Rel: December 2, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2201007

Stacy Turney

v.

Amy Turney

Appeal from Madison Circuit Court
(DR-19-900485)

On Application for Rehearing

THOMPSON, Presiding Judge.

This court's opinion of August 19, 2022, is withdrawn, and the following is substituted therefor.

Stacy Turney ("the husband") appeals a judgment of the Madison Circuit Court ("the trial court") divorcing him from Amy Turney ("the

wife"). We affirm the judgment with regard to the awards of an attorney fee, past-due child support, and periodic alimony; we reverse the judgment with regard to the requirement that the husband maintain a life-insurance policy to secure the periodic-alimony obligation awarded to the wife; and we remand the cause.

The parties were married in 1991. Three children were born of the marriage, with the youngest child attaining the age of majority in October 2020, during the pendency of the underlying proceedings.[1] In 2018, after the husband had admitted to engaging in several extramarital sexual encounters, the parties separated. On June 17, 2019, the wife filed a complaint in the trial court seeking a divorce. A pendente lite order was issued that same day. That order provided, among other things, that the parties were to preserve all financial assets in their present form and that they were to maintain the status quo and continue to pay expenses in the same manner as before the filing of the divorce complaint. The husband filed an answer and asserted a counterclaim.

[1]The oldest child was born in June 1998; the middle child was born in January 2000; the youngest child was born in October 2001.

On April 13, 2021, the trial court conducted a trial and received ore tenus evidence. The husband testified that he was 50 years old and that he and the wife had been married for almost 30 years. He stated that, after he graduated from high school, he joined the Marine Corps Reserve and served a five-month deployment in the Gulf War. When he returned from that war, he married the wife, enrolled in an online theological course, and worked in a Christian bookstore. From 1998 through 2017, the husband served in various churches. He stated that the wife had been a good mother to their children, had supported his ministry career, had been an asset to his ministry, and had supported his decision in August 2017 to end his ministry career.

The record indicates that when the husband retired from his ministry career, he had not secured other employment. He stated that he and the wife discussed his future employment opportunities and that they decided that the family would move to north Alabama and he would seek permanent employment after their middle child graduated from high school in May 2018. Thus, upon retiring from his ministry career, the husband went to work for one of his former parishioners, and, in December 2017, the husband accepted a position as a financial planner

with Edward D. Jones & Co. The husband stated that he had planned on studying for and taking his licensing exams to become a certified financial planner in Dothan and then opening a financial-planning office in north Alabama after the family had moved there.

According to the husband, in February 2018, he became fearful that he had contracted a sexually transmitted disease and informed the wife that since 2015 he had engaged in several anonymous extramarital sexual encounters. The husband also informed the wife that he had engaged in a sexual encounter with a masseuse.

Upon learning of the husband's extramarital sexual encounters, the wife asked him to leave the marital residence. The husband decided to move to north Alabama ahead of the family and to live with various relatives. Hoping that he and the wife could reconcile and that the family could be reunited, the husband signed a lease for a house in Madison.

In late May 2018, the wife and the children moved into the house that the husband had leased. The wife, however, refused to let the husband live with her and the children because the husband had engaged in additional extramarital sexual encounters after moving to north Alabama. The husband testified that, despite his lack of faithfulness to

the wife, the wife never spoke derogatorily about him and that he accepted full responsibility for his actions, which, he said, contributed significantly but not entirely to the breakdown of the parties' marriage.

Evidence was presented indicating that during the marriage the husband was the breadwinner for the family and the wife was a stay-at-home mother who had also worked part-time at the various churches where the husband had worked. According to the husband, when he retired from a career in the ministry and, consequently, resigned from his position with a church for which he was working, the wife, who also had worked for that same church but in a part-time position, lost her part-time position. The evidence indicated that, at the end of his ministry career, the husband earned the equivalent of $102,500 per year in salary and benefits. When he entered the Edward Jones training program, the husband received an initial salary of $70,000 per year. He testified that, because he had subsequently passed his licensing exams, over a five-year period his salary would decrease incrementally and the percentage of his commissions on the accounts that he managed for Edward Jones would increase. The husband explained that, as he increased his client base and acquired new accounts for Edward Jones, he would also earn

bonuses. He stated that he had been given an $8,000,000 account of a retiring broker to manage and that, in January 2021, he had started receiving a commission from that account.[2] As of April 2021, the husband had received $23,108 in income from Edward Jones for the year, and he stated that he expected his gross income for 2021 to be $92,000. He further testified that he received disability benefits in the amount of $661 per month from the Department of Veteran's Affairs ("VA") due to injuries he had suffered while on active military duty.[3] The husband testified that his VA disability benefits would be reduced when the divorce judgment was entered because he would no longer have a spouse.

According to the husband's testimony, his W-2 tax form for 2019 indicated that his gross income was $74,955 and that he had invested

[2]According to the husband, his income from that account would be sporadic because, he said, he would receive compensation from the account only if the owner of the account sold stocks or reallocated funds.

[3]The husband testified that his VA disability benefits consisted of $443 for him, $48 for the wife, and $170 for the two children enrolled in college. The husband did not testify that his VA disability benefits were received in lieu of retirement benefits.

$7,300 in a health-savings account ("HSA").[4] The husband testified that his W-2 form for 2020 indicated that his gross income was $66,527 and that his HSA contribution was $7,344.[5] The wife's exhibit number 23, which was admitted into evidence, indicated that each month in 2020 the husband had received $486.69 in benefits from the VA. The husband further testified in his deposition that in the past year he had received approximately $30,000 from the VA, consisting of VA disability back payments and a refund. The husband admitted to cashing most of the checks from the VA without sharing any of those funds with the wife. Specifically, he explained that, in January 2020, he had received a check from the VA in the amount of $2,250 and that, in February 2020, he had received a funding-fee refund in the amount of $1,628 due to a VA application that he had submitted approximately 8 years earlier while he was married to the wife. He further testified that, in October 2019, he

[4]The parties' oldest child, who is an adult, has Crohn's disease. The husband testified that he placed funds in the HSA to cover the cost of the child's insurance deductibles and medications.

[5]The husband disputed the amounts that he contributed to the HSA reflected on his W-2 forms for 2019 and 2020, but he did not dispute that the code "S-125" on each W-2 form designated an HSA or that $7,300 and $7,344 were the amounts associated with that code reflected on his W-2 forms for 2019 and 2020, respectively.

had received a check from the VA in the amount of $24,293. He admitted, however, that he had not deposited that check until after his July 2020 deposition in the divorce action. When asked during the deposition why he did not deposit that check when he received it, he responded: "I wasn't about to put that amount of money in [a bank account] and it be considered in any way that she would take some of that or require some of that." He stated at trial that only $3,600 of those funds remained. When asked specifically how he had spent $20,693 of the $24,293 from the VA lump-sum payment, he stated that he had used approximately $9,000 for legal fees, $5,625 for work on a driveway located on his father's property, and $4,500 for cellular telephones and accessories for the adult children.[6] The husband admitted on cross-examination that, when his Edward Jones compensation, the value of the benefits he received from the VA, and other income were combined his gross income for 2020 was approximately $102,734.

