

2016 WL 1615600

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NOT YET RELEASED FOR PUBLICATION.

Court of Civil Appeals of Alabama.

C.C.

v.

E.W.

2150007.

April 22, 2016.

Synopsis

Background: Unwed mother filed a petition seeking a paternity adjudication, a judgment awarding the parents joint legal custody of the child and awarding the mother primary physical custody of the child, and an award of child support. The Marshall Juvenile Court, Nos. CS-15-900121, awarded the parents joint legal custody of the child and awarded the mother sole physical custody of the child and ordered the father to pay the mother \$521.23 per month in child support. Father appealed.

Holding: The Court of Civil Appeals, Thomas, J., held that, as matter of first impression, the phrase "employment or job search" did not include educational pursuits, as that phrase was used in child support guidelines.

Reversed and remanded with instructions.

West Headnotes (1)

[1] Child Support

☛ Day Care Expenses

The phrase "employment or job search" did not include educational pursuits, as that phrase was used in child support guidelines, providing that 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, and thus court, in determining unwed father's child-support obligation, should not have included monthly child-care costs that were incurred by mother while she attended college; guidelines did not expressly refer to child-care expenses for education-related pursuits. Judicial Administration Rule 32(B)(8).

Cases that cite this headnote

Opinion

THOMAS, Judge.

*1 E.W. ("the mother") and C.C. ("the father") are the unmarried parents of a daughter ("the child") born on December 13, 2014. On May 1, 2015, the mother filed a petition in the Marshall Juvenile Court seeking a paternity adjudication, a judgment awarding the parents joint legal custody of the child and awarding the mother "primary" physical custody of the child, and an award of child support.

The juvenile court entered a judgment on September 4, 2015, in which it awarded the parents, who lived approximately 50 miles apart, joint legal custody of the child and awarded the mother sole physical custody of the child. The juvenile court ordered the father to pay the mother \$521.23 per month in child support. The father raises one issue on appeal—whether the juvenile court erred in applying Rule 32(B)(8), Ala. R. Jud. Admin., because, in determining his child-support obligation, it included monthly child-care costs in the amount of \$320 that are incurred by the mother while she attends college classes.

The judgment reads, in pertinent part:

"4. In accordance with Rule 32 of the Alabama Rules of Judicial Administration and based on the income affidavits the Court finds the [father] shall pay the amount of \$521.23 per month to the [mother] for the support and maintenance of the minor child (see attached CS-42).

"a. Note as to child care costs: The amount of \$110/week testified to by the [mother] exceeds the allowed

maximum in accordance with Rule 32(B)(8) of the [Alabama Rules of Judicial Administration,] which is currently set at \$74 per week in Marshall County for a child 0–30 months old. This reduction is reflected in the CS–42.

“b. Further under the laws of the State of Alabama the voluntary full time enrollment in college, while laudable and certainly in the [mother's] and her child's long term best interest, by the [mother] requires the Court to impute minimum wage as her income instead of her actual current income of \$400 per month. This is reflected in the CS–42 as well.”

Rule 32 provides for the calculation of the adjusted monthly gross income of both parents after any preexisting child-support or alimony obligations are deducted. The total is compared to the schedule of basic child support obligations appended to Rule 32 (“the schedule”) to yield the basic child-support obligation. Once the basic child-support obligation has been determined, certain additional expenses, like “work-related child care-costs,” may be added. Rule 32(c)(2). The revised child-support obligation is then prorated between the parents, based on their proportionate share of income.

The record on appeal contains the CS–42 child-support-guidelines form, which demonstrates that the parents had no preexisting child-support or alimony obligations, that the mother's imputed income of \$1,256 per month and the father's income of \$1,733 per month are added together, and that the total was compared to the schedule to determine the basic child-support obligation, which is, in this case, \$579 per month. “Work-related child-care costs” are listed on the CS–42 form as \$320 per month and, when added to the basic child-support obligation, yield a total child-support obligation of \$899 per month. The father's prorated portion—57.98%—includes 57.98% of the child-care costs.

*2 The father filed a timely postjudgment motion in which he raised several issues. On September 28, 2015, the juvenile court amended the judgment to provide a standard visitation schedule; the remainder of the September 4, 2015, judgment was not altered. Thereafter, the father filed a timely notice of appeal. Our standard of review is well settled:

“When a trial court hears ore tenus evidence, its judgment based on facts

found from that evidence will not be disturbed on appeal unless the judgment is not supported by the evidence and is plainly and palpably wrong. *Thrasher v. Wilburn*, 574 So.2d 839, 841 (Ala.Civ.App.1990). Further, matters of child support are within the sound discretion of the trial court and will not be disturbed absent evidence of an abuse of discretion or evidence that the judgment is plainly and palpably wrong. *Id.*”

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

The mother testified that she was a part-time employee at a restaurant and a college student seeking a degree that would take more than five years to complete. The mother testified that she worked 15 hours per week during the semester and 25 or more hours per week during school breaks. The mother said that child care was necessary during the day when she was at work or at school; L.W., the child's maternal grandmother, took care of the child if the mother worked after 4:00 p.m. The mother testified that she had arranged for the child to be cared for at a church day-care center Monday through Friday from 8:00 a.m. until 4:00 p.m. at a cost of \$110 per week. The daily cost of child care at that day-care center was \$25 for a child who attended for less than an entire week.¹

The mother testified that she attended classes Monday through Thursday from 9:30 a.m. through 3:30 p.m. and that her schedule was likely to change each semester; however, to maintain her scholarship, the mother was required to be registered for at least 15 hours of classes. The mother said that her normal work schedule included working every Wednesday night, every other Friday afternoon or night, and on “Saturdays and then usually Sunday.” In other words, the mother testified that she required child care to attend classes with the exception of, perhaps, two Friday afternoons per month when she might work. S.C., the child's paternal grandmother, testified that she and her family were willing to take care of the child every Friday. The mother testified that S.C. had never made that offer before; however, the mother had no

objection to accepting S.C.'s offer as long as it was S.C. who cared for the child.

On appeal, the father argues that the juvenile court erred by ordering him to pay a prorated portion of the child-care costs incurred by the mother because, he asserts, those costs are not "work-related child-care costs"; Rule 32(B)(8), which defines and addresses "child-care costs," provides, in pertinent part: "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.'" (Emphasis added.)

