REL: March 20, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180594

Daniel R. Fields

v.

Laura Fields

Appeal from Baldwin Circuit Court
(DR-17-900019)

PER CURIAM.

In January 2017, Daniel R. Fields ("the husband") commenced in the Baldwin Circuit Court ("the trial court") an action seeking a divorce from Laura Fields ("the wife"); that action was assigned case number DR-17-900019 ("the divorce

action"). The husband filed contemporaneously with the complaint in the divorce action a motion for temporary custody of the parties' child and a request for a restraining order relating to certain financial issues. The wife answered the husband's complaint in the divorce action and asserted a counterclaim for a divorce; she, too, requested temporary custody of the parties' child and certain financial relief. The wife had previously commenced in the trial court a protection-from-abuse action pursuant to the Protection from Abuse Act, Ala. Code 1975, § 30-5-1 et seq.; that action was assigned case number DR-17-900004 ("the PFA action"). The wife also filed a motion in the divorce action seeking to have the husband held in contempt of a "status quo order," which, we assume, is the January 27, 2017, temporary order entered in both the PFA action and the divorce action, a copy of which does not appear in the record of the divorce action. The PFA action and the divorce action were assigned to the same trial judge.

After a hearing in February 2017, the trial court entered a pendente lite order in the divorce action addressing pendente lite custody of the parties' child and various other

issues, including payment of the expenses of the wife and the child pendente lite, access by the husband or his employees to items required for his business that were located on the property surrounding the marital residence, and the prohibition of contact between the husband and the wife and the child. The February 2017 pendente lite order in the divorce action, like the January 27, 2017, temporary order, also required the husband to pay certain household bills, to pay the wife $1,000 per week as pendente lite support and maintenance, to continue to submit to color-code testing for drugs and alcohol, and to visit with the child once per week at "the parenting center." After the wife filed a motion to dismiss the PFA action, the trial court amended the January 2017 temporary order in April 2017 to allow the parties to have contact with one another to attempt a reconciliation; the amended PFA order required the husband to refrain from the consumption of alcohol.

During the next few months, the parties attempted a reconciliation. In September 2017, the wife, acting pro se, mailed a letter to the trial court indicating that the reconciliation had failed and requesting assistance; that

letter was filed in both the PFA action and the divorce action. On October 4, 2017, the trial court entered in the PFA action a temporary amended PFA order that again prohibited contact between the husband and the wife and child. In February 2018, the wife filed another motion in the divorce action seeking to hold the husband in contempt for testing positive for the presence of alcohol on two color-code tests in December 2017, for failing to submit to several color-code tests, for failing to pay certain household bills in violation of the February 2017 pendente lite order, and for failing to ready the parties' Orange Beach house for rent; she also sought to have the husband held in contempt for violating the no-contact provisions of the October 2017 temporary PFA order entered in the PFA action. The husband responded to the wife's motion and, in March 2018, filed a motion seeking to hold the wife in contempt for failing to allow him to retrieve certain tools and business equipment from a barn or outbuilding located on the land surrounding the marital residence; the wife then responded to the husband's contempt motion.

The trial court held a hearing on the pending contempt motions in May 2018. After that hearing, the trial court entered an order in July 2018 holding the husband in criminal contempt for failing to appear for color-code testing and/or for testing positive for alcohol on those tests on nine separate occasions. The trial court sentenced the husband to 45 days in the county jail, but ordered him to serve 5 days and suspended the remaining "40 days ... for a term of probation to terminate on final judgment in this matter." The trial court expressly stated that the terms of the husband's probation required him to comply with all previous court orders relating to color-code testing. The trial court also found the husband in criminal contempt for violating the no-contact order by contacting the wife and the child via text message on a total of 23 occasions. The trial court sentenced the husband to 90 days' incarceration for those instances of contempt, required him to serve 5 days, and suspended the remaining 85 days "for a term of probation to terminate on final judgment in this matter." The order stated that the terms of probation relating to the contempt originating from the no-contact order included that the husband have no contact

with the wife. The trial court further required that the two five-day sentences run consecutively. The trial court also found the husband in civil contempt based upon his failure to ready the Orange Beach house for rent. The husband did not appeal the contempt judgment. See Rule 70A(g), Ala. R. Civ. P. (stating that orders holding a party in contempt are reviewable by appeal); Gladden v. Gladden, 942 So. 2d 362, 369 (Ala. Civ. App. 2005) (explaining that "an order adjudging a party guilty of contempt is a final, separately appealable judgment").

The PFA action and the divorce action were ultimately consolidated in August 2018; the trial court directed the parties to thereafter file all pleadings in the divorce action. The trial court set the consolidated actions for a trial to be held in October 2018. Before the trial, the husband filed a motion in limine objecting to the admission of any testimony or other evidence relating to the wife's reasonable and necessary monthly expenses. The husband argued in that motion that, despite an interrogatory request asking for a detailed budget, the wife had refused to provide any itemized budget or list of expenses during the discovery

process, stating only that she required $10,000 per month upon which to live. The trial court granted the husband's motion in limine "in part," stating in its order that the wife "shall not [be] allowed to introduce at trial any detail of monthly expenses related to her request for $10,000 per month in alimony; however, the Court has heard and may consider testimony related to those expenses from prior hearings."

The trial took place on October 17, 2018. At the conclusion of the trial, the trial court requested that the parties file posttrial briefs addressing the issues raised at trial. The wife filed a motion seeking to hold the husband in contempt after the trial but before the entry of a judgment in the divorce action. The record does not indicate that a hearing was held on the wife's contempt motion.

