REL: September 25, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2180776

B.C.H., Jr.

v.

M.H.

Appeal from Lee Circuit Court
(DR-14-109.01)

DONALDSON, Judge.

B.C.H., Jr. ("the father"), appeals from a judgment ("the modification judgment") of the Lee Circuit Court ("the trial court") insofar as it (1) modified the visitation of M.H. ("the mother") with the parties' three youngest children, (2)

deviated from the Rule 32, Ala. R. Jud. Admin., guidelines in establishing the mother's child-support obligation, (3) declined to award the father child support retroactive to the date he commenced this action, and (4) omitted a specific list of the types of uninsured medical expenses of the parties' children that were to be shared equally by the parties. We affirm in part, reverse in part, and remand.

Facts

The parties married in 1988. Three children, all girls, were born of the marriage, namely, H.E.H., who was born in 1993; A.F.H., who was born in 1998; and E.A.H., who was born in 2001. In addition, the parties adopted five children, namely, B.B.H. ("the older son"), a boy born in 2002; N.J.C.H. ("the younger son"), a boy born in 2005; C.R.M.L.H. ("the third youngest child"), a girl born in 2007; Z.G.A.H. ("the second youngest child"), a girl born in 2008; and R.B.H. ("the youngest child"), a girl born in 2011.

The record indicates that, in approximately 2014, the parties' two oldest children, namely, H.E.H. and A.F.H., told the father that the mother, who was responsible for homeschooling all the children while the father worked to

provide income for the family, had engaged in corporal punishment of the children that was excessive in both severity and frequency. At the trial of this action, the three oldest children testified that the corporal punishment that had occurred during the time the mother and father lived together had been a daily occurrence and provided extensive details of the punishment.

In 2014, the father sued the mother for a divorce. The parties ultimately entered into two written agreements settling the divorce action; one of those written agreements dealt with custody of the children, while the other dealt with the parties' assets and financial obligations. Their written agreements were incorporated by reference into their divorce judgment ("the divorce judgment"), which was entered in July 2015. In pertinent part, the parties' written agreement regarding custody provided:

> "3. Custody: The parties shall have joint legal and physical custody of the minor children. ...
>
> "4. Custodial Time: The mother shall have custodial time with the three (3) younger children as set out in the pendente lite agreement, and that would be subject to the recommendation of [T.L.], the Court-appointed counselor. ... The next two children are the sons, [B.B.H.] and [N.J.C.H.]. ... Their initial visitation will be simply group

counseling sessions with the mother and [T.L.] until [T.L.] feels that they have reached a point that they can have visitation. ... Whether that visitation is supervised, unsupervised, the extent of it time wise, would be to the discretion of [T.L.]. [E.A.H.], the next child, would be the same conditions. [A.F.H.] will visit with [T.L.] and any recommendations [T.L.] makes for [E.A.H.] will be adhered to. ...

"5. The custodial times shall be supervised by [F.W.] or another supervisor the counselor, [T.L.], approves. ...

"6. During visitation there will be no corporal punishment and the mother will not bathe the children. ...

"....

"8. [T.L.] shall be named the parenting coordinator. ... She will have the decision-making authority on how visitation will work going forward for all visitation. ...

"....

"10. The mother will begin to see a PhD for counseling services and she will sign a release with that PhD for the information to be freely exchanged between [T.H.] and the [guardian ad litem].

"....

"16. The parenting coordinator, [T.L.], has decision-making power over all the tiebreakers that would involve joint custody between the parties and the children in the event the parties do not agree. [T.L.] will decide the tiebreakers."

The divorce judgment did not order the mother to pay child support.

Procedural History

In November 2017, the father commenced the present action by filing a complaint asking the trial court to modify the divorce judgment by (1) vesting him with sole physical and sole legal custody of the children who were still minors, (2) reducing the mother's visitation time with the children who were still minors, (3) ordering the mother to pay child support, (4) requiring the mother to pay the cost of supervising her visitation, (5) ordering the mother to pay the cost of the parenting coordinator, (6) ordering the mother to pay one-half of all medical, dental, eye, drug, orthodontic, and mental-health-treatment bills of the minor children that were not covered by insurance, and (7) ordering the mother to pay the father a reasonable attorney's fee to compensate him for the expense of prosecuting this action. The mother answered the father's complaint, denying that he was entitled to the relief he sought, and counterclaimed for a modification of the custody and visitation provisions of the divorce judgment so as to either increase her visitation time and

terminate the requirement that her visitation be supervised or, in the alternative, vest her with sole physical and sole legal custody. The father answered the mother's counterclaim, denying that she was entitled to the relief she sought.

