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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200187

Donald Craig Marshall

v.

Taryn Carnes Marshall

Appeal from Talladega Circuit Court
(DR-16-25.01)

FRIDY, Judge.

Donald Craig Marshall ("the father") appeals from a judgment of the Talladega Circuit Court ("the trial court") permitting Taryn Carnes

Marshall ("the mother") to move with the parties' two children ("the children") from Talladega County to Orange Beach. Because of the move, the trial court modified the father's visitation schedule. In its judgment, the trial court also denied the father's requests to modify custody, to terminate his alimony obligation, to award him attorney's fees, and to hold the mother in contempt for a number of reasons. We affirm in part and reverse in part.

I.

The trial court divorced the mother and the father in May 2017. In the divorce judgment, the trial court incorporated an agreement of the parties pursuant to which the mother and the father were awarded joint legal custody of the children and the mother was awarded sole physical custody subject to the father's visitation. At the time of the trial in this action, the children were twelve years old and fourteen years old. In June 2018, the father filed a petition to modify custody, alleging that the mother "continues to make unflattering and derogatory remarks to the children"; that he had remarried and now had the ability to care for the children full- time; that the children were falling behind in their

schoolwork and the mother refused to enroll them in public school; and that the mother refused to tell the father whether she had remarried or was living with a man.

In the same petition, the father moved to have the mother held in contempt because, he said, she had failed to allow him visitation with the children pursuant to the terms set forth in the divorce judgment; she had refused to provide him with updates on the children's medical care and schooling; and she had prevented him from obtaining certain items of personal property that he had been awarded in the divorce judgment. The father later amended the petition to include a request that the trial court enter a "co-parenting plan" designating the parent who is to have the primary authority over decisions regarding the children's academic, religious, civic, cultural, athletic, and other activities. The father, who is a physician, claimed that he was better suited to make decisions regarding the children's academic, athletic, medical, and dental needs.

On July 2, 2018, the mother filed a counterclaim alleging that the father had failed to pay half of the medical bills incurred by the children, as he was required to do pursuant to the divorce judgment, and that he

had "willfully interfered with the medical treatment" of the parties' younger child by preventing that child from receiving a scheduled medical procedure. Both parties later amended their pleadings, each requesting a modification of the child support awarded to the mother in the divorce judgment.

During the course of the litigation, the mother notified the father of her intent to move with the children to Fairhope. That notice is not contained in the record. On November 12, 2018, as part of this action, the father filed an objection to the mother's proposed relocation. A week later, the father filed a motion seeking to have a guardian ad litem appointed for the children. In the motion, the father said that he was concerned because, among other things, the mother had wanted to have the younger child undergo a medical procedure that would have required anesthesia and the older child was showing "concerning behaviors and voic[ing] issues regarding suicide." Based upon an agreement of the parties, on November 27, 2018, the trial court entered an order appointing Trina Hammonds as the children's guardian ad litem.

Hammonds filed a report advising the trial court that on December 3, 2018, she had visited the mother's home, i.e., the former marital residence that the mother had been awarded in the divorce judgment. Hammonds said that the home

> "is in a secluded part of Talladega County and difficult to access from the main road. The trailer [i.e., the former marital residence] is in need of repairs. I do feel that the children would benefit from living in a neighborhood. In my opinion, the children would also benefit from attending a public school. I feel that the mother has the ability and financial ability to provide a stable home in Fairhope."

On December 14, 2018, after a hearing on the issue of the children's proposed relocation, the trial court entered an order denying "at this time" the mother's request to relocate with the children.[1]

On June 5, 2020, the mother filed a second notice of intent to relocate, this time to Orange Beach. In that notice, the mother expressed her belief that the trial court's denial of her previous request to move to

[1]Although a transcript of the hearing is not included in the record on appeal, it does not appear that the parties presented evidence, testimonial or otherwise, at the hearing because the trial court based its order denying the mother's request specifically on the mother's notice, the father's objection, and the arguments of counsel.