*3 The father cites *Ray v. Ray*, 782 So.2d 797 (Ala.Civ.App.2000), in which this court concluded that the trial court had erred by allowing an unemployed father to claim \$150 for occasional child-care expenses under Rule 32(B)(8). The unemployed father in *Ray* is easily distinguishable from the mother in this case who is both an employee and a student. The mother points our attention to *J.L. v. A.Y.*, 844 So.2d 1221 (Ala.Civ.App.2002), but, in that opinion, this court did not address whether the trial court could require the father in that case to pay non-work-related child-care expenses because of an inadequate record. Equally lacking in guidance is *Hoplamazan v. Hoplamazan*, 740 So.2d 1100, 1104 (Ala.Civ.App.1999), in which the mother in that case, who was the recipient of the child support, was not employed and did not intend to become employed. The trial court in *Hoplamazan* had imputed income to the mother and had then included the hypothetical cost of child care the mother would have incurred were she employed when it determined the child-support obligation of the father in that case. *Id.* This court concluded in *Hoplamazan* that the mother in that case had not incurred child-care costs because of her employment or job search and that "[t]o impute such a cost to her, when the result would *increase* the father's support obligation, is patently unfair." *Id.* at 1105. Neither party cites, nor does our research reveal, a case in which we have allowed or prohibited the inclusion of child-care costs related to a parent's pursuit of an education. Whether the phrase "employment or job search," as it is used in Rule 32(B)(8), includes educational pursuits is an issue of first impression; therefore, we look to other jurisdictions for guidance.

Comparable rules and statutes in our neighboring states of Florida, Georgia, and Tennessee expressly refer to child-care expenses for education-related pursuits. Section

61.30(7), Fla. Stat., provides, in pertinent part: "Child care costs incurred due to employment, job search, *or education* calculated to result in employment or to enhance income of current employment of either parent shall be added to the basic obligation." (Emphasis added.) Likewise, express guidance is provided to trial judges in § 19-6-15(a) (24), Ga.Code Ann., which reads:

"In an appropriate case, the court may consider the child care costs associated with a parent's job search or the training *or education* of a parent necessary to obtain a job or enhance earning potential, not to exceed a reasonable time as determined by the court, if the parent proves by a preponderance of the evidence that the job search, job training, *or education* will benefit the child being supported."

(Emphasis added.) Rule No. 1240-02-04-.04(8)(c)(1.), Tenn. Comp. R. & Regs., provides in pertinent part:

"Childcare expenses necessary for either parent's employment, *education*, or vocational training that are determined by the tribunal to be appropriate, and that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together, shall be averaged for a monthly amount and entered on the [Child Support] Worksheet in the column of the parent initially paying the expense."

*4 (Emphasis added.)

Section 43-19-103(j), Miss.Code Ann., includes a discretionary provision regarding adjustment to the basic child-support obligation, allowing for

"[a]ny ... adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt."

The New Mexico Court of Appeals interpreted § 40-4-11.1(H), N.M. Stat. Ann., in *Alverson v. Harris*, 123 N.M. 153, 157, 935 P.2d 1165, 1169 (Ct.App.1996). Because the statute contained no explicit definition of a “job search,” *Alverson*, 123 N.M. at 155, 935 P.2d at 1167, the *Alverson* court concluded that the phrase “employment or job search” in the statute was ambiguous and that “an educational pursuit is a reasonable component of a ‘job search.’” 123 N.M. at 157, 935 P.2d at 1169. The *Alverson* court discerned a legislative intent to include education-related child-care costs within the meaning of child-care costs incurred “due to employment or job search,” as that phrase was used in § 40-4-11.1(H), as long as the parent proved a “good faith pursuit of a reasonable and attainable goal of future employment at a significantly higher wage than she reasonably can be expected to earn without such education.” *Id.*

In *Stufflebean v. Stufflebean*, 941 S.W.2d 844, 847 (Mo.Ct.App.1997), the Missouri Court of Appeals upheld on public-policy grounds the inclusion of the mother’s child-care expenses resulting from her attending school as a part of the child-support calculation.

“To prohibit a custodial parent who is attending school from having her child care expenses considered for child support purposes would, in effect, discourage a custodial parent from attending college to better equip herself to obtain employment and, thus, eventually contribute to the support of the children. Where a custodial parent establishes actual and necessary child care expenses incurred as a result of working or attending school, the expenses can be considered in calculating child support. *See Gal v. Gal*, 937 S.W.2d 391, 396 (Mo.App.E.D.1997)(‘school related’ day care costs properly included as an extraordinary expense in Form 14 calculation).”

Rule 32 does not expressly refer to child-care expenses for education-related pursuits, and it does clearly define “child-care costs.” Rule 32(B)(8), in pertinent part, defines “child-care costs” as costs “incurred on behalf of the children *because of* employment or job search of either parent.” (Emphasis added.) Certainly the pursuit of a college education can be *related* to employment or a job search; however, to support an interpretation in favor of the mother, we would have to conclude that education-related child-care costs are incurred “because of” employment or a job search and we would be forced to turn a blind eye to the obvious lack of inclusion in the definition of “child-care costs” of education-related child-care costs, which are included in the definitions of “child-care costs” or “childcare expenses” in the statutes of our neighboring jurisdictions.

*5 Therefore, this court reverses the judgment of the juvenile court insofar as it improperly awarded the mother a prorated amount of work-related child-care expenses and remands the cause to the juvenile court for it to recalculate the father’s child-support obligation. On remand, the juvenile court is instructed to include in its calculation only the costs of work-related child care. Nothing in this opinion is intended to imply that the juvenile court could not then deviate from the child-support guidelines upon its inclusion of a “written finding on the record indicating that the application of the guidelines would be unjust or inappropriate,” Rule 32(A), based upon “facts or circumstances that the court finds contribute to the best interest of the child or children for whom child support is being determined.” Rule 32(A)(1)(g).

REVERSED AND REMANDED WITH INSTRUCTIONS.

THOMPSON, P.J., and PITTMAN, MOORE, and DONALDSON, JJ., concur.

All Citations

--- So.3d ---, 2016 WL 1615600

Footnotes

1

The juvenile court properly determined that the amount of \$110 per week exceeded the maximum of \$74 per week allowable in Marshall County for a

child between 0 and 30 months old based on a schedule developed by the Alabama Department of Human Resources.

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

2150563

J.W.J. III

v.

Alabama Department of Human Resources ex rel. T.R.

Appeal from Lee Juvenile Court
(CS-98-293.03)

THOMAS, Judge.

