Rel: November 1, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180470

Emmett Shane Devore Cheshire

v.

Jenifer Eve Cheshire

Appeal from Shelby Circuit Court
(DR-17-900348)

THOMPSON, Presiding Judge.

Emmett Shane Devore Cheshire ("the husband") appeals from a judgment of the Shelby Circuit Court ("the trial court") divorcing him from Jenifer Eve Cheshire ("the wife"). In the judgment, among other things, the trial court divided the

parties' marital assets and awarded the wife periodic alimony for a period of eight years.

The record indicates the following. The parties married in February 1994 in New York. At the time of the trial, the husband and the wife had been married 24 years and both were 53 years old. They did not have any children.

According to the wife, in March 2017 she traveled to Mexico at the insistence of the husband to visit a friend who was terminally ill. The day she returned home, the wife said, the husband told her that he wanted a divorce. The wife said that the husband's statement came as a surprise to her. In May 2017, the husband left the marital residence at the wife's request and moved to Crestview, Florida. The wife filed a complaint for a divorce on June 8, 2017, on the grounds of incompatibility and an irretrievable breakdown of the marriage.

On June 9, 2017, the husband filed an answer and a counterclaim for a divorce. During the August 20, 2018, trial of this matter, the husband testified that the marriage had stopped being a partnership about five years before he told the wife he wanted a divorce. He explained that he felt like

the wife was "selfish" and that, together, the parties always did what the wife wanted to do. The wife acknowledged that she had told the husband during more than one argument that she would divorce him. She also related an incident from much earlier in the marriage when the husband and she were "both pretty drunk" at a concert and she bit him, after which he punched her in the face. She did not explain what had initially led her to bite him.

During the time the parties were separated but after the complaint was filed--the specific time is not clear from the record--the wife discovered sexually explicit e-mails between the husband and a woman he had met via computer while playing an online computer game. Evidence indicated that the woman was married and living in Florida and that she and the husband had been exchanging e-mails since October 2014. The husband testified that he did not physically meet the woman until April 2017, after he told the wife he wanted a divorce. The husband said that, in April 2017, he and the woman met at a hotel in Florida and had sex. Nonetheless, the e-mails indicate that the husband and his paramour had had a long-term active fantasy relationship before they met physically. The

husband acknowledged that, in their e-mail correspondence, he and the woman discussed the husband's desire to divorce the wife and to have a child with the woman. The wife testified that she had been unaware of the husband's extramarital relationship until she discovered the e-mails, which, as noted earlier, was apparently after she filed the divorce complaint.

On June 15, 2017, the wife filed a motion in the trial court seeking pendente lite support. At a November 22, 2017, hearing on the wife's motion, the wife testified that, from May 2017, when the parties separated, until November 2017, when the pendente lite hearing was held, the husband's bank records indicated that he had spent $17,070.80 gambling. The husband conceded that he had spent that amount gambling during the time in question. During that same period, the wife said, the husband had given her only $600 for groceries, clothes, gas, care of their pets, and similar household expenses. The wife said that she had to borrow $35,000 from a family member and a friend to make ends meet.

The husband testified that the wife had mischaracterized the way he had handled money after his departure from the marital residence. He said that, after he left the marital

residence, he continued to pay the mortgage and the utility bills associated with the marital residence. The husband testified that he had sent text messages to the wife asking her whether she needed money for food, gas, clothes, and for the pets, but, he said, she did not respond to him. The husband testified that he assumed that, because the wife was working for a pet-sitting service when he left the marital residence, she was still working "making the money to pay her individual bills." The wife denied that she had received those text messages from the husband.

On December 1, 2017, the trial court entered a pendente lite order pursuant to which the husband was to pay the wife $3,500 a month plus 25% of any commissions he received. The wife had exclusive use of the marital residence pending the divorce. The husband was directed to pay the mortgage and all utility bills. He was also ordered to pay the wife's medical bills.

The husband filed a motion to modify the pendente lite order, and further litigation ensued. On April 2, 2018, the the parties announced to the trial court that they had reached an agreement regarding pendent lite support. Pursuant to that

agreement, which the trial court incorporated into its order of April 17, 2018, the husband was to continue to pay the wife $3,500 a month plus 35% of any commissions he made. The husband was also directed to make the April 2018 mortgage payment on the marital residence, but, from that point forward, the wife was responsible for paying the mortgage. She was also ordered to pay all current and future "household bills."