Fairhope "was predicated on [the trial] court's being able to resolve the issues" between the parties but that the issue of relocation had not yet been heard on the merits. The father again objected to the mother's proposed relocation. On July 24, 2020, the trial court held a trial on the parties' various petitions and on the mother's request to move to Orange Beach.

The testimony elicited during the trial was often disputed, and the parties, who were the only witnesses to testify, tended to characterize events in different lights. The evidence demonstrates that the parties have a contentious relationship. The mother, especially, makes little effort to communicate with the father and has told him to contact her through her attorney. The father testified that the mother does not keep him apprised of the children's doctors' appointments and school activities or of other events in their lives. During his testimony, the father's primary concern appeared to be what he described as the mother's inability to coparent with him. For example, the father said, the mother had moved from the former marital residence without notifying him and without providing him with an address where he could reach the children.

In the divorce judgment, the mother had been awarded "the marital residence," which was a double-wide mobile home in need of repair. She also was responsible for the outstanding debt in the amount of $67,000 associated with the mobile home. The mobile home was on a parcel of property where the father apparently had been building a log cabin when the parties divorced. It was undisputed that the cabin had not been completed and that no one was living there. In addition to the unfinished cabin, the property held a number of outbuildings, such as storage sheds and a "guinea house." The father testified that, at the time of the divorce, he had agreed that the mother should be awarded the former marital residence so that the divorce did not "disrupt" the children's lives.

As Hammonds, the guardian ad litem reported, the former marital residence was in a secluded area. After receiving the guardian ad litem's report, which recommended that the children live in a neighborhood or community, the mother and the children began staying in a house owned by the father of one of the younger child's friends. The mother acknowledged that she had been in a romantic relationship with that man years earlier, although the record did not indicate how many years earlier,

but she denied that the two had been in a relationship when she lived in the house or at the time of the trial. The mother said that she had not notified the father that they were living there because it was a temporary arrangement. In fact, the mother and the children stayed in that house for only three weeks before moving into a rental house in Oxford. The mother testified that the original lease she had had for the house in Oxford had expired and that, at the time of the trial, she had a month-to-month lease.

When the parties divorced, the mother was homeschooling the children. She testified that she had enrolled them in Faith Christian Academy, a private school, for the 2019-2020 school year. She said that she had been motivated to do so at least in part by the allegation in the father's petition that she had refused to enroll them in public school. The father testified that he had learned that the children had been enrolled in the school from the children themselves. He said that he had not been part of the decision-making process regarding where the children would attend school and was not helping to pay their tuition. The mother acknowledged that she had made the decision without seeking any input from the father and that she had paid the $11,000 annual tuition herself. The mother

testified that, if she were permitted to move with the children, they would attend Orange Beach public schools.

The father, who was forty-six years old at the time of the trial, remarried shortly after the parties divorced. He has two children ("the siblings") with his new wife, who was twenty-three years old at the time of the trial. The father testified that they lived in a house in a neighborhood in Gadsden. He had changed jobs and worked in Morgan County, meaning he had a commute of about three hours each day he worked. He testified that he would like to have custody of the children every other week and that his wife was willing to take the children to and from school on the days he is at work.

The father said that the children had a "wonderful relationship" with his wife and the siblings. When the children are at his house, the father said, they play with the siblings "nonstop" and tell the father how much they love the siblings. The father described the children's relationship with his new family as being "positive." He said that he objected to the proposed move to Orange Beach because he believed that the children needed continuing stability and continuity with him, his wife, the siblings,

their school, and their friends. He said that he believed that the move would be detrimental, adding that he was "terrified" he would lose all contact with the children if they moved. He said that he believed the move was designed to "further distance" the children from him.

The mother denied that that was her intention in seeking to move to Orange Beach. She said that, although she did not have family in Orange Beach, she would be closer to her family there. She did not specifically say where her family lived. The mother also conceded that she did not have a job offer in Orange Beach.