In October 2013, the Alabama Department of Human Resources ("DHR") brought a contempt petition in the Lee Juvenile Court ("the juvenile court") on behalf of T.R. ("the mother"), in which it sought to establish the child-support arrearage owed by J.W.J. III ("the father"). After several interim hearings and orders, the juvenile court held a trial

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on March 3, 2016, relating to the father's expected receipt of disability benefits from which he could pay sums toward his arrearage.

The evidence at the trial indicates that the father had suffered an accident that had left him disabled. The juvenile court remarked that the father appeared to have serious health issues on the date of the trial. The father testified that he had undergone two surgeries and that he had been awarded Supplemental Security Income ("SSI") benefits from the Social Security Administration as a result of his inability to earn any income; the father is not employed. He explained that he has been awarded \$700 per month in SSI benefits and that he had received a \$2,000 lump-sum payment of retroactive SSI benefits in January 2016. He explained that he would receive two additional lump-sum payments of retroactive SSI benefits: another \$2,000 payment in June 2016 and a \$6,000 payment in January 2017.

The juvenile court entered a judgment on March 3, 2016, in which it determined that the father's child-support arrearage was \$12,252.50 and ordered that the father pay \$750 from the SSI benefits that he had already received, \$750 in

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June 2016 after receipt of the second lump-sum installment, and \$2,523 from his third, and final, lump-sum installment in January 2017. The juvenile court also ordered that the father pay \$100 per month toward the arrearage out of his \$700 in monthly SSI benefits. The judgment specifically states that the father must make the payments ordered or face incarceration for contempt. The father filed a timely postjudgment motion, to which DHR responded by conceding that federal law prevented the juvenile court from ordering the father to pay his child-support arrearage out of his SSI benefits. The juvenile court denied the father's postjudgment motion, and the father timely appealed, arguing that the juvenile court's judgment violated the anti-attachment provisions of 42 U.S.C. § 407(a).

The issue in this appeal is the same as that presented in J.W.J. III v. Alabama Department of Human Resources ex rel. B.C., [Ms. 2150564, August 19, 2016], ___ So. 3d ___ (Ala. Civ. App. 2016), decided this same day. In Alabama Department of Human Resources ex rel. B.C., we have held that an obligor parent's SSI benefits cannot be subjected to a trial court's order requiring their payment toward a child-support

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arrearage. As we explained, § 407(a) prevents the use of legal process to reach an obligor parent's SSI benefits. ___ So. 3d at ___. However, a trial court may calculate a child-support arrearage and hold hearings at which it may attempt to determine whether an obligor parent has other income or assets with which the child-support arrearage may be paid. Id. at ___.

Accordingly, the juvenile court's judgment, insofar as it compels the father to pay his child-support arrearage out of his SSI benefits, is reversed. The father does not seek review of the judgment insofar as it calculated his child-support arrearage, and therefore the propriety of that portion of the judgment is not an issue before this court. The juvenile court is permitted to determine on remand if the father has access to other income or assets from which he may satisfy his obligations, but it may not order the father to pay his child-support obligation or arrearage from his SSI benefits.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ.,
concur.

REL: 08/19/2016

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

2150564

J.W.J. III

v.

Alabama Department of Human Resources ex rel. B.C.

Appeal from Lee Juvenile Court
(CS-07-39.02)

THOMAS, Judge.

In August 2013, the Alabama Department of Human Resources ("DHR"), on behalf of B.C. ("the mother"), filed a contempt petition in the Lee Juvenile Court ("the juvenile court") seeking to compel J.W.J. III ("the father") to pay his child

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support and to calculate the father's child-support arrearage. After several interim hearings and orders, the juvenile court held a trial on March 3, 2016, relating to the father's expected receipt of disability benefits from which he could pay sums toward his arrearage.

The evidence at the trial indicates that the father had suffered an accident that had left him disabled. The juvenile court remarked that the father appeared to have serious health issues on the date of the trial. The father testified that he had undergone two surgeries and that he had been awarded Supplemental Security Income ("SSI") benefits from the Social Security Administration as a result of his inability to earn any income; the father is not employed. He explained that he has been awarded \$700 per month in SSI benefits and that he had received a \$2,000 lump-sum payment of retroactive SSI benefits in January 2016. He explained that he would receive two additional lump-sum payments of retroactive SSI benefits: another \$2,000 payment in June 2016 and a \$6,000 payment in January 2017.

The juvenile court entered a judgment on March 3, 2016, in which it determined that the father's child-support

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arrearage was \$12,252.50 and ordered that the father pay \$750 from the SSI benefits that he had already received, \$750 in June 2016 after receipt of the second lump-sum installment, and \$2,523 from his third, and final, lump-sum installment in January 2017. The juvenile court also ordered that the father pay \$100 per month toward the arrearage out of his \$700 in monthly SSI benefits. The judgment specifically states that the father must make the payments ordered or face incarceration for contempt. The father filed a timely postjudgment motion, to which DHR responded by conceding that federal law prevented the juvenile court from ordering the father to pay his child-support arrearage out of his SSI benefits. The juvenile court denied the father's postjudgment motion, and the father timely appealed.

We begin our analysis by noting that Rule 32(B)(2)(b), Ala. R. Jud. Admin., clearly exempts SSI benefits from the definition of "gross income." The rule states that "benefits received from means-tested public-assistance programs, including, but not limited to, ... Supplemental Security Income," are not considered "gross income." However, this fact does not assist us in determining whether the juvenile

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court erred in ordering the father to make payments toward his child-support arrearage out of his SSI benefits.

As the father argues and DHR concedes, 42 U.S.C. § 407(a) provides that Social-Security benefits are not transferable, assignable, or attachable. That section reads:

"The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

We note that Congress created an exception to the anti-attachment provision of § 407(a) by enacting 42 U.S.C. § 659(a), which permits withholding of certain federal benefits, "the entitlement to which is based upon remuneration for employment," for payment of child-support or alimony obligations. However, SSI is not based on remuneration for employment and is instead a means-tested federal-benefit program. See Tennessee Dep't of Human Servs. ex rel. Young v. Young, 802 S.W.2d 594, 597 (Tenn. 1990) (explaining that SSI benefits are not based on remuneration for employment). Furthermore, 5 C.F.R. § 681.104(j) includes SSI benefits within those benefits that are not subject to garnishment.