The action proceeded to trial on August 20, 2018. Evidence presented at the trial indicated that, when the parties were first married, the wife had graduated from cosmetology school and worked as a cosmetologist. Early in the marriage, the husband and the wife both obtained associates degrees and went on to the State University of New York, and, in 2004, each obtained a bachelor's degree. The wife earned her degree in environmental biology; the husband earned his in paper-science engineering. While in college, the parties each accumulated significant student debt. The husband testified that, in 2006, after graduating, he attempted to obtain a job that would allow them to stay in New York, but, he said, the parties needed money and he accepted

an offer from a company called Nalco to work at a paper mill in Valliant, Oklahoma, near the Oklahoma-Texas border. While the husband worked in Valliant, the husband and the wife lived in Paris, Texas.

The wife testified that, after working only six months at the Valliant mill, the husband was transferred because, she said, he threatened to "cut the throat" of a competing sales representative. The husband did not deny making the threat, but he said that he did it because the competitor "messed with [his] delivery driver." Rather than being punished for his conduct, the husband said, he was praised for coming to the aid of the driver. Regardless, the husband was transferred to a plant in Orange, Texas, near Lake Charles, Louisiana, where the parties lived for about four and a half years. The wife testified that the husband began "having trouble with the mill management" in Orange. As a result, she said, in 2012, the husband was transferred to Ruston, Louisiana, and the parties moved again. Ultimately, the wife said, the husband was fired from Nalco. In 2013, the husband took a job with GE in Birmingham, and the parties moved to Shelby County in January 2014. The wife said that the husband was fired from his job

with GE and that he began working with Evoqua Water Technologies in Birmingham in December 2015.

The evidence indicated that, at the time of the trial, the husband's base salary was $97,539. He could also earn a commission of $78,083 or more if he reached or exceeded his goal of making $9 million in sales. The husband explained that if he reached 80% of the goal, he would earn 50% of the total commission and that he would earn 60% of the commission if he reached 90% of his goal. The husband said that he would not receive any commission if he did not meet at least 80% of the sales goal. However, if exceeded his sales goal, the husband said, he could earn an even higher commission. The commissions were paid quarterly. In 2016, his first year with Evoqua, the husband earned $128,696.77. He acknowledged that he could earn approximately $170,000 for the year the trial was taking place.

In addition to his salary, the husband said, he had a company car. The husband testified that just under $200 was taken from his paycheck each month so that he could drive the vehicle for personal use. Evoqua also provided the husband

with a cellular telephone and paid his expenses when he traveled for work.

The wife testified that the parties moved seven times in eight years. She acknowledged that not each move was associated with a job change. For example, the parties had to move from one house when the lease on that house expired. They had to move from another house that was apparently damaged in a hurricane. Nonetheless, the wife said, she managed the packing and unpacking for each move, setting up the household at each new location. She testified that she was the person who found new doctors and veterinarians, did the shopping, and took care of the other necessities that had to be dealt with when moving to a new area. The wife said that she also entertained the husband's business associates. The wife attributed the husband's frequent changes in jobs to his inability to "get along" with the people with whom he worked.

The evidence indicated that the wife did not attempt to obtain a full-time job after the parties finished college. She took some graduate-level courses but never actively pursued a graduate degree. The wife testified that the

parties' frequent moves prevented her from establishing a career of her own or from working toward a graduate degree. Instead, she said, she had worked four part-time jobs in the eleven years before the parties separated. She said that, during the marriage, the most she had ever earned was $10 an hour working 35 hours a week. The parties agreed that the husband asked the wife to work at different points during the marriage. While living in Birmingham, the wife had worked as a stable hand at the stables where the parties kept their two horses. However, the wife said, because of back and neck pain and plantar fasciitis, she was unable to stay in that job. At the time the parties separated in May 2017, the wife worked no more than ten hours a week as a pet sitter. However, the wife said, she was so upset about the circumstances regarding the parties' separation that she "couldn't stop crying," she was making mistakes and unable to concentrate, and, therefore, she said, she had to quit that job. At the trial, the wife said that she had not had a job in 14 months.

The husband testified that, during the marriage, he had asked the wife to work, not just for the money, but because, he said, when the wife was not feeling good, he encouraged her

to work or volunteer some place so that she would be around other people. In July 2012, the husband and the wife bought a pair of horses. The wife said that she had been riding since she was five years old. The husband testified that he had not realized how expensive the horses would be and wanted to "get rid of" his horse, but the wife would not let him. Not only did the horses require upkeep, but, during the marriage, the wife entered them in what she called "schooling shows." The wife testified that the upkeep for the horses used to cost between $2,500 and $3,000 each month. The husband said that, at that time, the expense of keeping the horses was half of his take-home pay each month. He said that eventually he had needed to take money from his retirement account to pay the costs associated with the horses. At the time of the trial, the wife said, she had moved the horses to stables costing less than half the price of the previous stables. She said that she had "reduced the cost [associated with the horses] immensely."