On February 4, 2019, the trial court entered a judgment in the divorce action divorcing the parties ("the divorce judgment"). Among other things not pertinent to this appeal, the divorce judgment awarded sole legal and physical custody of the parties' two children (one of whom was born during the pendency of the divorce action) to the wife and ordered the husband to pay $1,582 per month in child support. The trial

court awarded the husband supervised visitation "up to two times per week" at "the Family Center" and allowed him telephone visitation three times per week at 7:00 p.m. for up to 10 minutes. The divorce judgment further required that the older child remain in counseling and that the husband pay the cost of that counseling. The child's counselor was authorized to determine when the husband's visitation could progress to being unsupervised. Furthermore, the trial court ordered that, once the husband's visitation became unsupervised, his visitation would be "predicated on his staying clear of alcohol for two full years"; the divorce judgment required the husband to remain on color-code testing for drugs and alcohol and, among other things, to provide the wife with the test results on the day following each unsupervised visit with the children.

In addition, the trial court awarded the wife $2,500 per month in periodic alimony, $10,845 for past-due expenses incurred by the wife while the divorce action was pending, and $48,500 representing one-half of $97,000 in cash that had been in the safe in the marital residence before the parties separated. The trial court expressly stated that the husband

> "either operates a tremendously successful plumbing business or has undisclosed income from another source. The parties have accumulated significant assets without debt in a very short time, and the same cannot be reconciled financially based on the parties' and the business's tax returns. The wife testified to significant cash inflows during the marriage, and this appears to be the only plausible way to explain the lifestyle in which the parties lived. The court finds the wife's and the other witnesses' testimony credible in this regard and does not find the husband's testimony to be wholly truthful. Therefore, the court is basing the division herein on that determination."

The divorce judgment awarded the husband all interest in his plumbing business, DanielFields Plumbing Repair, LLC ("the business"). All of the parties' real-estate interests, which included the marital residence and the four acres on which it sits, the Orange Beach house, a rental house in Loxley, and a vacant lot beside the Loxley house, were awarded to the wife. The wife was made responsible for her credit-card debt and for the mortgage associated with the Loxley house, the balance of which was approximately $87,000. The wife was also awarded a camper, two jet skis, a Duramax truck, a GMC Acadia sport-utility vehicle, and all the contents of the marital residence and the associated outbuilding, except those items that were the personal property of the husband or were used in his business.

The divorce judgment further stated:

> "The PFA shall be made permanent and shall be entered by separate order. The court notes that there was evidence of 23 instances of violations of the PFA after its entry, along with [the husband's] statements in text[messages] that he had 'no respect for the law.' ... [The husband] shall have no contact with [the wife] except as necessary related to the well-being of the children only. [Communication] shall be [by] text [message] or [electronic] mail only and shall be civil and reasonable at all times. [The husband] shall not possess any guns during the duration of the PFA (which at this point is an undefined period of time, until further court order)."

The divorce judgment denied all requested relief not specifically addressed in that judgment.

The trial court entered in the PFA action a permanent PFA order effective until further order of the court on the same date that it entered the divorce judgment. The permanent PFA order makes reference to certain of the provisions of the divorce judgment. Like the divorce judgment, the permanent PFA order indicates that the husband must surrender any firearms and limits contact between the husband and the wife to that contact related to and necessary for the well-being of the children.

The husband filed a timely postjudgment motion in the divorce action, which the trial court denied. The husband did

not file a postjudgment motion in the PFA action. The husband then filed in the divorce action a notice of appeal to this court.

The record, which includes the transcripts of several hearings that took place over the 22 months the divorce action was pending, reveals the following facts. The husband and the wife, who were 33 and 32 years old, respectively, in February 2017, married in March 2004. They have two children, a daughter born in 2007 and a son born in 2017, during the pendency of the divorce action. The husband is a plumber and owns the business. The wife had been employed until 2015 at a local hospital as an ultrasound technician, but she did not become properly certified and, at the time of the several hearings and the trial, was working only part-time.

As explained above, the wife commenced the PFA action in January 2017 based on the husband's treatment of her. At the trial on the PFA action, the wife presented exhibits, including audio recordings and a video without audio, portraying the husband's volatility and anger on several occasions beginning in July 2017. The audio recordings, on the whole, contain significant amounts of profanity and

belittling insults directed at the wife by the husband. The husband accused the wife of overspending on the parties' credit card and stated that he was "almost bankrupt." During one verbal altercation, the husband and the wife argued about whether they could afford a horse that had been purchased for the older child. The husband accused the wife of driving up the credit-card bill and using the credit card without his knowledge to purchase the horse, and she responded by saying that his drinking habit cost more than the older child's horse-riding hobby. The husband also said: "I'm doing the best I can not to blow your [multiple profane words] head off."

The wife testified that the husband had thrown items at her, including what she described as a saw but what appears in photographs to be a name-brand, battery-powered oscillating tool. The wife said that she had dodged the tool but that it had gouged the floor, as is depicted in another photograph. The wife also testified that the husband had removed the tires from her vehicle and that he had broken in a door at the marital residence; the wife presented photographic evidence of both incidents. She explained that the husband had threatened

to kill her before, that he had aimed a gun at her before, and that he slept with an automatic rifle under his pillow.

She recounted a particular incident involving the rifle. She explained that she had left the marital residence one evening to avoid an argument with the husband and that she had driven to the end of the parties' driveway, where she intended to wait in her vehicle for the husband to fall asleep before returning to the marital residence; she apparently turned off the headlights of the vehicle. She said that the husband had contacted her via text message, a photograph of which was admitted as an exhibit, stating: "Turn those lights back on. Steady aim." According to the wife, she had taken the content of that text message to mean that the husband intended to shoot her. She said that, when she returned to the house on that occasion once she was certain the husband was asleep, she had found the husband lying on his rifle in his bed. She stated that the rifle had had one round of ammunition in the chamber.