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Thus, SSI benefits are not subject to attachment pursuant to § 659(a). See Sykes v. Bank of America, 723 F.3d 399, 405 (2d Cir. 2013); Department of Pub. Aid ex rel. Lozada v. Rivera, 324 Ill. App. 3d 476, 480, 755 N.E.2d 548, 551, 258 Ill. Dec. 165, 168 (2001).

We agree with the Illinois Court of Appeals, which explained the protection afforded SSI benefits by § 407(a) thusly:

"SSI is a national program to provide supplemental security income to '[e]very aged, blind, or disabled individual who is determined [under federal standards] to be eligible on the basis of his income and resources.' 42 U.S.C.A. § 1381a (West Supp. 2001). The purpose of SSI is to provide a subsistence allowance to (among others) anyone who is unable to engage in any substantial gainful activity by reason of a disability that can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months. See 42 U.S.C.A. § 1382c(a)(3)(A) (West Supp. 2001); Schweiker v. Wilson, 450 U.S. 221, 223-24, 101 S. Ct. 1074, 1077, 67 L. Ed. 2d 186, 191 (1981).

"....

"We agree with petitioner that section 407(a) preempts state child support laws and shelters any of her SSI payments from going to child support. A federal law preempts state regulation of domestic matters if 'Congress has "positively required by direct enactment" that state law be preempted.' Davis v. Office of Child Support Enforcement, 341 Ark. 349, 354, 20 S.W.3d 273, 275 (2000), quoting

Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 2033-34, 95 L. Ed. 2d 599, 607 (1987). We agree with the courts that have held that section 407(a) has such preemptive force in that it prohibits state courts from ordering child support to come from SSI benefits. See Davis, 341 Ark. at 355, 20 S.W.3d at 276; Becker County Human Services v. Peppel, 493 N.W.2d 573, 576 (Minn. App. 1992); Tennessee Department of Human Services ex rel. Young v. Young, 802 S.W.2d 594, 597-99 (Tenn. 1990). See also Commonwealth ex rel. Morris v. Morris, 984 S.W.2d 840, 842-47 (Ky. 1998) (Stephens, J., dissenting). To allow courts to order child support payments to come out of SSI benefits would seriously damage the clear and substantial interests that section 407(a) represents.

"Section 407(a) states that 'none of the moneys paid or payable under [SSI] shall be subject to execution, levy, attachment, garnishment, or other legal process.' 42 U.S.C.A. § 407(a) (West 1991). While section 407(a) undoubtedly bars a state court from garnishing SSI benefits or ordering future benefits to be withheld (see Morris, 984 S.W.2d at 841; Young, 802 S.W.2d at 599; Whitmore v. Kenney, 426 Pa. Super. 233, 241, 626 A.2d 1180, 1184 (1993)), it appears to prevent more than just the use of the federal government as a collection agency for child support obligations. We determine that section 407(a) forbids ordering child support that burdens any SSI benefits, even those that the beneficiary has already received."

Rivera, 324 Ill. App. 3d at 478-79, 755 N.E.2d at 550, 258 Ill. Dec. at 167.

The juvenile court's judgment does not execute upon, levy, attach, or garnish the father's SSI benefits. Instead, the juvenile court orders the father to pay the amounts

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specified upon his receipt of his SSI benefits under threat of contempt. Thus, we must consider whether an order compelling payment of a child-support arrearage under threat of contempt is an attempt to reach SSI benefits through "other legal process" in violation of § 407(a).

The United States Supreme Court has explained that "other legal process"

"should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability."

Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003). Orders requiring payment of a recipient's SSI benefits under pain of contempt have been construed as "other legal process." In re Lampart, 306 Mich. App. 226, 239-40, 856 N.W.2d 192, 199-200 (2014) (restitution order); Becker Cty. Human Servs. v. Peppel, 493 N.W.2d 573, 575 (Minn. Ct. App. 1992) (child-support order). Although In re Lampart involved an order requiring an SSI recipient to pay restitution, we find the

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discussion regarding how a contempt order used to coerce an SSI recipient into paying his or her obligation violates § 407(a) instructive.

"We find that the reasoning of the trial court, if effectuated through its contempt powers so as to cause [the SSI recipient] to satisfy her restitution obligations from her [SSI] benefits, would be the use of a judicial mechanism to pass control over those benefits from one person to another. Thus, it would constitute 'other legal process' that is prohibited under 42 U.S.C. § 407(a). The process by which the trial court would enforce the restitution order would be the employment of its civil-contempt powers. Civil contempt is defined as '[t]he failure to obey a court order that was issued for another party's benefit.' Black's Law Dictionary (9th ed.), p. 360. 'A civil-contempt proceeding is coercive or remedial in nature.' Id.

"When used in this manner, the court's use of its civil-contempt powers to enforce a restitution order would act as a process much like the processes of execution, levy, attachment, and garnishment, because in that context, the process would involve a formal procedure by which the restitution victim, through the trial court, would gain control over [the recipient's SSI] benefits. See Keffeler, 537 U.S. at 383-385, 123 S.Ct. 1017. ... In this case, the court's demand was the restitution order, and the court would compel compliance with that demand through its civil-contempt powers. Consequently, if the trial court were in fact to use its contempt powers in a manner as would compel [the recipient] to satisfy her restitution obligations using her [SSI] benefits, we would find that the process employed falls within the definition of 'other legal process' as the term is used in 42 U.S.C. § 407(a).

".....

"We note that it could be argued that, in imposing a civil contempt, a court does not touch a contemnor's money directly, but rather imposes a personal sanction on the contemnor that will be lifted if the contemnor chooses to comply. In other words, civil contempt imposes a choice; perhaps a choice in which neither alternative is appealing, but nonetheless a choice that the contemnor is in fact free to make. However, we find this argument not to be compelling when the circumstances are such that a contempt finding necessarily requires a contemnor to satisfy the legal obligation that is the subject of the contempt order by invading a monetary source that the court is not allowed to reach directly. In those circumstances, the contempt order would be the functional equivalent of an order directly reaching the funds, such that labeling the order as one of 'contempt' rather than 'garnishment' would exalt form over substance and ignore the reality of the circumstances. See In re Bradley Estate, 494 Mich. 367, 387-388, 835 N.W.2d 545 (2013) (holding that the substance of an action labeled a civil-contempt indemnification action was a claim for tort liability despite its label)."

In re Lampart, 306 Mich. App. at 239-42, 856 N.W.2d at 199-201.

