REL: December 20, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180624

Jose Alberto Rivera, Jr.

v.

Lorena Sanchez

Appeal from Morgan Circuit Court
(DR-12-900044.01)

EDWARDS, Judge.

Jose Alberto Rivera, Jr. ("the father"), and Lorena Sanchez ("the mother") were divorced by an April 2012 judgment ("the April 2012 divorce judgment") of the Morgan Circuit Court ("the trial court"). Among other things, the April 2012

divorce judgment, which had incorporated a settlement agreement executed by the parties, awarded the parties joint legal custody of their minor child, awarded the mother sole physical custody of the child, required the father to pay child support in the amount of $1,044 per month, and ordered the father to pay the mother alimony in the amount of $756 per month until the parties' marital residence was sold and $220 per month thereafter. In March 2017, the father filed a complaint seeking a modification of the April 2012 divorce judgment. Specifically, the father sought a reduction in his child-support obligation and a modification of his visitation to increase his custodial time with the child.[1]

The mother answered the father's complaint and filed a counterclaim in which she sought to have the father held in contempt for failing to pay child support. The mother was later granted leave to amend her counterclaim to seek to have the father held in contempt for failing to pay alimony. At the trial, which was held in November 2018, the trial court

[1]The father also requested that the trial court determine custody, visitation, and child support regarding a child born to the mother after the entry of the April 2012 divorce judgment; the issues regarding that child were addressed in a separate action, and the father raises no issues on appeal relating to his requests for relief regarding that child.

allowed the father to seek a modification of custody to joint custody, over the objection of the mother, who had argued that the father had not specifically pleaded a claim for modification of the parties' custody arrangement. On December 31, 2018, the trial court entered a judgment modifying the father's child-support obligation, as agreed upon by the parties; declining to modify the father's visitation or to award him joint physical custody of the child;[2] holding the father in contempt for his failure to pay child support and alimony; ordering the father to pay, in specified installments, $10,842.25 in past-due child support, including interest, and $11,144.88 in past-due alimony; and awarding the mother an attorney fee. The father, through new counsel, filed a postjudgment motion in which he asserted the argument that the parties' reconciliation and cohabitation should have nullified or abrogated the child-custody, child-support, and alimony provisions of the April 2012 divorce judgment.[3] After

[2]The trial court modified a restriction on the father's visitation that required the father to exercise visitation only in Morgan County, but that modification is not an issue on appeal.

[3]We note that the trial court exercised its discretion and considered the new legal arguments raised by the father for the first time in his postjudgment motion. See Stroeker v. Harold, 111 So. 3d 138, 144 n.4 (Ala. Civ. App. 2012).

a hearing, the trial court denied the father's postjudgment motion, and the father filed a timely notice of appeal to this court.

The record reveals the following facts. Immediately after the entry of the April 2012 divorce judgment, the father's Department of Veterans Affairs ("VA") benefit was $699 per month, which amount he had deposited each month into the mother's bank account, and he began paying child support. In October 2012, the father returned to the former marital residence, the parties resumed cohabitation, and they later had a second child; they did not, however, remarry. The father lost his job during that period, and he did not pay the mother child support; however, he continued to have his VA benefit deposited into the mother's bank account.

In April 2016, the father moved out of the former marital residence. He continued to have his VA benefit deposited into the mother's bank account; however, the father did not pay to the mother the difference between his $699 VA benefit and the $756 alimony obligation between April 2016 and December 2016. The father's VA benefit increased to $702 in January 2017, and, although the VA benefit continued to be deposited into

the mother's bank account, the father still did not pay the difference between his VA benefit and his alimony obligation to the mother.

The father remarried in November 2016. In March 2017, the father stopped having his VA benefit deposited into the mother's bank account and did not otherwise pay his alimony obligation to the mother. According to the testimony of the mother and exhibits admitted at the trial, the father's past-due alimony obligation was $11,144.88 in principal and $549.11 in interest at the time of the trial. The father did not dispute the mother's calculation of his alimony arrearage at trial.

In addition to failing to pay alimony, the father failed to pay his monthly child-support obligation between August 2016 and December 2016. The father paid some, but not all, of his monthly child-support obligation in January 2017 and February 2017 and between January 2018 and April 2018. According to the testimony of the mother and an exhibit admitted at trial, the total principal amount of the father's child-support arrearage was $10,038.50 and he owed interest in the amount of $803.75 at the time of the trial. The father

did not dispute the mother's calculation of his child-support arrearage at trial.

