REL: February 12, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190263

Anand Prakash

v.

Abhilasha Pandey

Appeal from Jefferson Circuit Court
(DR-18-900588)

EDWARDS, Judge.

Anand Prakash ("the husband") appeals from a divorce judgment entered by the Jefferson Circuit Court ("the trial court"), challenging the

amounts of periodic alimony and child support awarded to Abhilasha Pandey ("the wife").

The husband and the wife are citizens of India, and they married in that country on July 10, 2006. They both received medical degrees in India. The husband moved to Alabama in August 2006 and began graduate school in the department of nutrition sciences at the University of Alabama at Birmingham ("UAB"). The wife, who had remained in India to complete her medical internship, joined the husband in Alabama in March 2007. The husband obtained his degree from UAB and, thereafter, completed a residency program in internal medicine. In September 2012, the husband, who had an H-1B visa, received his Alabama license to practice internal medicine and began working as a hospitalist in Tuscaloosa. Thereafter, the husband also began working in a second hospitalist position at a hospital in Bessemer. The wife has a limited work history, which is discussed infra. The parties have a daughter, who was born in October 2008, and a son, who was born in April 2015.

On April 27, 2018, the husband filed a complaint in the trial court seeking a divorce from the wife on the grounds of incompatibility of

temperament and an irretrievable breakdown of the marriage.[1] On that same day, the wife filed a protection-from-abuse ("PFA") action in the "Jefferson Family Court"; that action was transferred to the trial court and consolidated with the divorce action, but only after a PFA order was entered against the husband. Pursuant to an agreement of the parties, the trial court entered a pendente lite order on May 15, 2018, leaving the PFA order in place, but allowing the husband to have contact with the children during visitations, allowing the wife to remain in the marital residence with the children, and requiring the husband to "pay all bills as he ha[d] prior to" the filing of the divorce complaint and to pay the "wife monthly support directly in amounts limited to the 6 month average of recurring and reasonable charges" for certain credit-card accounts and other accounts. The pendente lite order also prohibited either party from transferring assets overseas or from dissipating assets. The pendente lite

[1]The parties had previous marital difficulties, including periods of separation and an earlier abandoned divorce proceeding in 2014. In 2017, the husband and the wife apparently participated in anger-management classes. The Alabama Department of Human Resources was involved with the family in 2017 and in April 2018 based on reports of domestic violence.

order was subsequently amended to replace the provisions regarding the payment of bills and support to the wife with provisions requiring the husband to pay the wife "$2,500 per month for support of her and the minor children" and to pay the mortgage on the marital residence, all utilities associated with the marital residence, automobile payments, various insurance premiums, and other specific items.

The wife filed an answer denying the material allegations of the divorce complaint and a counterclaim seeking a divorce on the same grounds alleged by the husband and also on the grounds that the husband allegedly had committed adultery and had physically, mentally, and financially abused the wife. The husband filed a response to the wife's counterclaim, denying the material allegations thereof. Also, upon agreement of the parties, the trial court appointed a guardian ad litem for the children.

The divorce action was protracted and very contentious, involving multiple show-cause motions for alleged violations of the pendente lite order and other matters. Also, before the trial, the husband voluntarily resigned from his hospitalist positions; he was scheduled to begin working

in a fellowship program in nephrology at UAB on the first day of trial. The husband had applied for the fellowship in July 2018 and was accepted to that program in November 2018, shortly before he removed $76,000 from the parties' Fidelity investment account and used those funds to purchase an Audi Q7 sport-utility vehicle ("the Audi Q7") in December 2018.[2] The change in employment resulted in a reduction in the husband's income from over $600,000 per year to approximately $57,953 per year. The husband testified that the fellowship was something he had desired to pursue for several years; the wife testified that the husband had never mentioned such a desire and that the parties had never planned for that. The husband also stated that it was necessary for him to go through a fellowship in order to specialize in a field within internal medicine for his career development and that he had been "killing" himself in internal

[2]The husband's withdrawal left only a nominal amount in the Fidelity investment account. The husband testified that he had paid approximately $79,000 ($76,000 plus $3,000 for his trade-in vehicle) for the Audi Q7 "[b]ecause going into the fellowship, I couldn't afford to even have the car while I have to -- still have to pay for the kids." Before he purchased the Audi Q7, the husband had been driving a 2011 Hyundai automobile, which was the trade-in vehicle.

medicine for several years and was not happy. The fellowship was subject to annual reappointment requirements and required two years to complete, but might be extended if the husband was accepted for further specialization.