The wife testified that she realized the horses were expensive and had found a new home for the husband's horse. However, she said, that horse was injured and she had it

returned to her so that it would not be sent to a "slaughter auction." The wife said that she would be distraught if she had to give away the horses, adding that they were not a hobby, they were like children.

The wife testified that, during the marriage, in addition to traveling to horse shows, the parties had traveled to the coast about once a month. She said that they had also taken short trips to Nashville and Memphis and had visited her family. At least once a year, the wife said, the husband and the wife would take a vacation to Mexico. The husband testified that he loved Mexico. At one point, the husband said, the parties had formed a corporation for the purpose of purchasing a small parcel of property in Mexico. The husband testified that the Mexico property was worth about $5,000, but, he said, he no longer wanted the property.

Like the wife, the husband also had an expensive hobby. He acknowledged that he gambled relatively large sums of money. The husband testified that, after the parties' separation and the entry of the order directing him to pay the wife pendente lite support, he continued to gamble. In addition, the husband said that he had also given his paramour

$2,000 and had taken vacations with his paramour and her children.

Evidence indicated that, when the wife filed the divorce complaint, the husband took $20,000 from his retirement account and used an additional $5,000 from the account to pay the tax penalty for early withdrawal. The husband testified that he intended to use the money to make needed repairs to the marital residence so that the house could be sold and the equity divided between the wife and him. Photographs of the house indicated that cabinets were missing and flooring and that drywall needed replacing. The wife testified that squirrels had damaged the roof and wiring and that there was no electricity to the living room. She also said that the deck outside the house and the deck around the swimming pool were both rotting in places and needed to be repaired or replaced. Instead of allowing the husband to use the $20,000 to make the necessary repairs, the husband said, the wife wanted a new vehicle. The wife testified that her previous vehicle was "catching on fire." The wife purchased a ten-year-old vehicle for $9,000. The husband said that he used the remainder of the money he withdrew to gamble. At the

trial, the wife testified that, based on the husband's checking-account statements, she concluded that he had spent $31,721.51 on gambling between April 17, 2017, and October 27, 2017. At an earlier hearing, she had testified that, during essentially the same period, she had concluded that, based on account statements, the husband had spent $17,070.80 gambling.

The parties agreed that they had purchased the marital residence for $279,000 and that, at the time of the trial, the balance of the mortgage on that house was approximately $235,000. Before the trial, the husband and the wife each had a real-estate agent look at the house. The wife testified that she believed that the marital residence in its current condition was worth between $275,000 and $285,000. The husband testified that, based on his real-estate agent's drive past the house, he believed that it was worth between $345,000 and $350,000.

As mentioned, the husband wanted to sell the marital residence and divide the equity. However, the wife told the trial court that she wanted to remain in the marital residence. She said that she would be able to refinance the

house in her own name and that she would make the necessary repairs.

Other than the marital residence and the property in Mexico, the only other large marital asset was the husband's retirement account, which the wife said contained about $30,000 at the time of the trial. The husband presented no evidence as to the value of his retirement account.

Each party submitted a monthly budget to the trial court. The husband's budget, which included rent, groceries, utilities, his student-loan payment, and the $3,500 in pendente lite support he paid to the wife each month, was $6,677. Before commissions, he stated, his monthly take-home pay was $5,251. The wife submitted a monthly budget of $7,311. That amount included the monthly mortgage payment as well as monthly payments for utilities, groceries, entertainment and travel, transportation, health insurance, medical expenses, personal care, church, pets, upkeep of the horses, and money to place in savings. The wife also included in her budget a total of $5,155 for burial expenses, to be paid over 24 months. The husband testified that, during the

marriage, the parties' monthly expenses had not reached the amount the wife had budgeted.

