REL: August 30, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180149

Charles Stroud Bittick

v.

Emily Major Bittick

Appeal from Jefferson Circuit Court
(DR-16-901169)

EDWARDS, Judge.

Charles Stroud Bittick ("the father") and Emily Major Bittick ("the mother") were married in 2004. They have two children. After the parties separated in April 2016, the mother filed a complaint for a divorce in the Jefferson

Circuit Court ("the trial court") in July 2016. In July 2017, the parties entered into a pendente lite agreement, which the trial court incorporated into an order, that prohibited the parties from having "overnight guests of the opposite sex past 9:00 pm when the children are present" and that reserved the issue of pendente lite child support so that the father could access financial records to better determine his income. The pendente lite order also required the father to pay the premiums for health-insurance coverage for the mother and the children and to pay the monthly mortgage payment on the marital residence. During the pendency of the divorce litigation, the father filed motions seeking to have the mother held in contempt for alleged violations of the provision of the pendente lite agreement respecting guests of the opposite sex.

After a trial held over four days in January, March, and May 2018, the trial court entered a divorce judgment in July 2018, which, among other things, divided the parties' property, awarded the wife rehabilitative alimony, awarded the parties' joint custody of the children, and ordered the father to pay $2,500 per month in child support. The divorce

judgment further required the father to be responsible for payment of the children's health-insurance premiums, to be responsible for one-half of the noncovered medical expenses incurred on behalf of the children, and to pay one-half of "all extra-curricular activity expenses for the ... children including but not limited to summer camps[,] cultural activities[,] such as dance or music and athletic activities, school field trips, school fees, and any other reasonable expenses." The trial court also ordered the father to pay the mother $30,000 representing pendente lite child support from the date of the filing of the divorce complaint. Both parties filed postjudgment motions directed to the divorce judgment, and, after a hearing, the trial court amended the divorce judgment in certain respects not relevant to the issues in this appeal. The trial court denied all other requests for an amendment to or alteration of the divorce judgment, and the father timely appealed.

On appeal, the father raises several issues. He first argues that the trial court's award of child support should be reversed, in part, because he urges this court to overrule Dyas v. Dyas, 683 So. 2d 971 (Ala. Civ. App. 1995), insofar as

it requires a trial court considering child support, when the parties' combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule, see Rule 32, Ala. R. Jud. Admin., to consider the ability of the obligor parent to pay as opposed to considering the ability of both parents to pay. He also urges reversal of the monthly child-support award on its merits, arguing that the $2,500 award is so excessive and onerous as to be punitive and that the amount is not rationally related to the reasonable and necessary needs of the children. The father next argues that the trial court's judgment should be reversed insofar as it requires him to pay 50% of the costs of the extracurricular activities of the children and "other reasonable expenses" based on the trial court's failure to make specific written findings regarding extraordinary expenses for the children as, he contends, is required by Rule 32(C)(4), Ala. R. Jud. Admin. The father next challenges the trial court's lump-sum award of $30,000 in pendente lite child support retroactive to the filing of the divorce complaint, arguing that the trial court should not have ordered support retroactive to the filing of the divorce complaint because he had made other payments to

support the family during the pendency of the divorce litigation and because, he says, the mother did not present evidence to support the $30,000 award. Finally, the father complains that the trial court erred by failing to find the mother in contempt of the pendente lite agreement regarding guests of the opposite sex.

The facts pertinent to our resolution of this appeal are as follows. The father owns or has an interest in three separate business entities, two of which involve the purchasing and renting or sale of real estate and the third of which, CSB Consulting, Inc., involves point-of-sale systems. The father's income, according to his Child-Support-Obligation Income Statement/Affidavit ("CS-41 form") included in the record, is $19,118 per month. According to the father, his income is derived solely from CSB Consulting, Inc.; he testified that the other two entities do not generate income. The father said that he pays $632 per month for health-insurance coverage for the children. The mother is self-employed as a wedding planner and also has a part-time position as a event coordinator for a local business. Her income, according to her CS-41 form, includes a yearly

financial gift from her mother and is $4,950 per month. Thus, the parties' combined income exceeds the uppermost limit of the child-support-guidelines schedule. See, e.g., Bradley v. Murphy, 221 So. 3d 459, 464 (Ala. Civ. App. 2016) (recognizing that the uppermost limit of adjusted monthly combined income on the Rule 32, Ala. R. Jud. Admin., child-support-guidelines schedule is $20,000).