The trial court conducted ore tenus proceedings over two days in July 2019. On August 26, 2019, the trial court entered a judgment disposing of all pending matters in the divorce action. On September 25, 2019, the husband filed a postjudgment motion, and the wife filed a response to that motion. The trial court held a hearing on the husband's postjudgment motion on October 21, 2019.[3]

On November 12, 2019, the trial court entered an amended judgment of divorce. In the divorce judgment, as amended, the trial court divorced the parties, awarded the wife primary physical custody of the parties' children, awarded the husband standard visitation with the children, awarded the parties' joint legal custody of the children, ordered

[3]On October 22, 2019, the husband and the wife received a notice of a foreclosure sale from BBVA USA regarding the marital residence. The foreclosure sale was scheduled for November 21, 2019.

the husband to pay the wife $7,500 per month in periodic alimony and $7,050 per month in child support, and divided the marital property. The amended divorce judgment left in effect the previously entered PFA order, providing that the husband was to have no contact with the wife "except in writing by email, text message, or ... U.S. mail ..., for communicating regarding the children," although he could attend public-school functions at which the wife would be present provided that he had no direct contact with her. Each party was found in contempt for violating orders previously entered of the trial court. The divorce judgment, as amended, denied all other pending motions or petitions.

Pursuant to the amended divorce judgment, the husband was required to pay "all outstanding joint debts arising during the marriage ...." The amended divorce judgment also required the husband to maintain his current life-insurance policies in effect to secure his obligations under the amended divorce judgment and provided that the parties were to be equally responsible for payment of the guardian ad litem's fee.

Regarding property division, the amended divorce judgment awarded the wife possession of the marital residence for a period of four months, after which the husband was to assume possession of the martial residence, was to place the residence on the market for sale, and was to divide any equity derived from the sale of the marital residence equally with the wife.[4] The husband was ordered to make all mortgage payments pending the sale of the marital residence. In addition to ordering the sale of the marital residence and an equal division of the equity derived from the proceeds from such sale, the amended divorce judgment awarded the husband a one-third ownership interest that he had purchased in a

[4]The parties purchased the marital residence for $981,443 in July 2015, and the monthly mortgage payment was $5,249.49. Upon purchase, the parties' equity in the marital residence was approximately $51,443 (the purchase price less a $930,000 mortgage) and, as of May 2019, the remaining principal balance owed on the mortgage was $888,860. The wife stated that she was unsure whether there was any equity in the marital residence and that the husband had stopped making the mortgage payments on the marital residence in May 2019. The wife also testified that one of the heating and air-conditioning units was not working, although, she said, she did not know whether that unit needed to be repaired or replaced, that the house needed painting, and that she believed that they might need to spend funds to stage the house for marketing purposes. The husband testified that he believed that there was approximately $120,000 in equity in the marital residence.

condominium in Pensacola, Florida,[5] the Audi Q7, any bank accounts in his name, some furnishings from the marital residence, $17,284.29 for his half of a life-insurance policy that the wife had liquidated,[6] one-half ($144,131.86) of his Capstone Health Services Foundation retirement account,[7] and all property in his possession or in his name that was not otherwise specifically addressed.[8]

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[5]According to the husband, he purchased the one-third ownership interest in the condominium in January 2018, as a business venture; he paid approximately $34,000 for his one-third interest; and the owners rented the condominium to third parties when it was not being used by one of the owners.

[6]The wife stated that she had surrendered a life-insurance policy on her life and had received $34,568.58 at the end of April 2018. According to the wife, she had spent most of those funds on her attorneys but had also used some of the funds to repair a broken mirror on her automobile and to pay credit-card bills. The wife stated that, at the time of trial, she still had approximately $5,000 or $6,000 of the funds she had received from the surrender of the life-insurance policy. The amended divorce judgment stated that the husband was allowed to deduct the $17,284.29 life-insurance-policy award from his payment obligations to the wife under the amended divorce judgment.

[7]The record includes no information concerning when or how this account was funded.

[8]The wife testified that the husband had ancestral land, gold bars, and "a good sum of ... marital assets in India," but she did not know the value of those assets. According to the husband, he had had some money

The amended divorce judgment awarded the wife $38,002.61 for her half of the proceeds from the Fidelity investment account that the husband had used to purchase the Audi Q7, any bank accounts in her name, the funds in her account at the Bank of India, one-half ($144,131.86) of the husband's Capstone Health Services Foundation retirement account, the Mercedes sport-utility vehicle she had been driving ("the Mercedes"), and all property in her possession or in her name that was not otherwise specifically addressed.[9] The husband was required

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in a bank account in India at one time, but he did not have any assets in India at the time of trial. The husband did not state what had happened to the money he had had in India. The wife testified that the husband controlled the finances and paid the bills during the parties' marriage. She stated that he had not shared with her information about where all of his income had been spent or sent.

The children had college savings accounts that had a joint value of approximately $42,000. Those accounts were awarded to the husband for the benefit of the children. Based on the parties' tax records, the parties had placed $10,000 in the accounts in 2016 and had made no contributions in 2017. Thus, the timing of the funding of the accounts is not clear from the record.