[6]The record reflects that a recurring issue throughout the divorce action was the husband's and the wife's expenditures on their adult children. During the husband's testimony, the trial court stated that it had informed the parties during a pendente lite hearing that they did not have sufficient disposable income to continue to spend on their adult children.

Regarding support for the wife and the youngest child, the husband testified that, after the entry of the pendente lite order, he had paid the rent on the Madison house and all the bills for utilities, the groceries, and miscellaneous expenses. The husband acknowledged that, for the first 16 months of this litigation, the youngest child was under the age of majority and lived exclusively with the wife. The husband admitted that in July 2020, after the two-year lease on the Madison house had expired, he stopped depositing his paycheck into the parties' joint account. He stated that, rather than giving the wife money, he had given large amounts of cash to the children and had continued to pay for his adult middle child's vehicle. He explained that he had stopped supporting the wife because "I paid and paid, and I never knew anything." The husband further stated that, even though at the time he no longer had any minor children, he had written checks for cash in the sums of $900, $1,300, $6,000, and $950 in November 2020 and had given those funds to the children. The husband insisted that, although he could produce evidence demonstrating that he had spent only $16,381 on the wife and the youngest child in 2020, he had actually spent much more than that amount on them.

The husband admitted that in June or July 2019 he had removed $11,500 from a retirement account. The husband also admitted to large withdrawals from his personal account from September 2020 through November 2020 and insisted that the withdrawn funds had not been invested elsewhere but had been used to pay for nonreimbursable business expenses. The husband, however, did not provide any documentation to corroborate his testimony about those "business-related" expenditures.

Regarding his expenses, the husband testified that, for the 30 months preceding the trial, he had lived with various relatives. He stated that, rather than paying rent to those relatives, he had compensated his relatives in other ways, such as by helping with utilities, cutting their lawns, and paying $5,625 to clear land for a driveway. He admitted that he had spent $800 on tires and maintenance on a vehicle his father had "loaned" him. According to the husband, after making payments to support the wife and the children, he had very few disposable funds remaining to pay for his living expenses. The husband's exhibit number 1, which was admitted into evidence, indicates that the husband anticipated his future monthly living expenses to total approximately

$5,769. That amount includes but is not limited to expenses for entertainment and a health-club membership; $364 for a church offering; $135 for clothing; $450 for food; $750 for rent; $590 for utility bills; $1,410 for health, home, and automobile insurance; $700 for an automobile loan payment; and $450 for gas and oil.

Regarding the parties' investment accounts and life-insurance coverage, the husband testified that he owned a Roth Individual Retirement Account ("Roth IRA"), with a balance of approximately $72,000, and an "Edward D. Jones & Co. Profit Sharing and 401(k) Plan" ("the 401(k) account") with a balance of $20,396. According to the husband, in 2020 he received $4,000 in profit sharing from Edward Jones. He stated that the wife owned a Roth IRA with Edward Jones with a balance of $1,764. The husband further testified that he maintained life-insurance policies with death benefits totaling $600,000, with the wife named as the beneficiary of those policies.[7]

[7]The wife's exhibit number 1, which was admitted into evidence, indicates that during the marriage the husband maintained a life-insurance policy with Primerica Life Insurance with a death benefit totaling $500,000, and that policy named the wife as the beneficiary. The monthly premium for the policy was $59.82.

The wife testified that she was 48 years old and that, although the husband and she had experienced a few incidents of discord during their marriage, she had thought they were happily married until February 2018, when the husband informed her about his extramarital sexual encounters. She stated that, upon learning of his unfaithfulness, she felt that she could not trust the husband and asked him to leave the marital residence and move to north Alabama ahead of the family. She stated that, while she remained in Dothan with the children, she and the husband had participated in counseling and had had conversations about continuing the marriage.

The wife testified that she suffers from migraine headaches and has 65-70% hearing loss, which impacts her ability to secure employment. According to the wife, she has a "business certificate" and, throughout the marriage, had been able to maintain only part-time employment, mainly working for the churches for which the husband had been employed. The wife explained that because she had to prepare the marital residence in Dothan for sale, sell that house, pack the household furnishings after the sale, move, and then set up the new house in Madison, she did not work from August 2017, when she lost her job with

the church, until September 2018. She stated that from September 2018 through February 2020, she was employed as a 9-month contract employee, working 19 hours a week at the rate of $25 per hour for the Madison City Board of Education. In March 2020, however, when the COVID-19 pandemic surged, she lost that job. She stated that she had looked for employment but was unable to find a full-time position due to the COVID-19 pandemic. According to the wife, during the fall of 2020, she had worked part-time as a home caregiver for Alabama Caregivers. The wife testified that in 2020 she had earned $12,625 from the Madison City Board of Education and $6,963 from Alabama Caregivers.

In February 2021, Price-Denton Endodontics ("PDE") hired the wife as a front-desk worker. According to the wife, PDE made accommodations for her hearing impairment so that she could check in patients, answer telephones, and perform other duties. She testified that she works 36 hours per week at $16.50 per hour and has some opportunities to work overtime due to patients scheduling COVID-19 make-up appointments resulting from missed appointments during the pandemic. The wife testified that PDE does not match contributions made by employees to PDE sponsored retirement accounts and that her

only retirement fund is her Edward Jones Roth IRA with a balance of approximately $1,700.

The wife's testimony indicated that, before the husband and she separated, the husband had paid the family's expenses from a joint checking account. After he moved to north Alabama, she had begun paying the family's expenses from that joint account. She stated that, in June 2019 when she filed the divorce complaint, the husband was depositing $2,500 per month into the joint account to provide financial support for the children and her. In December 2019, the husband started examining the bills and designating the bills that were to be paid from the funds in the joint account. Beginning in June 2020, the husband stopped depositing $2,500 into the joint account, started making random deposits of smaller sums, and directed the wife as to which bills to pay. In January 2021, the husband stopped depositing any funds into the joint account. According to the wife, the husband owed her $887.60 per month in child support for the months of June through October 2020. She admitted on cross-examination, however, that the husband had provided some funds for support between June 1 and October 31, 2020, but, she

testified, she did not know whether those funds were for child support or her support.