Thus, we conclude that the juvenile court's order requiring the father to pay his child-support arrearage from his SSI benefits under threat of contempt violates § 407(a). As DHR argues, however, the juvenile court is not prevented from entering a judgment on the arrearage or from enforcing its order that the father make payments toward the arrearage provided that the father is ordered to satisfy his obligations

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from assets or sources of income other than the father's SSI benefits. As the Michigan Court of Appeals explained, the juvenile court can hold future hearings to determine whether the father has other income or assets from which his child-support arrearage may be satisfied.

"Given that the trial court in this case has not yet held [the recipient] in contempt, has not made a determination with regard to whether she has any other assets (apart from any that are proceeds of her [SSI] benefits) from which restitution may be satisfied, and has not made any recent determination of her income sources to ascertain whether any exist apart from her [SSI] benefits, we decline to determine whether circumstances exist that might warrant a contempt order at this time. However, on remand, the trial court should follow our direction in this opinion, to appropriately (and perhaps periodically) ascertain [the recipient's] assets and sources of income, perhaps through a contempt hearing, and to enter further orders as appropriate, while avoiding any directive, either explicit or otherwise, that will in fact cause [the recipient] to have to invade her [SSI] benefits (or the proceeds thereof) to satisfy her continuing restitution obligation."

In re Lampart, 306 Mich. App. at 242, 856 N.W.2d at 201 (footnote omitted).

Accordingly, the juvenile court's judgment, insofar as it compels the father to pay his child-support arrearage out of his SSI benefits, is reversed. The father does not seek review of the judgment insofar as it calculated his child-

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support arrearage, and therefore the propriety of that portion of the judgment is not an issue before this court. The juvenile court is permitted to determine on remand if the father has access to other income or assets from which he may satisfy his obligations, but it may not order the father to pay his child-support obligation or arrearage from his SSI benefits.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ.,
concur.

Rel: 08/19/2016

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

2150222

Minda Garcia Chapman

v.

Christopher Chapman

Appeal from Jefferson Circuit Court
(DR-13-901371)

DONALDSON, Judge.

Minda Garcia Chapman ("the wife") appeals from a judgment of the Jefferson Circuit Court ("the trial court") divorcing her from Christopher Chapman ("the husband") and determining the custody of the parties' child. The wife challenges the

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trial court's judgment insofar as it (1) did not order the husband to pay child support, (2) was based on findings of fact that allegedly are not supported by the evidence, and (3) awarded attorney fees to the husband. We reverse the trial court's judgment and remand the cause to the trial court for further proceedings consistent with this opinion.

Background

On July 31, 2013, the husband filed a complaint for a divorce alleging adultery of the wife and incompatibility of temperament as grounds. The husband stated in the complaint, among other things, that he and the wife were married in September 2005; that the wife had a child from a previous marriage; that one child, A.C. ("the child"), was born of the marriage in March 2008; that the wife had committed adultery; that, while he was working in another country, the wife became pregnant by a paramour; that the wife failed to pay household bills while he was working in another country; and that the wife and the child had left the marital home to live with the wife's paramour. He sought custody of the child and an award of attorney fees. The wife filed an answer denying the allegations in the husband's complaint and a counterclaim for

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a divorce alleging that she was the primary caregiver of the child, that she was pregnant with another child, and that there was incompatibility of temperament between the parties. She also requested, among other things, sole custody of the child, subject to the husband's visitation rights, and an award of attorney fees. The record shows that the wife gave birth to her third child in December 2013 while the divorce case was pending.

On March 23, 2014, the trial court entered an order appointing a guardian ad litem for the child and requiring each party to pay \$750 toward the guardian ad litem's fee. On April 2, 2014, the husband filed a motion seeking an order requiring genetic testing of the child born to the wife in December 2013. The trial court granted the husband's motion. The husband was ordered to pay the expenses for the genetic testing. The order also required the wife to reimburse the husband should the results of the testing reveal that he was not the father of the child born in December 2013. The testing showed that the husband was not the biological father of the that child.

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On August 29, 2014, the trial court entered a temporary order ("the temporary order") providing that the parties were to share joint legal custody of the child and granting the husband "primary physical custody" of the child during the pendency of the divorce case. The trial court, however, ordered that the husband would have custody of the child during "the first and third full weeks of each month from 9:00 a.m. on Sunday until 8:00 a.m. the following Thursday" and that the wife would have custody of the child during "the [s]econd and [f]ourth weeks of each month from 3:00 p.m. on Thursday until 9:00 a.m. the [f]ollowing Sunday." The temporary order also contained provisions for the parties to exercise specified custodial periods with the child during holidays, other special occasions, and the summer. The trial court did not order either party to pay child support and ordered the husband and the wife each to pay half of the child's expenses.

Both parties submitted a Child-Support-Obligation Income Statement/Affidavit ("CS-41 form") during the proceedings. On his CS-41 form, the husband stated that he had a monthly gross income of \$3,120. He also stated that the child was covered

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by health insurance at a monthly cost to him of \$204. The wife stated on her CS-41 form that she had a monthly gross income of \$2,836.16. She stated that the child's health insurance was provided through Medicaid.

The record contains affidavits from counsel for both parties that were submitted at different times during the proceedings in support of the parties' requests for an award of attorney fees. On August 5, 2014, the husband's attorney submitted an affidavit stating that, up to that point in the litigation, her fees in the case amounted to \$13,875. The wife's attorney stated that he had billed the wife \$17,305 as of March 23, 2015.

The trial court held a trial on March 23, 2015, at which the husband and the wife testified. The husband testified that, although the trial court had granted him sole physical custody of the child in the temporary order, he had not exercised his right to that custody because it would have been disruptive to the child, who attended school in Chilton County, to move to Jefferson County and to change schools. The husband testified that the wife had allowed him to keep the child only for a single weekend during the pendency of the

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proceedings. The husband testified that the mother of the wife's paramour kept the child while the wife worked and that he had no means of contacting the child when she was with the mother of the wife's paramour. The husband testified that there were occasions when he could not get in touch with the wife.

The husband also testified that, when he had worked in another country, he had sent money to the wife to cover household expenses for the wife, the child, and the wife's older child who lived with the family. The husband testified that he had had to take emergency leave from his employment and return to the United States when he found out that the wife had left the marital home. He testified that, because of the wife's failure to properly manage the family's finances while he was in another country, he lost the marital home to foreclosure and that there were other debts that he had been required to pay due to her mismanagement of finances.