The father suffered two heart attacks in the first two weeks of November 2017. He did not return to work until April 2018. As a result of his heart attacks, which, he said, had been determined to be related to his military service, the father was declared 100% disabled and was awarded full VA disability benefits, which totaled $3,615.94 per month.

The father's overarching argument on appeal is that the trial court erred in failing to conclude that the parties' cohabitation between October 2012 and April 2016 "nullified" the April 2012 divorce judgment, rendering the child-custody, child-support, and alimony provisions of the April 2012 divorce judgment ineffective. The father relies on Stone v. Sintz, 572 So. 2d 1270, 1272 (Ala. 1990), Ray v. Ohio National Life Insurance Co., 537 So. 2d 915, 916 (Ala. 1989), and Ex parte Phillips, 266 Ala. 198, 95 So. 2d 77 (1957), to support his argument. He contends that, under the holdings of those authorities, his and the mother's cohabitation nullified the April 2012 divorce judgment. Although this appeal involves issues of child custody, child support, and alimony, the

review of the trial court's legal conclusions is de novo. See Hughes v. Hughes, 253 So. 3d 423, 432 (Ala. Civ. App. 2017), and Caswell v. Caswell, 101 So. 3d 769, 772 (Ala. Civ. App. 2012).

The Effect of the Cohabitation of a Divorced Couple on Child Support and Child Custody

Certainly, there is legal precedent to the effect that the remarriage of previously divorced parents abrogates the child-custody and child-support provisions of a prior divorce judgment. See Ray, 537 So. 2d at 916, and Ex parte Phillips, 266 Ala. at 200, 95 So. 2d at 79. In Ray, our supreme court considered whether the remarriage of divorced spouses terminated one former spouse's obligation under the divorce judgment to name his three children as beneficiaries of a life-insurance policy. Ray, 537 So. 2d at 916. Our supreme court stated, based on its earlier holding in Ex parte Phillips, that "remarriage of the spouses to each other terminates the divorce court's jurisdiction and nullifies the provisions as to custody" and "support." Ray, 537 So. 2d at 916. Thus, it concluded that the provision requiring the former spouse to name his three children as beneficiaries was no longer enforceable after the remarriage. Id.

The discussion in Ex parte Phillips is especially instructive regarding the effect of the remarriage of previously divorced parents on the child-custody and child-support provisions contained in their divorce judgment.

> "'Where a decree of divorce makes provision for the custody, care, control, and support of minor children of divorced parents, during their minority, or during a less period named in the decree, the jurisdiction of the court over custody continues during such period, even though there is no express reservation of jurisdiction in the decree. Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 [(1930)].
>
> "['....]
>
> "'But if the parties remarry they no longer have separate rights of custody which require supervision by the court. Instead there is a resumption of the same joint right to custody which antedated the separation and the divorce.
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> "'With the parties reunited in marriage, and with their several rights of custody remerged into one common right of custody, the basis for the court's further jurisdiction ceases.
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> "'It is generally the law that remarriage of the parents terminates a divorce court's jurisdiction over the parties and their minor children. Thus it is said in Nelson Divorce and Annulment, 2nd Edition 15.40 that "... if the divorced parents of minor children are reunited in lawful marriage to each other, the parental rights of each parent are restored the same as if no divorce had ever been granted, even though the custody of the children was awarded to one of the parents by the divorce decree." Citing McAlhany v. Allen, 195 Ga. 150, 23 S.E.2d 676 [(1951)].'"

Ex parte Phillips, 266 Ala. at 200, 95 So. 2d at 79 (quoting Lockard v. Lockard, 102 N.E.2d 747, 747-48 (Ohio Ct. Com. Pl. 1951)).

In the present case, although the mother and the father had resumed living together for over three years and apparently resumed sexual relations, producing a second child, the father and the mother, unlike the parties in Ex parte Phillips, did not remarry. As the trial court commented at the hearing on the postjudgment motion, neither party contended that they had entered into a common-law marriage. In fact, as the trial court further observed, the father's conduct after the parties' second separation in April 2016, which was to marry another woman, belies any belief on the father's part that a common-law marriage resulted from the parties' cohabitation.