On November 13, 2018, the trial court entered a judgment divorcing the parties. The judgment included findings of fact regarding, among other things, what the trial court called the husband's "sexually explicit emotional affair," his gambling, and the wife's fragile emotional state after the husband asked for the divorce and she learned of the husband's affair. In the judgment, the trial court ordered the husband to pay the wife periodic alimony of $3,000 per month for 96 months, i.e., 8 years, to give the wife the opportunity "to pursue and complete her graduate courses of study and re-enter the workforce." The wife was also awarded 25% of any commissions the husband received "so long as he owes an obligation of alimony to the wife." The wife was also awarded the marital residence and all of the equity therein. According to the wife's lowest estimate, the parties had at least $40,000 of equity in the marital residence. The wife was made responsible for the balance of the mortgage and all other expenses associated with the marital residence. In addition, the wife was awarded a property settlement of $20,000, the

parcel of property in Mexico, the vehicle that had been purchased with money from the husband's retirement account, and the parties' pets, including the horses. The husband was directed to maintain health insurance on the wife for the longer of the period permitted by his employer or as allowed by law. He was also directed to maintain a life-insurance policy in the amount of $250,000, naming the wife as the beneficiary, for the eight years he was required to pay her periodic alimony.

The husband was awarded all of the furniture in the marital residence, which the husband had estimated had a value of approximately $8,000. He was also awarded the balance of his retirement account, which the wife estimated was approximately $30,000. Each party was awarded his or her personal property.

During the pendency of the divorce proceeding, the wife had filed a motion for contempt alleging that the husband had failed to comply with all of the provisions of the December 1, 2017, pendente lite order. Specifically, the wife alleged that the husband had failed to pay her medical bills, her share of the commission the husband had received in November

2017, and the first pendente lite alimony check owed December 1, 2017. The total amount the wife claimed the husband had failed to pay her was $9,319.21. That amount also included $2,800 for a furnace--an expense the wife conceded at trial was not included in the pendente lite order and agreed could be removed from the total she was seeking. In the judgment, the trial court found the husband in contempt and ordered him to pay $9,319, deducting nothing for the cost of the furnace. Finally, the husband was ordered to pay $15,000 toward the wife's attorney fee.

The husband filed a timely motion to alter, amend, or vacate the judgment, which was denied by operation of law. The husband filed a timely notice of appeal to this court.

On appeal, the husband contends that a number of the trial court's findings of fact were erroneous. As part of that contention, the husband asserts that the judgment appears to have been a proposed judgment prepared by the wife that the trial court adopted. Therefore, he argues in his brief, it "'does not reflect the independent and impartial findings and conclusions of the trial court.' Ex parte Ingram, 51 So. 3d 1119, 1124 (Ala. 2010)." The record does not contain a

proposed order from the wife, which the husband acknowledges. Because the husband's assertion as to the origin of the judgment is based only on speculation and conjecture and is not supported by the record, we reject the argument that it does not reflect the trial court's independent findings.

In his appellate brief, the husband sets forth five quotes from the trial court's findings that he contends are "blatant" material errors that led the trial court to fashion an inequitable property division and award of periodic alimony. Regarding four of the five statements, the husband is actually challenging the conclusions the trial court drew from the evidence.

> "'When evidence is presented ore tenus, the trial court is "'unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility.'" Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007) (quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). Therefore, a presumption of correctness attaches to a trial court's factual findings premised on ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008). ... We will not disturb the findings of the trial court unless those findings are "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence." Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987) (citing Cougar Mining Co. v. Mineral Land & Mining Consultants, Inc., 392 So. 2d 1177 (Ala. 1981)). "'The trial court's judgment [in cases where evidence is presented ore tenus] will be affirmed, if, under any

> reasonable aspect of the testimony, there is credible evidence to support the judgment.'" Transamerica[Commercial Fin. Corp. v. AmSouth Bank, N.A.], 608 So. 2d [375] at 378 [(Ala. 1992)] (quoting Clark v. Albertville Nursing Home, Inc., 545 So. 2d 9, 13 (Ala. 1989), and citing Norman v. Schwartz, 594 So.2d 45 (Ala. 1991)); see also Ex parte Perkins, 646 So. 2d 46 (Ala. 1994).'"

Seibert v. Fields, [Ms. 2171028, March 22, 2019] ___ So. 3d. ___, ___ (Ala. Civ. App. 2019)(quoting Espinoza v. Rudolph, 46 So. 3d 403, 412 (Ala. 2010)).

The first statement the husband takes issue with is: "[The] Wife assisted her husband in job relocations wherein they moved around the United States 9 times. During each move the Wife managed the move." The husband states that the parties moved only four times, not nine times, and that the wife did not pack and totally unpack for each move. The record indicates that the parties moved from state to state four times; however, they also moved from house to house within a given area. The wife testified that the parties moved seven times in eight years. She also testified that she managed the packing and unpacking and set up the household at each location. Based on the record, although the trial court possibly overstated the total number of times the parties moved--it appears they moved eight times and not nine as the

judgment states--the error, if any, is so minimal it cannot be said to have probably injuriously affected the husband's substantial rights. Rule 45, Ala. R. App. P. ("No judgment may be reversed ... unless in the opinion of the court to which the appeal is taken ..., after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). Therefore, the error, if any, is harmless, and we cannot say that the first challenged statement, although not precise, is unsupported by the evidence.