The father testified that the mother did not notify him regarding how the children were doing in school or advise him of upcoming school events. However, the evidence was undisputed that the mother had provided the father with the contact information for the school and that he was able to obtain such information directly from the school and to be involved in their school activities. The mother said that she never attempted to deny the father his right to obtain information from the school about the children's progress or activities. The father said that he was aware of the children's extracurricular events only when the children

told him of them. He said that he had been "left out" of activities such as school sports and karate tournaments. Additionally, the father said, that to his "horror," he had learned that he was not listed with the school as the emergency contact for the children. Instead, the father said, the mother had given the name of the children's maternal grandmother, who lives out of state, as the emergency contact.

The parties also disagreed over the children's medical care. For example, the mother testified that the younger child experienced stomach illnesses. The father attributed the child's illness to anxiety arising from the parties' divorce. The mother accused the father of "sabotaging" the child's medical care. The mother said that the child's family doctor had referred the child to Dr. King, a gastroenterologist practicing at the University of Alabama Birmingham Hospital. Dr. King recommended that the younger child have a procedure that included an esophagogastroduodenoscopy (an endoscopic procedure) and a colonoscopy. The procedure was scheduled for a Monday. On Fridy before the procedure was to take place, the mother informed the father of the procedure, although she had been aware that the procedure was to be performed

about three weeks before it was scheduled. The father testified that the mother's notifying him of the procedure was the first time he had been told that the child was being seen by a specialist. He said that he had been concerned that the procedure was to be performed on a child, noting that people had died having it done, and that he had called Dr. King to discuss the matter with him. The procedure did not go forward as planned. The mother testified that Dr. King had told her that the father had "interfered" with the younger child's treatment. The father testified that he thought the procedure was a "needless medical test." He claimed that the mother had not given Dr. King all the facts regarding the younger child's illness. The mother acknowledged that she had not attempted to reschedule the procedure even though, she said, the child was still experiencing the same problems.

The evidence was undisputed that the older child had made comments about wanting to die and about wanting the father to die. The older child had purchased a book about planning to kill people at a school. The father testified that the older child was "great" when he was with the father, except when the father had heard him saying he wanted to die and

that the father should die or when the older child was hitting the younger child in the face and throat.

The parties also testified to disputes they had had over whether the mother had blocked the father's telephone number on the children's cell phones, which the trial court had previously forbidden, or whether she had sometimes taken the children's cell phones away as a means of punishment. The father said that the mother's conduct prevented him from being able to communicate freely with the children. The mother testified that the father was free to text her at any time to say that he wanted to talk with the children. She also said that she had told the father when she had taken away the children's cell phones.

The parties also had been engaged in a long-running dispute over whether the father could stack his individual weeks of summer visitation with the children on to his regularly scheduled weekend visitations, which would result in a visitation period of up to ten days at one time. The mother's interpretation of the father's weeklong visitation periods with the children during the summer was that he was entitled to five days with the children. She begrudgingly acknowledged that, generally, a week was

considered to be seven days, but, she said, a week was not ten days long.

The father testified that he had placed the mother under surveillance. He said that he had watched the mother's house himself, adding that he "had to because [he] was afraid for where my children were." He said that he also believed that the mother was living with the man who owned the house where she and the children had stayed for three weeks before moving into the house in Oxford. He said that the man had stayed overnight with the mother, including an entire weekend. The father said that, as well as watching the house himself, he had tracked the older child's cell phone. By doing so, the father said, he had been able to see that the mother and the children had gone to the lake and to restaurants. The father also had watched the house in Oxford, observing the vehicles that were parked there. During his testimony, the father testified as to the current location of the mother's vehicle as well as her attorney's vehicle.

The father testified that the mother had prevented him from retrieving from the former marital residence certain items of personal property that he had been awarded in the divorce judgment, including a

gun safe and his medical license. The father testified that he had gone with two other men to the former marital residence at the time the mother and he had arranged and had "loaded up" a truck with a trailer. He said that he had been permitted to go through the outbuildings at the former marital residence to collect his belongings but that he had not been permitted to enter the former marital residence itself. He said that he had been told that his personal property had been placed in containers that were on the back deck and that he none of his personal property remained in the former marital residence. However, the father said, he had been able to see that his gun safe remained in the former marital residence. He said that professional movers were required to move the gun safe and that he had not been able to make arrangements to move the gun safe because of the parties' lack of communication.

