount as an attorney fee, i.e., that the amount of the fee to be awarded to the father was zero.

"Generally, the award of an attorney fee is within the sound discretion of the trial court and will not be reversed

absent an abuse of discretion." Deas v. Deas, 747 So. 2d 332, 337 (Ala. Civ. App. 1999). Further, with regard to a violation of a discovery order, "the equities of the parties may require an adjustment in the relative costs, expenses and attorneys fees." Carbine Constr. Co. v. Cooper, 368 So. 2d 541, 542 (Ala. 1979).

Rule 37, Ala. R. Civ. P., sets forth the authority for a trial court to sanction a party for a failure to comply with discovery. In pertinent part, that rule states that if a motion to compel discovery is granted,

> "the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Rule 37(a)(4), Ala. R. Civ. P. (emphasis added).

At the conclusion of the ore tenus hearing, the father's attorney reminded the trial court that the father's request for sanctions for the discovery violation remained outstanding. In response, the mother's attorney stated to the trial court that his own personal issues had caused the delay and that he had discussed that matter with the father's

attorney. We note that the unsworn statement of a party's attorney is not evidence. Ex parte K.M.D., 189 So. 3d 71, 74 (Ala. Civ. App. 2015) (citing Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005)).

Regardless, "[a]pplicants for an attorney fee bear the burden of proving their entitlement to an award and documenting their appropriately expended hours." City of Birmingham v. Horn, 810 So. 2d 667, 682 (Ala. 2001). In his November 7, 2017, motion for sanctions, the father requested, among other things, an award of "reasonable attorney fees." The father did not submit a statement or evidence in support of his claim for an attorney fee either in support of his motion for sanctions or during the ore tenus hearing. The father's attorney stated at the conclusion of the ore tenus hearing that she had submitted an affidavit setting forth the amount of fees, but no such affidavit is contained in the record on appeal. Thus, there is no evidence in the record concerning the amount of an attorney fee that would be reasonable for the discovery violation under the facts of this case and Rule 37(a)(4). Given the record on appeal, we cannot say that the father has demonstrated error with regard to this issue.

The mother's attorney has requested an attorney fee on appeal, and the attorney has supported that claim with an affidavit setting forth his hourly rate and the amount of time expended on the appeal. We grant the request and award the mother an attorney fee on appeal in the amount of $2,000.

APPLICATION OVERRULED; OPINION OF APRIL 19, 2019, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.