The mother testified and presented documentary evidence concerning her expenditures for herself and for the children during the parties' separation. The mother presented an exhibit outlining her expenditures on behalf of the children each month, which, the exhibit reflected, totaled $2,576. The mother testified that one of the children had a tutor and that the children participated in certain cultural or extracurricular activities, like dance and art classes; the costs of the tutor and the children's activities are included in the mother's exhibit outlining her monthly expenditures for or related to the children. The father testified that he was willing to pay for the children to take art classes, and he specifically stated that he desired that one of the children resume soccer as an activity. The father did not voice

disapproval of any of the activities in which the children were engaged.

According to the mother, the father had paid her $2,000 per month between their separation and November 2016 to assist her in paying household bills; however, she said, he had stopped paying her any money in November 2016. The mother testified that she had had to seek employment after November 2016 in order to pay the family's bills; she said that she had become employed in February 2017. The father testified that, during the protracted divorce litigation, he had paid the mortgage payment, the children's health-insurance premium of $632, and the mother's health-insurance premium each month; he also testified that he had paid the property taxes on the marital residence and $6,500 for a new HVAC unit for the marital residence. According to the father, his expenditures related to the marital residence, the mother, and the children totaled approximately $3,000 per month during the pendency of the litigation.

The evidence suggested that the mother's boyfriend, J.W., had spent significant time with the mother both in and outside the presence of the children beginning some time after August

2016, when the mother and J.W., who had attended the same high school as the mother, became reacquainted. The mother admitted that, after the imposition of the 9:00 p.m. restriction, J.W. had stayed at the marital residence after 9:00 p.m. on one occasion when the children were present at a holiday party she hosted at the marital residence; the mother said that other persons were in attendance as well. J.W. testified that he might have left the marital residence after 9:00 p.m. on a few evenings when the parties had lost track of time while watching a movie; however, he testified that he had never left the marital residence later than 9:20 p.m. when the children were present. The mother admitted that she, the children, and J.W. had spent the night in the same residence, but not the same room, on a few occasions when they had been invited to stay as guests at the residences of others (i.e., at a friend's beach condominium and at a friend's lake house). She testified that she had not understood the prohibition to apply when she was not at the marital residence.

The father first argues that this court should overrule Dyas v. Dyas, 683 So. 2d 971 (Ala. Civ. App. 1995). In Dyas, this court discussed the application of Rule 32(C)(1), Ala. R.

Jud. Admin., which states that "[t]he court may use its discretion in determining child support in circumstances where combined adjusted gross income is below the lowermost levels or exceeds the uppermost levels of the schedule." We explained that

> "[w]hen the combined adjusted gross income exceeds the uppermost limit of the child support schedule, the amount of child support awarded must rationally relate to the reasonable and necessary needs of the child, taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed before the divorce, and must reasonably relate to the obligor's ability to pay for those needs."

Dyas, 683 So. 2d at 973-74 (footnote omitted). The father contends that Dyas incorrectly requires consideration of solely the ability of the obligor parent to pay. The father argues that focusing solely on the ability of the obligor parent to pay results in a diminution of the other parent's duty to support the parties' children. Thus, he urges this court to overrule Dyas and its progeny.

Although Dyas was an opinion of this court, the obligor parent in that case, Dr. Lloyd Chesney Dyas, sought review of this court's opinion in our supreme court. See Ex parte Dyas, 683 So. 2d 974, 977 (Ala. 1996). In its opinion affirming

this court's judgment, our supreme court reaffirmed this court's specific holding that, because Dr. Dyas's income exceeded the uppermost limit of the child-support-guidelines schedule, "[t]he amount of child support is within the discretion of the trial court, after it has considered both the reasonable and necessary needs of the children and the ability of Dr. Dyas to pay for those needs." Ex parte Dyas, 683 So. 2d at 977. Thus, our supreme court has indicated that, in determining the proper child-support award in an action involving parents whose combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule, the ability of the obligor parent is the second relevant inquiry, after the determination of the reasonable and necessary expenses of the children. We are not at liberty to alter the pronouncement of our supreme court, see Ala. Code 1975, § 12-13-16, and, therefore, we reject the father's request that we overrule Dyas and its progeny. See Thomas v. Williams, 21 So. 3d 1234, 1236 n.1 (Ala. Civ. App. 2008) (stating that "this court is bound by the precedent of our supreme court, and, therefore, we are unable to overrule prior caselaw in order to alter a well-settled [legal principle]").