The second challenged statement is: "Then the Husband left the marital residence on May 13, 2017, to move to Florida." The husband complains that the statement does not recognize that the wife asked him to leave the marital residence. Nonetheless, as the trial court pointed out before that statement, on the day the wife came home from Mexico, the husband "blindsided her" with a request for a divorce. The wife did ask the husband to leave the marital home, but, once the wife made that request, the husband made the decision to move from Shelby County to Florida. Once again, we cannot say

that the trial court's statement is plainly and palpably wrong.

The next statement the husband takes umbrage with is: "The Husband had been having a sexually explicit emotional affair with his girlfriend since 2014." The husband's argument as to this statement is that, during the trial, the trial judge made the statement that he did not believe you could have an "adulterous affair over email" and that such an affair "requires sex." In its judgment, the trial court made a nuanced statement that the husband was engaged in a "sexually explicit emotional affair." The evidence shows that the husband and the woman with whom he carried out the e-mail correspondence over a number of years sent each other literally thousands of notes in which they were sexually explicit, discussed the husband divorcing the wife to be with the woman, and discussed the husband and the woman having a child together. Based on that evidence, the trial court's characterization of their relationship as a "sexually explicit emotional affair" is factually accurate.

The fourth statement the husband sets out as being erroneous is: "It is undisputed that, after her Husband left,

he provided no financial support for Wife's food, gas, clothing, money to feed their pets ...." As to this statement, the husband points out that he sent the wife a text offering to give her money for those expenses, but, he said, the wife never responded. The wife testified that she never received such a text. It is the trial court's duty to resolve factual disputes. Wells v. Tankersley, 244 So. 3d 975, 982 (Ala. Civ. App. 2017). It was undisputed that the husband did not provide the wife with money for those expenses until the pendente lite order was entered directing him to pay the wife $3,500 each month. Once again, the trial court's finding is a fair reading of the evidence.

The fifth statement quoted by the husband is challenged for a different reason than the previous four statements. The fifth statement reads: "The Wife testified regarding her MOTION TO SHOW CAUSE AND FOR SANCTIONS. She entered into evidence that the husband owed her $9,319.21 to date for unpaid items that he was ordered to pay pursuant to the pendente lite orders." The basis for the husband's challenge to this statement is that, at the trial, the wife testified that $2,800 of that total amount was used to purchase a new

furnace--an expense that was not specifically addressed in the pendente lite orders. The wife told the trial court that that amount could be deducted from the total amount she claimed the husband had failed to pay her. Therefore, the husband argues, the trial court erred in ordering him to pay the wife $9,319 as a sanction for contempt.

In the pendente lite order entered on December 1, 2017, the trial court ordered the husband to "pay all the mortgage and utility bills of the marital home pendent lite." The receipt for the furnace indicates that the wife purchased it on January 10, 2018. The modified pendente lite order, which made the wife responsible for "household bills currently due in addition to household bills going forward" was entered on April 16, 2018.

"The determination of whether a party is in contempt is within the sound discretion of the trial court, and that determination will not be reversed absent a showing that the court exceeded the limits of its discretion. Stack v. Stack, 646 So. 2d 51 (Ala. Civ. App. 1994)." Routzong v. Baker, 20 So. 3d 802, 810 (Ala. Civ. App. 2009). In his argument that the trial court erred in making the fifth statement in its

findings of fact, the husband states that there was no evidence that he was wilfully noncompliant with any court order, as Rule 70A(2)(D), Ala. R. Civ. P., requires. Therefore, he says, he could not be held in contempt.

> "'"Civil contempt" is defined as a "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with." Rule 70A(a)(2)(D), Ala. R. Civ. P. ..."'
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> "Routzong v Baker, 20 So. 3d 802, 810 (Ala. Civ. App. 2009). '"The failure to perform an act required by the court for the benefit of an opposing party constitutes civil contempt." Carter v. State ex rel. Bullock County, 393 So. 2d 1368, 1370 (Ala. 1981).' J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1012 (Ala. Civ. App. 2007). Furthermore, '"[t]he purpose of a civil contempt proceeding is to effectuate compliance with court orders and not to punish the contemnor." Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997).' Hall v. Hall, 892 So. 2d 958, 962 (Ala. Civ. App. 2004)."