The wife further testified that the husband had broken her computer and had damaged the security system at the marital residence. She also presented photographic evidence

showing damage to a glass window in a door at the marital residence; she testified that the husband had thrown a wrought-iron figurine through the glass window to gain access to the marital residence. She also testified that the husband had slammed her against a trailer on one occasion, had caused bruising on her on at least one occasion, and had injured her thumb.

The wife described the husband as a violent drunk. She said that, in the early years of their marriage, he had drank frequently but had not been not abusive. She explained that he had become increasingly angry and violent during the marriage, especially after the older child was born. According to the wife, the husband had advanced to drinking as much as a 24-pack of beer each evening.

Megan Clary, the husband's cousin, who had resided with the parties for two years before their separation, testified that she had seen the husband become angry frequently and that, on one occasion, she had observed him cut the television cord out of anger over the volume of a program, resulting in the television catching fire. According to Clary, the husband frequently drank an 18-pack of beer in an evening during the

time that she had lived with the parties. She stated that, one evening when she arrived home from her employment, she had seen the older child shaking and crying in fear of the husband. Clary testified that the husband would yell at the wife "about every other night." However, Clary said that she had never seen the husband hit the wife or threaten her with any weapons.

The husband testified that he had never hit the wife, although he admitted that he might have pushed her. He admitted that he had not handled his irritation with the wife over their differing financial views well, as reflected by the audio and video recordings and photographs the wife submitted at the several hearings held throughout the pendency of the divorce action and the PFA action. He said that he worked long hours to provide for his family and that he had been concerned when he realized that the wife had begun carrying a large balance on the business credit card. He insisted that he was not an alcoholic, but he admitted at the trial that he had tested positive for alcohol on a test administered in June 2018, after the contempt hearing but before the entry of the

contempt judgment; a copy of the results of that test were admitted into evidence.

The wife had been employed at a local hospital as an ultrasound technician earning over $50,000 per year until July 2015. She testified that she had been unable to pass a certain portion of a registration examination that had become required for her to maintain her employment. As a result, she explained, she was "let go" from her employment. She said that she began doing the bookkeeping for the business after she left her employment at the hospital and that the husband had paid her to do so until July 2016.

The wife admitted that she still performed ultrasound examinations for a local physician on an as-needed basis; she explained that she was allowed to perform an ultrasound examination provided that she was working under the supervision of a registered technician, which, she said, was the case at the physician's office. According to the wife, she also performed substitute teaching for a local school system two or three times per week and also worked for her church. The wife testified that she earned $70 per day teaching for the school system, $200 per day when she worked

for the local physician, which she said she did only two or three times every three months, and $100 per week from her church.

The wife testified that the husband earned over $400,000 per year in the business. She explained that he was frequently paid in cash, which, she said, he did not report on either the business's or his personal tax returns. She said that he would keep cash he was paid in the safe in the marital residence until he had collected a certain amount and that he would then take the cash from the safe. According to the wife, she did not know what the husband would do with the cash once he removed it from the safe. She recalled that, shortly before the separation, the husband had approximately $97,000 in the safe, which, she said, the husband took from the safe when the parties separated.

The husband denied being paid substantial sums in cash or having had $97,000 in the safe around the time of the parties' separation. He maintained that his income was that reflected on his personal or business income-tax returns. The parties' personal income-tax returns indicate that the husband earned $64,867, $83,132, and $38,993 in 2014, 2015, and 2016,

respectively. The business's tax returns for 2015, 2016, and 2017 were also admitted as exhibits. Those returns indicate that the business's gross receipts were $629,664, $691,044, and $864,431 in those years, respectively. Those returns also show the business's ordinary business income each year, which was $127,848, $66,256, and $124,979, respectively. The 2017 tax return for the business indicates that the business owns equipment with an unadjusted cost basis of over $400,000. Neither party provided any expert testimony regarding the value of the business.

The parties owned four parcels of real estate. They owned a house in Loxley ("the Loxley house"), which had been the parties' marital residence in the early years of their marriage. According to the testimony at trial, they acquired the Loxley house from the wife's parents for $95,000, of which they paid $60,000; the remaining $35,000 was considered to be either a gift to the wife or a portion of her inheritance. The parties also owned an unimproved lot that adjoined the Loxley house ("the Loxley lot"), for which, according to the husband, he had paid $17,000; the wife testified that she had thought the Loxley lot might be worth closer to $30,000.

The Loxley house was being rented at the time of the hearings and trial in the divorce action; the rental income paid the mortgage payment on the property. The testimony reflected that the parties had mortgaged the Loxley house in order to construct the current marital residence, which was located on four acres in Robertsdale. The balance on the mortgage on the Loxley house was approximately $87,000 to $90,000 at the time of trial.

The record does not reflect the value of the marital residence. The parties testified that it was not mortgaged. However, the evidence at trial suggested that the wife's father, Donald Wigstrom, had either loaned the parties $30,000 to assist in financing the construction of the marital residence or had "sold" them the four acres on which the marital residence is situated for what Wigstrom called a "lien" of $30,000 on the property. The husband testified that he had paid the $30,000 debt; the wife and Wigstrom testified that he had not.

During the final years of the parties' marriage, they undertook construction of a house in Orange Beach. The wife testified that they had spent $500,000 in constructing the

house, which, both parties testified, was not mortgaged. However, the parties agreed that Wigstrom had loaned them $120,000 to assist in the construction of the Orange Beach house, which, again, the husband testified he had completely repaid. The wife and Wigstrom testified that the parties still owe Wigstrom $113,000. Neither party testified regarding the value of the Orange Beach house.