The trial court held a bench trial on February 19 and 20 and April 16 and 17, 2019. Before the trial court began receiving testimony on February 19, the mother made an oral motion to dismiss her counterclaim insofar as it sought sole physical and sole legal custody of the minor children, which the trial court granted. During the trial, the trial court received evidence ore tenus from numerous witnesses, including both of the parties, the parties' three oldest children, three expert witnesses called by the father, one expert witness called by the mother, the mother's spiritual advisor, several of the people chosen by T.L. to supervise the mother's visitation, the mother's supervisor at her place of employment, the mother's two sisters, and some of the mother's friends. The record reveals that the trial court was extremely attentive to the witnesses' testimony, often asking the witnesses questions either to clarify their testimony or to

inquire about a subject that the parties' counsel had not asked about.

The father's exhibit 1 in the present action, which consists of several discovery requests, discovery responses, and motions filed in the parties' divorce action and several orders entered in that action, indicates that, in the course of the divorce action, the father had sent the mother several written discovery requests, one bearing a certificate of service dated September 29, 2014, one bearing an electronic filing stamp dated November 24, 2014, and one bearing an electronic filing stamp dated December 15, 2014. Each of those written discovery requests contained one or more requests for admission. When the mother did not timely respond to those discovery requests, the father, on January 15, 2015, filed a motion in the divorce action asking the trial court to deem admitted his requests for admission served electronically "on or about November 24, 2014." On February 3, 2015, the trial court entered in the divorce action an order stating that the father's motion to "[d]eem 'admitted,' his Requests for Admission dated November 24, 2015, is granted ...." (Emphasis added.) The father offered his exhibit 1 as evidence at the

trial of the present action; the mother objected to that exhibit but did not assert as a basis for her objection that Rule 36(b), Ala. R. Civ. P., precluded its admission in the present action, and the trial court admitted it.[1] Obviously, none of the father's discovery requests filed before the entry of the February 3, 2015, order were dated November 24, 2015, a date approximately 10 months in the future when the trial court entered its February 3, 2015, order. Assuming that the date of "November 24, 2015," in the February 3, 2015, order was a clerical error, it appears that the trial court was referring to the discovery request bearing an electronic filing stamp dated November 24, 2014. That discovery request contained only one discovery request that could be construed as a request for admission, which stated: "Have you ever admitted to anyone, including the [father], that you have abused your children? If the answer is yes, please provide the name, address and telephone number of each such person." Although comments made by the father's counsel at the trial of

[1]In pertinent part, Rule 36(b), Ala. R. Civ. P., provides that "[a]ny admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding." (Emphasis added.)

this action indicate that he was under the impression that the trial court's February 3, 2015, order entered in the divorce action had deemed other requests for admission to be admitted, the language of the February 3, 2015, order does not support that interpretation.

At the trial of the present action, the father also sought to introduce an evaluation ("the J.S.W. evaluation") written by J.S.W., a psychologist who had been employed by the mother while the divorce action was pending. J.S.W. was not called to testify by either party in the present action, but the father sought to introduce the J.S.W. evaluation into evidence as "work product" of G.V., the psychologist who was counseling the mother during the trial of this action, based on G.V.'s testimony that he had reviewed, among other things, the J.S.W. evaluation in forming his opinions regarding the mother. The mother did not object to the admission of the J.S.W. evaluation, and the trial court admitted it into evidence. The J.S.W. evaluation indicated that J.S.W. had interviewed both parties and all the children, and other people who knew the parties, and that both parties and the children agreed that, at least on several occasions while the

mother and father had been married, the mother had engaged in behavior toward the children that was abusive. The J.S.W. evaluation further indicated that there was disagreement among the people he had interviewed regarding other allegations that had been made against the mother and that J.S.W. recommended that the mother not bathe the children in the future. The J.S.W. evaluation indicated that, although the children had valid reasons to be angry at the mother, the unified front that the children presented against their mother reflected something more than an appropriate emotional reaction to mistreatment that was occurring and had taken on a life of its own that would effectively preclude the mother from ever having a positive relationship with some of the children if it was not addressed therapeutically. The J.S.W. evaluation opined that the mother had a personality disorder with compulsive, borderline, and paranoid traits and recommended that the mother undergo residential psychological treatment.