The father said that, when retrieving his personal property, the mother had had to take the children to a dental appointment and he had had to leave the premises "shortly after that." He said that he had been told he would be able to collect the remainder of his personal property later. The father testified that his medical license was missing and that

the mother had told him that it was no longer at the former marital residence.

The mother sold the former marital residence "as-is" for $315,000 in 2019. The sales price included all the personal items on the property, including furniture, items the father had not retrieved, and items the children had left. The father said that the mother had not told him that she was selling the former marital residence and had not given him an opportunity to pick up his remaining items. The mother testified that, when she sold the former marital residence, she had assumed that the father no longer wanted whatever may have been left out there because, she said, "he'd been given many opportunities to get it and never came." Contrary to the impression left by the father's testimony, the mother testified that the father had been to the former marital residence "numerous times taking things."

The father testified that the man who had purchased the former marital residence contacted him and told him that he had some of the father's photographs that he would like to give to the father. When the father arrived at the former marital residence, the father said, the man

was wearing a hat and shirt of the father's, as well as the father's gun holster. The father said that he had found some of his tools and other belongings that he had not seen when he initially went to pick up his personal property after the divorce. The new owner gave him photographs, the father said, but would not allow him to take other things, such as the tools, firearms-related items, and office items, because, the father said, the man told him he had purchased those things with the former marital residence.

On August 4, 2020, the trial court entered a judgment permitting the mother to move with the children to Orange Beach and modifying the father's visitation schedule due to the resulting distance between the father and the children. The trial court explicitly denied the father's request to modify custody. It also denied both parties' respective requests to have the other held in contempt and their respective requests for attorney's fees, as well as any other relief sought by either party.

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

II.

The father raises a number of issues on appeal, each of which we address in turn.

A.

The father first contends that the trial court erred by granting the mother permission to relocate to Orange Beach with the children. Specifically, he argues that the mother failed to meet her burden under the Alabama Parent-Child Relationship Protection Act ("the Act"), Ala. Code 1975, § 30-3-160 et seq., to overcome the presumption that the proposed move to Orange Beach was not in the children's best interests. § 30-3-169.4, Ala. Code 1975.

When a trial court's judgment regarding a proposed relocation pursuant to the Act is based on factual findings made after ore tenus proceedings, that judgment is presumed to be correct and will not be reversed unless it is plainly and palpably wrong. Larue v. Patterson, 163 So. 3d 356, 358–59 (Ala. Civ. App. 2014). "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). Additionally, "[w]hen 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 City of Tuscaloosa, 481 So. 2d 911, 913 (Ala. Civ. App. 1985).

Subjection to an exception that is not applicable in this case, the Act creates "a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child." § 30-3-169.4. It was the mother's burden, as the party seeking to relocate, to present sufficient evidence to rebut that presumption. Larue, 163 So. 3d at 359–60. In considering whether a change of principal residence is in a child's best interest, the trial court must consider numerous factors, including but not limited to the child's relationship with each parent, siblings, or other significant people in the child's life; the age and needs of the child; the extent to which visitation and custody rights have been exercised; whether the child's general quality of life will be enhanced as a result of the proposed move; whether a support system is available for the relocating

parent and the child in the new location; the increased travel time and costs resulting from the proposed relocation; the availability of means of communication between the child and the nonrelocating parent; the child's preference, depending on the child's age and maturity; the intent of the parties in proposing or objecting to the move; and the degree to which a change of the principal residence of the child will result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child. § 30-3-169.3, Ala. Code 1975; § 30-3-169.7, Ala. Code 1975.