The husband testified that he provided the child with health-insurance coverage. He testified that he paid for the child's hair care and bought her shoes for school. He testified that he offered financial support to the wife

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during the pendency of the divorce proceedings but that he never actually provided any such support. The husband testified that the temporary order required him to pay half of the child's expenses for extracurricular activities but that he did not pay any of those expenses because the wife would not permit him to do so.

The wife testified that she lived in a two-bedroom apartment. The wife testified that the child had her own room. She testified that she was employed as a home-health nurse and that she worked from 8:00 a.m. to 5:30 p.m. on Tuesdays, Wednesdays, and Thursdays, on Friday evenings, and half days on Saturday. The wife testified that she never declined the husband's requests to visit the child and that she never interfered with his attempts to communicate with the child. The wife testified that the husband never provided her with financial support for the child. She testified that she did not provide the husband with a telephone number for her paramour's mother. The wife admitted to committing adultery. She testified that she did not allow her paramour to supervise the child alone and that her paramour never spent the night in the same house as her. The child's report cards were admitted

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into evidence, and they reflected that the child was performing well in school. The report cards also showed that the child had been tardy on five occasions and had been absent six times during the prior school year. The wife testified that the child had been sick on the days that she was absent. The wife testified that she had not provided the husband with the child's telephone number. She testified that the husband had paid for the child's shoes, clothes, and other expenses.

On July 1, 2015, the trial court entered a final judgment of divorce, stating in pertinent part:

"3. The grounds for Divorce are due to adultery by the [wife] who moved in with another man and had a child from this man from DNA testing.

"4. The [husband] and the [wife] shall share custody and control of the [child] Primary physical custody is hereby awarded to the [wife].

"(a) The [husband] is awarded first and third and Fifth full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m, the following Monday. The [husband] is awarded every odd fifth week.

"(b) That the [husband] shall exercise physical custody from the end of school to the first day of school.

"....

"5. Because of the shared custodial order made in this case, and the periods of physical custody

exceeds the standard neither party shall be required to pay child support to the other party towards the support and maintenance of the parties' minor child. Each party shall be responsible for and provide for the day-to-day care and support of the child(ren) during his or her respective periods of joint physical custody. The parties shall each be responsible for and pay one-half ... of the following expenses for their child(ren); provided, however, that the parties shall discuss and mutually agree in advance as to any such expense to be shared:

"(a) Day care or after-school care expenses

"(b) Extra-curricular activity expenses

"(c) School related expenses

"6. All non-covered medical expenses incurred shall be paid equally (50-50) by the [husband] and the [wife] including, but not limited to, hospital, doctor, dental, orthodontic, optical care, prescription drugs and the like.

"....

"15. That the [wife] is hereby ordered to pay attorney fees due to the adultery finding.

"16. The [wife] shall pay to the [husband's] Attorney, Wanda Outlaw, as reimbursement for the attorney fees and expenses incurred in this case, the sum of Five Thousand 00/100 (\$5,000.00) Dollars. Said sum shall be paid directly to [the] attorney of record for the [husband]. This amount does not necessarily reflect the total value of services rendered but rather represents the appropriate contribution due from the [husband] towards those services due to the adultery finding."

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On July 21, 2015, the wife filed a motion to alter, amend, or vacate the judgment pursuant to Rule 59, Ala. R. Civ. P. ("the Rule 59 motion"), arguing only that the judgment "is contrary to the evidence presented" and that the judgment "is contrary to the applicable law." On July 27, 2015, the wife amended the Rule 59 motion to specifically challenge certain provisions of the judgment, including the custody determination, the determination not to grant child support, and the order requiring her to pay some of the husband's attorney fees.¹ On that same day, the wife filed a motion pursuant to Rule 52(b), Ala. R. Civ. P. ("the Rule 52(b) motion"), requesting the trial court to enter an order stating its findings of facts and conclusions of law. The trial court held a hearing on the wife's postjudgment motions on October 6, 2015. On October 21, 2015, the trial court entered an

¹We deem the second postjudgment motion, which was filed within the 30-day period provided in Rule 59, Ala. R. Civ. P., to be an amendment to the first postjudgment motion. Thus, the second postjudgment motion "trigger[ed] a new 90-day jurisdictional period" pursuant to Rule 59.1 for the trial court to rule. Roden v. Roden, 937 So. 2d 83, 85 (Ala. Civ. App. 2006). Accordingly, the trial court's October 21, 2015, order amending the judgment was within the 90-day jurisdictional period.

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order granting the Rule 59 motion in part and amending the judgment ("the amended judgment"), stating in pertinent part:

"4. That Paragraph 4(a) of the parties' Final Judgment of Divorce is hereby Amended as follows:

"5. The [husband] is awarded first and third full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. The [wife] is awarded Second and Fourth full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. That the [husband] is awarded every even fifth week and the [wife] is awarded every odd fifth week.

". . . .

"8 That all other prayers for relief are hereby DENIED."

On the same day, the trial court also entered an order granting the Rule 52(b) motion ("the Rule 52 order"), stating in pertinent part:

"1. [The wife's] Post-Judgment Motion to Find Facts Specifically and State Separately the Conclusions of Law Thereupon, Made Pursuant to [Alabama Rule of Civil Procedure] 52(b) is hereby GRANTED.

"2. That the Court considered the best interest of the child would be served by awarding to the [husband] and [the wife] shared custody of the child

"3. Court based the ruling upon the following specific facts:

"a. That the [husband] had obtained work outside of the United States to earn money for the family.

"b. That the [husband] had sent this money home to [the wife].

"c. After a period of time, he could no longer get in touch with the [wife] by phone, no calls were answered by the [wife] nor were calls made.

"d. The [husband] became concerned enough about the welfare of the [wife] and his child that he took emergency leave from his job overseas to find out what had happened to them.

"e. That the [husband] found the house abandoned. He finally found his wife and child living in a camper trailer with a man by the name of Matthew Collins.

"f. Not only was the [wife] living with Matthew Collins but was pregnant. DNA testing showed that the [husband] was not the father of this child.

"g. After the [husband] returned, he and the [wife] exchanged the child every other week.

"h. The [wife] has moved twice since the divorce action was pending.

"i. That the [wife] hit the child with the handle of a spoon and hit the child over the head with her purse.

"j. That the [husband] hit the child with a belt.

"k. That the [wife] has her boyfriend's mother keeping the child of the parties. The [husband] exercised as many periods of physical custody as he had available.

"l. That the child had five tardies and six absences.