[9]The wife stated that her India bank account contained the equivalent of $1,000 and that she had jewelry worth more than $5,000 that was given to her by parents and relatives during the marriage. The wife stated that she did not know whether her jewelry was worth more than $20,000, but the husband stated that, if he had to guess, "it's about

to pay the indebtedness on the Mercedes, which had an outstanding balance of $19,000 and a payment of $800 per month. The amended divorce judgment also ordered the husband to pay $17,500 toward the wife's attorney's fees.

Regarding the husband's child-support obligation, the amended divorce judgment stated that the husband was voluntarily underemployed and "ha[d] the ability to earn more than ... $600,000 ... per year" and imputed income to him in the amount of $50,000 per month. The trial court further found that the wife was voluntarily underemployed, imputed income to the wife in the amount of $3,000 per month, acknowledged that parties' income exceeded the uppermost limit of the Rule 32, Ala. R. Jud. Admin., child-support-guidelines, and determined that the "reasonable and necessary expenses of the children (taking into account the lifestyle to which the children were accustomed and their standard of living prior to the divorce)" were $7,500 per month. The

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close to 50, $60,000 worth of jewelry" that they had accumulated during the marriage.

amended divorce judgment stated that, based on the fact that the husband was responsible for 94% of the parties' combined imputed incomes, his child-support obligation was $7,050 per month. The amended divorce judgment further stated that the parties would be equally responsible for the children's extracurricular-activity expenses, that the husband was required to provide medical insurance and dental insurance for the children and to pay all noncovered medical and dental expenses incurred by the children, and that the husband was entitled to claim the children as dependents for income-tax purposes.

Regarding the periodic-alimony award, the trial court determined that the wife lacked a separate estate sufficient to preserve the economic status quo of the parties as it existed during the marriage, "to the extent possible," and that the husband had "the ability to supply those means without undue economic hardship." The amended divorce judgment stated, however, that an award of rehabilitative alimony to the wife was "not feasible" and that the wife's "household expenses for the support and maintenance of herself and the children [were] ... $22,000 ... per month." The amended divorce judgment required the husband to pay the wife

$7,500 per month as periodic alimony for 141 months, a period equal to the length of the parties' marriage.

On December 20, 2019, the husband timely filed a notice of appeal to this court, challenging the periodic-alimony and child-support awards in the amended divorce judgment.

The wife and the husband testified at trial and presented conflicting testimony on numerous matters. Thus, the ore tenus rule and its attendant presumptions in favor of the trial court's judgment apply in this case. See, e.g., Yokley v. Yokley, 231 So. 3d 355, 360 (Ala. Civ. App. 2017). This court may not disturb the findings of fact made by the trial court unless they are so unsupported by the evidence as to be plainly and palpably wrong. Id. "The presumption of correctness is based in part on the trial court's unique ability to observe the parties and the witnesses and to evaluate their credibility and demeanor." Littleton v. Littleton, 741 So. 2d 1083, 1085 (Ala. Civ. App. 1999). "[I]t is not our function to reweigh the evidence or to substitute [our] judgment for that of the trial court." Dees v. Dees, 628 So. 2d 945, 947 (Ala. Civ. App. 1993).

The husband argues that, based on the evidence presented at trial, the trial court erred by imputing $600,000 in income to him for purposes of calculating the periodic-alimony award and the child-support award to the wife and by failing to impute more income to the wife based on what he says is her "full-earning potential." Rule 32(B)(5), Ala. R. Jud. Admin., states, in pertinent part, that, for purposes of determining a parent's child-support obligation,

> "[i]f the court finds that either parent is voluntarily unemployed or underemployed, it shall estimate the income that parent would otherwise have and shall impute to that parent that income; the court shall calculate child support based on that parent's imputed income. In determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should take into consideration the specific circumstances of the parent to the extent known, including such factors as the parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case. The court may take into account the presence of a young or physically or mentally disabled child necessitating the parent's need to stay in the home and therefore the inability to work."

"[T]he amount of income to be imputed to the parent is a question of fact to be decided based on the evidence presented to the trial court." Stone v. Stone, 26 So. 3d 1228, 1231 (Ala. Civ. App. 2009). "We may reverse a judgment imputing income to a voluntarily underemployed parent that is based on ore tenus evidence only if that judgment is so unsupported by the evidence as to be plainly and palpably wrong." Id.

Likewise, in considering an award of periodic alimony, a trial court may consider "[a]ny ... factor the court deems equitable under the circumstances of the case." Ala. Code 1975, § 30-2-57(f)(10). As to the obligor spouse's ability to pay, the trial court must consider, among other factors, that spouse's "net income" and "[h]is or her wage-earning ability, considering his or her age, health, education, professional licensing, work history, family commitments, and prevailing economic conditions." § 30-2-57(e)(4) and (5), respectively.

