

DIVORCE, CUSTODY AND POST-DIVORCE

*Volunteer Lawyers Program
Alabama State Bar*

*Robin L. Burrell, Editor
Najjar, Denaburg P.C.*

Prior Editors and Contributors

<i>Robin L. Burrell, Editor Najjar, Denaburg P.C.</i>	<i>1994-04</i>
<i>Richard J. R. Raleigh, Student Editor University of Alabama, School of Law, Class of 1995</i>	<i>1994</i>

PREFACE

Family law ranks among the most frustrating and stressful areas of the practice of law. The lawyer is generally representing a person who is emotionally devastated, may be the subject of abuse, may have no understanding of his or her own personal financial situation and may often seek to have personal decisions made for him or her by the attorney. It has often been said that "divorce attorneys see good people at their worst". When the parties have children, the actual decree of divorce is seldom the only court order entered pertaining to the parties, as custody, visitation, child support, alimony and grandparents' visitation issues may continue to cause court intervention. Divorce can wreak havoc with the emotions of the parties and can cause otherwise rational people to totally disregard the best interests of their children in an effort to get the upper hand in a divorce or to get revenge. Most judges handling these cases correctly urge the parties to resolve their disputes by agreement, and the attorney should explore this possibility before any others, as it is generally in the parties' best interests to have a hand in fashioning their destiny. This manual seeks to provide an elementary overview of divorce and post-divorce issues for the volunteer lawyer. I highly recommend Fernambucq & Pate, *Family Law in Alabama: Practice and Procedure, 2d Ed.* and Davis & McCurley, *Divorce, Alimony, Child Custody Hornbook* as excellent authorities for more detailed information on any aspect of Alabama divorce law.

Robin L. Burrell, Esq., Editor

DIVORCE, CUSTODY AND POST-DIVORCE*

I. ETHICAL ISSUES IN FAMILY LAW.

The *Alabama Rules of Professional Conduct* set the standard by which Alabama lawyers must live. While there are no fees being charged to your client in this program, it is important that the attorney become familiar with those rules which specifically apply to the practice of family law.

Rule 1.5 prohibits attorneys from charging clearly excessive fees. Additionally, the fee should be communicated to the client before or within a reasonable time, preferably in writing. *Rule 1.5(b)(1)* prohibits a contingency fee in divorce or alimony cases. The fee cannot be contingent upon the securing of a divorce, upon receiving alimony or support, upon a property settlement nor upon receiving custody. *Rule 1.9* prohibits an attorney from using confidential information gained in the representation of a client to that former client's disadvantage. If a lawyer represents one spouse in divorce or any other family law proceeding, (s)he cannot thereafter represent the other spouse in a subsequent custody, child support, or other family law proceeding, unless the former spouse is consulted and gives consent. This does not prohibit an attorney from representing the other spouse in a matter not related to the former proceeding.

Rule 1.6 mandates that a lawyer not reveal any information "relating to the representation of a client" without regard to the source of the information or whether the client requested the information be held in confidence. There are several instances where this information may properly be revealed. The information may be revealed by the attorney if the client consents after consultation. The information may be revealed by the lawyer if (s)he reasonably believes it is necessary to prevent the client from "committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Disclosure is permitted for the lawyer's protection from a claim arising from the representation of the client, including the attorney's claim for fees.

Under *Rule 1.8(k)*, an attorney may only represent one party in a divorce or family law proceeding. However, the lawyer may have limited contact with the other non-represented party if the matter is uncontested. The attorney must prepare a document stating that (s)he is not serving as counsel to the non-represented party, and the non-represented party has the right to obtain counsel for his or her representation.

* Copyright © 1994.

Moreover, if the attorney feels it is in the non-represented parties' best interest, (s)he should advise the other party to seek counsel. If the attorney complies with the guidelines of 1.8(k), (s)he may prepare documents for the non-represented party to sign.

II. JURISDICTION

Both personal and subject matter jurisdiction must exist and be pleaded in the complaint in order for a court to grant a divorce in Alabama. The marital status must be before the court by virtue of at least one of the parties being domiciled in the state. If the Defendant is a non-resident, the Plaintiff must have been a resident of this state for a period of six months next preceding the filing of the Complaint. If both parties are truly domiciled here, this requirement is not statutorily mandated. *Ala. Code §30-2-5 (1975)*. One of the statutory grounds for divorce must be stated in the Complaint. In most cases this will be "no fault" or irretrievable breakdown. The grounds for divorce are contained in *Ala. Code §30-2-1 (1975)*. The court must have *in personam* jurisdiction over a non-resident defendant in order to go further than granting the divorce (i.e., determining custody, child support, property division, etc.).