"m. That the [wife] did not provide the [husband] with a phone number to call the child.

"n. That the child had to sleep in the bed with [the wife] due to lack of accommodations.

". . . .

"5. Though the Court considered the adulterous acts of the [wife] and her pregnancy by the paramour, it did not deprive her of custody instead it gave her shared custody as the parties had maintained during the pendency of the divorce. Also, the Court did consider the child's five tardies and six absences, sleeping in the bed with [the wife], not providing the [husband] with a number to contact the child, the number of times the [wife] moved during the pendency of the case as relevant factors in awarding custody of the child.

"6. That based on the aforementioned finding of facts the Court awarded shared custody to the [husband] and the [wife]. The court must make the findings required by Rule 32(A)(ii), Ala. R. Jud. Admin. Based on the shared custody, the Court did make the finding based on Rule 32 stated that the deviation was due to visitation being awarded to the [husband] was equal to that of the [wife] which is above the standard visitation schedule.

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"a. The [husband] was awarded first and third full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. The [wife] was awarded Second and Fourth full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. That the [husband] was awarded every even fifth week and the [wife] was awarded every odd fifth week."

The wife filed a notice of appeal to this court on December 1, 2015. On appeal, the wife contends that the trial court's custody determination should be reversed in part because the findings of fact made by the trial court, on which that award is based, are not supported by the evidence; that the trial court committed reversible error by failing to grant her child support; and that the trial court committed reversible error by awarding the husband attorney fees. The husband did not file a brief on appeal.

Discussion

I. Custody and Child Support

The wife argues that the trial court committed reversible error by failing to order the husband to pay her child support and that the custody provisions in the judgment do not justify a deviation from the child-support guidelines of Rule 32, Ala. R. Jud. Admin.

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This court has stated that "matters relating to child support 'rest soundly within the trial court's discretion, and will not be disturbed on appeal absent a showing that the ruling is not supported by the evidence and thus is plainly and palpably wrong.'" Scott v. Scott, 915 So. 2d 577, 579 (Ala. Civ. App. 2005) (quoting Bowen v. Bowen, 817 So. 2d 717, 718 (Ala. Civ. App. 2001)). This court has also stated that

"[t]he amount of support that would result from the application of the guidelines is presumed to be the correct amount of child support. Rule 32(A), Ala. R. Jud. Admin. This presumption may be rebutted if the trial court makes a finding of fact that, based upon the evidence presented, the application of the guidelines would be manifestly unjust or inequitable."

Hamilton v. Hamilton, 647 So. 2d 756, 758 (Ala. Civ. App. 1994). Rule 32(A)(1) provides a nonexclusive list of reasons for deviating from the guidelines, including:

"(a) Shared physical custody or visitation rights providing for periods of physical custody or care of children by the obligor parent substantially in excess of those customarily approved or ordered by the court;

"(b) Extraordinary costs of transportation for purposes of visitation borne substantially by one parent;

"(c) Expenses of college education incurred prior to a child's reaching the age of majority;

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"(d) Assets of, or unearned income received by or on behalf of, a child or children;

"(e) The assumption under the Schedule of Basic Child-Support Obligations that the custodial parent will claim the federal and state income-tax exemptions for the children in his or her custody will not be followed in the case;

"(f) The actual child-care costs incurred on behalf of the children because of the employment or job search of either parent exceeds the costs allowed under subsection (B)(8) of this rule by twenty percent (20%) or more; and

"(g) Other facts or circumstances that the court finds contribute to the best interest of the child or children for whom child support is being determined."

In Flanagan v. Flanagan, 656 So. 2d 1228 (Ala. Civ. App. 1995), this court stated:

"The Commentary to Rule 32 outlines three 'assumptions' that have been 'incorporated in the Schedule of Basic Child Support Obligations.' One of those assumptions concerns the matter of 'Visitation.' Under that heading, the Rule 32 Comment states:

"'The Schedule of Basic Child Support Obligations is premised on the assumption that the noncustodial parent will exercise customary visitation rights, including summer visitation. Any abatement of child support because of extraordinary visitation should be based on visitation in excess of customary visitation.'

"(Emphasis added.)"

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656 So. 2d at 1231.

"The Comment to Rule 32 states: 'The Alabama child support guidelines do not specifically address the problem of establishing a support order in joint legal custody situations. Such a situation may be considered by the court as a reason for deviating from the guidelines in appropriate situations, particularly if physical custody is jointly shared by the parents.'"

Knight v. Knight, 739 So. 2d 507, 509 (Ala. Civ. App. 1999).

The wife argues that the trial court granted the parties joint legal custody of the child, granted her sole physical custody of the child, and granted the husband standard visitation with the child. She contends that, under that custodial arrangement, there is no basis for the trial court to deviate from the child-support guidelines and to decline to award her child support.

After considering the arguments of the wife and reviewing the judgment, the amended judgment, and the Rule 52 order, we are unable to determine the type of custody granted to the parties. In paragraph four of the judgment, the trial court ordered that the parties "shall share custody and control of the [child]" and granted the wife "[p]rimary physical custody" of the child. The trial court stated in the amended judgment that

"[t]he [husband] is awarded first and third full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. The [wife] is awarded Second and Fourth full weeks of each month from 3:00 p.m. on Friday until 8:00 a.m. the following Monday. That the [husband] is awarded every even fifth week and the [wife] is awarded every odd fifth week."

As argued by the wife, the judgment and the amended judgment can be read as essentially ordering that the husband shall have visitation with the child every other weekend and during the summer. However, in paragraph five of the judgment, the provision in which the court stated its reasons for deviating from the child-support guidelines and for not granting child support, the trial court referred to its custody determination as a "shared custodial order."² In the same paragraph, the

²Section 30-3-151, Ala. Code 1975, a part of Alabama's joint-custody statutes, Ala. Code 1975, §§ 30-3-150 through -157, does not contain a definition for the terms "shared custody" or "primary physical custody." "As we have explained before, the proper terms for custody judgments are contained in Ala. Code 1975, § 30-3-151, which became effective on January 1, 1997. See Harris v. Harris, 775 So. 2d 213, 214 (Ala. Civ. App. 1999)." Smith v. Smith, 887 So. 2d 257, 261 (Ala. Civ. App. 2003). As this court stated in Richardson v. Fotheringham, 950 So. 2d 339, 341 (Ala. Civ. App. 2006):

"The trial court's divorce judgment awarded the parties 'joint custody,' yet it awarded the father 'primary physical custody.' 'These terms have been commonly employed by the bench and bar; however, in light of the definitions of the types of custody set

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trial court required the parties to bear the responsibility for day-to-day expenses for the child during their "respective periods of joint physical custody." (Emphasis added.) In paragraph five of the Rule 52 order, the trial court stated that the parties would maintain "shared custody" of the child in the same manner that they had under the temporary order. The temporary order granted the husband "primary physical custody" of the child. In paragraph six of the Rule 52 order, the trial court again stated that it had granted the parties "shared custody" of the child and that it had granted the parties equal visitation time with the child.