> "As with the matter of voluntary underemployment for child-support purposes, the factual question of the earning capacity of a spouse is to be decided by the trial court as an exercise of its judicial discretion. ... Hence, we may reverse a judgment based on a finding regarding the earning ability of

> a spouse for alimony purposes only if the trial court has exceeded its discretion in making that finding."

Stone, 26 So. 3d at 1231.

Based on the information from the parties' federal and state income-tax returns, in 2016 the husband's employment income was $533,904 and the wife's employment income from a temporary position she had in Georgia was $23,580; the parties' 2016 income, net of federal and state income taxes, exceeded $370,000. In 2017, the husband's employment income was $598,319 and the wife had no employment income; the parties' 2017 income, net of federal and state income taxes, exceeded $410,000. According to the wife, the husband had made more in 2018 than he had in 2017 (the parties' 2018 income-tax returns were not prepared before trial), and she was working as an unpaid volunteer in an attempt to enhance her chances of being accepted to a residency program, which she stated still was unlikely in light of the competitive nature of the market for those positions, the time that had passed since she had graduated from medical school, and her employment history. The husband admitted that his employment income for 2018 was more than $600,000. As noted

above, before trial, the husband voluntarily resigned from his employment positions that had resulted in the foregoing earnings, and, beginning on the first day of trial, he purportedly was to begin working in a nephrology fellowship program earning $57,953 per year, a decision that he admittedly made for personal satisfaction and without considering that he might be responsible for paying alimony and child support as a result of the pending divorce action, which he had instituted months before he applied for the fellowship program.

The husband argues that the trial court should not have considered him to be underemployed for purposes of determining his child-support and periodic-alimony obligations because, he says, his decision to seek a career in nephrology at a significantly lower salary was not done with ill intent and the coincidental timing of that decision with the commencement of the divorce action was simply "not optimal." That argument, however, is dependent on the credibility of his testimony, which was an issue to be decided by the trial court, not this court. See, e.g., Sherrill v. Sherrill, 105 So. 3d 1223, 1229 (Ala. Civ. App. 2012). The husband cites Rubenstein v. Rubenstein, 655 So. 2d 1050, 1052 (Ala. Civ.

App. 1995), and Stover v. Stover, 176 So. 3d 854, 860 (Ala. Civ. App. 2015), in support of his argument. However, in Rubenstein and Stover the respective trial courts did not impute income to the obligor spouses in those cases, and this court affirmed those judgments based on substantial evidence that supported the respective determinations not to impute income to the obligor spouses. See Rubenstein, 655 So. 2d at 1052 (holding, in a child-support-modification case, that "ample evidence ... support[ed the trial court's] finding that the father was not voluntarily underemployed[, and that,] therefore, the trial court did not abuse its discretion by failing to impute income to him and failing to increase his support obligation"); Stover, 176 So. 3d at 860 (holding, in a divorce case, that "the testimony presented would not support a determination that the circuit court abused its discretion by its apparent determination that the father's retirement was not an act of voluntary underemployment"). In the present case, the trial court was not required to accept the husband's explanation for his decision to seek a fellowship and career in nephrology, and there was substantial evidence indicating that the husband was capable of earning in excess of $600,000 per year and that he had been

doing so before he made his career decision. Thus, the trial court's determination that the husband is voluntarily underemployed, and its decision to impute income to him in the amount of $600,000 for purposes of its child-support and periodic-alimony determinations, are supported by substantial evidence and cannot be reversed. See Stone, supra.

Regarding the trial court's determination that the wife also was voluntarily underemployed, the husband argues that the determination that she was capable of earning only $3,000 per month is not supported by the evidence. According to the husband, the evidence does not support a conclusion that the wife was capable of earning only $36,000 per year because, he says, in 2012 she earned $46,000 per year while participating in a family-medicine residency program in Tuscaloosa and in 2016 she earned $85 per hour while working part-time for a Georgia medical clinic. The husband reasons that, if the latter employment had been full-time, the wife would have made $176,800 in 2016 ($85 x 40 hours per week x 52 weeks per year). As noted above, the wife's actual income in 2016 from her part-time work for the Georgia medical clinic was $23,580.

The wife contends that the husband did not raise the issue of her imputed income in the trial court and, thus, has waived that issue on appeal. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992). We reject that contention, however. In the initial divorce judgment entered by the trial court in August 2019, the trial court noted that the wife "ha[d] no income" and imputed no income to her. The husband challenged the basis for the latter determination in his postjudgment motion. In the amended divorce judgment, the trial court then imputed income to the wife of $3,000 per month. Based on the argument that the husband made in his postjudgment motion, we disagree with the wife's contention that the husband failed to preserve the argument that imputing to her income of only $3,000 per month was not supported by the evidence. However, we nevertheless reject the husband's argument because the evidence supports the trial court's conclusion regarding the wife's imputed income.