The husband raises several issues on appeal. He complains about the criminal-contempt finding in the divorce judgment; he specifically argues that the trial court could not properly hold him in criminal contempt twice for the same instances of contempt and that the color-code test results should not have been admitted into evidence because they do not meet the test for admissibility set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). He then argues that the trial court erred in issuing the permanent PFA order and by restricting his possession of firearms. In addition, the husband challenges the award of alimony to the wife and the division of property; he contends that the division of property is inequitable and that the wife did not

prove a need for alimony and that the award financially cripples him. The husband also challenges the trial court's calculation of child support based on his assertions that the court incorrectly determined his income and failed to include in its calculation the amount he pays for health insurance for the children. The husband further argues that the trial court should not have required him to pay the $10,845 in past-due pendente lite bills and that the trial court should not have ordered him to subject himself to color-code testing for the entirety of the children's minority.

In general, our standard of review on appeal from a divorce judgment is limited.

> "In reviewing a judgment of the trial court 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 to be 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). This presumption of correctness is based on the trial court's unique position to observe the witnesses and to assess their demeanor and credibility. Hall v. Mazzone, 486 So. 2d 408 (Ala. 1986)."

Kratz v. Kratz, 791 So. 2d 971, 973 (Ala. Civ. App. 2000).

The husband first argues that the trial court erred by holding him in criminal contempt for nine instances of either testing positive for alcohol or for failing to submit to color-code testing when called.

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

L.A. v. R.H., 929 So. 2d 1018, 1019 (Ala. Civ. App. 2005) (quoting Ex parte Ferguson, 819 So. 2d 626, 629 (Ala. 2001), quoting in turn United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987)). A trial court, as the trier of fact in a nonjury trial, is entitled to make credibility determinations regarding a party's excuse for noncompliance with a court order. D.E. v. T.M., 142 So. 3d 1142, 1148 (Ala. Civ. App. 2013). "Furthermore, we have held that, '[a]bsent an abuse of discretion, or unless the judgment of the trial court is unsupported by the evidence so as to be plainly or palpably wrong, the determination of whether a party is in contempt is within the sound discretion of the trial court.'" Preston v. Saab, 43 So. 3d 595, 599 (Ala. Civ. App. 2010) (quoting

Shonkwiler v. Kriska, 780 So. 2d 703, 706 (Ala. Civ. App. 2000)).

Initially, the husband contends that the results of the color-code tests should not have been admitted because, he says, the method of testing for alcohol enzymes have not been established to "comport with the Frye standard or [to] comply with Daubert." However, as the wife contends, the husband did not object to the admission of the one positive color-code test at the time of its admission in the October 2018 trial. See James v. James, 768 So. 2d 356, 361 (Ala. 2000) ("[T]he law requires that an objection be made when the evidence is offered."). The husband had made a Frye argument against the admission of the color-code test results before the trial court at the May 2018 contempt hearing; that objection was overruled, the trial court held the husband in criminal contempt based, in part, on the two positive color-code tests, but the husband did not appeal the contempt judgment. Because the husband did not object to the admission of the results of the one positive color-code test at the October 2018 trial, we cannot consider his objection to the positive color-code test on appeal from the divorce judgment.

However, we agree with the husband that, in the divorce judgment, the trial court appears to have held him in contempt for the same nine instances of contempt for which he had been previously tried and sentenced. At best, the evidence before the trial court in October 2018 would support a finding of one instance of criminal contempt based on the husband's June 2018 positive color-code test.[1] Although the husband mentioned in his testimony in October 2018 that he recalled nine instances of failing or missing color-code tests, the evidence relating to the husband's "failing and or missing nine drug tests" was presented to the trial court in May 2018, and, as discussed, formed the basis of the July 2018 judgment of criminal contempt. We explained in O'Barr v. O'Barr, 163 So. 3d 1076, 1085 (Ala. Civ. App. 2014), that this court would not "uphold the trial court's finding of two different counts of contempt based on the same occurrence." Thus, we reverse the divorce judgment insofar as it held the husband in criminal contempt

[1]Contrary to the wife's assertion in her brief on appeal, defendant's exhibit 2 to the October 2018 trial is not evidence of a positive color-code test; it is instead a portion of a credit-card statement indicating that the husband made a purchase at a liquor store. The wife produced evidence of only one failed color-code test at the October 2018 trial.

for nine instances of either failing or missing color-code tests.

The husband contends that the trial court's pendente lite order requiring him to submit to color-code testing was not of reasonable specificity such that he could have been found to be in willful criminal contempt of that order. He points out that, at a motion hearing in February 2018, the trial court indicated that it was "not overly concerned with" the husband's compliance with color-code testing because the husband was not currently exercising visitation. Thus, the husband contends, "[t]he trial court could not thereafter determine beyond a reasonable doubt that it gave [the husband] a lawful order of reasonable specificity and that he willfully violated it." However, although the contempt judgment was not entered until July 2018, at the May 2018 hearing on the wife's contempt motion, the trial court announced that it intended to hold the husband in contempt for failing and/or missing color-code tests. The husband's decision to drink and, consequently, to fail another color-code test after the contempt hearing could certainly have been perceived to be willful by the trial court. On remand, the trial court is

instructed to amend the divorce judgment to reflect a criminal-contempt finding and an appropriate sentence based solely on the evidence submitted at the October 2018 trial that the husband had failed one color-code test after the May 2018 contempt hearing.

The husband next argues that the trial court committed error by issuing a permanent PFA order and by prohibiting him from owning a firearm. The wife contends that the husband cannot raise any issue relating to the permanent PFA order on appeal because he did not appeal from the permanent PFA order entered in the PFA action. She relies on the principle that, although the divorce action and the PFA action were consolidated, they maintained their separate identities and the pleadings in one action did not automatically become pleadings in the other. See Cox v. Cox, 218 So. 3d 1215, 1220 (Ala. Civ. App. 2016). Thus, she concludes, the husband's postjudgment motion, which was filed only in the divorce action, did not serve as a postjudgment motion in the PFA action. See Cox, 218 So. 3d at 1220. We agree.