Over the father's objection, the mother introduced into evidence an evaluation ("the A.D.B. evaluation") performed by A.D.B., Ph.D., a licensed clinical psychologist, that G.V. had also relied on in formulating his opinions regarding the

mother. A.D.B. was not called to testify by either party. The A.D.B. evaluation was performed while the divorce action was pending but after the J.S.W. evaluation. The A.D.B. evaluation stated that the J.S.W. evaluation and recommendation were inaccurate, that the mother did not meet the criteria for a psychiatric disorder, that J.S.W.'s own test data did not indicate that the mother had a psychiatric disorder, that the mother needed outpatient counseling rather than residential treatment, and that the children would be safe with the mother.

The mother admitted at the trial of this action that she had used corporal punishment to discipline the children during the marriage but denied that the punishment was as severe or as frequent as the three oldest children claimed. The mother denied that she had ever touched any of the children inappropriately when she bathed them. The mother further testified that, subsequent to the divorce, she had been employed by a private nonprofit organization that provides child-development and family-support services to low-income families. She travels to the homes of the families to whom her employer provides services and provides the parents with

education regarding parenting. The mother testified that, in connection with her employment, she had received training provided by the Alabama Department of Human Resources ("DHR") regarding, among other things, nutrition, mental health, and conscious discipline. The mother stated that, in her current employment, she is a mandatory child-abuse reporter and testified that she had learned how to discipline children without engaging in corporal punishment. The record contains no evidence indicating that the mother had engaged in corporal punishment of the three youngest children during her supervised visitation with them subsequent to the divorce.

Both parties called expert witnesses to testify on their behalf. The father's experts gave testimony that supported the father's contention that the mother should not have unsupervised visitation with the children; the mother's expert gave testimony that supported the mother's contention that she should be allowed to have unsupervised visitation. When the action was tried, the third youngest child was approximately 12 years old, the second youngest child was approximately 11 years old, and the youngest child was approximately 8 years old.

On May 29, 2019, the trial court entered the modification judgment that, in pertinent part, stated:

> "This court has reviewed the pleadings and requests for relief, heard the testimony along with considering the demeanor and bias of the witnesses and has reviewed the various exhibits introduced into evidence. The court is of the opinion that sufficient evidence of required changes have been proven to justify, under the law, a modification of the [divorce judgment], and accordingly, it is hereby ordered and adjudged that the [divorce judgment] is hereby modified as follows:
>
> "1. The services of [T.L.] as a parental coordinator for the parties are terminated as of the date of this Order. ...
>
> "2. Custody
>
> "A. The physical custody of the following minor children, namely, [E.A.H.], [B.B.H.], [and] [N.J.C.H.], shall be and is hereby vested in the father. The parties shall continue to share joint legal custody with the father having final decision-making authority. The father shall notify and discuss educational and medical issues relating to the older minor children with the mother. The court recognizes that there is little to no relationship between these said children and their mother. This is very troubling and the reasons for the breakdown lie at the feet of both parties. Since the said children are physically under the control of the father this court expects the father to use his best efforts to encourage each child to develop a loving relationship with their mother.
>
> "B. <u>The parties shall be vested with joint legal and physical custody of the three younger minor children, namely, [C.R.M.L.H.], [Z.G.A.H.,] and</u>

[R.B.H.], with the father having primary residential custody.

"....