III. VENUE

The divorce is filed in the county in which the defendant resides or the parties resided at the time of separation or, where the defendant is a non-resident, the county where the Plaintiff resides. *Ala. Code §30-2-4 (1975)*. Venue may be waived if not properly pleaded. *Ramsey v. Ramsey, 347 So. 2d 999 (Ala. 1977)*. Venue for post divorce modifications may be changed to the county of the custodial parent after the parent and child have resided there for three years prior to commencing an action for modification at the option of the custodial parent. *Ala. Code §30-3-5*.

IV. DEFAULT PROCEDURES

The Defendant must file a response to the Complaint within the time provided by law. If the party has appeared in the action but has not filed an answer, that party must be given three days written notice prior to the entry of default. *Rule 55(a), ARCP*. An entry of default is made by the attorney upon the expiration of the time for filing an answer followed by the setting of a hearing for the testimony. It is critical to note that the Plaintiff cannot receive relief in excess of that prayed for in the complaint. Thus, the practitioner must draft the prayer for relief with the possibility of default in mind.

V. TEMPORARY ORDERS

There are several matters which may require action by the court prior to the trial of the divorce. Temporary orders are not intended to resolve the case, but, rather, to preserve the status quo, resolve intermediate issues and, if necessary, to restrain acts of actual or threatened violence.

Where physical violence has recently occurred and one of the parties is fearful of its continuation, the party may file a Motion for a Temporary Restraining Order. *Rule 65(b)*, *ARCP*, lists the requirements for a Temporary Restraining Order. One party may need temporary custody, child support and/or alimony pending the trial. A motion to restrain the parties from depleting assets may be appropriate. Where there are questions regarding paternity, a motion for paternity testing may be filed. Any such issue can be addressed by the court by temporary orders. It is important to note that the procedures for obtaining pendente lite relief vary from county to county. In some counties, all of these matters are determined by affidavits submitted by the parties while in some counties hearings are held either before the judge or a special master. The practitioner should contact the appropriate clerk's office in order to ascertain the procedures of the county.

VI. CHILD SUPPORT/ALIMONY

A. CHILD SUPPORT: A divorce decree must provide for the support of minor children. The parties may not agree to waive the right to support, and an agreement so providing is not enforceable. *Tucker v. Tucker*, 403 So. 2d 262 (Ala. Civ. App. 1981).¹ Support normally continues through the age of majority or emancipation, whichever first occurs; however, children who are incapable of self-support due to a mental or physical handicap may be entitled to support so long as the divorce is filed prior to the attainment of the age of majority. *Martin v. Martin*, 539 So. 2d 283 (Ala. Civ. App. 1988). Additionally, as of 1989, parents may be required to provide post-minority support for college education so long as the action seeking same is filed before the child attains the age of majority. *Ex Parte Bayliss*, 550 So. 2d 986 (1989). This award is discretionary with the court, taking into consideration the financial resources of the parents and the child, the child's commitment to and aptitude for college education, the standard of living the child would have enjoyed absent the divorce, the child's relationship with the parents, and the child's responsiveness to parental advice and guidance. The extent of the parent's obligation is normally defined as including tuition, books, fees and room and board.² The Court of Civil Appeals has mandated that a trial

¹ See, also, *Wilkerson v. Wilkerson*, 719 So. 2d 236 (Ala. Civ. App. 1998): The right to child support is inherent and cannot be waived.

² See Fer nambucq & Pate, *Family Law in Alabama* §9.10 (1990).

court must set reasonable limitations on the parent's postminority-support obligation, including a time period, a graduation requirement and student status requirement (*i.e.*, full time).³

The method of determining the appropriate amount of child support was drastically changed when the Alabama Supreme Court adopted *Rule 32, Alabama Rules of Judicial Administration*, commonly known as the "child support guidelines". *Rule 32* provides a method of computing child support and creates a rebuttable presumption that the amount resulting from the application of the guidelines is the correct amount of child support to be awarded in both divorce and modifications of child support. Evidence establishing that the application of the guidelines would be manifestly unjust or inequitable would be sufficient to rebut the presumption. If the child support award does not comply with the guidelines, the practitioner should demonstrate a reason for deviation from the guidelines that results in a benefit flowing to the child, such as the non-custodial parent's payment of mortgage payments on the home in which the child resides or an agreement to pay for certain non-curricular activities for the child on a regular basis.⁴