We have not overlooked that, as is permitted by Rule 42(a), Ala. R. Civ. P., the trial court instructed the parties

to make all filings in the consolidated cases in the divorce action. See Ex parte Glassmeyer, 204 So. 3d 906, 908 (Ala. Civ. App. 2016). However, as required by our caselaw, the trial court properly entered a separate judgment in each case, see Cox, 218 So. 3d at 1220, and the husband filed a postjudgment motion directed solely to the divorce judgment. Nothing in the husband's postjudgment motion, which bore only the case number for the divorce action, attacked the permanent PFA order, which was entered on the same day as the divorce judgment, February 4, 2019. Thus, as was the case in Cox, even if we were to consider the husband's notice of appeal in the divorce action to have indicated his intent to file a notice of appeal in the PFA action,[2] see Cox, 218 So. 3d at 217 n.3 (indicating that this court can construe a notice of appeal as an appeal from multiple judgments in the case of consolidated actions, provided that the intent to appeal may be inferred from the notice of appeal or docketing statement), the husband's notice of appeal, which was filed on April 17, 2019, would not have been timely filed with regard to the

[2]We are not concluding that the husband's notice of appeal and docketing statement reveal a specific intent to appeal from the permanent PFA order entered in the PFA action.

permanent PFA order. See Rule 4(a)(1), Ala. R. App. P. (stating that, with exceptions not pertinent here, a notice of appeal must be filed within 42 days of the entry of a judgment).

Accordingly, we agree that the permanent PFA order is not before this court, because the husband filed a timely notice of appeal in only the divorce action. However, the divorce judgment itself refers to the permanent PFA order and includes some of the same provisions. Thus, to the extent that the divorce judgment orders that the parties have no contact other than that necessary for the well-being of the children through electronic mail or text messages and prohibits the husband from owning any guns during the duration of the permanent PFA order, we may consider the husband's arguments.

The husband first contends that the wife did not prove her allegations of abuse by a preponderance of the evidence. The legal authority upon which the husband relies relates to PFA orders, which require proof of abuse by a preponderance of the evidence. Although we are not reviewing the permanent PFA order in the present case, we note that the trial court determined the husband to be a danger to the wife and

potentially to the children; thus, the trial court could have imposed restrictions like those in the divorce judgment pursuant to Ala. Code 1975, § 30-3-135(b)(8) (allowing a trial court to "[i]mpose any other condition that is deemed necessary to provide for the safety of the child, the victim of family or domestic violence, or other family or household member" in a judgment addressing child custody and visitation when a parent has committed domestic violence or abuse). We have affirmed an award of relief similar to that granted in this case, i.e., a no-contact order, based on evidence indicating that the husband used vile and abusive language toward the wife when he was drinking and had threatened the life of the wife. See Russell v. Russell, 45 Ala. App. 455, 460, 231 So. 2d 910, 914 (Civ. 1970). The husband has provided no authority relating specifically to the propriety of the provision of the divorce judgment prohibiting him from possessing firearms and, in particular, makes no argument that the divorce judgment abridges his Second Amendment right to bear arms. The wife testified that the husband slept with a loaded rifle and that he had sent a text message to her that she had construed to be a threat on her life; she testified

further that he had made threats on her life at other times. Because the evidence, viewed in the light most favorable to the divorce judgment, see Williams v. Williams, 905 So. 2d 820, 827 (Ala. Civ. App. 2004) ("We must view the evidence in the light most favorable to the trial court's judgment."), established that the husband had used profane and abusive language in verbal altercations with the wife, had drank excessively, had been angry when he was drunk, and had threatened the wife's life, we cannot conclude that the trial court's prohibition on contact between the parties and on the husband's possession of firearms is not supported by the evidence.

The husband next argues that the trial court erred in calculating his child-support obligation. The husband first contends that the trial court erred in concluding that his income is $14,583 per month. The husband contends that the evidence supports that he makes $62,328 per year, the average of the amount of income reflected on his personal tax returns in 2014, 2015, and 2016. However, testimony at trial indicated that the husband had used the business account regularly to pay the family's expenses and that he regularly

earned a substantial amount of cash income, which was not reported on any tax return and which he collected in the safe located at the marital residence. As the trial court commented, "the only plausible way to explain the lifestyle in which the parties lived" was to conclude that the husband had earned more income than he had reported on the business's and the parties' personal income-tax returns. Thus, we cannot hold the trial court in error for concluding that the husband's income exceeded $14,000 per month.

The husband also complains that the trial court failed to include the expense he incurs for health insurance for the children in calculating his child-support obligation. The husband testified that he "thought" that he paid about $1,200 per month for health insurance for all four members of his family. Although the wife is correct that the husband indicated that his mother would better know the exact amount of his insurance payment, the only evidence of record is that the husband pays $1,200 per month for health insurance covering the family. Had the wife wished to controvert that amount, she could have done so.

The Alabama Rules of Judicial Administration explain how a trial court is to determine the appropriate portion of a family health-insurance premium to add to the basic child-support obligation:

> "(e) The amount to be added to the 'basic child-support obligation' and inserted in Line 6 ('Health-Care-Coverage Costs') of the Child-Support Guidelines form (Form CS-42) shall be the pro rata portion of the health-care-coverage cost attributable to the child or children who are the subject of the support order, which shall be calculated by dividing the total health-care-coverage cost actually paid by, or on behalf of, the parent ordered to provide the coverage by the total number of persons (adult and/or children) covered and then multiplying the result by the number of children who are the subject of the support order."

Rule 32(B)(7)(e), Ala. R. Jud. Admin. Thus, the trial court was required to add to the basic child-support obligation the sum of $600 (($1,200/4) x 2 = $600) and to give the husband credit for paying that prorated monthly health-insurance premium. See Rule 32(B)(7)(f); Jackson v. Jackson, 777 So. 2d 155, 158 (Ala. Civ. App. 2000). We therefore reverse the divorce judgment insofar as it ordered the payment of $1,582.57 per month in child support. On remand, the trial court should properly calculate the husband's child-support

obligation after including in its calculations the amount of the health-insurance premium attributable to the children.