The father also contends that the trial court's award of $2,500 in child support is "so excessive and onerous as to be punitive" and "is unsupported by the evidence as it does not rationally relate to the reasonable needs and necessities of the children on a monthly basis." Rule 32(C)(1) indicates that, in circumstances such as those in the present case, when the amount of the combined monthly income of the parents exceeds the uppermost limit of the child-support-guidelines schedule, the amount of child support lies within the trial court's discretion.

> "However, the trial court's discretion in these circumstances is not unbridled. The award of child support must rationally relate to the reasonable and necessary needs of the child, taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed before the divorce, and it must reasonably relate to the obligor parent's ability to pay for those needs."

Brasfield v. Brasfield, 679 So. 2d 1091, 1094 (Ala. Civ. App. 1996) (emphasis omitted). "'To avoid a finding of an abuse of discretion on appeal, a trial court's judgment of child support must satisfy both prongs.'" Tompkins v. Tompkins, 843 So. 2d 759, 763 (Ala. Civ. App. 2002) (quoting Dyas, 683 So. 2d at 974). "'Moreover, matters relating to child support "rest soundly within the trial court's discretion, and will

not be disturbed on appeal absent a showing that the ruling is not supported by the evidence and thus is plainly and palpably wrong."'" Thomson v. Shepard, 225 So. 3d 627, 634 (Ala. Civ. App. 2016) (quoting Scott v. Scott, 915 So. 2d 577, 579 (Ala. Civ. App. 2005), quoting in turn Bowen v. Bowen, 817 So. 2d 717, 718 (Ala. Civ. App. 2001)).

The father describes the evidence relating to the children's reasonable and necessary expenses as "undisputed," and he appears to accept without dispute the sums represented on the mother's monthly expense exhibit. Based on that exhibit, he contends, the children's monthly expenses are $2,576, of which, he complains, he is required to pay all but $76. Although he is correct that the mother's exhibit reflects that amount as the total amount of the monthly expenses she incurred on behalf of the children during the pendency of the litigation, the father fails to recognize that the mother's exhibit does not reflect the most significant sum expended on behalf of the children -- two-thirds of the monthly mortgage payment -- because the mother did not pay that expense pendente lite. However, the mother was awarded the marital residence in the divorce judgment, and she is

responsible for making the mortgage payment each month. Thus, the monthly expenses of the children, based on the mother's exhibit and the evidence at trial, total not $2,576 but $3,812 ($2,576 + $1,236). Furthermore, the trial court found that the father earned 82% of the parties' combined monthly income, indicating that, in all fairness, the father should, in fact, bear a larger proportion of the children's expenses.

Insofar as the father argues that the requirement that he pay 50% of the children's school fees, extracurricular activities, and noncovered medical expenses results in a reduction of the children's expenses, we disagree. However, we do agree that, in light of the fact that the judgment requires the father to pay 50% of such expenses, those expenses should be deducted from the mother's statement of the children's expenses. After deducting those expenses from the children's expenses on the mother's exhibit, the expenses of the children total $3,157, which still exceeds the $2,500 child-support award. We also reject the father's apparent argument that it is unfair to require him to pay the children's health-insurance premium of $632. If the health-

insurance premium is included in the children's expenses, they total $3,789.

The father also contends that the trial court should have considered the fact that the parties are to share joint custody of the children when determining the appropriate child-support award. Although this court has indicated that a trial court may deviate from the child-support guidelines when it awards the parties joint custody of their children, the trial court is not required to deviate from the child-support guidelines merely because it has awarded joint custody. Rohling v. Rohling, 266 So. 3d 51, 66 (Ala. Civ. App. 2018). We see no reason to require a trial court exercising its discretion in setting a child-support obligation in a case involving parents with a combined monthly income exceeding the uppermost limit of the child-support-guidelines schedule to do more than consider the joint-custody arrangement in making its award of child support. The trial court expressly stated that it had considered that factor in setting the father's child-support obligation.

Thus, we cannot conclude, as the father urges, that the award of $2,500 in child support is not supported by the

evidence of the children's reasonable and necessary expenses. We also reject the father's contention that the $2,500 child-support award is so onerous and excessive as to be punitive in nature, especially in light of the father's substantial monthly income and the lifestyle to which the children have become accustomed. Accordingly, we affirm the judgment of the trial court insofar as it ordered the father to pay $2,500 a month in child support.