During the trial, the mother presented little if any evidence that would overcome the presumption that the proposed move to Orange Beach was not in the children's best interest. Hammonds, the guardian ad litem, recommended that the children live in a neighborhood instead of the secluded area where the former marital residence was, but the mother had already moved from that location by the time of the trial. No evidence was presented regarding the quality of life the children would have in Orange Beach. The mother failed to demonstrate that the schools the children would attend there offered better educations or experiences than

Faith Christian Academy, where the children currently attend school. See, e.g., Henderson v. Henderson, 978 So. 2d 36, 42 (Ala. Civ. App. 2007) (affirming judgment prohibiting relocation when mother failed to demonstrate the quality of the school system the children would enter and the existence and quality of extracurricular activities in which the children could participate). She also failed to present any evidence indicating that the Orange Beach community could provide the children with more opportunities than they had in their current community. The mother did not have a job waiting for her in Orange Beach, and she provided no evidence regarding what her job prospects would be there. In fact, the mother provided no explanation regarding why she desired to move to Orange Beach. She noted that her family would be closer to her, but she did not say where her family lived. There was no evidence indicating that the children were close to members of the mother's family. There was also no evidence presented regarding whether the children desired to relocate. In short, there was insufficient evidence presented to support a determination that the mother had met her burden of overcoming the presumption that relocation was not in the children's best

interests. See, e.g., Pepper v. Pepper, 65 So. 3d 421, 426 (Ala. Civ. App. 2010) (reversing judgment permitting mother to relocate with children when "little evidence" was presented to rebut the presumption that relocation was not in the children's best interest); Larue, 163 So. 3d at 361 (same).

We are mindful of the presumption that the trial court's findings of fact are correct, and we recognize that this court cannot reweigh the evidence presented. However, based on the record before us, we conclude that the trial court's judgment allowing the mother to move to Orange Beach with the children was plainly and palpably wrong. Therefore, that portion of the judgment is reversed. Because we reverse the trial court's determination permitting the mother to move to Orange Beach with the children, we also reverse the trial court's modification of the father's visitation schedule, which took into consideration the distance that would have existed between the parties and the time required to travel to enable visitation.

B.

The father next contends that the trial court erred by denying his request to modify custody, which he made before the mother sought to relocate to Orange Beach. Our review of this contention is governed by the same standard as our review of the first one:

> "We review the father's claim that the trial court erred in finding a change in circumstances and modifying custody of the child after hearing ore tenus testimony under the following 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." ' Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005) (quoting Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002))."

Kilgore v. Kilgore, 100 So. 3d 544, 548 (Ala. Civ. App. 2012).

The father, as the party seeking to modify an existing sole-physical-custody award to the mother, was required to meet the burden imposed by Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). The custody-modification standard set forth in Ex parte McLendon requires the noncustodial parent seeking modification to demonstrate (1) "that he or she is a fit custodian"; (2) "that material changes which affect the child's welfare have occurred"; and (3) "that the positive good brought about by the change in custody will more than offset the disruptive effect

of uprooting the child." Kunkel v. Kunkel, 547 So. 2d 555, 560 (Ala. Civ. App. 1989). A parent seeking modification of any type of custody arrangement must show a material change of circumstances giving rise to a need for a change of custody. Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005); Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987). A material change of circumstances is a change in the circumstances of the parties " 'such as to affect the welfare and best interest of the child or children involved.' " Watters, 918 So. 2d at 916 (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. App. 1973)). Furthermore,

> "the trial court cannot order a change of custody ' "unless [the parent] can show that a change of the custody will materially promote [the] child's welfare." ' Ex parte McLendon, 455 So. 2d 863 at 865 (Ala. 1984)(quoting Greene v. Greene, 249 Ala. 155, 157, 30 So. 2d 444, 445 (1947)). We noted in Ex parte McLendon that '[i]t is important that [the parent] show that the child's interests are promoted by the change, i.e., that [the parent seeking the change in custody] produce evidence to overcome the "inherently disruptive effect caused by uprooting the child." ' 455 So. 2d at 866."

Ex parte Cleghorn, 993 So. 2d 462, 466-67 (Ala. 2008).