Regarding her expenses, the wife testified that she incurred expenses in the amount of $4,457 per month, including, but not limited to, $1,050 for rent for a house; $355 for health and automobile insurance; $625 for utility bills; $800 for food; $260 for transportation; $445 for personal and medical needs; and $250 for a church tithe. On cross-examination, she stated that the two younger adult children lived with her and admitted that they benefited from her providing housing and paying for utilities and food. Additionally, she stated that she, too, had paid the middle adult child's car payment on occasion and had not received a benefit from doing so. The wife testified that she has no source of funds, other than her PDE salary, to pay for her expenses and asked the trial court to award her $2,500 per month in alimony to assist her with her expenses.

The trial court admitted into evidence a statement from the wife's attorney indicating that the attorney had an hourly rate of $400, had rendered 54.30 hours of service, and had incurred expenses on the wife's behalf in the amount of $1,481.47. The statement indicated that the wife

owed the attorney $22,144.07 for representing her in the divorce action.

On cross-examination, the wife admitted that on February 13, 2018, she had removed $31,550 in funds -- the equity from the sale of the marital residence in Dothan -- from the parties' joint account and had placed those funds in an account with Wells Fargo. When asked how she had expended those funds, the wife explained that the funds had been used to pay for rent and living expenses for her and the children while they remained in Dothan,[8] to pay for expenses incurred when the oldest child had surgery in Birmingham, to pay for automobile maintenance and repair, and to pay for moving expenses. According to the wife, the husband and she had discussed the use of those funds for those purposes, and he was aware of how those funds were spent. She further testified that she had used the parties' 2018 tax refund, as the husband and she had agreed, to pay for the children's educational expenses.

On May 5, 2021, the trial court entered the divorce judgment. The judgment awarded the husband certain personal property, including funds in his individual checking or savings accounts, funds in various

[8]It appears that the marital residence in Dothan sold before May 2018 and that the wife rented housing for her and the children until the middle child graduated from high school. They then moved to Madison.

accounts with Edward Jones, other than the 401(k) account, totaling approximately $7,322, three used vehicles, and a Gravely lawnmower. The wife was awarded certain personal property, including funds in her individual checking or savings account, two used vehicles, $3,374 as equity in the Gravely lawnmower, and the funds in her Edward Jones Roth IRA containing $1,764. The wife was also awarded $36,095 to be paid from the husband's Roth IRA, 50% of the balance in the husband's 401(k) account, $4,438 in past-due child support,[9] and an attorney fee in the amount of $22,000. The judgment further provided:

> "This court hereby finds [the wife's] separate estate is insufficient to enable her to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage. Moreover, the court finds that [the husband] has the ability to supply those means without undue economic hardship. Based on the evidence presented regarding [the wife's] age, her hearing impairment, limited work, earning capacity and education and taking into consideration the prevailing economic conditions, this court expressly finds that an award of rehabilitative alimony is not feasible.
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> "The court has also considered the statutory factors set forth in Ala. Code 1975, § 30-2-57, especially the relative fault of the parties for the breakdown of this marriage. Based on all these factors and the evidence presented, [the husband] is

[9]The trial court concluded that the husband owed the wife past-due child support for the youngest child in the amount of $887.60 per month for the months of June, July, August, September, and October 2020.

> hereby ordered to pay unto [the wife] the sum of [$2,500] per month as periodic alimony. Said alimony payments shall begin on May 1, 2021 and shall continue on the first day of each month until [the wife] marries, dies, or cohabitates with a member of the opposite sex, whichever comes first."

The trial court further ordered the husband to "name [the wife] as an irrevocable beneficiary on a life-insurance policy with a minimum death benefit of [$600,000] for so long as [the husband] owes a duty of periodic alimony to [the wife]." The trial court denied all other claims for relief.

On June 2, 2021, the husband filed a postjudgment motion, alleging that the trial court had exceeded its discretion by ordering him to pay the wife $2,500 per month in periodic alimony, an attorney fee, and past-due child support because, he said, those awards financially crippled him. He further alleged that by ordering him to maintain a life-insurance policy to secure the periodic-alimony obligation for the benefit of the wife, the trial court had exceeded its discretion by imposing an improper "benevolent gesture."

On July 22, 2021, the trial court conducted a hearing on the husband's postjudgment motion. At the hearing, the husband argued that, because, he said, the evidence at trial established that his net income per month from Edward Jones was only $4,259.40 and he was

ordered to pay the wife $2,500 in monthly periodic alimony, an attorney fee in the amount of $22,000, $4,438 in past-due child support, and to maintain a life-insurance policy for the wife's benefit with a monthly premium of $40, he did not have sufficient funds upon which to live. He further argued that the trial court had exceeded its discretion by ordering him to pay past-due child support because the wife had expended all the proceeds from the 2018 sale of the marital residence and the 2018 tax refund and he had not received any benefit from those proceeds. According to the husband, the trial court's calculation of the 2020 child-support arrearage was erroneous because, he said, the calculation was based in part on a one-time back payment of VA disability benefits that the evidence showed he had received in 2019, not in 2020. Additionally, he argued that the requirement that he maintain a life-insurance policy to secure the periodic-alimony obligation for the benefit of the wife constituted a "mere gratuity or benevolent gesture" that was not supported by caselaw. The husband concluded his argument by maintaining that he believed that the financial awards to the wife were not based on the evidence but were punitive in nature.

The wife responded that, because the evidence established that at the time of trial the husband's commission payments had increased and his monthly net income in 2021 from Edward Jones was $6,700 and that the husband also received monthly VA benefits, the monetary awards to her were not financially crippling to the husband. She further argued that any consideration of the wife's use of the 2018 proceeds from the sale of the marital residence and the 2018 tax refund to negate the husband's financial obligations was improper because those proceeds were received and expended before the divorce action was initiated. She maintained that the caselaw supported the award requiring the husband to maintain a life-insurance policy to secure his alimony obligation and that the attorney-fee award was proper because, she argued, the husband had a greater capacity to earn income and she had no extra funds from which to pay her attorney. Lastly, regarding the propriety of the award of past-due child support, the wife observed that the husband had not challenged at trial the admission of evidence indicating that the youngest child had been living with the wife from June 2020 through October 2020 or that he had not paid child support to the wife during that period.

After considering the parties' arguments, the trial court observed that the evidence established that, throughout the entire time the divorce action was pending, the husband gave substantial funds to his adult children and other relatives even though he was not required to do so. The trial court commented:

> "[O]ne of the reasons why it was difficult to go back and calculate [past-due child support] was because [the husband] said repeatedly as opposed to child support he would give the kids money. He wouldn't give it to [the wife]; he gave it to them. Or he paid for things or he gave them monies, which he was not required to do."