Child support can be modified at any time during the minority of the child. Modification is appropriate in many situations, both upward and downward. The non-custodial parents' negative financial change can be grounds for a downward modification of the support. Prior to the 1993 amendments to the guidelines, one clearly had to show a material change of circumstances in the needs, conditions and circumstances of the children in order to modify child support focusing upon their advancing age and the cost of living occasioned by inflation and an examination of the payor's ability to meet the needs of the children. However, the amendments provide that the guidelines shall be applied to child support modifications and create a rebuttable presumption that support should be modified when there is more than a ten per cent difference between the existing support and the amount determined by the application of the guidelines.

³*Manring v. Manring*, 744 So. 2d 919 (Ala. Civ. App. 1999).

⁴The trial court has the discretion to deviate from the guidelines where it finds the application manifestly unjust or inequitable but it must make findings of fact based upon evidence to justify a deviation. *Golden v. Golden*, 710 So. 2d 924 (Ala. Civ. App. 1991).

The guidelines operate as a sliding scale of child support obligation based on the parties' combined incomes and number of children. The first applicable factor is the parties' gross income. It is important to note that the parties' ability to earn and not his or her actual earnings controls on the issue of that parties' true gross income. Thus, the court may use the previous earnings of a person who quits a job for the purposes of avoiding child support. For the purposes of the guidelines, gross income includes money from any source and includes earnings, both regular and overtime, interest or dividend income, severance pay, etc. There are two deductions to gross income recognized by the guidelines: payments of periodic alimony or child support under a preexisting order in another case. The guidelines permit the court to deduct for "imputed preexisting child support." Where there are children from a current marriage, case law allows (but does not mandate) the judge to deviate from the guidelines. *Loggins v. Hook*, 595 So. 2d 488 (Ala. Civ. App. 1991). Once these deductions are made, the chart provides a child support figure for parties at their combined incomes and number of children. One then divides the adjusted income of each party by the basic child support obligation to get a percentage for that party. Net child care cost is added to this basic child support obligation. This is not the actual child care cost, but, rather, comes from standards adopted and changed from time to time by the Department of Human Resources. The amount to be used for day care expense incurred due to employment or search for employment is the lesser of the actual cost or the amount allowed by the DHR standards. The practitioner should be able to obtain these figures from the appropriate clerk's and/or judge's office. To this is added the actual cost of health care insurance which covers the minor child.⁵ One then applies the percentages obtained to the total child support obligation (the total of the basic obligation, day care and health insurance). If the payor provides health insurance for the child, that amount is deducted from his or her child support obligation. If not, the figure obtained by application of the percentages is the payor's obligation.

There are four forms which must be completed and submitted to the court in order for any agreement regarding child support to be approved. A CS-41 (Income Statement/Affidavit) must be completed and sworn to by each party verifying his or her current income, last income if unemployed, medical insurance expenses for the minor child and day-care expense. In a default situation, the plaintiff must complete the form for the defendant based on knowledge or belief. The attorney may subpoena wage information or bring to court a prior W-2, tax return or other evidence of income for the defaulted party. A CS-42 (Child Support Guideline Form) must be completed showing the method of computing the child support under the guidelines and the resulting award from application of the guidelines. A CS-43 (Notice of Compliance) must be completed advising the court as to whether or not the guidelines have been followed, and if not, the reasons why they have

⁵⁵ The trial court should use the actual amount of the total insurance premium for family/dependent coverage and not the difference between the charge for individual versus family coverage. *Bertram v. Doss*, 709 So.2d 1274 (Ala. Civ. App. 1998).

not.

An Order of Continuing Withholding for Support must be entered in every decree where child support is mandated. This is an order served on the employer directing it to deduct child support from the wages of the obligor and pay it to the appropriate clerk's office for payment to the recipient. The order does not have to be served on the employer, but a reason for not doing so should be included in the divorce decree. If the obligor becomes delinquent for one full month for more than thirty days, the recipient can file a motion asking that the order be served at that time.

Payments of child support are not taxable income to the recipient nor are they tax deductions for the payor. Child support obligations are not dischargeable in bankruptcy. The *Uniform Interstate Family Support Act* was passed by the legislature in 1997, and it contains sweeping changes as regards the method of collecting interstate child support.