The father contends that his resuming cohabitation with the mother resulted in a sharing of parental responsibilities and a continuation of their lives as a united family unit. Although the father's factual assertions might be true, the cohabitation of divorced parents does not legally restore their marital status or the legal rights that attend that

status. Thus, we reject the father's argument because the postdivorce relationship that he and the mother established was not legally sufficient to establish a basis to apply the principles set out in Ex parte Phillips or Ray such that the child-custody and child-support provisions of the April 2012 divorce judgment should be considered nullified.

From that conclusion flows the further conclusion that, contrary to the father's argument, the trial court correctly applied the burden established in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), to the father's request to modify the custody provisions of the April 2012 divorce judgment. The father makes no argument that the trial court erred in concluding that he had not satisfied the burden imposed by Ex parte McLendon, so any such argument is waived. See D.E.F. v. L.M.D., 76 So. 3d 834, 837 (Ala. Civ. App. 2011) (determining that the failure of the father in that case to argue that the trial court had erred in concluding that he had not presented sufficient evidence to meet the standard imposed by Ex parte McLendon resulted in a waiver of that issue on appeal). The trial court's judgment, insofar as it denied the father's request that the custody provisions of the April 2012 divorce

judgment be modified, is therefore affirmed. Similarly, the father's argument that his child-support arrearage would not have existed because the child-support provisions of the April 2012 divorce judgment were nullified by his resuming cohabitation with the mother fails, and the trial court's calculation of the father's child-support arrearage, having not otherwise been challenged, see J.F. v. R.J., 59 So. 3d 719, 727 n.4 (Ala. Civ. App. 2010) (indicating that the failure to argue that the calculation of a child-support arrearage was incorrect resulted in a waiver of the issue), is also affirmed.

The Effect of the Cohabitation of a Divorced Couple on Alimony

The father also contends that the alimony provision of the 2012 divorce judgment was nullified by his resuming cohabitation with the mother. He again relies on Ray and Stone to support his argument. However, we find no support for the father's position in our review of either authority.

In Stone, our supreme court characterized the issue before the court as "whether the transfer of personalty made solely in contemplation of a divorce that never transpired should be set aside as void for lack of consideration."

Stone, 572 So. 2d at 1272 (emphasis added). The present appeal does not, in any way, involve a transfer of personalty. Instead, the father relies on Stone to seek to have the alimony provisions of the April 2012 divorce judgment nullified based on the parties' cohabitation after their divorce. To that end, the father focuses on a portion of the discussion in Stone, which contains legal principles applicable to the effect of a couple's reconciliation on a separation agreement.

The father contends that "the consideration for the separation agreement failed" when he and the mother reconciled. Indeed, the opinion in Stone contains the following sentence: "'The consideration for a separation agreement fails when the parties become reconciled and resume cohabitation.'" Id. (quoting M.L. Cross, Annotation, Reconciliation As Affecting Separation Agreement or Decree, 35 A.L.R.2d 707, 708-09 (1954) (supplementing Annotation, 40 A.L.R. 1227 (1926))). However, at issue in Stone was an oral agreement and resulting transfers of property made by John Stone and Helen Stone in anticipation of a divorce that never transpired. Id. at 1271. The Stone court considered whether

the transfers of personal property made by the Stones pursuant to their oral agreement in contemplation of a divorce that never occurred could be set aside as void for lack of consideration. Id. at 1272. Thus, the facts of Stone are far different than the facts of the present case, which involve a settlement agreement incorporated into a divorce judgment.

Nonetheless, the father relies on the following quotation from Stone:

> "'The general rule as stated by the annotator in 40 A.L.R. 1227 [(1926)], is where husband and wife have made a separation agreement and thereafter become reconciled and resume cohabitation, it is said generally that the effect is to annul the agreement. Limitations of the rule are stated by the annotator on page 1231 of 40 A.L.R., as:
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> > "'"The general rule as heretofore stated, while laid down generally in many cases, is, by most of the decisions which have considered it in that aspect, limited to such separation agreements as provide merely for living separately and for the payment of a stated sum for separate maintenance. As to other provisions, it is said that whether a reconciliation operates to annul the agreement depends on the intention of the parties as shown by their acts."'"

Stone, 572 So. 2d at 1272 (quoting Williams v. Williams, 261 Ala. 328, 335-36, 74 So. 2d 582, 589 (1954)) (emphasis added)).