The father further argues that the trial court erred in making him responsible for 50% of "all extra-curricular activity expenses for the ... children including but not limited to summer camps[,] cultural activities[,] such as dance or music and athletic activities, school field trips, school fees, and any other reasonable expenses." He relies on Rule 32(C)(4), Ala. R. Jud. Admin., and this court's opinions in Myers v. Myers, 260 So. 3d 55, 64 (Ala. Civ. App. 2018), and J.D.A. v. A.B.A., 142 So. 3d 603, 618 (Ala. Civ. App. 2013), in which this court concluded that Rule 32(C)(4) is applicable in cases involving parents whose combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule. In both Myers and J.D.A., Presiding

Judge Thompson and Judge Moore dissented from that portion of each opinion applying Rule 32(C)(4), pointing out that Rule 32 is not applicable to the determination of child support for affluent parents.

In his special writing in J.D.A., Judge Moore went on to explain:

> "In determining child support in cases in which the parents' combined adjusted gross income exceeds the uppermost limits of the guidelines, the trial court must consider all the evidence regarding the former marital standard of living, not just the costs associated with necessaries, such as food, shelter, and clothing. See, e.g., Tompkins v. Tompkins, 843 So. 2d 759 (Ala. Civ. App. 2002) (trial court could consider costs of continuing horseback-riding, gymnastics, and dance lessons and use of parents' two vacation homes when awarding child support outside the guidelines). In such cases, a trial court is not limited to awarding only those 'extraordinary' expenses outlined in Rule 32(C)(4). ... Therefore, when Rule 32 does not apply, a trial court can order [certain] expenses for a child as a component of child support if those expenses had been borne by the parents during the marriage so that the child has become accustomed to those payments as a part of the marital standard of living."

J.D.A., 142 So. 3d at 623-24 (Moore, J., concurring in part, concurring in the result in part, and dissenting in part).

Upon further reflection and consideration of the dissenting opinion in J.D.A., we conclude that the application

of Rule 32(C)(4) to those cases involving parents whose combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule runs afoul of our long-standing pronouncement that Rule 32 does not govern the determination of child support in such cases. See, e.g., Bradley v. Murphy, 221 So. 3d 459, 464 (Ala. Civ. App. 2016) (noting that, in cases in which the adjusted gross income of the parties exceeds $20,000 per month, "Rule 32 is inapplicable and the [obligor parent's] child-support obligation was not subject to calculation by the application of the Rule 32 child-support-guidelines schedule or the CS-42 form"); Arnold v. Arnold, 977 So. 2d 501, 507 (Ala. Civ. App. 2007); Batain v. Batain, 912 So. 2d 283, 285 n.2 (Ala. Civ. App. 2005) (noting that, "if the parties' combined gross monthly income exceeds $10,000, [which, at the time, was the uppermost limit of the child-support-guidelines schedule,] the filing of CS-41 income affidavits and CS-42 forms are not necessarily required because an award of child support in that circumstance would not be governed by Rule 32"); Derie v. Derie, 689 So. 2d 142, 145 (Ala. Civ. App. 1996); and St. John v. St. John, 628 So. 2d 883, 883 (Ala. Civ. App. 1993). As

Judge Moore noted in his special writing in J.D.A., the majority's reliance on McGowin v. McGowin, 991 So. 2d 735, 742 (Ala. Civ. App. 2008), which was a plurality opinion of this court, was questionable, especially because, unlike those cases in which reference to the Rule 32 guidelines provide the basic child-support obligation, a trial court, when setting the child-support obligation in a case involving parents whose combined monthly income exceeds the uppermost limit of the guidelines, "must consider all the evidence regarding the former marital standard of living, not just the costs associated with necessaries, such as food, shelter, and clothing." J.D.A., 142 So. 3d at 623. This court held in Derie that a written finding that the application of the guidelines would be inappropriate or inequitable under Rule 32(A)(ii), Ala. R. Jud. Admin., was unnecessary because "the employment income of the parents placed the determination of the child support obligation beyond the scope of the guidelines." Derie, 689 So. 2d at 145. We see no reason not to extend that same principle to the requirement of a written finding under Rule 32(C)(4). Accordingly, we overrule J.D.A. and Myers to the extent that they require written findings

under Rule 32(C)(4) to support additional awards for child support in cases in which the parents' combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule.[1] We therefore affirm the judgment of the trial court insofar as it orders the father to be responsible for 50% of the costs of extracurricular expenses of the children.[2]

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[1]In his special writing, Judge Donaldson indicates that he would not overrule Myers and J.D.A. because this court was not requested to do so. However, this court is not prohibited from overruling a prior decision when it is convinced of its incorrectness.