In addition to child support, the practitioner should seek to ensure that the child will be covered by health insurance by at least one of the parties and that the non-custodial parent keeps life insurance in place during the child's minority with the minor child named as the irrevocable beneficiary during the minority.

B. ALIMONY: There are two kinds of alimony in Alabama, one constituting support of the spouse and the other representing a property settlement between the spouses.

The purpose of periodic alimony is to preserve the economic status quo of the parties as it existed during the marriage, where possible. *Ala. Code §3-2-52(1975)* establishes the court's authority. It is available to both sexes when warranted. Payments of periodic alimony are taxable to the recipient and deductible for the payor if they meet certain requirements: payments must be in cash; payments are made under a written divorce or separation order or agreement; payments are made to or in behalf of a payee spouse; payor and payee spouse are not members of the same household; payment obligation of payor spouse terminates on death of the payee spouse; and the order or instrument does not eliminate the tax consequences of the payments. The determination of the amount of the award is discretionary with the court; however, case law has given us certain standards to evaluate: the standard of living during the marriage; the parties' future prospects; the parties' potential for maintaining their standard of living after their divorce; the parties' ages; the parties' health; the length of the marriage; the source or sources of their common property; and the conduct of the parties with reference to the cause of the divorce.⁶

As a practical matter, periodic alimony is generally awarded in a lengthy marriage where one party stayed at home for a good portion of the marriage developing few or no job

⁶See Fernambucq & Pate, *Family Law in Alabama* §7.1 (1990).

skills. *Ala. Code §30-2-51 (1975)* requires an evaluation of the separate estate of the party requesting alimony to determine whether it is insufficient for his or her maintenance. The payor's separate estate is only taken into account when it has been commonly used by both spouses during the marriage. Many courts and practitioners have used the concept of "rehabilitative alimony" to provide periodic alimony for a specific period of time in order to allow the payee spouse to "get back on his or her feet" and become self-supporting. This may be appropriate when the payee needs to update his or her certifications or licenses or look for a job. The practitioner needs to ensure that the decree or agreement clarifies this intent to limit the periodic payments to a specific amount of time. In order to retain the same tax treatment, this alimony must be subject to the same terminating events as above. Many jurisdictions have informal "rules" for determining the amount of alimony. It is advisable to speak with members of the bar in your area who have some expertise in this area to determine what informal standards, if any, the judge has used in the past. It should be noted that there are certain recapture provisions in the Internal Revenue Code regarding large alimony payments in early years.

A material change in circumstances of one or both parties may warrant an increase or decrease in the amount of periodic alimony. See *Murphy v. Murphy*, 470 So. 2d 1297 (*Ala. Civ. App.* 1985). However, the voluntary change in income status by the payor does not necessarily warrant a reduction, as the issue is ability to earn and not actual earnings. *Ala. Code §30-2-55* specifies that periodic alimony terminates upon the recipient's remarriage or cohabitation with a member of the opposite sex. Periodic alimony is also terminated at the death of either party. By case law, alimony may be terminated upon the attainment of self support by the recipient. Periodic alimony obligations for support are not dischargeable in bankruptcy.

Alimony in gross is part of the property settlement of the divorce and is designed to compensate the recipient for the loss of inchoate property rights in the spouse's estate and constitutes a termination of the parties' property rights. In order to be classified as alimony in gross, the amount and time of the payment must be certain, and the right to the payments must be vested and not subject to modification. It may take the form of a lump sum payment, a number of payments over a specified period of time, or both. Alimony in gross is part of the property settlement and, thus, is not modifiable in subsequent proceedings. However, alimony in gross is subject to discharge in bankruptcy. Thus, the practitioner may want to reserve the issue of periodic alimony even when an award of same is not contemplated in order to provide a mechanism to protect the recipient in the event that a bankruptcy is filed. The court should consider the following when awarding alimony in gross: earning abilities of the parties, their probable future prospects, the source of the marital property, the contribution of each to its attainment, the duration of the marriage, the extent of the offending party's fault and the compensation to the recipient for the loss of future support and statutory inchoate property rights. *Thompson v. Thompson*, 377 So. 2d

141 (Ala. Civ. App. 1979). Examples of situations warranting alimony in gross include an ongoing business run by one party where its value is dependent on his or her continued management. The other spouse may receive payments over time to compensate him or her for the marital interest. This is not support but, merely, termination of the business interest and compensation therefor. Alternatively, when a home was owned by one party but substantially improved during the marriage, the other party may be compensated for that improvement value.