The trial court further noted that evidence was presented from which the court could infer that the proceeds from the 2018 sale of the marital residence and from the 2018 tax refund were used for the family's benefit and not for the wife's personal benefit. The trial court then stated:

> "But I will say this as far as [the husband's] request that the court take a step back [and consider whether the awards were punitive]. I can say this: In the 14 years I've been on the bench, … there are a handful of cases where I have awarded one spouse a significant amount of assets over and above the other spouse. I try my best to listen to the evidence, to be fair. For the most part I think there is -- in most cases plenty of fault and/or blame to contribute to the deterioration of the marriage for both parties. … The anonymity … of the sexual contact and the multiple occasions of it bothered this court greatly; the exposure to the wife of unknown diseases without her knowledge; and also the testimony regarding this masseuse ... when they were living in South Alabama. ...

> Those things together … 'egregious' was exactly the word that I came up with in my head in trying to describe his conduct. Again, … the facts and circumstances in this case I thought were as bad as this court had ever seen.
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> "....
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> "So, I mean, it's rare that I award [an attorney fee], but in this case, I felt it was justified. I can tell you this, if [the wife] had not sought employment -- because I think I told her at one of the pendente lite [hearings], 'You've got to get a job.' I'm not for this somebody staying at home. And she got a job. And her employer has made accommodations for her as a receptionist and be able to do that. And my recollection was from the testimony that she lived ... with her mother for a while to try to save on expenses. ... I know with her hearing impairment, probably a lot of jobs were not available to her. Fortunately, she works for a great employer who has assisted on that. So, all of those things were things that I took into account in determining the award of alimony."

The trial court emphasized that the attorney-fee award was based on evidence of the wife's limited ability to earn income due to disability, the extensiveness of the litigation, and the wife's continual effort to earn income and lessen expenses. The husband's postjudgment motion was denied by operation of law.

> "'When a trial court hears ore tenus evidence, its judgment based on facts found from that evidence will not be disturbed on appeal unless the judgment is not supported by the evidence and is plainly and palpably wrong. Thrasher v. Wilburn, 574 So. 2d 839, 841 (Ala. Civ. App. 1990)….'

> "Spencer v. Spencer, 812 So. 2d 1284, 1286 (Ala. Civ. App. 2001). However, the trial court's application of law to facts is reviewed de novo. See Ladden v. Ladden, 49 So. 3d 702, 712 (Ala. Civ. App. 2010)."

Jones v. Jones, 101 So. 3d 798, 802 (Ala. Civ. App. 2012).

On appeal, the husband contends that the trial court's judgment awarding the wife periodic alimony in the amount of $2,500 per month, considering the other awards of an attorney fee in the amount of $22,000, past-due child support in the amount of $4,438, and equity in the Gravely lawnmower in the amount of $3,375, is plainly and palpably erroneous because, he says, paying $2,500 per month to the wife creates an undue economic hardship on him and is punitive. We will address the husband's arguments regarding the propriety of each respective award[10] and then consider whether the periodic-alimony award creates an undue hardship and is punitive.

[10]The husband does not challenge the propriety of the award of $3,375 as equity in the Gravely lawnmower. Any argument concerning the awarded equity in the Gravely lawnmower is waived. See Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005)("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

The husband contends that the trial court's judgment is plainly and palpably wrong because, he says, the trial court exceeded its discretion by awarding the wife an attorney fee in the amount of $22,000.

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

Lackey v. Lackey, 18 So. 3d 393, 402 (Ala. Civ. App. 2009). This court will not reverse the trial 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).

Our review of the record establishes that the trial court did not exceed its discretion by awarding the wife an attorney fee. The trial court at the postjudgment hearing stated that the attorney-fee award was based on the extensiveness of the litigation and the evidence that the wife had a limited ability to earn income and, yet, had been proactive in finding employment and lessening expenses. The trial court's observations are supported by the evidence. Additionally, the record reflects that the trial court considered the husband's conduct before and during the litigation, and the evidence indicates that the husband can earn a substantial salary, whereas the wife has limited earning capacity. Based on the foregoing evidence, we cannot conclude that the trial court exceeded its discretion and committed clear or palpable error by awarding the wife an attorney fee.

The husband further contends that the trial court's judgment is plainly and palpably wrong because, he says, the trial court exceeded its discretion by ordering him to pay the wife $4,438 as past-due child support. To the extent that the husband argues that the wife did not petition the court for payment of past-due child support, we note that the issue of past-due child support was litigated at trial without objection

from the husband and, therefore, was properly before the trial court for consideration. See Rule 15(b), Ala. R. Civ. P.

> "'[A] trial court's determination of the amount of a child support arrearage, including the grant or refusal of a credit, is largely a discretionary matter, and the trial court's ruling in that regard will not be reversed on appeal absent an abuse of discretion.' Vlahos v. Ware, 690 So. 2d 407, 410 (Ala. Civ. App. 1997)."

Kuhn v. Kuhn, 706 So. 2d 1275, 1278 (Ala. Civ. App. 1997). See also Curvin v. Curvin, 6 So. 3d 1165, 1173 (Ala. Civ. App. 2008)("The determination of a child-support arrearage and how any arrearage should be paid are matters left to the discretion of the trial court.").

According to the husband, the trial court erred in calculating his child-support arrearage by including in its determination of his yearly gross income for 2020 the one-time back payment of VA disability benefits that he had received in 2019 but did not deposit until 2020.[11]

[11]The husband also contends in his appellate brief that the trial court, when determining his income for 2020, erred in considering the VA funding-fee refund. The husband, however, did not present this argument in the trial court, and, therefore, we will not consider it. See Docen v. Docen, 294 So. 3d 767, 770-71 (Ala. Civ. App. 2019)("We cannot consider these arguments, however, because they are being raised for the first time on appeal."). See also Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992)(holding that an appellate court's review is "restricted to the evidence and arguments considered by the trial court").

The evidence indicates that the husband did not disclose or deposit those funds until 2020; therefore, although the husband received the funds in 2019, by holding the funds and depositing them in 2020 the husband did not realize the funds as income until 2020. Therefore, we cannot agree that the trial court erred by considering those funds. Cf. Arnold v. Arnold, 977 So. 2d 501, 505-06 (Ala. Civ. App. 2007)("The trial court does not have the discretion to disregard a source of income in determining a parent's gross monthly income for the purposes of determining child support."); Powell v. Powell, 628 So. 2d 832, 834 (Ala. Civ. App. 1993)(recognizing that it is the duty of the trial court to reconcile conflicting evidence regarding a party's gross income when calculating child support). Moreover, the evidence indicates that the youngest child, who was still a minor, lived with the wife from June 2020 through October 2020 and that the husband did not pay child support to the wife during that period. Consequently, we cannot conclude that the trial court exceeded its discretion by awarding the wife past-due child support for those months. Ennis v. Venable, 689 So. 2d 165, 166 (Ala. Civ. App. 1996)("[Child-support] matters are still committed to the sound

discretion of the trial court, and its judgment on these matters will not be disturbed on appeal absent a palpable abuse of that discretion.").