> "Although we have a healthy respect for the principle of stare decisis, we should not blindly continue to apply a rule of law that does not accord with what is right and just. In other words, while we accord 'due regard to the principle of stare decisis,' it is also this Court's duty 'to overrule prior decisions when we are convinced beyond ... doubt that such decisions were wrong when decided ....' Beasley v. Bozeman, 294 Ala. 288, 291, 315 So. 2d 570, 572 (1975) (Jones, J., concurring specially)."

Ex parte State Farm Fire & Cas. Co., 764 So. 2d 543, 545-46 (Ala. 2000) (footnote omitted; second ellipsis added).

[2]To the extent the father characterizes the trial court's judgment as requiring him to pay 50% of "'any other reasonable expenses,'" we note that the judgment merely requires the father to pay 50% of the children's extracurricular and school-related expenses, including fees for field trips, summer camps, or other reasonable expenses, like uniforms or recital costumes, related to the extracurricular activities of the children but does not require that the father be subject to paying 50% of "any other reasonable expenses."

The father next argues that the trial court erred in ordering him to pay $30,000 in child support retroactive to the filing of the divorce complaint. He argues that he provided support for the mother and the children during the pendency of the divorce litigation, including paying the entire mortgage payment and paying the children's health-insurance premiums; the evidence further indicates that the father also paid a $2,000 monthly stipend to the mother between the date of separation and November 2016. Thus, he appears to contend that, because he provided financial assistance to the mother and the children during the pendency of the litigation, he cannot be ordered to pay child support retroactive to the date of the filing of the divorce complaint. See, e.g., K.H.L. v. K.G.M., 782 So. 2d 804, 807 (Ala. Civ. App. 2000) (affirming a trial court's decision not to award retroactive child support when "the father had voluntarily paid the mother $500 per month since the child's birth and $900 per month since January 1999"). In addition, the father argues that the mother failed to prove that "$30,000 of expenses had not been paid by the father for the support of the children," and he contends that "the record

does not contain sufficient evidence to substantiate the trial court's award of retroactive support."

The fact that a trial court is permitted to award child support retroactively to the filing of a divorce complaint when a pendente lite order of support was not entered during the pendency of the divorce litigation is not questioned by the father. A trial court has been permitted to award retroactive pendente lite support since the issuance of our decision in Brown v. Brown, 719 So. 2d 228, 231–32 (Ala. Civ. App. 1998). In Brown, we explained:

> "A basic principle of Alabama law is that a parent has a duty to support a minor child. 'Parental support is a fundamental right of all minor children.' State ex rel. Shellhouse v. Bentley, 666 So. 2d 517, 518 (Ala. Civ. App. 1995) (quoting Ex parte University of South Alabama, 541 So. 2d 535, 537 (Ala. 1989)). See also Anderson v. Loper, 689 So. 2d 118 (Ala. Civ. App. 1996). In March 1994, §§ 30-3-110 through 30-3-115, Ala. Code 1975, became effective. Those Code sections create a cause of action, maintainable by the custodial parent or guardian or the State, for retroactive child support against a nonsupporting parent. In enacting these sections, the Alabama legislature determined that, even in the absence of a court order requiring the noncustodial parent to pay support, a custodial parent or guardian can recover support for periods when the noncustodial parent made no contribution for the support of the child. The parties in this case, however, did not assert a claim for retroactive support pursuant to § 30-3-110, Ala. Code 1975. Therefore, this court must

address the question whether the trial court may award an arrearage for unpaid support where the parent had a duty to support the child but had not been ordered to pay support.

"In Maye v. Maye, 660 So. 2d 1325 (Ala. Civ. App. 1995), this court reversed a trial court's award of a child support 'arrearage' where the parent had not been ordered to provide support. In this case, as in Maye, the trial court had not entered a pendente lite order requiring the husband to pay child support. This court determined that 'there was no basis upon which the trial court could have found the [husband] to be in arrears at the time of the divorce.' Maye, 660 So. 2d at 1327. After careful consideration, we hereby overrule Maye.