VII. STANDARDS FOR AWARDING CUSTODY

Custody of children denominates care, custody and control. There are different types of custodial arrangements. One parent may be denominated the custodian with the other party having visitation rights. Parents may share parental responsibility for decision making regarding the children. Joint physical may occur where the parties may more equally divide residential time. A joint custody arrangement may rotate physical custody week to week or month. Custody is initially decided in the divorce proceeding or in a proceeding ancillary to the divorce proceeding. Prior to now, most judges in this state would not award shared or joint custody in a trial but would generally approve an agreement for same. However, *Ala. Code §30-3-150, et. seq.*, mandates the courts to consider some form of joint custody in all cases. The critical word is *consider* - it does not require joint custody but, rather, simply directs that the courts consider it. The Court is still directed to award any form considered to be in the best interests of the child. This law was effective January 1, 1997, and, also, provides both parties access to all medical and school records of the child. If circumstances change after the initial custodial determination, then the court may modify the custody arrangement in a post-divorce modification. The standards for awarding custody in a divorce proceeding and in a post-divorce proceeding differ.

A. DIVORCE:⁷ In the past, a mother enjoyed a rebuttable presumption that it was in the best interest of children under the age of seven to be with their mother. See, *Jenkins v. Jenkins*, 376 So. 2d 1099 (Ala. Civ. App. 1979). This doctrine was abolished in 1981 by *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981), which established twelve elements to be considered in analyzing the issue of custody. Those twelve elements are as follows: the sex and age of the children; the characteristics and needs of each child, including their emotional, social, moral, material, and educational needs; the respective home environments offered by each party; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal

⁷See Fernambucq & Pate, *Family Law in Alabama* §9.3 (1990).

relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; preference of the child, if the child is of sufficient age and maturity; the report and recommendation of any expert witness or other independent investigator; the available alternatives; and any other relevant matter which may be present. The courts in Alabama have held that, in applying the above factors, past performance should determine future capability. The analysis is sex neutral. See, e.g., *Smith v. Smith*, 448 So. 2d 381 (Ala. Civ. App. 1984); *Thompson v. Thompson*, 431 So. 2d 1310 (Ala. Civ. App. 1983); *Gazaway v. Gazaway*, 423 So. 2d 1375). The general standard is what is in the best interests of the child. This generally is a common sense approach to determining who has the nurturing relationship with the child, who is better equipped to care for the child and other practical concerns. Several factors may be important. The affection which exists between the parent and the child must be considered. *Ashley v. Ashley*, 383 So. 2d 861 (Ala. Civ. App. 1980); *Saunderson v. Saunderson*, 379 So. 2d 91 (Ala. Civ. App. 1980). If the child is competent, evidence of the desire by the child to live with one parent is compelling, but not controlling. *Alford v. Alford*, 368 So. 2d 295 (Ala. Civ. App. 1979); *Snellings v. Snellings*, 272 Ala. 254, 130 So. 2d 363 (1961). The circumstances leading up to the divorce may also be important in the custody determination. For example, the determination that one party was at fault in the termination of the marriage may be pertinent in making the custody determination. *McBride v. McBride*, 268 Ala. 619, 109 So. 2d 718 (1959). Moreover, while adultery is not, in and of itself, determinative of the custody issue, it is one circumstance that should be considered in making the determination. *Monk v. Monk*, 386 So. 2d 753 (Ala. Civ. App. 1980); *Warren v. Warren*, 386 So. 2d 1166 (Ala. Civ. App. 1980). Particularly relevant is evidence showing that acts of immorality by one spouse may have had a detrimental effect on the child. *Nesmith v. Nesmith*, 419 So. 2d 247 (Ala. Civ. App. 1982). The question is not merely was there sexual activity, but rather, did the presence of sexual activity by one spouse have a detrimental effect on the growth of the child and detract from a stable and worthwhile living environment for the child. Other misconduct may also be considered by the court in determining the issue of custody. If one parent is guilty of physical or mental cruelty to the parent, this may be considered in determining custody. *Hawkins v. Hawkins*, 292 Ala. 31, 121 So. 92 (1929). However, this circumstance is not determinative of the issue. The fact that a spouse has severe mental or emotional problems may weigh heavily in the custody determination. *Marr v. Marr*, 371 So. 2d 423 (Ala. Civ. App. 1979). If both parents exhibit psychological problems, the fact that one parent sought professional care while the other refused care is relevant to the determination of custody. *Crosslin v. Crosslin*, 494 So. 2d 431 (Ala. Civ. App. 1986). While the financial well-being of both parents is relevant, it is pertinent more to the issue of whether the parent is responsible rather than whether the parent can provide for the child. *West v. West*, 469 So. 2d 610 (Ala. Civ. App. 1984); *Parks v. Parks*, 275 Ala. 613, 157 So. 2d 212 (1963). The fact that one parent removed the child to another state without the other's consent in order to raise the child away from the other parent, weighs heavily against the removing parent's custody request. *Long v. Long*, 239 Ala. 156, 194 So. 190 (1940).