The husband further contends that the trial court's judgment awarding the wife periodic alimony in the amount of $2,500 a month is plainly and palpably wrong.

Section 30-2-57, Ala. Code 1975, provides, in pertinent part:

> "(a) Upon granting a divorce or legal separation, the court shall award either rehabilitative or periodic alimony as provided in subsection (b), if the court expressly finds all of the following:
>
> > "(1) A party lacks a separate estate or his or her separate estate is insufficient to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.
> >
> > "(2) The other party has the ability to supply those means without undue economic hardship.
> >
> > "(3) The circumstances of the case make it equitable.
>
> "(b) If a party has met the requirements of subsection (a), the court shall award alimony in the following priority:
>
> > "….
> >
> > "(2) In cases in which the court expressly finds that rehabilitation is not feasible, … the court shall award the party periodic installments of alimony for a duration and an amount to allow

> the party to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage as provided in subsection (g).
>
> "....

"(d) In determining whether a party has a sufficient separate estate to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall consider any and all relevant evidence, including all of the following:

> "(1) The party's own individual assets.
>
> "(2) The marital property received by or awarded to the party.
>
> "(3) The liabilities of the party following the distribution of marital property.
>
> "(4) The party's own wage-earning capacity, taking into account the age, health, education, and work experience of the party as well as the prevailing economic conditions.
>
> "(5) Any benefits that will assist the party in obtaining and maintaining gainful employment.
>
> "....
>
> "(7) Any other factor the court deems equitable under the circumstances of the case.

"(e) In determining whether the other party has the ability to pay alimony, the court shall consider any and all evidence, including all of the following:

"(1) His or her own individual assets, except those assets protected from use for the payment of alimony by federal law.

"(2) The marital property received by or awarded to him or her.

"(3) His or her liabilities following the distribution of marital property.

"(4) His or her net income.

"(5) His or her wage-earning ability, considering his or her age, health, education, professional licensing, work history, family commitments, and prevailing economic conditions.

"....

"(7) Any other factor the court deems equitable under the circumstances of the case.

"(f) In determining whether the award of rehabilitative or periodic alimony is equitable, the court shall consider all relevant factors including all of the following:

"(1) The length of the marriage.

"(2) The standard of living to which the parties became accustomed during the marriage.

"(3) The relative fault of the parties for the breakdown of the marriage.

"(4) The age and health of the parties.

"(5) The future employment prospects of the parties.

> "....
>
> "(7) The extent to which one party reduced his or her income or career opportunities for the benefit of the other party or the family.
>
> "(8) Excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition of property.
>
> "....
>
> "(10) Any other factor the court deems equitable under the circumstances of the case.

"(g) Except upon a finding by the court that a deviation from the time limits of this section is equitably required, a person shall be eligible for periodic alimony for a period not to exceed the length of the marriage, as of the date of the filing of the complaint, with the exception that if a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility.

"....

"(i) Rehabilitative or periodic alimony awarded under this section terminates as provided in Section 30-2-55, [Ala. Code 1975,] or upon the death of either spouse."

Regarding an alimony award, this court has held:

> "'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.'

> "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).

> "The purpose of periodic alimony is to support the former dependent spouse and to enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until the spouse is self-supporting or maintaining a status similar to the one enjoyed during the marriage."

O'Neal v. O'Neal, 678 So. 2d 161, 165 (Ala. Civ. App. 1996). "The source of periodic-alimony payments must be the current income of the payor spouse." Rose v. Rose, 70 So. 3d 429, 433 (Ala. Civ. App. 2011) (citing

Smith v. Smith, 866 So. 2d 588, 591 (Ala. Civ. App. 2003)). See also Rieger v. Rieger, 147 So. 3d 421, 431 (Ala. Civ. App. 2013) ("For purposes of determining a spouse's ability to pay, and for purposes of calculating an appropriate amount of periodic alimony, the trial court should ordinarily use the spouse's net income as the starting point for these evaluations.").

> "'This court and our supreme court have enumerated the many factors trial courts must consider when weighing the propriety of an award of periodic alimony, Edwards v. Edwards, 26 So. 3d 1254, 1259 (Ala. Civ. App. 2009), which include: the length of the marriage, Stone v. Stone, 26 So. 3d 1232, 1236 (Ala. Civ. App. 2009); the standard of living to which the parties became accustomed during the marriage, Washington v. Washington, 24 So. 3d 1126, 1135-36 (Ala. Civ. App. 2009); the relative fault of the parties for the breakdown of the marriage, Lackey v. Lackey, 18 So. 3d 393, 401 (Ala. Civ. App. 2009); the age and health of the parties, Ex parte Elliott, 782 So. 2d 308, 311 (Ala. 2000); and the future employment prospects of the parties, Baggett v. Baggett, 855 So. 2d 556, 559 (Ala. Civ. App. 2003). In weighing those factors, a trial court essentially determines whether the petitioning spouse has demonstrated a need for continuing monetary support to sustain the former, marital standard of living that the responding spouse can and, under the circumstances, should meet. See Gates v. Gates, 830 So. 2d 746, 749-50 (Ala. Civ. App. 2002) ….
>
> "'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). …

"'Once the financial need of the petitioning spouse is established, the trial court should consider the ability of the responding spouse to meet that need. See Herboso v. Herboso, 881 So. 2d 454, 458 (Ala. Civ. App. 2003). The ability to pay may be proven by showing that the responding spouse has a sufficient separate estate, following the division of the marital property, see § 30-2-

51(a), Ala. Code 1975, and/or sufficient earning capacity to consistently provide the petitioning spouse with the necessary funds to enable him or her to maintain the parties' former marital standard of living. Herboso, supra. In considering the responding spouse's ability to pay, the trial court should take into account all the financial obligations of the responding spouse, including those obligations created by the divorce judgment. See O'Neal v. O'Neal, 678 So. 2d 161, 164 (Ala. Civ. App. 1996). The trial court should also consider the impact an award of periodic alimony will have on the financial condition of the responding spouse and his or her ability to maintain the parties' former marital lifestyle for himself or herself. Id. A responding spouse obviously has the ability to pay if the responding spouse can satisfy the entirety of the petitioning spouse's needs without any undue economic hardship. See, e.g., MacKenzie v. MacKenzie, 486 So. 2d 1289, 1292 (Ala. Civ. App. 1986). In most cases, however, simply due to the fact that, after separation, former spouses rarely can live as well and as cheaply as they did together, Gates, 830 So. 2d at 750, a trial court will find that the responding spouse cannot fully meet the financial needs of the petitioning spouse. Walls v. Walls, 860 So. 2d 352, 358 (Ala. Civ. App. 2003). In those cases, the trial court should endeavor to determine the amount the responding spouse can fairly pay on a consistent basis. See Rubert v. Rubert, 709 So. 2d 1283, 1285 (Ala. Civ. App. 1998).