"3. Visitation

"A. The court does NOT find the mother to be a risk to any of the minor children[;] however, since the three younger children have not had any unsupervised visitation with the mother in a very long time and to permit an orderly transition to unsupervised visitation, the court does continue to impose the requirement of supervision for visitation until September 1, 2019. Supervision during visitation periods will be provided, at the choosing of the mother, by one of the following people, namely, [S.O.], [J.M.], the maternal grandmother, maternal aunts or [E.W.]. Additional supervisors may be selected by the mother during this time, but such will be subject to approval by the father, which said approval SHALL NOT be unreasonably refused. In the event that none of the named supervisors can supervise during a given visitation period and the parties cannot agree on a supervisor, the mother may choose a previous supervisor and the payment, for compensation to said supervisor, if any is charged, for visitation shall be the responsibility of the father. All supervisors shall provide their name, mailing address, email, and phone number to the father. At the end of the stated supervision period, i.e., September 1, 2019[,] the supervision requirement shall cease and terminate. While visitation is supervised, unless the parties mutually agree (this means both must agree) to different times and/or dates for the mother to have the said three younger children, it shall be every other Friday from 5:00 p.m. [to] 8:00 p.m., Saturday 8:00 a.m. [to] 8:00 p.m., and Sunday 8:00 a.m. [to] 8:00 p.m.

"B. Special Occasions: The mother shall be able to have her three youngest minor children with her at events such as weddings, baptisms, familial birthday parties, graduation, work picnics/activities, and reunions provided she gives at least two-weeks' notice to the father. The father shall not deny the mother's request absent a reasonable and valid excuse.

"C. Beginning September 1, 2019, the visitation provided to the mother for the three youngest minor children, namely [C.R.M.H., Z.G.A.H., and R.B.H.], will be in accord with the attached [standard visitation schedule,] which is incorporated into this order by reference as though fully set out herein. Visitation from the date of this order forward for the three older minor children, namely [E.A.H.], [B.B.H.], [and] [N.J.C.H.], will be at reasonable times, places and circumstances as the parties may mutually agree BUT with consideration to be given to the desires of any of the three said older minor children. One or more of these older children may not want to visit with their mother and the Court does not expect the father to make them go. However, as aforesaid, the father should exercise every possible encouragement to attempt to motivate each child to reestablish a good relationship with their mother. In regard to the three younger minor children, they do not have a authority to deny visitation and the father is expected to encourage, promote and facilitate visitation with the mother.

4. Child Support - The mother shall pay to the father the monthly sum of $200.00 as child support for the minor children of the parties. <u>This amount is not based upon the application of the Rule 32 guidelines. However, this Court determines that the mother suffers under such necessitous circumstances that it is appropriate and proper to so deviate from the Rule 32 guidelines</u>. ... Child support payments will begin on July 1, 2019 and continue to be due by

> the first day of each month thereafter. It is expressly determined that the facts do not support the payment of any retroactive child support by the mother to the father. ...
>
> "5. The father shall provide health insurance coverage for the minor children. All uninsured medical expenses shall be equally divided with each party paying one-half of such expenses. ...
>
> 6. Attorney Fees and Costs of Court: Each party shall be responsible for their own attorney's fees in this matter and the father shall be responsible for the court costs associated with this action."

(Emphasis altered; capitalization in original.)

On May 31, 2019, the father filed a motion titled "Emergency Motion for Clarification" in which he asserted that immediate implementation of the modification judgment would prevent the three youngest children from attending special events the father had previously scheduled and that subparagraph B of paragraph 3 of the modification judgment gave the mother the right to have the three youngest children with her at special events but did not give the father the same right. On May 31, 2019, the trial court entered an order delaying the implementation of the modification judgment so that its implementation would not interfere with the special events the father had previously scheduled, deleting subparagraph B of paragraph 3, and providing that "[t]he

parties simply will have to work together if such special events occur." The father then filed a timely notice of appeal to this court.

Standard of Review

> "'"'[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.'"' Water Works & Sanitary Sewer Bd. v. Parks, 977 So. 2d 440, 443 (Ala. 2007) (quoting Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005), quoting in turn Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002)). '"The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment."' Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985)). 'Additionally, the ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts.' Waltman v. Rowell, 913 So. 2d at 1086."

Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007).