The husband next challenges the property division in the divorce judgment, which he complains is inequitable.[3]

> "'It is well settled that trial judges enjoy broad discretion in fashioning divorce judgments.' Ex parte Bland, 796 So. 2d 340, 343 (Ala. 2000). ...
>
> > "'Each case is decided on its own peculiar facts and circumstances. Criteria which should be considered by the trial court when awarding alimony and dividing property include the length of the parties' marriage, their ages, health, station in life, and future prospects; the sources, value, and type of property owned; the standard of living to which the parties have become accustomed during the marriage and the potential for maintaining that standard; and, in appropriate situations, the conduct of the parties with reference to the cause of divorce.'
>
> "Currie v. Currie, 550 So. 2d 423, 425 (Ala. Civ. App. 1989). A property division does not have to be equal, but it must be equitable, J.H.F. v. P.S.F.,

[3]Within his argument relating to the property division, the husband complains that the trial court should not have ordered him to provide the wife insurance under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). The husband admits that, at the postjudgment hearing, the trial court, in response to an argument that the business did not qualify for COBRA insurance because of its size, indicated that if the husband did not have COBRA insurance available to him, such an award would be a legal impossibility. Thus, we perceive the issue to be moot.

> 835 So. 2d 1024 (Ala. Civ. App. 2002), and it must be 'supported by the particular facts of the case,' Ex parte Elliott, 782 So. 2d 308, 311 (Ala. 2000). The determination of what is equitable is a matter of discretion for the trial court. Carter v. Carter, 934 So. 2d 406 (Ala. Civ. App. 2005)."

Wright v. Wright, 19 So. 3d 901, 910–11 (Ala. Civ. App. 2009).

As noted above, the parties failed to present evidence of the value of their real-estate holdings or of the business during the trial in this matter, leaving the husband, who is the appellant, in a precarious position insofar as he seeks reversal of the property-division aspect of the divorce judgment. See K.W.M. v. P.N.M., 116 So. 3d 1179, 1191 (Ala. Civ. App. 2013) (affirming the property-division aspects of a divorce judgment and stating that, "[g]iven the lack of evidence on the specific value of the business, among other assets, it is impossible for this court to determine to total relative valuations of the marital assets awarded to each party"). The evidence presented to the trial court indicated that the business had been extremely profitable, so much so that the parties had recently constructed a $500,000 beach house with the assistance of only a $120,000 loan from Wigstrom. The trial court was free to believe the wife's testimony indicating that the business earned significant

income in cash in addition to the earnings reported on the business's tax returns. With that testimony in mind, we cannot conclude that the trial court erred in determining that the business was a major asset of the marriage and that it might be equivalent to the value of the parties' real property. Without evidence regarding the actual value of the business or of the parties' real property, we cannot conclude that the trial court erred in awarding the business to the husband and in awarding the real property of the parties, subject to their mortgage or associated debt, to the wife.

As part of his challenge to the division of property, the husband also challenges the trial court's order requiring him to return to the wife a Kubota brand tractor or to pay her $25,000 to replace the tractor. The husband contends that the evidence concerning the tractor was that it belonged to Wigstrom, that the husband had traded the tractor in exchange for certain labor used in building the Orange Beach house, and that the record does not contain evidence of the value of the

tractor. Thus, he contends, the divorce judgment should be reversed insofar as it awarded the wife the tractor.[4]

The wife and Wigstrom explained in their respective testimony that the husband had desired a newer tractor to assist him in the business and that he had, with Wigstrom's permission, traded in an older John Deere tractor owned by Wigstrom to purchase the Kubota tractor or, as Wigstrom described it, backhoe. Based on the wife's testimony, the agreement occurred when the parties moved to the marital residence, which occurred when the older child was

[4]The husband's legal argument on this issue is five sentences long and contains not one citation to authority. See Rule 28(a)(10), Ala. R. App. P. (requiring an appellant to support his or her legal argument with citations to appropriate supporting authority). However, because the wife responds to the husband's argument and because we have sufficient understanding of it from the briefs submitted on appeal, we will address the issue. See Kirksey v. Roberts, 613 So. 2d 352, 353 (Ala. 1993) (explaining that an appellate court may consider an argument that is not compliant with what is now Rule 28(a)(10) if the court is able to adequately discern the issues presented); Bishop v. Robinson, 516 So. 2d 723, 724 (Ala. Civ. App. 1987) (explaining that an appellate court may consider an argument that is not compliant with what is now Rule 28(a)(10) when the appellee adequately responds to the issues raised by the appellant in brief despite the noncompliance); and Thoman Eng'rs, Inc. v. McDonald, 57 Ala. App. 287, 290, 328 So. 2d 293, 295 (Civ. 1976) (explaining that an appellate court may consider an argument that is not compliant with what is now Rule 28(a)(10) when the argument "has been raised in a manner which is fair to all concerned").

approximately four years old, or in 2012. Both Wigstrom and the wife testified that Wigstrom had conditioned the agreement on the stipulation that the tractor be used to maintain the 18 acres owned by Wigstrom that surrounds the parties' marital residence and the 4 acres on which the marital residence sits. That testimony supports the wife's position that the tractor was, in fact, marital property. The wife further testified that the husband had taken the Kubota tractor upon their separation and that she did not have a suitable tractor to perform the necessary maintenance of the large acreage. The trial court was free to believe the testimony of the wife and Wigstrom that the Kubota tractor was intended to be used at the parties' marital residence, despite the husband's testimony that he had traded the tractor for work performed on the Orange Beach house.