At first blush, the principles our supreme court set out in Stone appear to support the father's argument. However, an examination of the discussion contained in the opinion in Williams is necessary for a more complete understanding of the rules governing the abrogation of settlement agreements upon reconciliation. In its opinion, after outlining the general rule as quoted above, the Williams court explained:

> "It is to be noted that these cases annotated, deal largely with separation agreements and reconciliation without any intervening decree of divorce. As for cases in which alimony has been ordered paid by the court, under a decree of separation, the rule is stated by the annotator in 40 A.L.R. [1227,] 1239 [(1926)], as follows:
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> > "'It is generally held that a decree for alimony or support money in an action wherein no absolute divorce is sought or granted is not annulled either permanently or temporarily by the reconciliation or renewed cohabitation of the parties, or by the act of one of them in condoning the misconduct of the other, but that these circumstances, like any other change in the situation of the parties, simply afford ground for new action of the court by annulling, reversing, or altering its former order, as justice may require.'"

Williams, 261 Ala. at 336, 74 So. 2d at 589-90 (emphasis added).

The parties in the present case were granted a divorce by the trial court in 2012, and their agreement was incorporated into the April 2012 divorce judgment. "The law is clear that when a trial court adopts a separation agreement made prior to divorce, it is merged into the final decree of divorce. It loses its identity and ceases to operate separately." Davidson v. Davidson, 580 So. 2d 1362, 1363 (Ala. Civ. App. 1991) (citations omitted); see also Williams, 261 Ala. at 337, 74 So. 2d at 590 (quoting Colton v. Colton, 252 Ala. 442, 444, 41 So. 2d 398, 299 (1949)) ("'[A]n agreement of the parties fixing the amount of such alimony becomes merged into the decree, and thereby loses the contractual nature at least to the extent that the court has the power to modify the decree when changed conditions so justify.'"). Thus, the principles set out in Stone and Williams indicating that a legal-separation agreement not incorporated into a judgment of divorce may be abrogated or nullified by a reconciliation or resumption of cohabitation by the parties are not applicable to the situation in which the parties in the present case find themselves.

The father further contends that his obligation to pay alimony should have been terminated under Ala. Code 1975, § 30-2-55, which provides, in pertinent part, as follows:

> "Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex."

The father contends that, as of October 2012, the mother was cohabiting with him, that he is a member of the opposite sex, and, therefore, that the award of periodic alimony must be terminated. This court rejected that same argument in Vaughn v. Vaughn, 507 So. 2d 960, 962 (Ala. Civ. App. 1987), concluding that the legislature intended that § 30-2-55 result in the termination of periodic alimony if the recipient former spouse is cohabiting with a member of the opposite sex other than the payor former spouse. The Vaughn court specifically stated that "we hold that [§] 30-2-55 is inapplicable to a case wherein a former husband cohabits with his former wife absent proof by the party paying alimony that either a formal marriage or a common-law marriage occurred between the parties." Vaughn, 507 So. 2d at 962.

The father, in his reply brief, argues that Vaughn was improperly decided and should be overruled. Essentially, the father contends that the Vaughn court "insert[ed] a qualifier that is not found in the language of the statute" when it concluded that "the member of the opposite sex" to which § 30-2-55 refers must be a person other than a former spouse. In addition, he criticizes the Vaughn court's reliance on a New York statute, which, he says, was not similar to our own. He also relies generally on the principle that, "[w]hen the legislature uses language that is plain and unambiguous, there is no room for judicial construction; instead, the statute should be applied as written." J.L.M. v. S.A.K., 18 So. 3d 384, 388 (Ala. Civ. App. 2008).

We cannot argue with the father's contention that the language of § 30-2-55 does not expressly require, as Vaughn does, that, in order to terminate periodic alimony, a former husband must prove "that [the former wife] is either remarried ... or that she is habitually living with another man." Vaughn, 507 So. 2d at 962 (emphasis added). However,

> "the fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Clark v. Houston County Commission, 507 So. 2d 902 (Ala.

> 1987); Advertiser Co. v. Hobbie, 474 So. 2d 93 (Ala. 1985); League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974). In construing the statute, this Court should gather the intent of the legislature from the language of the statute itself, if possible. Clark v. Houston County Commission, supra; Advertiser Co. v. Hobbie, supra; Morgan County Board of Education v. Alabama Public School & College Authority, 362 So. 2d 850 (Ala. 1978). We may also look to the reason and necessity for the statute and the purpose sought to be obtained by enacting the statute. Ex Parte Holladay, 466 So. 2d 956 (Ala. 1985)."