Analysis

The father's first argument is that the modification judgment is internally inconsistent because, he says, it purports to vest the parties with joint physical custody of the parties' three youngest children while also providing that

the father would have "primary residential custody" of those children and that the mother would have what is described as standard visitation only. Although we agree that awarding the father "primary residential custody" and awarding the mother standard visitation appears to be inconsistent with awarding the parties joint physical custody, that inconsistency was originally introduced by the parties' written custody agreement that was incorporated into the divorce judgment. That agreement provided that the parties would have joint physical custody but awarded the mother limited visitation only. Based on existing caselaw, we will interpret the language of the modification judgment awarding the father "primary residential custody" and awarding the mother standard visitation only as awarding the father sole physical custody of the three youngest children and awarding the mother visitation only with those children. Cf. Harris v. Harris, 775 So. 2d 213, 214 (Ala. Civ. App. 1999) (holding that judgment granting the parties "joint custody" but granting the father "primary physical custody" could "be construed only one way -- that is, it awards the parties joint legal custody, but awards the father sole physical custody"). Although the trial court's

characterization of the custody arrangement as joint physical custody appears to be erroneous when the modification judgment is viewed as a whole, that error is harmless because it did not prejudice the substantial rights of the parties. Cf. Harris (affirming judgment despite inconsistency of language awarding the parties joint custody but awarding the father "primary physical custody"); see Rule 45, Ala. R. App. P. Therefore, we cannot reverse the modification judgment based on the father's first argument.

The father's second argument is that the trial court's awarding the parties joint physical and joint legal custody of the three youngest children was erroneous because, he says, the evidence indicated that the animosity between the parties, their personalities, and their inability to agree on matters related to the children render them unable to co-parent the children. Insofar as the father argues that the trial court erroneously awarded the parties joint physical custody, we conclude, as described above, that the trial court did not award the parties joint physical custody. Cf. Harris.

Insofar as the father argues that the trial court erroneously granted the parties joint legal custody of the

parties' three youngest children, we note that the parties' written custody agreement that was incorporated into the divorce judgment also awarded the parties joint legal custody. Thus, the trial court's award of joint legal custody was not a modification of the divorce judgment. Consequently, in order to prevail on his argument that it was error for the trial court to award the parties joint legal custody, the father would have to successfully argue that he established that a material change in circumstances had occurred since the entry of the divorce judgment and that a modification of the joint legal custody awarded the parties in the divorce judgment was in the three youngest children's best interests. See Bird v. Bandy, 192 So. 3d 1165, 1169 (Ala. Civ. App. 2015) ("[A] legal-custody award ... may be modified only upon a showing that there has been a material change of circumstances since the date of the award and that modification would be in the best interests of the child[ren]."). The father does not argue that the record established a material change in circumstances since the entry of the divorce judgment that would justify a modification of the parties' joint legal custody of the three youngest children. Therefore, the father's second argument

does not establish a basis for reversing the modification judgment insofar as it awarded the parties joint legal custody of the three youngest children. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982).

The father's third argument is that the trial court's awarding the parties joint physical and joint legal custody of the parties' three youngest children was erroneous because, he says, it did not take into account the fact that the mother had physically abused the children during the marriage. We observe again that, to the extent the argument rests on the premise that the trial court awarded joint physical custody of the parties' three youngest children, that argument fails because we have concluded that the trial court did not award the parties joint physical custody. Cf. Harris. Second, insofar as the father's third argument asserts that the trial court erroneously awarded the parties' joint legal custody, we again point out that the divorce judgment had awarded the parties joint legal custody. Therefore, the trial court's continuation of that joint-legal-custody arrangement would be erroneous only if the father successfully argued that a material change in circumstances had occurred since the entry

of the divorce judgment and that a modification of the joint-legal-custody arrangement would be in the three youngest children's best interests, an argument he does not make. See Bird; Boshell. Therefore, the father's third argument does not establish a basis for reversing the modification judgment.

The father's fourth argument is that the trial court's modification of the visitation provisions of the divorce judgment so as (1) to eliminate the requirement that the mother's visitation with the three youngest children be supervised, (2) to allow the mother to exercise overnight visitation with the three youngest children, and (3) to award the mother standard visitation was erroneous because, he says, the great weight of the evidence indicated that no material change in circumstances had occurred since the entry of the divorce judgment that would warrant those modifications and that those modifications are contrary to the best interests of the three youngest children.