A large part of the father's argument on appeal as to why a change in custody was warranted is based on the mother's proposed move to Orange Beach. That basis has been rendered moot by our conclusion that the trial court erred in permitting the mother to move with the children.

The father also argues that the parties' inability to coparent or communicate, his remarriage, and the mother's several moves since the divorce constitute material changes of circumstances. However, in reviewing the record, the father failed to present evidence indicating that those changes necessitated a change of custody or that the children's interests would be promoted by a change in custody.

He contends that he can now "provide a stable and loving home" for the children. There is no suggestion in the record that the mother was not already providing the children with a loving, stable home. In criticizing the mother for moving several times, the father ignores the circumstances surrounding those moves. The record indicates that Hammonds reported that the children would benefit from moving from the former marital residence, which was in poor repair and in a secluded area of Talladega County, and into a neighborhood. The mother left the former marital

residence with the children and stayed for three weeks in a house owned by the father of one of the younger child's friends, until she was able to obtain a lease and move herself and the children into the house in Oxford.

Other evidence indicated that the older child had talked of suicide. Contrary to the father's suggestion that the mother's moves were somehow a sign of instability, a reasonable view of that evidence would be that the mother acted quickly to remove the children from a secluded, isolated situation to a place where help would be more readily available if the older child attempted to act on his thoughts of suicide and obtained a permanent residence as soon as possible.

The mother also stopped homeschooling the children and placed them in a private school. Although this court does not condone the mother's decision to place the children in Faith Christian Academy without first discussing the matter with the father, there is no suggestion that the decision was harmful to the children. In fact, in challenging the mother's proposed move to Orange Beach, the father said that he would like for the children to remain in that school.

In short, the trial court could have reasonably concluded from the evidence that a change in custody was not necessary or that the father had not demonstrated that the children's interests would be materially promoted by a change in custody. Accordingly, the trial court's decision to deny the father's request for a custody modification is affirmed.

C.

The father next argues that the trial court erred by refusing to hold the mother in contempt for what he said were violations of the visitation provisions of the divorce judgment and for making unilateral decisions about the children's academic and medical activities. The father also asserts that the trial court erred in refusing to award him money damages for personal property that he was awarded in the divorce judgment but was not able to retrieve from the former marital residence.

Whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence. Brown v. Brown, 960 So. 2d 712, 716 (Ala. Civ. App. 2006).

> " 'Civil contempt' is defined as a 'willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with.' Rule 70A(a)(2)(D), Ala. R. Civ. P. The determination of whether a party is in contempt is within the sound discretion of the trial court, and that determination will not be reversed absent a showing that the court exceeded the limits of its discretion. Stack v. Stack, 646 So. 2d 51 (Ala. Civ. App.1994)."

Routzong v. Baker, 20 So. 3d 802, 810 (Ala. Civ. App. 2009).

> " 'Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.' United States v. United Mine Workers of America, 330 U.S. 258, 303–04, 67 S. Ct. 677, 91 L. Ed. 884 (1947). Alabama courts have reiterated that a civil-contempt determination may be used to encourage a contemnor's future compliance with court orders. Chestang v. Chestang, 769 So. 2d 294 (Ala. 2000); Pate v. Guy, 934 So. 2d 1070 (Ala. Civ. App. 2005)."

J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1012 (Ala. Civ. App. 2007).

In his argument, the father does not set forth the provisions of the divorce judgment he claims the mother violated and does not demonstrate how the trial court's decision not to hold the mother in contempt constitutes error. In looking at the merits of his argument in context, we

cannot say that the trial court erred by refusing to hold the mother in contempt.

Whether the father could "stack" his weeklong visitation periods onto his already scheduled weekend visits, giving him nine- or ten-day visitation periods with the children, was litigated early in this case. In an order dated July 24, 2019, the trial court directed that the father's visitation was to run from Friday, July 26, 2019, at 5:00 p.m. until Thursday, August 1, 2019, at 5:00 p.m. A similar dispute had arisen in the summer of 2018, when the trial court had denied the father's attempt to obtain "make-up" visitation when the mother did not give him ten-day visitation periods. Accordingly, it appears that the trial court did not believe that the mother was violating the visitation provisions of the divorce judgment and that there was no basis to hold her in contempt for this issue in the August 4, 2020, judgment.