Reed v. Dyas, 28 So. 3d 6, 8 (Ala. Civ. App. 2009)(emphasis added).

There is no language in either pendente lite order that would indicate to the husband that he was responsible for reimbursing the wife for the purchase of a new furnace. Thus, the husband obviously did not fail to comply with any order of the trial court by not paying for the furnace, and he cannot

be held in contempt on that basis. Accordingly, the trial court abused its discretion in including in its judgment the $2,800 attributable to the cost of the furnace as part of its contempt sanction against the husband. The provision of the judgment ordering the husband to pay the wife a total of $9,319 for his "noncompliance with [the trial] court's prior pendente lite orders" must be reversed so that the trial court can enter a new judgment deducting $2,800 from the total amount of the contempt sanction levied against the husband.

The husband next argues that the trial court's award of periodic alimony and the division of marital property were not equitable.

> "'In reviewing a trial court's judgment in a divorce case where the trial court has made findings of fact based on oral testimony, we are governed by the ore tenus rule. Under this rule, the trial court's judgment based on those findings will be presumed correct and will not be disturbed on appeal unless it is plainly and palpably wrong. Hartzell v. Hartzell, 623 So. 2d 323 (Ala. Civ. App. 1993). Matters of alimony and property division are interrelated, and the entire judgment must be considered in determining whether the trial court abused its discretion as to either of those issues. Willing v. Willing, 655 So. 2d 1064 (Ala. Civ. App. 1995). Furthermore, a division of marital property in a divorce case does not have to

> be equal, only equitable, and a determination of what is equitable rests within the sound discretion of the trial court. Golden v. Golden, 681 So. 2d 605 (Ala. Civ. App. 1996). In addition, the trial court can consider the conduct of the parties with regard to the breakdown of the marriage, even where the parties are divorced on the basis of incompatibility. Ex parte Drummond, 785 So. 2d 358 (Ala. 2000). Moreover, in Kluever v. Kluever, 656 So. 2d 887 (Ala. Civ. App. 1995), this court stated, "[a]lthough this court is not permitted to substitute its judgment for that of the trial court, this court is permitted to review and revise the trial court's judgment upon an abuse of discretion." Id. at 889.'
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> "Langley v. Langley, 895 So. 2d 971, 973 (Ala. Civ. App. 2003). 'Trial judges enjoy broad discretion in divorce cases, and their decisions are to be overturned on appeal only when they are "unsupported by the evidence or [are] otherwise palpably wrong."' Ex parte Bland, 796 So. 2d 340, 344 (Ala. 2000) (quoting Ex parte Jackson, 567 So. 2d 867, 868 (Ala. 1990))."

Cottom v. Cottom, 275 So. 3d 1158, 1163 (Ala. Civ. App. 2018).

> "'Matters such as alimony and property division are within the sound discretion of the trial court. Ex parte Drummond, 785 So. 2d 358 (Ala. 2000); Parrish v. Parrish, 617 So. 2d 1036 (Ala. Civ. App. 1993); and Montgomery v. Montgomery, 519 So. 2d 525 (Ala. Civ. App. 1987). The issues of property division and alimony are interrelated, and they must be considered together on appeal. Albertson v. Albertson, 678 So. 2d 118 (Ala. Civ. App. 1996).

> "'In dividing property and awarding alimony, a trial court should consider "the earning abilities of the parties; the future prospects of the parties; their ages and health; the duration of the marriage; [the parties'] station[s] in life; the marital properties and their sources, values, and types; and the conduct of the parties in relation to the cause of the divorce.' Russell v. Russell, 777 So. 2d 731, 733 (Ala. Civ. App. 2000). Also, a trial court is not required to make an equal division of the marital property, but it must make an equitable division based upon the particular facts and circumstances of the case. Golden v. Golden, 681 So. 2d 605 (Ala. Civ. App. 1996); and Brewer v. Brewer, 695 So. 2d 1 (Ala. Civ. App. 1996). "A property division that favors one party over another does not necessarily indicate an abuse of discretion." Fell v. Fell, 869 So. 2d 486, 496 (Ala. Civ. App. 2003) (citing Dobbs v. Dobbs, 534 So. 2d 621 (Ala. Civ. App. 1988))."
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> "Turnbo v. Turnbo, 938 So. 2d 425, 429–30 (Ala. Civ. App. 2006)."