> "'In matters concerning child custody ..., the trial court's judgment is presumed correct ... and will not be reversed unless plainly and palpably wrong.' Ex parte T.L.L., 597 So. 2d 1363, 1364 (Ala. Civ. App. 1992).
>
> "'The ore tenus rule provides that a trial court's findings of fact based on

> oral testimony "have the effect of a jury's verdict," and that "[a] judgment, grounded on such findings, is accorded, on appeal, a presumption of correctness which will not be disturbed unless plainly erroneous or manifestly unjust." Noland Co. v. Southern Dev. Co., 445 So. 2d 266, 268 (Ala. 1984). "The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986).'

"Ex parte Anonymous, 803 So. 2d 542, 546 (Ala. 2001). 'The trial court's judgment in cases where the evidence is heard ore tenus will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment.' River Conservancy Co., L.L.C. v. Gulf States Paper Corp., 837 So. 2d 801, 806 (Ala. 2002). Accord Clark v. Albertville Nursing Home, Inc., 545 So. 2d 9, 13 (Ala. 1989). 'In ore tenus proceedings, the trial court is the sole judge of the facts and of the credibility of the witnesses, and it should accept only that testimony which it considers worthy of belief.' Clemons v. Clemons, 627 So. 2d 431, 434 (Ala. Civ. App. 1993).

"'"Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court ...."' Ex parte Roberts, 796 So. 2d 349, 351 (Ala. 2001) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)). 'When the evidence in a case is in conflict, the trier of fact has to resolve the conflicts in the testimony, and it is not within the province of the appellate court to reweigh the testimony and substitute its own judgment for that of the trier of fact.' Delbridge v. Civil Serv. Bd. of Tuscaloosa, 481 So. 2d 911, 913 (Ala. Civ. App. 1985). '[A]n appellate court may not substitute its judgment for that of

> the trial court. To do so would be to reweigh the evidence, which Alabama law does not allow.' Ex parte Foley, 864 So. 2d 1094, 1099 (Ala. 2003) (citations omitted)."

Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004).

We are not allowed to reweigh the evidence or to substitute our judgment for that of the trial court regarding the weight to be assigned to the evidence or the credibility of the witnesses; therefore, our inquiry is limited to determining whether, under any reasonable aspect of the testimony, there is evidence the trial court could have found to be credible to support the modification judgment insofar as it eliminated the restrictions on the mother's visitation with the three youngest children. See R.E.C. The mother testified that, after the entry of the divorce judgment, she was employed by a private nonprofit organization that provides child-development and family-support services to low-income families and that her job involves traveling to the homes of her employer's clients and providing the parents with education regarding parenting. The mother further testified that she had received training provided by DHR regarding nutrition, mental health, and conscious discipline and that she is a mandatory child-abuse reporter. Moreover, she

testified that she had learned how to discipline children without engaging in corporal punishment, and the record contains no evidence indicating that she had engaged in corporal punishment of the three youngest children during visits with them subsequent to the divorce.

The determination whether the mother's testimony was credible was for the trial court, which had the opportunity to observe her demeanor while she testified, and this court cannot substitute its judgment for that of the trial court on that issue. Id. The record indicates that the trial court performed the required functions of listening to and assessing the testimony of the witnesses who testified during the four days of trial before reaching its decision. The record further indicates that the trial court was extremely attentive to the witnesses' testimony and often asked the witnesses questions of its own. The mother's testimony and the absence of evidence indicating that she has engaged in activity placing the children at risk subsequent to the entry of the divorce judgment supports the trial court's findings that a material change in circumstances had occurred since the entry of the divorce judgment and that the mother was no longer a risk to

the three youngest children, who were 12, 11, and 8 years of age when this action was tried. Because those findings are supported by evidence in the record, we cannot reverse the modification judgment insofar as it eliminated the restrictions on the mother's visitation with the three youngest children. "This court might not have reached the same result as did the trial court. However, this court may not reweigh the ore tenus evidence." Chunn v. Chunn, 183 So. 3d 985, 993 (Ala. Civ. App. 2015). The trial court's decision to eliminate the restrictions on the mother's visitation with the three youngest children is debatable and subject to disagreement, but it was made based on a record that contains evidence supporting it, and, therefore, it was not plainly erroneous or manifestly unjust.