Pace v. Armstrong World Indus., Inc., 578 So. 2d 281, 283 (Ala. 1991) (emphasis added). More simply put, "we [are to] construe the words of [the] legislation in accord with the legislature's intent in its enactment." Parish v. Parish, 374 So. 2d 348, 349 (Ala. Civ. App. 1979).

The father's "plain language" argument would require us to focus upon one term in the statute in isolation instead of considering that term in conjunction with the other language contained in that statute. The father's argument fails to account for (1) the distinction between the payor former spouse, who would be the "party to the decree" filing the petition to modify the divorce judgment, and (2) the "member of the opposite sex" referred to by the legislature. The language used in the statute indicates that the legislature

had a person other than a "party to the decree" in mind for purposes of determining whether remarriage or cohabitation by the recipient former spouse would result in termination of the payor former spouse's periodic-alimony obligation. That conclusion is further supported by the fact that a payor former spouse's marriage to the recipient former spouse does not result in termination of the payor former spouse's periodic-alimony obligation based upon the operation of § 30-2-55 but, instead, upon the support obligations that are incident to marriage between the parties and the fact that, because the parties' status as divorced parties is a precondition to any obligation to pay alimony as between them, the payor former spouse's obligation to pay alimony necessarily ceases upon remarriage to the recipient former spouse. See Wood v. Wood, 258 Ala. 72, 75, 61 So. 2d 436, 439 (1952) (recognizing that the "obligation and duty" of "support and maint[enance]" "are creatures of the common law resting on and growing out of the contract of marriage and enforceable by courts of equity under our decisions"). In other words, the father's argument, although plausible, would result in an

overly broad and legally unnecessary application of the statute when considered in regard to the statute as a whole.

In Vaughn, this court explained its rejection of the argument that cohabitation with a former recipient spouse should extinguish the payor former spouse's alimony obligation by reference to what it considered to be the legislative intent behind § 30-2-55 as follows:

> "Should our construction of [§] 30-2-55 be other than that stated above, a former husband who is legally obligated to pay alimony could, by encouraging or persuading the former wife to move in and live with him, lay the foundation for an action to terminate his alimony payments. We do not believe this was the intent of the legislature when it enacted [§] 30-2-55."

Vaughn, 507 So. 2d at 962.

The father characterizes the reasoning quoted above from Vaughn as "antiquated," says that it "assumes the stereotype of the woman as the 'weaker sex' who will be fooled by such manipulation," and complains that it is "unfair to apply to th[e] father and other similarly situated men who resume living with the former spouse." He also contends that his resuming cohabitation with the mother was not "a fly-by-night reunion on the part of the father to avoid payment of alimony or child support" but, instead, involved a true reconciliation

of the parties, for a significant period, and a decision to bring another child into the world. Although we do not dispute the particular facts of the parties' lengthy cohabitation, we do not find the situation presented by this case a persuasive basis for overruling Vaughn.

In addition, we note that, in 2017, the legislature enacted a new statute governing the award of periodic alimony. See Ala. Code 1975, § 30-2-57. That statute specifically provides that "[r]ehabilitative or periodic alimony awarded under this [§] terminates as provided in [§] 30-2-55, or upon the death of either spouse." § 30-2-57(I) (emphasis added). The Comment to § 30-2-57 further provides that "subsection (I) is consistent with prior law by providing that alimony terminates upon the death of either spouse or as is provided in Section 30-2-55 of the Code of Alabama." Thus, we presume that the legislature, having had occasion to consider the issue in conjunction with its decision to enact § 30-2-57, is content with the interpretation given to § 30-2-55 by Vaughn, which has been the law on this issue for more than 30 years. See Hexcel Decatur, Inc. v. Vickers, 908 So. 2d 237, 241 (Ala. 2005).