Walker v. Walker, 216 So. 3d 1262, 1270–71 (Ala. Civ. App. 2016). There is no rigid standard or mathematical formula on which a trial court must base its determination of alimony and the division of marital assets. Yohey v. Yohey, 890 So. 2d 160, 164 (Ala. Civ. App. 2004). Finally, the issues of property division and alimony are interrelated, and they must

be considered together on appeal. Albertson v. Albertson, 678 So. 2d 118 (Ala. Civ. App. 1996).

> "'A petitioning spouse proves a need for periodic alimony by showing that without such financial support he or she will be unable to maintain the parties' former marital lifestyle. See Pickett v. Pickett, 723 So. 2d 71, 74 (Ala. Civ. App. 1998) (Thompson, J., with one judge concurring and two judges concurring in the result). As a necessary condition to an award of periodic alimony, a petitioning spouse should first establish the standard and mode of living of the parties during the marriage and the nature of the financial costs to the parties of maintaining that station in life. See, e.g., Miller v. Miller, 695 So. 2d 1192, 1194 (Ala. Civ. App. 1997); and Austin v. Austin, 678 So. 2d 1129, 1131 (Ala. Civ. App. 1996). The petitioning spouse should then establish his or her inability to achieve that same standard of living through the use of his or her own individual assets, including his or her own separate estate, the marital property received as part of any settlement or property division, and his or her own wage-earning capacity, see Miller v. Miller, supra, with the last factor taking into account the age, health, education, and work experience of the petitioning spouse as well as prevailing economic conditions, see DeShazo v. DeShazo, 582 So. 2d 564, 565 (Ala. Civ. App. 1991), and any rehabilitative alimony or other benefits that will assist the petitioning spouse in obtaining and maintaining gainful employment. See Treusdell v. Treusdell, 671 So. 2d 699, 704 (Ala. Civ. App. 1995).

> If the use of his or her assets and wage-earning capacity allows the petitioning spouse to routinely meet only part of the financial costs associated with maintaining the parties' former marital standard of living, the petitioning spouse has proven a need for additional support and maintenance that is measured by that shortfall. See Scott v. Scott, 460 So. 2d 1331, 1332 (Ala. Civ. App. 1984).'
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> "Shewbart v. Shewbart, 64 So. 3d 1080, 1087–88 (Ala. Civ. App. 2010)."

Rieger v. Rieger, 147 So. 3d 421, 430 (Ala. Civ. App. 2013).

In this case, the parties had two primary marital assets and a number of assets of lesser value. The largest of their marital assets was the marital residence, which, it was undisputed, was in disrepair. The wife received the marital residence and all of the equity accumulated in the residence. However, she also must assume the remaining debt on the mortgage secured by the marital residence, as well as the costs of repairs. The only other asset of significant value was the husband's retirement account in the amount of $30,000, which was awarded to the husband. The trial court also ordered the husband to pay the wife a property settlement of $20,000. In deciding to award the wife the $20,000, the trial court could have considered the undisputed evidence that the

husband gambled and used money from his retirement account to cover his losses. Without those loses, the parties would have had a larger marital estate, which would have benefited them both.

Regarding the smaller marital assets, the wife was awarded the parties' pets, including their two horses, and all of the equipment that goes with the horses. Like the marital residence, the upkeep of the horses will be an added expense for the wife. The wife also was awarded the property in Mexico valued at $5,000; health insurance for as long as the husband's employer will allow the husband to have the wife as a beneficiary or for as long as allowed by law, whichever is longer; and her vehicle, purchased for $9,000. The husband was awarded furniture valued at $8,000.

The trial court also awarded the wife periodic alimony in the amount of $3,000 a month for eight years and 25% of the commissions the husband receives as long as he is paying periodic alimony. Since earning her bachelor's degree, the wife worked only four part-time jobs earning, at most, $10 an hour. At the time the divorce judgment was entered, the husband and the wife were both 53 years old and had been

married 24 years. The wife testified that, before the divorce, the parties had maintained their horses and the wife had attended horse shows. The wife testified that, during the marriage, the parties had traveled to Mexico for a vacation at least once a year. In addition, the wife said, they would travel to the coast about once a month and would take short trips throughout the year.

There was no evidence indicating that the husband had any health issues, and he testified that he intended to work until he was 70 years old. The wife complained of back and neck pain and plantar fasciitis that prevented her from doing jobs such as working as a stable hand, but, she said, she was able to work. The husband had been the primary wage earner since the parties finished college. He earns substantially more income than the wife, and he will continue to do so for the foreseeable future. He also has the ability to substantially increase his annual income by earning a substantial bonus each year. The trial court stated that the award of periodic alimony to the wife was intended to "provide the Wife the opportunity to pursue and complete her graduate courses of study and re-enter the workforce."