The father's fifth argument is that the trial court erroneously "failed to allow important testimony in regard to the mother's abuse of the children and thus could not adequately understand why the mother had supervised visitation and no overnight visitation." The father's brief at p. 57. We are not directed, however, to any specific instance in the record in which he sought to elicit testimony regarding this

issue and the trial court refused to admit the testimony into evidence. Moreover, the parties' three oldest children testified in great detail regarding the mother's abusive conduct that had occurred during the marriage. "An appellate court does not presume error; the appellant has the affirmative duty of showing error." Greer v. Greer, 624 So. 2d 1076, 1077 (Ala. Civ. App. 1993). Therefore, the father's fifth argument does not establish a basis for reversing the modification judgment.

The father's sixth argument is that the trial court erroneously deviated from the child-support guidelines without making sufficient findings to support the deviation and erroneously declined to award the father retroactive child support. As we have previously observed, the modification judgment awarded the father sole physical custody of the three youngest children. It also awarded the father sole physical custody of the other three children who were still minors when this action was tried. Because he was awarded sole physical custody of the parties' minor children, the father was entitled to an award of child support to be paid by the mother. Under Rule 32(A), Ala. R. Jud. Admin., there is a

rebuttable presumption that the correct amount of child support to be awarded the father is the amount that would result from the application of the Rule 32 child-support guidelines.

> "A trial court has the discretion to deviate from the child support guidelines in situations where it finds the application of the guidelines would be manifestly unjust or inequitable. Schlick v. Schlick, 678 So. 2d 1176 (Ala. Civ. App. 1996). However, if a trial court deviates from the guidelines, it must make findings of fact, based upon evidence before the court, which are sufficient to justify a deviation from the guidelines. Rule 32, Ala. R. Jud. Admin."

State ex rel. Golden v. Golden, 710 So. 2d 924, 926 (Ala. Civ. App. 1998)(emphasis added). The only reason given by the trial court for deviating from the Rule 32 child-support guidelines was that "the mother suffers under such necessitous circumstances that it is appropriate and proper to so deviate from the Rule 32 guidelines." That conclusion is not accompanied by "findings of fact, based on evidence before the court, which are sufficient to justify a deviation from the guidelines." Id. Accordingly, we reverse the modification judgment insofar as the trial court deviated from the Rule 32 child-support guidelines in establishing the amount of the mother's child-support obligation.

> "Although no pendente lite child-support order was entered in this case, the trial court could have made the final child-support award retroactive. See Brown v. Brown, 719 So. 2d 228, 232 (Ala. Civ. App 1998) ('Given this state's policy and law requiring a parent to support a minor child, we hold that a trial court may, in its discretion, award child support retroactive to the filing of the complaint for divorce where the trial court has failed to enter a pendente lite child support order for the period in which the parent had a duty to support the child but failed to provide that support.').
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> "In Pate v. Guy, 942 So. 2d 380 (Ala. Civ. App. 2005), this court, relying on Brown, as well as the subsequent opinion in Vinson v. Vinson, 880 So. 2d 469 (Ala. Civ. App. 2003), reversed a divorce judgment that had failed to make a child-support award retroactive...."

Yokley v. Yokley, 231 So. 3d 355, 361 (Ala. Civ. App. 2017) (footnote omitted). In Yokley, as in Pate v. Guy, 942 So. 2d 380 (Ala. Civ. App. 2005), this court reversed a judgment that did not award child support retroactive to the filing of the complaint when the parent was able to pay child support but did not do so pendente lite. Based on Yokley and Pate, we reverse the modification judgment insofar as it declined to award child support retroactive to the date the father filed his complaint commencing this action.

The father's seventh and final argument is that the trial court erroneously failed to clarify what types of uninsured

expenses were encompassed by "medical expenses" in the provision providing that such expenses were to be paid in equal shares by the parties. We do not find the term "medical expenses" to be ambiguous in this context; it refers to expenses incurred as a result of medical care. Therefore, no basis for reversal is established.

Conclusion

We reverse the modification judgment insofar as it deviated from the Rule 32 child-support guidelines in establishing the mother's child-support obligation and insofar as it declined to award retroactive child support, we affirm the modification judgment in all other respects, and we remand the cause to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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