"In cases seeking modification of child support, it is within the discretion of the trial court to make any modification retroactive to the date of the filing of the petition for the modification. State ex rel. Nathan v. Nathan, 680 So. 2d 339 (Ala. Civ. App. 1996); Rogers v. Sims, 671 So. 2d 714 (Ala. Civ. App. 1995); State ex rel. Dunnavant v. Dunnavant, 668 So. 2d 851 (Ala. Civ. App. 1995). ... Finally, the Alabama legislature recognized the parent's duty to support a child and created a cause of action for retroactive support. See §§ 30-3-110 et seq., Ala. Code 1975.

"Given this state's policy and law requiring a parent to support a minor child, we hold that a trial court may, in its discretion, award child support retroactive to the filing of the complaint for divorce where the trial court has failed to enter a pendente lite child support order for the period in which the parent had a duty to support the child but failed to provide that support."

719 So. 2d at 231-32.

The trial court did not make specific findings relating to its award of $30,000 in retroactive child support. The trial court's judgment states: "The [father] shall pay to [the mother] the sum of Thirty Thousand Dollars ($30,000.00) as back child support." The trial court's judgment does not explicitly state the extent of retroactivity of the $30,000 award, despite the fact that the evidence indicates that the father paid the mortgage payment and provided $2,000 per month to the mother at least through November 2016, which could support a conclusion that the award should be retroactive only to December 2016. Although, typically, this court will presume that a trial court made those findings that would support its judgment, we cannot determine what findings would support the $30,000 award in the present case. Further, in Brown, we specifically instructed trial courts to include in any retroactive child-support award a statement of reasons for the award and the manner in which the award was calculated. Brown, 719 So. 2d at 232 ("In future cases, when awarding retroactive support, the trial court should state its reasons for the award, the factors it considered, and the manner in which it calculated the retroactive support award."). We

cannot discern exactly how the trial court calculated its $30,000 retroactive-support award, what period the award was intended to cover (24 months or a lesser number of months based on the father's payment of the $2,000 monthly stipend between July 2016 and November 2016), whether the trial court considered the father's payment of any portion of the mortgage or the children's health-insurance premiums in calculating the award, or whether it excluded any payments made by the father as being other forms of pendente lite support (i.e., a form of pendente lite alimony). See A.B. v. J.B., 40 So. 3d 723, 732 (Ala. Civ. App. 2009) (reversing an award of retroactive support "[b]ecause we cannot determine how the trial court arrived at the $5,000 child-support-arrearage amount"). Instead of attempting to surmise the calculations the trial court might have employed in setting the $30,000 retroactive-child-support award, we reverse the judgment insofar as it awarded the mother $30,000 in retroactive child support, and we remand the cause for the trial court to comply with the requirements described in Brown.

Finally, the father argues that the trial court erred by failing to find the mother in contempt of the parties'

pendente lite agreement regarding the presence of members of the opposite sex after 9:00 p.m. during each party's custodial periods. According to the father, the mother admitted that J.W. had stayed at the marital residence later than 9:00 p.m. when the children were in her custody and that J.W. had stayed overnight in the presence of the children while all of them were guests in the homes of others on at least two occasions. Thus, he contends, the fact of the mother's contempt is undisputed.

The father sought to have the mother held in criminal contempt.

> "In order to establish that a party is in criminal contempt of a court order, a contempt petitioner must prove beyond a reasonable doubt that the party against whom they are seeking a finding of contempt was subject to a '"lawful order of reasonable specificity,"' that the party violated that order, and that the party's violation of the order was willful."

L.A. v. R.H., 929 So. 2d 1018, 1019 (Ala. Civ. App. 2005) (quoting Ex parte Ferguson, 819 So. 2d 626, 629 (Ala. 2001), quoting in turn United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987)). A trial court, as the trier of fact, is entitled to make credibility determinations regarding a party's excuse for noncompliance with a court order. D.E. v.

T.M., 142 So. 3d 1142, 1148 (Ala. Civ. App. 2013). "Furthermore, we have held that, '[a]bsent an abuse of discretion, or unless the judgment of the trial court is unsupported by the evidence so as to be plainly or palpably wrong, the determination of whether a party is in contempt is within the sound discretion of the trial court.'" Preston v. Saab, 43 So. 3d 595, 599 (Ala. Civ. App. 2010) (quoting Shonkwiler v. Kriska, 780 So. 2d 703, 706 (Ala. Civ. App. 2000)).