Additionally, although the wife did not seek a divorce on the ground of adultery, the trial court reasonably could have believed that the husband's relationship with the woman with whom he had been having the "emotional affair" since 2014 led to the decline of the marriage. "'"[E]ven where the parties are divorced on the grounds of incompatibility, the conduct of the parties and fault with regard to the breakdown of the marriage are factors for the trial court to consider in fashioning its property division."'" Culver v. Culver, 199 So. 3d 772, 777 (Ala. Civ. App. 2016) (quoting Ex parte Drummond, 785 So. 2d 358, 363 (Ala. 2000), quoting in turn Myrick v. Myrick, 714 So. 2d 311, 315 (Ala. Civ. App. 1998)).

No useful purpose would be served by setting forth the details of the husband's extramarital relationship. However, the nature of that evidence supports a determination that the trial court considered the husband's fault in bringing about the end of the parties' marriage when it fashioned its award of alimony and the division of marital property.

Under the facts of this case, and given the broad discretion afforded the trial court in making such awards, we cannot say that the husband has demonstrated that the trial

court abused its discretion in reaching its property division and the award of periodic alimony to the wife.

Finally, the husband argues that the trial court erred in ordering him to pay the wife an attorney fee of $15,000. Most of the husband's argument as to this issue is devoted to his assertion that the wife improperly obtained his private e-mails without his permission. He then says the e-mails should not have been considered in the computation of attorney fees. He also notes that he missed a hearing early in the proceedings because, he said, his former attorney gave him the wrong date and he came to court the next day.

At the trial, the wife testified that she had paid her attorney approximately $30,000 and owed an additional $2,000 to $5,000. In its judgment, the trial court found that, rather than providing the wife with financial documents requested in discovery, the wife had had to request subpoenas to obtain each document necessary to prove the husband's income and assets. The trial court also found that the wife had had to "spend extra money in attorney fees to have three pendente lite hearings." One of those hearings was the one for which the husband did not appear. The third pendente lite

hearing was required because of "the husband's attempt to alter, amend, or vacate the order for support from the second hearing." We observe that, in awarding the wife an attorney fee, the trial court did not mention the e-mails that the husband said were improperly gathered.

> "Whether to award an attorney fee in a domestic relations case is within the sound discretion of the trial court and, absent an abuse of that discretion, its ruling on that question will not be reversed. Thompson v. Thompson, 650 So. 2d 928 (Ala. Civ. App. 1994). 'Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney.' Figures v. Figures, 624 So. 2d 188, 191 (Ala. Civ. App. 1993). Additionally, a trial court is presumed to have knowledge from which it may set a reasonable attorney fee even when there is no evidence as to the reasonableness of the attorney fee. Taylor v. Taylor, 486 So. 2d 1294 (Ala. Civ. App. 1986)."

Glover v. Glover, 678 So. 2d 174, 176 (Ala. Civ. App. 1996).

> "The circuit court had the discretion to decide whether to require the husband to pay the wife's attorney fees. We will not reverse the circuit court's discretionary decisions unless we are convinced that it '"'committed a clear or palpable error, without the correction of which manifest injustice will be done.'"' D.B. v. J.E.H., 984 So. 2d 459, 462 (Ala. Civ. App. 2007) (quoting Clayton v. State, 244 Ala. 10, 12, 13 So. 2d 420, 422 (1942), quoting in turn 16 C.J. 453)."

Damrich v. Damrich, 178 So. 3d 872, 882 (Ala. Civ. App. 2014); see also Brown v. Brown, 260 So. 3d 851, 858-59 (Ala. Civ. App. 2018).

In this case, the trial court found that the husband's conduct caused the wife to incur more attorney fees than she ordinarily would have. It also had before it evidence of the amount the wife had already paid to her attorney, plus a smaller, additional amount still owed. The evidence indicated that the husband earned substantially more money than the wife at the time of the trial and that, as a result, the husband was better able to afford the attorney fee. Finally, although the wife filed the divorce complaint, it is undisputed that the husband told her he wanted a divorce, seemingly catching the wife off guard. The trial court ordered the husband to pay the wife approximately half of the attorney fee she had incurred. Based on the record before us, we cannot say that the trial court erred in ordering the husband to pay the wife an attorney fee of $15,000.

For the reasons set forth above, we reverse that portion of the judgment ordering the husband to pay a total of $9,319 as a sanction for contempt, and we remand the cause to the

trial court for it to enter a judgment deducting the $2,800 cost of the furnace from that total. The remainder of the judgment is affirmed.

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

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