Similarly, the trial court had previously entered an order prohibiting the mother from blocking the father's telephone number on the children's cell phones. The mother testified that, although she no longer had the father's telephone number blocked, she did sometimes take the children's

cell phones from them as a means of punishing them. She said that the father could text her on her cell phone if he was unable to reach the children on their own phones. Based on the mother's explanation, the trial court reasonably could have found that the mother was not in contempt of the provision of the divorce judgment providing that "each party shall have the right of reasonable telephone communication with the minor children when they are in the other party's physical custody."

Regarding the mother's unilateral decisions concerning the children's health-care and academic needs, we note that, although the parties were awarded joint legal custody of the children in the divorce judgment, that judgment did not specify that either party was responsible for certain decisions over different aspects of the children's lives. We do not condone the mother's delay in informing the father of the younger child's scheduled medical procedure or her decision to enroll the children in a school without first seeking input from the father. However, we cannot say that her conduct in doing so rises to the level of contempt. Moreover, in his appellate brief, the father does not make a legal argument demonstrating how that conduct constitutes contempt.

Accordingly, we decline to hold that the trial court erred in refusing to hold the mother in contempt for those decisions.

As to the father's assertion that the trial court erred by failing to award him money damages for the personal property he said that he was unable to retrieve from the former marital residence, his only "argument" is that the mother had the financial ability to pay for those "lost and damaged" items from the proceeds of the sale of the marital residence. The divorce judgment awarding the father the items at issue was entered on May 25, 2017. The mother did not sell the former marital residence until 2019. The parties both testified, that in January 2018, the father and two other men came to the former marital residence in a truck pulling a trailer and picked up his personal belongings, as had been arranged in advance. The mother said that the father went through the outbuildings on the property and took what he wanted at that time. She added that it was her attorney who had told the father he could not enter the former marital residence at that time. It is undisputed that the father's gun safe was still in the former marital residence, but, according to the father's testimony, professional movers were needed to retrieve the safe. The evidence showed

that on February 4, 2018, the father sent a text message to the mother asking when he could pick up the safe. The mother apparently did not respond to that text. However, she said, the father made no further efforts to contact her between that date and when she sold the former marital residence in 2019. She also said that she had not felt obligated to contact the father when she sold the former marital residence to advise him to come pick up his personal property because, she said, she had thought he had "already gotten everything he wanted," and she noted that he had been to the former marital residence "numerous times" and had "been given many opportunities to get" what he wanted.

"[A] finding of civil contempt must be supported by clear and convincing evidence." Kizale v. Kizale, 254 So. 3d 233, 238 n. 3 (Ala. Civ. App. 2017). Moreover, it is the trial court's duty to reconcile conflicts in the evidence. Caseco, LLC v. Dingman, 65 So. 3d 909, 925 (Ala. Civ. App. 2010); Hornady Transp., LLC v. Fluellen, 116 So. 3d 236, 246 (Ala. Civ. App. 2012). Because more than a year had passed between the father's last communication with the mother regarding retrieving any personal property he had remaining at the former marital residence and the time

the mother sold the former marital residence, the trial court reasonably could have believed the mother's testimony that she had thought that the father had already picked up everything he wanted. Accordingly, we cannot say that the trial court erred by refusing to award the father monetary damages for the property left at the former marital residence when the mother sold the property "as-is" without notifying the father of the pending sale.

D.

Next, the father contends that the trial court erred by refusing to terminate his periodic-alimony obligation because, he argues, the mother had cohabited with the man who owned the house in which she and the children stayed for a short time before moving into the Oxford house.

> "It is a question of fact for the trial court to determine as to whether a spouse is living openly or cohabiting with a member of the opposite sex in order to authorize a termination of periodic alimony under § 30-2-55, Code of Alabama 1975. The burden of proof as to that matter is upon the party seeking relief under the code section. The trial court's decision upon that issue will not be revised upon an appeal unless, after considering all the evidence and the reasonable inferences therefrom, the trial court was palpably wrong."