The mother testified that she did not understand that the prohibition against having a member of the opposite sex around the children after 9:00 p.m. would apply if she and J.W. were guests at the residence of another person. The testimony at trial indicated that, on the few occasions that J.W. remained at the marital residence after 9:00 p.m., it was accidental because they had lost track of time or it was because of a party at which others were also in attendance. Thus, although the mother admitted, and other evidence revealed, that J.W. had been at the marital residence after 9:00 p.m. on a few occasions and that he had spent the night in the same residence with the mother and the children on at least two

occasions at the residences of others, the trial court was free to conclude that the mother's behavior, although violative of the pendente lite order, was not so contemptuously willful that a criminal-contempt finding was warranted. See, e.g., McDaniel v. Winter, 412 So. 2d 282, 282 (Ala. Civ. App. 1982) (commenting upon a trial court's decision not to hold a party in contempt because the trial court had concluded that the party's action was not willful but resulted from a misunderstanding); see also Mullins v. Sellers, 80 So. 3d 935, 943 (Ala. Civ. App. 2011) (noting that, when the evidence indicated that the parties had agreed that the father was not required to pay child support to the mother for a certain period, the trial court could conclude that the father's failure to pay child support to the mother during that period was not willful and therefore was not contemptuous). Because the evidence supports such a conclusion, the trial court did not err in declining to hold the mother in criminal contempt.

After considering the father's several arguments, we reject his invitation to overrule Dyas and we conclude that the trial court did not err in setting the father's monthly

child-support obligation at $2,500. We also overrule J.D.A. and Myers to the extent that those decisions hold that Rule 32(C)(4) applies to require a written finding before a trial court may award additional child support for expenses like private-school tuition or extracurricular activities in cases involving parents whose combined monthly income exceeds the uppermost limit of the child-support-guidelines schedule, and we therefore affirm the trial court's judgment insofar as it ordered the father to pay 50% of the expenses associated with the children's extracurricular activities. We also affirm the trial court's judgment insofar as the trial court declined to hold the mother in criminal contempt. However, we reverse the judgment insofar as it awarded the mother $30,000 in retroactive child support because the trial court did not "state its reasons for the award, the factors it considered, and the manner in which it calculated the retroactive support award." Brown, 719 So. 2d at 232. The cause is therefore remanded for the trial court to comply with the directive in Brown.

The mother's request for an award of attorney's fees on appeal is denied.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Donaldson, J., concurs in part and dissents in part, with writing.

DONALDSON, Judge, concurring in part and dissenting in part.

I concur with the main opinion except for that portion that sua sponte overrules portions of Myers v. Myers, 260 So. 3d 55 (Ala. Civ. App. 2018), a case that neither party cited to this court, and J.D.A. v. A.B.A., 142 So. 3d 603 (Ala. Civ. App. 2013). In our 2018 opinion in Myers, we noted that we had specifically "asked the parties to submit letter briefs ... to address whether J.D.A. ... should be overruled." Myers v. Myers, 260 So. 3d at 64 n.4. In response, neither party asked us to do so, and, therefore, we applied the holding in J.D.A. in Myers. A little more than a year later, the court sua sponte overrules both J.D.A. and Myers without any request that we do so by either party to this appeal and without affording the parties to this appeal notice that we were contemplating overruling those cases and giving the parties an opportunity to be heard on that subject. I agree that stare decisis does not prevent this court from overruling Myers and J.D.A., but I would consider doing so only within the adversarial appellate-advocacy process. When viewed from the perspective of a party or counsel for a party on appeal, I believe this approach promotes public confidence and "best

advances the broader interests of justice; mitigates potential due process concerns; and better conforms to the adversarial system of judicial review." Freed v. Geisinger Med. Ctr., 607 Pa. 225, 240, 5 A.3d 212, 221 (2010) (Saylor, J., dissenting).

Therefore, I would apply the law in effect at the time the judgment was entered, reverse that portion of the judgment that requires the father to pay for 50% of "all extra-curricular activity expenses," and remand the cause for the trial court to comply with Rule 32(C)(4), Ala. R. Jud. Admin., as interpreted by Myers and J.D.A.