Furthermore, the view espoused by Vaughn and the case on which it relied, Frost v. Frost, 189 Misc. 133, 71 N.Y.S.2d 438 (Sup. Ct. 1947), that the cohabitation of former spouses did not serve to abrogate the alimony provisions of a divorce judgment, was not uncommon. See, e.g., McDermott v. McDermott, 120 N.J. Super. 42, 293 A.2d 232 (Ch. Div. 1972); Peebles v. Peebles, 186 Ga. 222, 197 S.E. 783 (1938). The reasoning set out in Weiner v. Weiner, 120 N.J. Super. 36, 39-40, 293 A.2d 229, 231 (Ch. Div. 1972), is apt and in line with the principles of law discussed above relating to the abrogation of separation agreements not yet incorporated into a divorce judgment and the abrogation of the child-custody and child-support provisions of a divorce judgment upon the remarriage of former spouses to one other:

> "Defendant argues that the resumption of cohabitation after the divorce was in fact a reconciliation which by law abrogates executory features of a separation agreement. The general rule with which this jurisdiction agrees is that a reconciliation or resumption of cohabitation before a divorce abrogates the executory provisions of a separation agreement. Wolff v. Wolff, 134 N.J. Eq. 8, 34 A.2d 150 (Ch. Div. 1943); Devine v. Devine, 89 N.J. Eq. 51, 104 A. 370 (Ch. Div. 1918); Restatement, Contracts, § 584(2); 35 A.L.R.2d ... 707 [(1954)].

> "The logic of this concept is compelling. Public policy favors preservation of the marriage. Terminating future obligations under a separation agreement upon reconciliation helps to restore the previous relationship of the parties, to recreate the status of the marriage before the separation.
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> "Thus, normal cohabitation, as a matter of public policy will terminate any future obligation contained in a separation agreement. However, cohabitation after a divorce without the benefit of remarriage can neither be said to be 'normal' nor does it restore the pre-existing relationship between the parties. Peer v. Peer, 17 Misc. 2d 380, 183 N.Y.S.2d 278 (Sup. Ct. 1959). Only a remarriage between the parties would serve the purpose of restoring the previous marital relationship in the circumstances of this case, after divorce."

The cohabitation of the parties in the present case did not restore the parties' former marital relationship. Although they might have shared expenses and the same bed, they were not married. The mother did not request that the trial court include in its calculation of the child-support and alimony arrearages any amounts that were due during the period that the parties cohabited, and we therefore need not determine whether the parties' cohabitation would serve as the mother's waiver of those payments. But see Frost v. Frost, 189 Misc. 133, 71 N.Y.S.2d 438 (Sup. Ct. 1947) (indicating that a recipient spouse waives the receipt of periodic alimony during the period of cohabitation with the payor spouse);

McDermott v. McDermott, 120 N.J. Super. 42, 293 A.2d 232 (Ch. Div. 1972) (same). However, we decline to overrule Vaughn, and its application to the present case prevents a conclusion that the father's alimony obligation to the mother ceased as a result of their cohabitation after the entry of the April 2012 divorce judgment. The father having failed to otherwise challenge the calculation of the alimony arrearage, the judgment of the trial court on that issue is affirmed.

Whether the Trial Court Erred by Holding the Father in Contempt

Naturally, by virtue of our earlier holdings, we have rejected the father's argument that the trial court erred in holding him in contempt for his failure to pay child support and alimony based on his contention that the parties' cohabitation abrogated or nullified the child-support and alimony provisions of the April 2012 divorce judgment. Therefore, we turn to the father's second argument for reversal of the contempt provisions of the trial court's judgment -- that he was not given proper notice of the mother's contempt claims against him as required by Rule 70A, Ala. R. Civ. P. The father raised this argument in his postjudgment motion, and the trial court addressed it in its

postjudgment order by stating that, although no show-cause order indicating that the father might be subject to an arrest order for a failure to appear at trial had been issued, the father had appeared and defended the mother's contempt claims. Thus, the trial court concluded that any possible error was harmless.

We agree with the trial court. The father was not subjected to a writ of arrest for failing to appear at trial, and he was able to litigate the claims for contempt, to which he made no objection at trial. As we stated in C.D.M. v. W.B.H., 140 So. 3d 961, 967 (Ala. Civ. App. 2013), "because the [father] was present at the hearing and had been given notice of the time and date of the hearing and no writ for [his] arrest was issued, it appears, at first glance, that any deficiency in the hearing notice amounted only to harmless error. See Rule 45, Ala. R. App. P."