Although the parties did not testify regarding the cost or the value of the Kubota tractor, the record contains the business's tax returns; the 2017 tax return of the business contains a list of equipment owned by the business. That list contains three pieces of Kubota equipment, one piece purchased in 2012 (a backhoe), one in 2015 (a tractor), and one in 2016

(a tractor), with their cost basis listed as $53,000, $11,510, and $35,000, respectively. Based on the information the trial court had, it could have reasonably determined that the initial cost of the Kubota backhoe was as much as $53,000 at the time of its purchase, and, based on the lack of evidence presented by either party as to the tractor's present value, we cannot conclude that the husband has established that the trial court erred in determining that value of the Kubota tractor or its reasonable equivalent should be approximately half that amount, or $25,000.

The husband further challenges the award of $2,500 per month in alimony to the wife. He contends that she did not prove her need for alimony, as this court explained was required in Shewbart v. Shewbart, 64 So. 3d 1080, 1087-88 (Ala. Civ. App. 2010). In Shewbart, we explained that a spouse seeking an award of periodic alimony "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." Shewbart, 64 So. 3d at 1088. Once the marital standard of living is established, the spouse seeking alimony 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, ... with the last factor taking into account the age, health, education, and work experience of the petitioning spouse as well as prevailing economic conditions, ... and any rehabilitative alimony or other benefits that will assist the petitioning spouse in obtaining and maintaining gainful employment." Id.

The wife contends that this court has since explained in Knight v. Knight, 226 So. 3d 688, 695 (Ala. Civ. App. 2016), that a spouse seeking alimony is not required to present an itemized monthly budget in order to establish a need for alimony. Instead, she correctly states, a spouse seeking alimony "need only present sufficient evidence from which the trial court can reasonably infer the costs associated with the marital standard of living." McCarron v. McCarron, 168 So. 3d 68, 76 (Ala. Civ. App. 2014). She further argues that the trial court could consider the conduct of the parties in causing the divorce in making its alimony award, see McCarron

v. McCarron, 168 So. 3d at 78 (quoting Shewbart, 64 So. 3d at 1089) (noting that, "when deciding questions surrounding periodic alimony, a trial court can and should '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'"), and the disparity of the parties' incomes in determining whether to award alimony.

The testimony at trial did not directly establish the monthly expenses of the parties during the marriage. The wife testified that the husband was often paid in cash, that he regularly collected large amounts of cash -- nearly $100,000 in the months before the separation of the parties -- in the safe located in the marital residence, that the husband preferred to spend cash on various expenses, and that the parties had little debt in comparison to their real-estate holdings. The parties expended $500,000 to construct a beach house, and they had purchased a horse for the older child, who also took riding lessons and participated in horse shows. The wife testified that she had previously paid for groceries, toiletries, and clothing for her and the older child out of

her paycheck from the hospital, while the husband handled the payment of larger expenses. According to the wife, she had paid for groceries and "day-to-day stuff" out of the $400 per week she was paid while performing bookkeeping for the business, and, she said, she had amassed over $39,000 in credit-card debt paying for those items after the husband stopped paying her in July 2016. She also testified that she had not had sufficient funds for the household expenses while the divorce action was pending, despite having been paid $1,000 per week; upon further questioning, the wife admitted that she was paying nearly half of her pendente lite support toward her attorney fees. The evidence therefore suggests that the general household and basic regular expenses of the parties had been approximately $4,000 per month, that they had lived in such a way as to pay expenses with cash and to have not amassed significant debt, and that they had built the $500,000 Orange Beach house using primarily cash. Based on that evidence, we cannot agree with the husband that the trial court abused its discretion by awarding the wife alimony in the amount of $2,500 per month. In addition, because the trial court was free to believe the wife's testimony

concerning the husband's receipt of considerable cash income, we cannot conclude that the trial court's $2,500 monthly alimony award is financially crippling to the husband, who the trial court concluded earned $14,583 per month, or $175,000 per year.

We next address the husband's argument relating to the $10,845 in past-due pendente lite expenses incurred by the wife that he was ordered to pay in the divorce judgment. He argues that the divorce judgment, insofar as it ordered him to pay that sum to the wife, is not properly supported by the evidence. He further contends that the wife admitted that she did not present those bills to him for payment. We note that the trial court did not hold the husband in contempt for failing to pay the past-due bills, likely because the wife admitted that she had not presented those bills to the husband for payment. However, the trial court had ordered the husband to be responsible for those bills pendente lite, and the wife testified to, and presented an exhibit outlining, those bills that had not been paid; the husband did not object to the wife's testimony or the admission of the exhibit. Furthermore, the wife's exhibit outlining the past-due

expenses is not included in the exhibits provided to this court, and, thus, we must presume that the missing exhibit supports the divorce judgment.[5] See Henning v. Henning, 26 So. 3d 450, 453 (Ala. Civ. App. 2009) (quoting White v. White, 589 So. 2d 740, 743 (Ala. Civ. App. 1991)) ("We note that '[w]here ... evidence before the trial court ... is not preserved for the appellate court, the evidence is conclusively presumed to support the trial court's [judgment].'"). Moreover, in contravention of Rule 28(a)(10), Ala. R. App. P., the husband has failed to provide this court with any legal authority supporting his argument that the wife's testimony regarding the past-due bills is somehow insufficient to support the divorce judgment. See White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008) ("Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal authorities that

[5]In fact, other exhibits from the various hearings are also not contained in the record on appeal. During one hearing, the trial court indicated that it had, as a matter of practice, returned exhibits to the parties or to their counsel. Although we requested that the circuit-court clerk attempt to locate the missing exhibits, the record was not supplemented with any of those exhibits.

support the party's position. If they do not, the arguments are waived.").