Regarding the wife's employment history, the wife testified that, after she moved to Alabama, she worked as a research assistant at UAB

earning $1,200 per month until six months after the birth of the parties' daughter. At that time, the husband was in a residency program and was being paid approximately $1,600 per month. The wife "shadowed" an internal-medicine physician in Birmingham in the fall of 2009. However, in December 2009, the wife was hospitalized, and, after she was released from the hospital, she returned home to care for the parties' daughter and home while the husband completed his residency program. According to the wife, the husband was working approximately 80 hours per week in his residency program.

As for the wife's remaining employment history, between May 2011 and March 2012, she volunteered as a visiting scientist at an echocardiography lab; she stated that she had taken that position to assist with her efforts to gain acceptance to a residency program and that she had not been paid for that work. In July 2012, the wife began a three-year family-medicine residency in Tuscaloosa, where her salary was approximately $46,000 per year. She stated that, if she had completed that three-year residency program, she would have been able to obtain her

Alabama medical license and to work under her own H-1B visa. However, the wife's completion of that residency program had been interrupted after one year by family issues that affected her performance and other matters.[10]

Upon the termination of her participation in the residency program, the wife obtained a master's degree in public health from UAB, with the husband's financial assistance.[11] After obtaining that degree, however, the wife stated that she had explored her options and had determined that she was eligible for a medical license in Georgia, which, she said, she obtained in May or June 2014. After the wife obtained a work permit in 2016, she began working on an as-needed basis as a physician at an outpatient medical clinic in Columbus, Georgia. The wife worked in that position from June to October 2016; she earned $85 per hour and worked 9-hour shifts, 6 to 8 days per month. According to the wife, her part-time

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[10]At trial, the husband took contradictory positions regarding the wife's employability.

[11]No evidence was presented about the earning potential of the wife based on her public-health degree.

work in Georgia took a toll on the family, however, and she stopped working because the employer hired a nurse practitioner and no longer needed the wife's services and because the husband said that the wife did not have to work because he could make more working in a single night than she could make working for three days.

In May 2017, the wife began volunteering in a geriatric-psychiatry unit at a hospital in Bessemer, which she continued to do at the time of trial; the wife was not paid for that work. The wife stated again that she had volunteered in order to increase her chances of being accepted for another residency program; her preference was a residency program in psychiatry. However, the wife had applied for two residency programs in 2019 and had not received a match for either program. We also note that the wife had some issues with anxiety and depression, and the wife's testimony would support the conclusion that finding employment likely would be difficult until she could obtain some clarification regarding her immigration status.[12] According to the wife, upon the parties' divorce, she

[12]Neither party has presented us with legal authority addressing the limitations of any pertinent immigration law applicable to the wife's

would need to complete a residency program to make "a sustainable living," but, she said, completing a residency program in her chosen field of psychiatry would take at least eight years. She requested alimony for that eight-year period, "at a minimum."

A further discussion of the evidence supporting the trial court's decision regarding the imputation of income to the wife is unnecessary. Based on the testimony and evidence regarding the factual circumstances of the wife, including her role as primary caregiver for the parties' young children, we cannot conclude that the trial court erred by imputing only $3,000 per month to the wife for purposes of its determinations regarding periodic alimony and child support.

The husband next argues that the trial court erred by awarding the wife $7,050 per month as child support, particularly because he was otherwise required to pay for one-half of the children's extracurricular-

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situation. However, the burden on appeal is on the husband in this case. See Rule 28(a)(10), Ala. R. App. P.; Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994) ("We have unequivocally stated that it is not the function [an appellate court] to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.").

activity expenses, their medical and dental insurance, their uninsured medical and dental expenses, the Mercedes debt obligation, and the mortgage payment on the martial residence where the wife and the children were to reside for four months, which, he says, benefited the children. Specifically, he argues that the $7,050 award is not in accord with the evidence regarding the reasonable and necessary needs of the children.

When the parents' combined monthly income exceeds the uppermost limit of the Rule 32 child-support-guidelines schedule, the trial court must consider the reasonable and necessary needs of the children and the ability of the obligor parent to pay in making its child-support determination. See Bittick v. Bittick, 297 So. 3d 397, 402 (Ala. Civ. App. 2019); see also Ex parte Dyas, 683 So. 2d 974, 977 (Ala. 1996), aff'g, Dyas v. Dyas, 683 So. 2d 971 (Ala. Civ. App. 1995).[13] " 'The award of child

[13]The husband concedes in his appellate brief that, if the trial court did not err by imputing $600,000 in annual income to him, the trial court was not bound by the Rule 32 child-support guidelines. He does not contend that, assuming the trial court properly imputed income to him, he nevertheless could not pay the amount of the child-support obligation at issue. See Bittick, 297 So. 3d at 402.

support must rationally relate to the reasonable and necessary needs of the child, taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed before the divorce ....' " Bittick, 297 So. 3d at 402 (quoting Brasfield v. Brasfield, 679 So. 2d 1091, 1094 (Ala. Civ. App. 1996)).