"'After being satisfied that the petitioning spouse has a need for periodic alimony and that the responding spouse has some ability to meet that need, the trial court should consider the equities of the case. The length of the marriage

does not determine the right to, or amount of, periodic alimony. Hatley v. Hatley, 51 So. 3d 1031, 1035 (Ala. Civ. App. 2010). However, the longer the parties have maintained certain living and financial arrangements, the more fair it will seem that those arrangements should be maintained beyond the divorce to the extent possible. See Edwards v. Edwards, 410 So. 2d 91, 93 (Ala. Civ. App. 1982). The trial court should also give due regard to the history of the marriage and the various economic and noneconomic contributions and sacrifices made by the parties during the marriage. See Hanna v. Hanna, 688 So. 2d 887, 891 (Ala. Civ. App. 1997). In light of those factors, the trial court should endeavor to avoid leaving the parties in an unconscionably disparate financial position. Jones v. Jones, 596 So. 2d 949, 952 (Ala. Civ. App. 1992). However, the trial court can consider whether the marriage, and its attendant standard of living, ended due to the greater fault of one of the parties, and, if so, the trial court can adjust the award accordingly. Yohey v. Yohey, 890 So. 2d 160, 164-65 (Ala. Civ. App. 2004). Lastly, the trial court should consider any and all other circumstances bearing on the fairness of its decision. See Ashbee v. Ashbee, 431 So. 2d 1312, 1313-14 (Ala. Civ. App. 1983).

"'The determination of whether the petitioning spouse has a need for periodic alimony, of whether the responding spouse has the ability to pay periodic alimony, and of whether equitable principles require adjustments to periodic alimony are all questions of fact for the trial court, Lawrence v. Lawrence, 455 So. 2d 45, 46 (Ala. Civ. App. 1984), with the last issue lying particularly within the discretion of the trial court. See Nolen v. Nolen, 398 So. 2d 712, 713-14 (Ala. Civ. App.

> 1981). On appeal from ore tenus proceedings, this court presumes that the trial court properly found the facts necessary to support its judgment and prudently exercised its discretion. G.G. v. R.S.G., 668 So. 2d 828, 830 (Ala. Civ. App. 1995). That presumption may be overcome by a showing from the appellant that substantial evidence does not support those findings of fact, see § 12-21-12(a), Ala. Code 1975, or that the trial court otherwise acted arbitrarily, unjustly, or in contravention of the law. Dees v. Dees, 390 So. 2d 1060, 1064 (Ala. Civ. App. 1980).'
>
> "Shewbart v. Shewbart, 64 So. 3d 1080, 1087-89 (Ala. Civ. App. 2010)."

Rodgers v. Rodgers, 231 So. 3d 1090, 1093-95 (Ala. Civ. App. 2016).

In his appellate brief, the husband does not challenge the propriety of the trial court's determination that an award of periodic alimony to the wife is equitable, see § 30-2-57(d) and (e); rather, he challenges the amount of the award.[12] First, he contends that the trial court exceeded its discretion by concluding that he can pay $2,500 per month to the wife without undue hardship. According to the husband, his individual assets are limited to the $47,978.56 awarded to him from his retirement

[12]At trial, the husband suggested that he be required to pay the wife $300 per month in periodic alimony. Therefore, the husband acknowledged that the wife, based on her earning capacity and income alone, could not maintain the standard of living that the parties enjoyed during the marriage.

accounts, $4,500 in his checking and savings accounts, and the Gravely lawnmower. He states that he does not own an automobile, although the evidence indicated that he expended funds on a vehicle that he was using. He further notes that he has been ordered to pay the wife $29,812 for an attorney fee, past-due child support, and equity in the Gravely lawnmower. The husband reasons that his monthly net income of $5,206 per month[13] will not allow him to meet his living expenses and pay the monthly periodic-alimony award and the other awards.

Initially, we note that the husband's estimation of his monthly net income does not include his VA disability benefit payment. According to the husband, his VA disability benefits cannot be considered when determining his ability to pay periodic alimony. The husband cites this court to Williams v. Burks, [Ms. 2200169, Nov. 5, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021), for the proposition that a trial court lacks the authority to award a spouse any portion of VA disability benefits. Williams addressed the propriety of an award of a portion of the former husband's VA disability benefits as part of the property division. Because

[13]The husband's computation of his net monthly income is based on his 2020 year-end pay stub from Edward Jones, which was admitted into evidence as the husband's exhibit number 4.

the trial court in this case did not award a portion of the husband's VA disability benefits to the wife as part of the property division, Williams does not apply.

In Nelms v. Nelms, 99 So. 3d 1228, 1230 (Ala. Civ. App. 2012), this court considered whether a veteran's disability benefits that are not paid in lieu of military-retirement benefits and, consequently, are not subject to 10 U.S.C. § 1408, may be awarded as alimony. Recognizing that the United States Supreme Court in Rose v. Rose, 481 U.S. 619 (1987), had held that a veteran's disability benefits from the VA could be used to satisfy his child-support obligation, we held that "a spouse whose income includes VA disability benefits can be ordered to pay periodic alimony, even when all or a portion of the alimony necessarily will be paid from those benefits." Nelms, 99 So. 3d at 1232. Accordingly, the trial court did not err in considering the husband's VA disability benefits when determining the husband's ability to pay $2,500 in periodic alimony. See note 3, supra.