The judgment, the amended judgment, and the Rule 52 order contain inconsistencies and ambiguities regarding the issue of the physical custody of the child and the amount of time the husband will exercise visitation with and/or custody of the child. Because we are not able to determine the trial court's

out in the joint-custody statute, those older terms are unclear and ... serve only to confuse the issue of custody.' Harris v. Harris, 775 So. 2d 213, 214 (Ala. Civ. App. 1999). Using the proper terms set out in the joint-custody statute, § 30-3-151, Ala. Code 1975, the divorce judgment can be construed only one way--that is, it awards the father sole physical custody and the mother and the father joint legal custody. See Harris, 775 So. 2d at 214."

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intent regarding custody of the child, it follows that we are unable to determine whether the trial court incorrectly deviated from the child-support guidelines. Therefore, we reverse the judgment, as amended, insofar as it addresses the issues of custody and child support, and we remand the cause for the trial court to clarify its custody determination and to specify (1) whether it granted the parties joint legal custody of the child or granted the wife sole legal custody of the child, (2) whether it granted the parties joint physical custody of the child, and (3) whether it granted the husband visitation or custody every other week or weekend. See Arnold v. Arnold, 977 So. 2d 501, 507 (Ala. Civ. App. 2007) (reversing in part a divorce judgment and remanding the cause to the trial court to resolve a conflict in the judgment pertaining to noncovered medical expenses); Hall v. Hall, 895 So. 2d 299, 305 (Ala. Civ. App. 2004) (reversing a judgment in part and remanding the cause with instructions to the trial court to remove language from the judgment that was inconsistent with another provision in the judgment); and Shipp v. Shipp, 435 So. 2d 1298, 1299 (Ala. Civ. App. 1983) (concluding that a provision of a judgment contained "ambiguities and

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uncertainty" and remanding the cause for the trial court to remove the ambiguity).

We note for the trial court's consideration in amending its judgment that, if, on remand, the trial court clarifies that its intent is to grant the wife sole physical custody and grant the husband visitation every other weekend and every other fifth weekend, the record does not contain any evidence or other basis to support a determination that such visitation is in excess of what is generally granted in conjunction with an order granting sole physical custody to the other parent.

The wife also contends that the trial court failed to take into account income that the husband earned from his employment with the Alabama National Guard. There is no indication in the record, however, that either party introduced evidence at trial concerning the husband's purported employment with the Alabama National Guard. Thus, no reversible error is established regarding the amount of income earned by the husband.

II. Findings of Fact

"A divorce judgment that is based on evidence presented ore tenus is afforded a presumption of correctness. Brown v. Brown, 719 So. 2d 228 (Ala. Civ. App.

1998). This presumption of correctness is based upon the trial court's unique position to observe the parties and witnesses firsthand and to evaluate their demeanor and credibility. Brown, supra; Hall v. Mazzone, 486 So. 2d 408 (Ala. 1986). A judgment of the trial court based on its findings of facts will be reversed only where it is so unsupported by the evidence as to be plainly and palpably wrong. Brown, supra. However, there is no presumption of correctness in the trial court's application of law to the facts. Gaston v. Ames, 514 So. 2d 877 (Ala. 1987).'

"Robinson v. Robinson, 795 So. 2d 729, 732-33 (Ala. Civ. App. 2001)."

Carnes v. Carnes, 82 So. 3d 704, 710 (Ala. Civ. App. 2011).

As noted above, in the Rule 52 order, the trial court found, among other things, that the husband and the wife had exchanged custody of the child every other week pursuant to the temporary order, that the husband had exercised visitation with the child as often as it was available to him, that the husband had hit the child with a belt, that the wife had hit the child with the handle of a spoon, that the wife had hit the child over the head with her purse, and that the child had had to sleep in a bed with the wife due to lack of accommodations. The wife contends that there was no evidence presented at trial to support those findings of fact. From

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our review of the record, we do not find support for those findings of fact.

Regarding the finding that the husband had "exercised as many periods of physical custody as he had available" to him under the temporary order, the husband testified as follows under questioning from the wife's attorney:

" Q. [Husband], when we were here in July, you asked this Court to award you custody of your daughter ...; is that correct?

"A. Yes, sir.

"Q. And the Judge ordered [in the temporary order] a week on, week off custody with you being the primary physical custodian; is that correct?

"A. Yes, sir.

"Q. But you haven't exercised that custodial time, have you?

"A. No, sir.

"Q. Instead, you've left [the child] with [the wife]?

"A. Yes, sir.

"Q. You haven't -- so, would it be an accurate statement to say that you couldn't be bothered to exercise your custodial time?

"A. It wouldn't be fair to my daughter."

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Additionally, regarding the trial court's findings that both the wife and the husband committed acts of physical abuse, the record does not contain evidence that either party had hit the child. There is also no testimony to support the trial court's finding that the child had to sleep in the wife's bed due to lack of accommodations.

We conclude that some of the trial court's findings are not supported by the evidence in the record. Because we are reversing the judgment, as amended, with regard to the issues of custody and child support and remanding the cause, we instruct the trial court to reconsider its judgment on remand without taking into account the aforementioned findings of fact that are not supported by the record.

III. Attorney Fees

In light of our decision to reverse the trial court's judgment on the issues of custody and child support and because the judgment (including the award of attorney fees) could change upon the trial court's reconsideration of those issues on remand, we pretermitt discussion of the wife's argument regarding the trial court's award of attorney fees to the husband in the amount of \$5,000.

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Conclusion

For the foregoing reasons, we reverse the judgment, as amended, insofar as it addresses the issues of custody and child support, and we remand the cause to the trial court to reconsider the custody and child-support provisions of the judgment and to reconsider the judgment without taking into consideration the erroneous findings of fact that are unsupported by the evidence

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

REVERSED AND REMANDED.

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

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