Knight v. Knight, 500 So. 2d 1113, 1115 (Ala. Civ. App. 1986).

"[C]ohabitation requires some permanency of relationship coupled with more than occasional sexual activity between the cohabitants." Hicks v. Hicks, 405 So. 2d 31, 33 (Ala. Civ. App. 1981). See also McNatt v. McNatt, 908 So. 2d 944, 946 (Ala. Civ. App. 2005).

> "To evaluate the permanency of a relationship to determine whether a former spouse is cohabiting with a member of the opposite sex, this court has considered whether the former spouse is sharing a dwelling with a member of the opposite sex; whether the former spouse has ceased to date other members of the opposite sex; payment of the former spouse's creditors by a member of the opposite sex; and the purchase of clothes for the former spouse by a member of the opposite sex. Knight v. Knight, 500 So. 2d [1113] at 1115 [(Ala. Civ. App. 1986)]."

McNatt, 908 So. 2d at 946.

A review of the record indicates that the mother and the children stayed for three weeks in a house owned by the father of one of the younger child's friends. The mother did not deny that that man and his children had stayed at the house some nights while she and the children were there. However, the mother denied that she and the man were involved in a romantic relationship. Even coupled with the evidence indicating that the mother and the man went to dinner with the children

(as the father surmised from tracking the older child's cell phone) or went on other outings together during that three-week period, the record does not contain sufficient evidence from which the trial court could have found that the mother was involved in a permanent relationship with that man or that they were cohabiting. The trial court did not err by refusing to end the father's obligation to pay the mother periodic alimony.

E.

Finally, the father argues that the trial court erred by refusing to award him attorney's fees as a sanction for what he said was a failure to comply with discovery. See Rule 37, Ala. R. Civ. P. In support of his argument, the father points out that, during his testimony, he responded affirmatively when asked a question by his attorney regarding whether the father had "repeatedly requested" in various motions expenses associated with attempting to have the mother comply with discovery requests.

Rule 37(a)(4) provides, in pertinent part, that, if a trial court enters an order granting a motion to compel discovery, the trial court should require the party whose conduct necessitated the motion to pay to the

moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order unless the court finds that circumstances would render such an award unjust. However, if the trial court denies the motion to compel, the trial court should require the moving party to pay the opposing party's attorney's fees incurred in opposing the motion. Rule 37(a). See Duncan v. Duncan, [Ms. 2190594, Apr. 16, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021).

The record in this case contains an order entered on November 19, 2019, in which the trial court, after considering the arguments of counsel on all pending motions, directed that the mother was required to answer within ten days the outstanding discovery requests the father had propounded and that the father was required to "fully and completely answer" the mother's discovery requests within ten days. The trial court determined that "[t]here shall be no sanctions against either party at this time." Given that the trial court compelled both parties to respond to discovery, we cannot say that the trial court erred by deciding not to assess attorney's fees against either one.

Separately, the case-action summary in the State Judicial Information System includes an entry dated March 26, 2019, stating: "Order generated for compel - rendered and entered: 3/26/2019 2:13:48 PM - order." Based on that entry, we cannot discern whether the father prevailed in that order. "An error asserted on appeal must be affirmatively demonstrated by the record, and if the record does not disclose the facts upon which the asserted error is based, such error may not be considered on appeal." Martin v. Martin, 656 So. 2d 846, 848 (Ala. Civ. App. 1995). Here, because we cannot determine whether the father prevailed on his motion to compel or, if he did, whether the trial court determined that it would be unjust to award attorney's fees to him, we cannot hold the trial court in error.

III.

For the reasons set forth above, we reverse those portions of the judgment permitting the mother to relocate with the children to Orange Beach and modifying the father's visitation schedule in light of that relocation, affirm the remainder of the judgment, and remand the cause to the trial court for entry of a judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

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