According to the husband, the only evidence of the children's living expenses was the wife's testimony indicating that she had calculated her living expenses to be $22,000 per month, including "mortgage, food, day care, extended care, clothing, laundry, telephone bill, internet bill, gas, electricity, cable, water, school lunches, medical psychiatric care, dental care, prescription drugs, auto insurance, and life insurance," adding that she "still [did not] have the numbers on medical insurance and car payment." Based on other evidence submitted at trial, the monthly mortgage payment on the martial residence was $5,249.49; however, that house was to be sold pursuant to the amended divorce judgment, and the mortgage payments were to be made by the husband until the sale of that residence. Also, the outstanding debt on the Mercedes, which the wife

used to transport the children, was approximately $19,000, with a payment of $800 per month, and the husband likewise was responsible for that debt, in addition to his child-support obligation. Nevertheless, in considering the issue of child support, the trial court could consider the lifestyle to which the children were accustomed, see id., particularly, the fact that the martial residence was not to be the permanent residence for the children and the wife would have to obtain another residence for herself and the children. However, the record contains no discussion of where the wife and children might reside after they moved from the marital residence and contains little discussion of the specific needs of the children or the costs associated with their care beyond the son's day-care expense of $1,200 per month, which was scheduled to end in the fall of 2020 when he began kindergarten, statements that spending for the children's clothes was a few hundred dollars every few months, and a discussion of certain past-due amounts that were not discussed in terms of monthly costs.[14] As noted, the husband was otherwise responsible for

[14]The husband argues that child-care costs should not be considered in determining his child-support obligation because such costs are not

one-half of the children's extracurricular-activity expenses and for the payment of the children's health insurance, which was $550 per month, and the costs of the daughter's counseling, for which no evidence of cost

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considered when the Rule 32 child-support guidelines apply, except in limited circumstances. See Rule 32(B)(8), Ala. R. Jud. Admin. ("Child-care costs, incurred on behalf of the children because of employment or job search of either parent, shall be added to the 'basic child-support obligation.' Child-care costs shall not exceed the amount required to provide care from a licensed source for the children, based on a schedule of guidelines developed by the Alabama Department of Human Resources."); see also Rule 32(A)(1)(f) & (g), Ala. R. Jud. Admin. (providing that a trial court may deviate from the child-support guidelines based on child-care costs in certain circumstances); C.C. v. E.W., 207 So. 3d 67, 71 (Ala. Civ. App. 2016).

The application of Rule 32 is limited when the parties' income exceeds the uppermost limit of the child-support guidelines. Rule 32 (C)(1) specifically provides, in part, that "[t]he court may use its discretion in determining child support in circumstances where combined adjusted gross income ... exceeds the uppermost levels of the schedule," as in the present case. We are not at liberty to restrict the trial court's discretion beyond the plain language of the rule, and we are not inclined to consider the conditions for deviating from the child-support guidelines when they do apply as somehow restricting the trial court's discretion when the child-support guidelines expressly do not apply. When the Rule 32 child-support guidelines are not otherwise applicable, our precedents require a trial court to "'consider[] ... the reasonable and necessary needs of the children'" in making its child-support determination. Bittick, 297 So. 3d at 402 (quoting Ex parte Dyas, 683 So. 2d at 977). That standard is sufficient for evaluating whether the inclusion of child-care costs in the child-support determination is warranted in a particular case.

was presented. Thus, those expenses may not be considered as part of the children's expenses included within the $7,050 child-support award. See Bittick, 297 So. 3d at 403 ("[I]n light of the fact that the judgment requires the father to pay 50% of such expenses, those expenses should be deducted from the mother's statement of the children's expenses.").

Based on the foregoing, we agree with the husband that the evidence was insufficient to support a finding that the children required $7,050 from him -- in addition to the expenses of the children that the amended divorce judgment otherwise obligated him to pay -- for their reasonable and necessary needs. Accordingly, "'"we reverse the portion of the judgment setting an amount of child support and remand for further proceedings that will allow the court to determine the reasonable and necessary needs of the [children]."'" Tyson v. Tyson, 21 So. 3d 7, 10 (Ala. Civ. App. 2009) (quoting Burgett v. Burgett, 995 So. 2d 907, 914 (Ala. Civ. App. 2008), quoting in turn Elliott v. Elliott, 782 So. 2d 303, 306 (Ala. Civ. App. 1999), reversed on other grounds, 782 So. 2d 308 (Ala.2000)).