The husband's final argument is that the trial court abused its discretion by conditioning his visitation on his submitting to color-code testing for alcohol "for the entirety of the children's minority." The divorce judgment "predicate[s] [the husband's unsupervised visitation] on his staying clear of alcohol for two full years" and requires the husband to submit to regular color-code testing to prove his sobriety. However, we do not read the divorce judgment as requiring the husband to undergo color-code testing for the remainder of the children's minority. The divorce judgment, which we construe as we do all judgments, by basing our interpretation on its plain language, see Sartin v. Sartin, 678 So. 2d 1181, 1183 (Ala. Civ. App. 1996), expressly states that the husband must stay clear of alcohol for "two full years." In any event, the husband has not provided this court with any authority indicating that the trial court abused its discretion by imposing what appears to be a reasonable two-year restriction on his visitation. See Rule 28(a)(10) (requiring appellant to support an argument with citations to

relevant legal authority); § 30-3-135(b)(4) (permitting the trial court to "[o]rder the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding the visitation"); § 30-3-135(b)(8) (permitting a trial court to impose restrictions to protect the children or the spouse in cases involving domestic violence or abuse).

We have considered each argument in favor of the reversal of the divorce judgment advanced by the husband. We have concluded that the trial court erred in holding the husband in contempt for nine instances of either failing or missing his color-code tests after having already adjudged him guilty in the July 2018 contempt order of those same incidents of contempt, save one. Insofar as the divorce judgment holds the husband in contempt for nine incidences related to color-code tests, the divorce judgment is reversed and the cause is remanded; on remand, the trial court is instructed to amend the divorce judgment to hold the husband in contempt for the sole positive color-code test from June 2018 and to modify the sentence accordingly. We have further determined that the trial court improperly computed the husband's monthly child-

support obligation by failing to include the pro rata amount of the husband's $1,200 health-insurance premium attributable to the parties' children in that calculation as required by Rule 32(B)(7)(e). Therefore, insofar as the divorce judgment requires the husband to pay $1,581.87 per month in child support, the judgment is reversed and the cause is remanded; on remand, the trial court is instructed to correctly calculate the husband's child-support obligation by including the cost the husband pays for health insurance for the parties' children pursuant to Rule 32(B)(7)(e) & (f). We affirm the divorce judgment in all other respects.

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

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

Edwards, J., concurs in part and dissents in part, with writing, which Moore, J., joins.

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

Although I concur in all other aspects of the main opinion, I respectfully dissent from the main opinion insofar as it affirms that portion of the divorce judgment entered by the Baldwin Circuit Court ("the trial court") awarding $2,500 per month in periodic alimony to Laura Fields ("the wife").

Daniel R. Fields ("the husband") challenges the trial court's award of $2,500 per month in periodic alimony to the wife based on his argument that she did not prove a need for alimony, as this court explained is required in Shewbart v. Shewbart, 64 So. 3d 1080, 1087-88 (Ala. Civ. App. 2010). In Shewbart, this court explained how a party seeking periodic alimony should establish the need for alimony:

> "In exercising its discretion [to award periodic alimony], the trial court is guided by equitable considerations. See Killingsworth v. Killingsworth, 925 So. 2d 977, 983 (Ala. Civ. App. 2005). 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); Hewitt v. Hewitt, 637 So. 2d 1382, 1384 (Ala. Civ. App. 1994) ('The failure to award alimony, although discretionary, is arbitrary and capricious when the needs of the wife are shown to merit an award and the husband has the ability to pay.').

"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)."

64 So. 3d at 1087–89 (emphasis added).

The wife counters the husband's argument by pointing out that this court explained in Knight v. Knight, 226 So. 3d 688, 695 (Ala. Civ. App. 2016), that a spouse seeking periodic alimony is not required to present an itemized monthly budget in order to establish a need for alimony. She argues that a spouse seeking periodic alimony "need only present sufficient evidence from which the trial court can reasonably infer the costs associated with the marital standard of living." McCarron v. McCarron, 168 So. 3d 68, 76 (Ala. Civ. App. 2014). She further points out, as the main opinion notes, that the trial court could properly consider both the conduct of the parties in causing the divorce, see McCarron, 168 So. 3d at 78, and the disparity of the parties' incomes in determining

whether to award alimony. Thus, the wife argues, the trial court could have inferred that she required money for typical expenses like food and utilities and also could have considered the husband's conduct and the large disparity in the parties' incomes in determining that she should be awarded $2,500 in monthly periodic alimony.

The main opinion admits that the testimony at trial did not directly establish the monthly expenses of the parties during the marriage. Although there was some testimony and other evidence from which the trial court might have inferred that the parties had certain monthly expenses, like those for utilities, Internet access, health insurance, physician's bills, and "animal expenses," the amount the parties regularly paid for any of those expenses is not capable of reasonable inference. Despite the fact that the husband had paid her $1,000 per week, the wife testified that she had not had sufficient funds for the household expenses while the divorce action was pending; she admitted, however, that she had used almost half of her pendente lite support to pay her attorney fees. Other evidence indicated that the wife had used her income from her previous employment to pay certain of the

parties' monthly expenses, like groceries and what the wife referred to as "day-to-day stuff"; however, the wife did not indicate whether she had exhausted all of her income on those expenses.

Based on the foregoing, I conclude that the wife failed to establish the marital standard of living such that the trial court could award her periodic alimony. In addition, in light of the wife's testimony that her former salary, which the trial court imputed to her as income for purposes of the child-support award, was used to defray the family's typical monthly or day-to-day expenses, I cannot agree that the wife established a need for $2,500 in monthly periodic alimony to maintain the former marital standard of living, especially in light of the division of the parties' property, which left the wife with all the parties' real estate. Accordingly, I would reverse the divorce judgment insofar as it awards the wife periodic alimony.

Moore, J., concurs.