The father further argues that the contempt provisions of the trial court's judgment are due to be reversed because, he contends, the evidence presented at trial proved that he was unable to pay his child-support and alimony obligations as a result of his November 2017 heart attacks and his resulting

period of convalescence, during which he had not been able to work. In his brief, the father states that, during that period, which began in November 2017 and concluded in April 2018, he had no financial resources other than his VA benefit; thus, he contends that he established an inability to pay. Therefore, he argues, the mother was required to prove his ability to pay and, he says, having failed to do so, she should not have succeeded in having him held in contempt.

"The inability to pay child support or alimony is a defense to contempt." Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997). Furthermore,

> "'"'[w]hen the accused presents evidence that he is unable to pay the ordered amount, the burden o[f] proof is on the complainant to prove beyond a reasonable doubt that he can comply.'"' [Sexton v. Sexton,] 935 So. 2d [454,] 460 [(Ala. Civ. App. 2006)] (quoting Sealy v. D'Amico, 789 So. 2d 863, 866 (Ala. Civ. App. 2000) (quoting in turn Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997))). However, the determination of whether a party is in contempt is within the discretion of the trial court, and, unless the record reveals an '"abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm."' Nave v. Nave, 942 So. 2d [372,] 377 [(Ala. Civ. App. 2005)] (quoting Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)). Furthermore, in Stamm [v. Stamm, 922 So. 2d 920 (Ala. Civ. App. 2004)], we held that a 'trial court's determination that a party's failure to comply with a judgment is willful

> and not due to an inability to comply, when based on ore tenus evidence, will be affirmed if it is supported by one view of that evidence.' 922 So. 2d at 924."

Clements v. Clements, 990 So. 2d 383, 396-97 (Ala. Civ. App. 2007).

The trial court specifically held the father in contempt for failing to pay child support between August 2016 and February 2017, well before the father suffered his heart attacks. The trial court stated in its judgment that the father was gainfully employed, received VA benefits, and was therefore able to pay his child-support obligation during that period. Similarly, the trial court determined that the father had willfully refused to pay any alimony to the mother between March 2017 and March 2018. Although the father produced some evidence indicating that he might have been unable to pay alimony during the period between November 2017 and April 2018, the record contains no evidence, and the father does not argue, that he was unable to pay the mother any alimony between March 2017 and November 2017. The trial court had evidence from which it could have determined that the father had contemptuously failed to pay his child-support and alimony obligations for several months; based upon that evidence, the

trial court held the father in civil contempt and not criminal contempt, and the trial court imposed the risk of imprisonment only in the case of a failure to pay the ordered $55 and $70 monthly installments on his past-due alimony and child-support arrearages, respectively. We therefore conclude that any error the trial court might have committed in holding the father in contempt for his failure to pay alimony between November 2017 and March 2018 is harmless error, see Rule 45, Ala. R. Civ. P., resulting in no injury to the father. Accordingly, the judgment of the trial court, insofar as it held the father in contempt, is affirmed. Moreover, because we have affirmed the finding of contempt, we will not consider the father's argument that he should not have been ordered to pay a portion of the mother's attorney fee.[4]

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[4]We note that the father's argument regarding the attorney-fee award was extremely brief and, in contravention of Rule 28(a)(10), Ala. R. App. P., unsupported by citation to any authority. Furthermore, even had we determined that the trial court had erred in holding the father in contempt, "[a]n attorney fee is ordinarily available in a modification proceeding because it is merely an extension of the original divorce action, and such a fee may be awarded without a finding of contempt." Singleton v. Harp, 689 So. 2d 880, 883 (Ala. Civ. App. 1996) (citing Ayers v. Ayers, 643 So. 2d 1375 (Ala. Civ. App. 1994)).

Conclusion

In conclusion, we reject the father's argument that the parties' cohabitation nullified or abrogated the April 2012 divorce judgment. As a result, we further reject the father's argument that the burden imposed by Ex parte McLendon did not apply to his custody-modification claim and his argument that his child-support and alimony obligations were terminated upon his cohabitation with the mother in October 2012. The father's child-support and alimony obligations continued to accrue, and, because he did not pay those obligations and demonstrated, at best, that he might have been unable to pay alimony for a five-month period, we affirm the trial court's judgment insofar as it found the father in contempt for nonpayment of those obligations. We also affirm the judgment insofar as it required the father to pay a portion of the mother's attorney fee.

The mother's request for the award of an attorney fee on appeal is denied.

AFFIRMED.

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

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