The husband next argues that the trial court erred by awarding the wife periodic alimony in the amount of $7,500 per month for 141 months. According to the husband, the trial court erred by finding that rehabilitative alimony was not feasible pursuant to Ala. Code 1975, § 30-2-57(b). He further argues that the periodic-alimony award does not reflect the economic status quo of the parties during their marriage, as to which he claims the wife presented no evidence or insufficient evidence, and that the amount of the award will cause him undue hardship.

Section 30-2-57 provides, in pertinent part:

> "(a) Upon granting a divorce or legal separation, the court shall award either rehabilitative or periodic alimony as provided in subsection (b), if the court expressly finds all of the following:
>
> > "(1) A party lacks a separate estate or his or her separate estate is insufficient to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.
> >
> > "(2) The other party has the ability to supply those means without undue economic hardship.
> >
> > "(3) The circumstances of the case make it equitable.

"(b) If a party has met the requirements of subsection (a), the court shall award alimony in the following priority:

> "(1) Unless the court expressly finds that rehabilitative alimony is not feasible, the court shall award rehabilitative alimony to the party for a limited duration, not to exceed five years, absent extraordinary circumstances, of an amount to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.
>
> "(2) In cases in which the court expressly finds that rehabilitation is not feasible, a good-faith attempt at rehabilitation fails, or good-faith rehabilitation only enables the party to partially acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall award the party periodic installments of alimony for a duration and an amount to allow the party to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage as provided in subsection (g).
>
> "....

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

> "(1) The party's own individual assets.

"(2) The marital property received by or awarded to the party.

"(3) The liabilities of the party following the distribution of marital property.

"(4) The party's own wage-earning capacity, taking into account the age, health, education, and work experience of the party as well as the prevailing economic conditions.

"(5) Any benefits that will assist the party in obtaining and maintaining gainful employment.

"(6) That the party has primary physical custody of a child of the marriage whose condition or circumstances make it appropriate that the party not be required to seek employment outside the home.

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

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

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

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

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

"(4) His or her net income.

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

"....

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

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

"(1) The length of the marriage.

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

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

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

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

"(6) The contribution of the one party to the education or earning ability of the other party.

> "(7) The extent to which one party reduced his or her income or career opportunities for the benefit of the other party or the family.
>
> "(8) Excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition of property.
>
> "....
>
> "(10) Any other factor the court deems equitable under the circumstances of the case.
>
> "(g) Except upon a finding by the court that a deviation from the time limits of this section is equitably required, a person shall be eligible for periodic alimony for a period not to exceed the length of the marriage, as of the date of the filing of the complaint, with the exception that if a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility."

The considerations required by the legislature are similar to those in our existing precedents. See, e.g., Shewbart v. Shewbart, 64 So. 3d 1080, 1087-89 (Ala. Civ. App. 2010); see also Ala. Code 1975, § 30-2-58 (providing that § 30-2-56 and § 30-2-57 "govern actions for divorce ... filed on or after January 1, 2018).

We have considered the foregoing provisions in light of the evidence and testimony presented to the trial court and conclude that a protracted

discussion of the husband's arguments regarding the periodic-alimony award is unnecessary. Based on the testimony regarding the wife's circumstances and the evidence regarding the living standard of the parties and their limited assets, we cannot conclude that the trial court erred by determining that rehabilitative alimony was not feasible under the circumstances of the present case.[15] If the wife eventually is

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[15]Section 30-2-57 does not define "rehabilitative alimony." However, this court has stated that "[t]he purpose of rehabilitative alimony is to provide temporary financial support for a former spouse while the former spouse undergoes vocational rehabilitation in order to restore or improve his or her earning capacity and become self-supporting." Seymour v. Seymour, 241 So. 3d 733, 741 (Ala. Civ. App. 2017); see also Santiago v. Santiago, 122 So. 3d 1270, 1279 (Ala. Civ. App. 2013) ("Rehabilitative alimony is intended to provide support for a dependent spouse for a limited period of reeducation or retraining following a divorce so that the dependent spouse may gain skills to become self-sufficient.").

Also, regarding the parties' living standard, the husband earned substantial income in the years preceding the commencement of the divorce action, but at trial he could not account for where his after-tax income had been spent during the marriage. He insisted, however, that he had fully disclosed his financial interests and that there were no additional accounts or assets, except for the savings account that he claimed he had inadvertently omitted during questioning by the guardian ad litem, who had discovered a notation reflecting a transfer to that account on one of the husband's bank statements.

successful in her efforts to gain acceptance into a residency program and to complete that program and attain employment as a licensed physician, or otherwise finds substantial employment, the husband may request a modification of his periodic-alimony obligation. See § 30-2-57(h) ("An order awarding rehabilitative or periodic alimony may be modified based upon application and a showing of material change in circumstances.").