The court may not permit religious or racial considerations to control an award of custody. *Jennings v. Jennings*, 490 So. 2d 10 (Ala. Civ. App. 1986) However, the Supreme Court of Alabama has held that while a court cannot condition an award of custody upon a parent's attendance at religious activities, the parent's involvement in religious services or activities may be relevant, just as the parent's involvement in civic organizations or other activities. *Ex parte Hilley*, 405 So. 2d 708 (Ala. 1981). The involvement may have an effect on the welfare and best interests of the child.⁸

The Alabama Legislature passed a law in the 1995 Session called the *Presumptions Against Custody Act*. Ala. Code §30-3-131. It provides that a determination by the court that domestic or family violence has occurred raises a rebuttal presumption that is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of domestic violence. The court is further directed to take into account what, if any, impact the domestic violence has had on the child. It has sweeping provisions that help a custodial parent where domestic violence has occurred. If the parent relocates because of an act of domestic or family violence by the other parent, the absence or relocation may not be a factor that weighs against the parent in determining custody.

The appellate courts issued a confusing series of opinions in 1998 on the issue of homosexuality. In *Ex Parte DWW*, (Ala. 1998), the Supreme Court held that the trial court did not abuse its discretion in considering the effects on the children of their mother's ongoing lesbian relationship. In *KTWP v. DRW* (Ala. Civ. App. 1998), the Court of Civil Appeals opined that the *Ex Parte DWW* opinion does not stand for the proposition that visitation restrictions are required in every case involving a homosexual parent. In *TKT v. FPT*, 716 So. 2d 1235 (Ala. Civ. App. 1998), the appellate courts declined to reach the issue of whether the trial court determined custody based on the husband's admitted homosexuality.

B. POST-DIVORCE MODIFICATION: It is more difficult in a post-divorce modification proceeding for the non-custodial parent to be awarded custody. In a post-divorce modification of custody, the general standard of proof required is outlined in *Ex parte McClendon*, 455 So. 2d 863 (Ala. 1984). The parent seeking to change custody must meet a stringent and heavy burden showing that the change of custody would materially promote the child's best interests and welfare sufficient to overcome the inherently disruptive effect caused by uprooting the child. The *McClendon* standard is a rule of repose and condemns frequent disruptions in the lives of children whose welfare is paramount. This standard also applies when there is a shared custody arrangement with a primary

⁸See, *Fernambucq & Pate, Family Law in Alabama* § 9.4

residential parent. *Crane v. Crane*, 563 So. 2d 615, 617 (Ala. Civ. App. 1990): "The petitioner must prove initially that a material change in circumstances has occurred since the last decree and that a change in custody would promote the child's welfare and best interests." See also, *Berrey v. Berrey*, 622 So. 2d 1136 (Ala. Civ. App. 1993). The standard for modifying a shared custody arrangement may differ when there is no primary custodial parent. *Smith v. Smith*, 470 So. 2d 1252 (Ala. Civ. App. 1985). In that situation, the standard for modification is not as stringent and is outlined in *Ex parte Couch*, 521 So. 2d 987 (Ala. 1988). In *Couch*, the parents rotated physical custody of their children from week to week. The court held that a best interests and welfare of the children standard applies when custody has not been awarded to one parent primarily and both parents have been held to be fit and proper persons to have custody.

In any proceeding where there is an issue regarding the modification of custody of the child, a finding that domestic or family violence has occurred since the last custody determination constitutes a finding of change of circumstances pursuant to the *Presumptions Against Custody Act*.