Sufficient evidence was presented from which the trial court could have concluded that the husband is able to pay $2,500 in monthly periodic alimony to the wife. Although the evidence indicates that the

husband's main individual assets are his retirement accounts in the amount, he says, of $47,978.56, and that he has other liabilities due to the divorce judgment in the amount of $29,812, the evidence demonstrates that the husband has sufficient monthly income that will allow him to meet the periodic-alimony obligation without undue hardship. Conflicting evidence was presented for the trial court to reconcile regarding the husband's net monthly income. At a minimum, the evidence indicates that in 2020 the husband earned $5,206 a month from Edward Jones, plus $443 a month from the VA (see, note 3, supra), for a total of $5,649 in net monthly income, and that (according to the wife's exhibit number 1, which was admitted into evidence) the wife's net monthly income in 2020 was $1,632 and in 2021 was $2,572. Additionally, evidence was presented indicating that some of the deductions from the husband's gross monthly income from Edward Jones for health, dental, and vision insurance and the HSA were not mandatory, but were for the benefit of the adult children, who he no longer has a legal obligation to support. Additionally, substantial evidence was presented indicating that the husband gave large sums of money to the children and other relatives on a regular basis. Evidence

was also presented from which the trial court could have inferred that some of the husband's anticipated monthly living expenses were overestimated or based on his desire to bestow benevolent gestures on the children and others. Moreover, in light of the husband's gifts to the children, the evidence does not demonstrate that the impact of the award of periodic alimony will prevent the husband from maintaining the parties' former marital lifestyle for himself. Cf. O'Neal v. O'Neal, 678 So. 2d at 164. Evidence, including the husband's testimony that he expected to earn $102,000 in 2021 and his first quarter earnings for that year, was presented from which the trial court could have inferred that the husband's income was stable, not speculative, and that he had sufficient earning capacity to assist the wife in maintaining the parties' former standard of living. Ebert v. Ebert, 469 So. 2d 615, 618 (Ala. Civ. App. 1985)("[The] ability to earn, as opposed to actual earnings, is a proper factor to consider in deciding … an initial award of … periodic alimony…."); Lackey, supra.

Lastly, the trial court properly exercised its discretion when making the award by considering the evidence of the husband's fault for the breakdown of the marriage. Ample evidence, including the husband's

testimony, supports the conclusion that the husband's conduct was the main reason for the breakdown of the marriage. Thus, sufficient evidence supports the trial court's determination that the factors set forth in § 30-2-57(e) are satisfied and that the husband is able to pay the periodic alimony. Consequently, we cannot conclude that the trial court's award of $2,500 in monthly periodic alimony to the wife is not supported by the evidence and is plainly and palpably wrong.

To the extent that the husband maintains that the periodic-alimony award is erroneous because the amount of the award, when added to the amount of the wife's net monthly income, exceeds the amount of the wife's anticipated monthly living expenses, we note that the trial court is not bound by a mathematical formula in determining the amount of periodic alimony to award. Rather, the trial court is charged with determining an equitable award. § 30-2-57(f). The evidence indicated that the wife anticipated her monthly expenses to total $4,457. The evidence established that the wife's net monthly income in 2021 was $2,572. The amount of the wife's net monthly income plus the amount of the monthly periodic-alimony award equals $5,072. Although that amount exceeds the amount of her anticipated monthly living expenses, considering the

evidence in this case, especially the wife's limited career opportunities and work history due to her hearing disability and migraine headaches, her longtime support of the husband's ministry career, and other evidence, we cannot conclude that the award is inequitable. Additionally, with regard to the husband's argument that no direct evidence was presented of the standard of living maintained by the parties during the marriage, we note that the record contains ample circumstantial evidence concerning the parties' disposable income during the marriage, their expenditures, and other payments from which the trial court could have inferred the standard of living of the parties during the marriage.

We now turn to the husband's argument that the periodic-alimony award is punitive. The record reflects that the wife's separate estate is insufficient to enable her to preserve the economic status quo of the parties as it existed during the marriage, that she supported and contributed to the husband's career during the marriage, that the husband has substantial earning capacity and the ability to support the wife, that the husband's extramarital sexual encounters caused the breakdown of the marriage, and that his continued extramarital sexual encounters prevented a reconciliation of the parties. Considering the

foregoing evidence, we cannot conclude that the trial court's award of periodic alimony is punitive; rather, the award constitutes an exercise of the trial court's duty to establish equity between the parties.

Lastly, the husband contends that the trial court's judgment is plainly and palpably wrong because, he says, the trial court exceeded its discretion by ordering him to maintain a life-insurance policy "for so long as he owes a duty of periodic alimony." Resolution of this issue rests upon the difference between periodic alimony and alimony in gross.

In TenEyck v. TenEyck, 885 So. 2d 146, 151-52 (Ala. Civ. App. 2003), this court discussed the difference between periodic alimony and alimony in gross, stating:

> "Our supreme court has explained the difference between periodic alimony and alimony in gross. Hager v. Hager, 293 Ala. 47, 299 So. 2d 743 (1974). Alimony in gross is considered 'compensation for the [recipient spouse's] inchoate marital rights [and] ... may also represent a division of the fruits of the marriage where liquidation of a couple's jointly owned assets is not practicable.' [Hager v.] Hager, 293 Ala. at 54, 299 So. 2d at 749. An alimony-in-gross award 'must satisfy two requirements, (1) the time of payment and the amount must be certain, and (2) the right to alimony must be vested.' Cheek v. Cheek, 500 So. 2d 17, 18 (Ala. Civ. App. 1986). It must also be payable out of the present estate of the paying spouse as it exists at the time of the divorce. [Hager v.] Hager, 293 Ala. at 55, 299 So. 2d at 750. In other words, alimony in gross is a form of property settlement. [Hager v.] Hager, 293

> Ala. at 54, 299 So. 2d at 749. An alimony-in-gross award is generally not modifiable. Id.
>
> "Periodic alimony, on the other hand, 'is an allowance for the future support of the [recipient spouse] payable from the current earnings of the [paying spouse].' [Hager v.] Hager, 293 Ala. at 55, 299 So. 2d at 750. Its purpose 'is to support the former dependent spouse and enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until that spouse is self-supporting or maintaining a lifestyle or status similar to the one enjoyed during the marriage.' O'Neal v. O'Neal, 678 So. 2d 161, 164 (Ala. Civ. App. 1996)(emphasis added). Periodic alimony is modifiable based upon changes in the parties' financial conditions or needs, such as an increase in the need of the recipient spouse, a decrease in the income of the paying spouse, or an increase in the income of the recipient spouse. See Tibbetts v. Tibbetts, 762 So. 2d 856, 858 (Ala. Civ. App. 1999). The paying spouse's duty to pay periodic alimony may be terminated by petition and proof that the recipient spouse has remarried or is cohabiting with a member of the opposite sex. Ala. Code 1975, § 30-2-55."