The wife testified that, while the divorce action was pending, her regular, nonexclusive, "bare bones," monthly expenses "came [to] around $22,000 per month," "includ[ing] mortgage, food, day care, extended care, clothing, laundry, telephone bill, internet bill, gas, electricity, cable, water, school lunches, medical psychiatric care, dental care, prescription drugs, auto insurance, [and] life insurance." The husband made no attempt to question the wife regarding the specifics of her $22,000 living-expense claim, although he had maintained control of the parties' finances during the marriage and had been responsible for paying most, if not all, of the wife's and the children's living expenses pursuant to the pendente lite order. According to the wife, the husband had refused to share information with her about where he spent his income.

Based on the wife's testimony and the positions and actions taken by the husband, the trial court could have inferred that substantially all of the husband's annual income must have been spent on maintaining the living standard of the parties and that the wife's testimony was credible. Thus, the trial court could have concluded that the wife had enjoyed the benefit of the type of lifestyle that most, if not all, of the husband's after-tax income would have provided for the family.

Likewise, we reject the husband's contention that his periodic-alimony obligation will cause him undue hardship. That argument is dependent on the credibility of the husband's testimony and his argument regarding his actual income, which he chose to reduce by approximately 90% after he filed the divorce complaint.[16] The husband testified that he had had no problem maintaining two households during the pendency of the divorce action until salary reductions purportedly began in the few months before trial in preparation for his entry into the fellowship program. More importantly, however, the trial court was required to consider not only the husband's actual income, but also "[h]is ... wage-earning ability, considering his ... work history," his mistreatment

[16]Based on the husband's testimony, his new career path was about his personal satisfaction and would not result in his eventually earning an income equivalent to the income to which the wife and the children had become accustomed.

Also, the husband had worked two jobs for several years before he commenced the divorce action. He claimed that his fellowship precluded him from working a second job; however, from his own testimony, it appears that that would be true only if he exceeded 80 hours per week in his fellowship, which was unlikely. Further, the wife stated that she knew multiple people who were in fellowship programs, some of whom were on visas, and moonlighted for additional income.

of the wife, and what appears to have been a pattern "abnormal expenditures [and] ... concealment ... of property" by the husband. § 30-2-57(e)(5) and (f)(8), respectively.[17] We cannot conclude that the trial court erred by determining that the $7,500 per month periodic-alimony obligation would not pose an undue hardship on the husband.

Finally, we reject the husband's argument regarding the sufficiency of the wife's evidence to support the $7,500 per month periodic-alimony award. In a joint stipulation that the parties' have filed on appeal regarding the exhibits presented at trial, they note that an exhibit introduced by the guardian ad litem is not in the record on appeal and could not be recreated. Based on the questioning of the husband at trial

[17]Some of the testimony regarding the husband's financial matters involved consideration of the bank-account exhibit introduced into evidence by the guardian ad litem, see note 15, supra, and discussion, infra, which is not included in the record on appeal. However, based on questioning of the husband at trial, that exhibit reflected a transfer by the husband to an undisclosed savings account and that he had made cash withdrawals from that bank account in the amounts of $10,000 in January 2019, $25,000 in February 2019, $10,000 in March 2019, $5,300 in April 2019, and $10,000 in May 2019. The husband could not account for where he had transferred or had spent the cash that he had withdrawn, although those funds were not used to pay his own living expenses, which he testified he had paid for by use of his American Express account.

regarding that exhibit, the missing exhibit apparently included bank statements from 2019 regarding the husband's bank account, reflecting his expenditures and withdrawals from that account for purposes of paying his living expenses and those of the wife pursuant to the pendente lite order. In other words, that exhibit contained information that was relevant to the parties' living expenses during the pendency of the divorce action, which was reflective of the status quo living expenses of the parties during the marriage. Because that evidence was relevant to the wife's living expenses and her accustomed standard of living during the marriage and because that evidence was presented to the trial court and is not before this court, we must conclusively presume that that evidence supports the trial court's judgment as to the amount of the periodic-alimony award. See, e.g., White v. White, 589 So. 2d 740, 743 (Ala. Civ. App. 1991) ("Where there is evidence before the trial court that is not preserved for the appellate court, the evidence is conclusively presumed to support the trial court's decree."). Accordingly, we reject the husband's

argument that the evidence does not support the $7,500 per month periodic-alimony award.

Based on the foregoing, the divorce judgment, as amended, is affirmed, except for the determination of the husband's child-support obligation. As to that issue, the amended divorce judgment is reversed, and the case is remanded to the trial court for further proceedings, including the receipt of additional evidence regarding the reasonable and necessary needs of the children.

The wife's request for an award of attorney fees and double costs on appeal is denied.

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

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

Moore, J., concurs in the result, without writing.