In Pittman v. Pittman, 419 So. 2d 1376, 1380-81 (Ala. 1982), our supreme court discussed whether alimony-in-gross and periodic-alimony obligations are chargeable against a decedent's estate, stating:

> "Periodic payments are modifiable by the court, unless clearly denominated otherwise, based on the contingencies of a change in circumstances of the parties. Therefore, a provision in a divorce [judgment] for a monthly allowance for future maintenance and support does not charge the estate with those payments, but terminates upon the death of the [payor spouse's], the event upon the happening of which the obligation of support would have ended had there been no divorce. LeMaistre v. Baker, 268 Ala. 295, 105 So. 2d 867

> (1958); See also, Jenkins v. Jenkins, 406 So. 2d 976 (Ala. Civ. App. 1981). On the other hand, alimony or support payments 'in gross' are not to be changed or modified, without jurisdiction being expressly retained after expiration of thirty days from the date of the [judgment]; payments of the latter kind become vested at the time of divorce. McEntire v. McEntire, 345 So. 2d 316 (Ala. Civ. App. 1977); Jenkins, supra. As a result, payments 'in gross' survive the death of the [payor spouse] and are chargeable against [the payor spouse's] estate. Hager v. Hager, 293 Ala. 47, 299 So. 2d 743 (1974)."

(Emphasis added.) Thus, "[a] [judgment] for alimony in gross, if without reservation, becomes a vested right from its rendition and survives the death of the [payor spouse]," Leo v. Leo, 280 Ala. 9, 12, 189 So. 2d 558, 561 (1966), while a payor spouse's obligation to pay periodic alimony "end[s] upon the death of the [payor spouse], the event upon which the obligation of support would have ended had there been no divorce," Borton v. Borton, 230 Ala. 630, 632, 162 So. 529, 531 (1935). See also Kelley v. State Dep't of Revenue, 796 So. 3d 1114, 1118 (Ala. Civ. App. 2000). Cf. Anderson v. Anderson, 686 So. 2d 320, 324 (Ala. Civ. App. 1996)("Indebtedness in the form of periodic alimony is nondischargeable in bankruptcy, but indebtedness in the form of alimony in gross or a property settlement is dischargeable.").

This court in Lacey v. Lacey, 126 So. 3d 1029, 1034 (Ala. Civ. App. 2013), recognized the foregoing distinction when it noted that a periodic-alimony obligation does not survive the death of the payor spouse and, consequently, that "life insurance may not be used to fund an obligation that is terminable at death." In other words, because the purpose of periodic alimony is to provide future support to the payee spouse from the payor spouse's current earnings, see Hager v. Hager, 293 Ala. 47, 55, 299 So. 2d 743, 750 (1974), and the obligation to pay periodic alimony to the payee spouse ends upon the death of the payor spouse, see Borton, supra, an award requiring the payor spouse to maintain a life-insurance policy to secure that obligation constitutes a "benevolent gesture" that has no basis in law or equity.[14] Alexander v. Alexander, 65 So. 3d 958,

[14]We note that, although a trial court does not have the authority to order the payor spouse to maintain a life-insurance policy to secure a periodic-alimony obligation, a trial court does have authority to order a parent to maintain a life-insurance policy for the benefit of a minor child. In Whitten v. Whitten, 592 So. 2d 183, 186 (Ala. 1991), our supreme court held that the provision in the trial court's judgment ordering the parent to designate the minor child as a beneficiary of the parent's life-insurance policy constituted child support. As Judge Crawley recognized in his special writing in Jordan v. Jordan, 688 So. 2d 839, 845 (Ala. Civ. App. 1997)(Crawley, J., concurring in part and dissenting in part), "the basic reason behind [a life-insurance] award is the desire to provide for the minor child in the event of the parent's untimely death."

968-69 (Ala. Civ. App. 2010)(Moore, J., concurring in the result). Thus, although a trial court has discretion to award life insurance as a separate award for the benefit of the wife, see Lackey, supra; Sellers v. Sellers, 893 So. 2d 456 (Ala. Civ. App. 2004); Bush v. Bush, 784 So. 2d 299, 300 (Ala. Civ. App. 2000); and Strong v. Strong, 709 So. 2d 1259 (Ala. Civ. App. 1998), it cannot order the payor spouse to maintain a life-insurance policy to secure a periodic-alimony obligation, which is an obligation that is terminable at the payor spouse's death. Lacey, supra. Therefore, the trial court erred by ordering the husband to maintain a life-insurance policy for the benefit of the wife to secure his periodic-alimony obligation, and its judgment is reversed in this regard.

We recognize that awards of alimony and property division are interrelated and that reversal of one of those awards normally

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Additionally, we note that past-due child-support payments and past-due alimony payments create a final judgment and that, therefore, if the payor dies, claims for such payments may be made against the payor's estate. Smith v. Estate of Baucom, 682 So. 2d 1065 (Ala. Civ. App. 1996). See also Ex parte Morgan, 440 So. 2d 1069, 1072 (Ala. 1983)(holding that "past due installments of child support ... create a final monied judgment"); Anderson v. Anderson, 686 So. 2d 320, 323 (Ala. Civ. App. 1996) ("Alimony arrearage is a final judgment as of the date due and is not subject to modification.").

necessitates reversal of the other award. See Beck v. Beck, 142 So. 3d 685 (Ala. Civ. App. 2013)(holding that because reversal of the $200,000 alimony-in-gross award was required, reversal of the periodic-alimony and attorney-fee awards was also required). We, however, do not regard the nominal monthly payment of a premium for the life-insurance policy in this case[15] to so greatly affect the other aspects of the trial court's judgment that reversal of the entire periodic-alimony and property-division award is necessary.

The wife requests an award of an attorney fee on appeal. The award of an attorney fee on appeal is within the authority and discretion of this court. See Ex parte Bland, 796 So. 2d 340, 345 (Ala. 2000)(citing Chancellor v. Chancellor, 52 Ala. App. 10, 288 So. 2d 794 (Civ. App. 1974)). See also K.D.H. v. T.L.H., 3 So. 3d 894, 902 (Ala. Civ. App. 2008). The wife's appellate attorney, who was also her trial attorney, has submitted an affidavit attesting that she has incurred expenses in the amount of $12,360 on appeal. Considering the familiarity of the wife's

[15]At the hearing on the husband's postjudgment motion on July 22, 2021, the husband argued that the monthly premium for the life-insurance policy would be $40. In his appellate brief, the husband states that the monthly premium will be approximately $38.

attorney with the underlying litigation, the lack of complexity of the alleged errors presented on appeal, and our affirmance of the trial court's awards of an attorney fee, past-due child support, and periodic alimony to the wife, we grant the wife an award of an attorney fee on appeal in the amount of $4,000.

For the reasons set forth above, the trial court's judgment is affirmed insofar as it awards the wife an attorney fee, past-due child support, and periodic alimony; the judgment is reversed insofar as it orders the husband to maintain a life-insurance policy for the benefit of the wife to secure his periodic-alimony obligation; and this cause is remanded for proceedings consistent with this opinion.

APPLICATION OVERRULED; OPINION OF AUGUST 19, 2022, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hanson and Fridy, JJ., concur.

Moore and Edwards, JJ., concur in the result, without opinions.