VIII. VISITATION

The trial court has broad discretion in determining visitation rights of a non-custodial parent, and must consider the child's best interests and welfare. *Watson v. Watson*, 555 So. 2d 1115 (Ala. Civ. App. 1989). Restrictions on visitation may occur where there are dangerous situations existing in the home of the non-custodial parent, such as mental instability or physical abuse. Most jurisdictions have standard visitation periods for parents graduated in time with the increasing age of the child and have separate standards for out of state visitation. It is important for the attorney to explain that one cannot withhold visitation privileges for failure to pay child support and vice versa.

The *Presumptions Against Custody Act* provides that a court may award visitation to a parent who has committed domestic or family violence only if the court finds that adequate provisions for the safety of the child and the parent who is a victim of domestic or family violence can be made. It allows the court to take certain specified actions in a visitation order to supervise the visitation, ensure that it occurs in a protected setting, to require counseling, to prohibit overnight visitation, to require a bond from the perpetrator for the return and safety of the child, and other important relief.

Grandparents of minor children may intervene in a divorce action to obtain visitation rights or may petition to modify a decree to receive these rights. *Ala. Code §30-3-4.1 (1975)*. This right is discretionary with the court. However, recently, various Alabama state courts have ruled Section 30-3-4.1 unconstitutional, following the reasoning of the United States

Supreme Court's ruling in *Troxel vs. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). While overruling a trial court's ruling that the statute is unconstitutional, the Alabama Court of Civil Appeals in *Ex parte State of Alabama (In re L.B.S. v. L.M.S.)* [Ms. 2000713, January, 2002] –So.2d— (Ala.Civ.App.2002) stated that the language of the statute allowed the trial court, on case by case basis to constitutionally apply the statute. The Court acknowledged that the rebuttable presumption in the statute in favor of grandparent visitation was unconstitutional but concluded that the remainder of the statute was enforceable.

The Alabama Adoption Code, Section 26-10A-30, Alabama Code (1975), has recently been ruled as constitutionally proper pursuant to *J.S. and E.S. vs. D.W. and J.W.*, WL 1001467 (2002). This code section allows for post-adoption visitation rights for the natural grandparents of the adoptee when the adoptee has been adopted by a stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Among other things, the Alabama Supreme Court found distinction between *J.S. and E.S.* and *Troxel*, as the former deals with rights exclusively dependent upon statutory law and as such, must be treated differently than natural parents.

IX. DIVISION OF ASSETS AND LIABILITIES

Alabama courts have discretion to divide the parties assets in an equitable manner. Thus, a property settlement does not have to be equal so long as it is equitable. *Ala. Code §30-2-51 (1975)* provides:

If either spouse has no separate estate or if it be insufficient for the maintenance of such spouse, the judge, upon granting a divorce, at his discretion, may order to such spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family; provided however, that the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the trial judge finds from the evidence that such property, or income produced by such property, has been used regularly for the common benefit of the parties during their marriage.

If the divorce is in favor of either spouse for the misconduct of the other spouse, the judge trying the case has the right to make an allowance to either spouse out of the estate of the other spouse, or not make an allowance as the circumstances of the case may justify, and if an allowance is made, the misconduct of either spouse may be considered in determining the amount; provided however, that any property acquired prior to the marriage of the parties or by inheritance or gift may not be considered in determining the amount. *Ala. Code*

§30-2-52. Once a property settlement is made either by agreement or by court order, it may not be modified.

Many factors may come into play when dividing the marital assets and liabilities, including, but not limited to, the source of common property, ages, sex and health of the parties, parties' future prospects and station in life, length of the marriage and conduct of parties in causing the divorce. A court can take into account the custody of children when dividing assets such as the home. Items of personalty or cash which were the separate property of one party by ownership prior to the marriage or by inheritance may become commingled during the marriage, making them divisible equitably in the divorce. It is critical that your client provide to you a complete listing of both assets and debts, as a divorce decree needs to provide for a division of all of the parties' assets and direct who will have responsibility for each of the parties' debts. Often your client will not have this information either because (s)he has no access to same or because (s)he does not understand the information. It is incumbent on the attorney to assist the client in this process by using the discovery process and/or by utilizing informal means to obtain this information. Where there are mortgages on real property, it is important to ascertain the use to which these funds were put. For instance, it may be inequitable to order a party to pay all mortgage indebtedness on a residence that (s)he is awarded where the proceeds of the second mortgage were used solely for the other party's benefit in purchasing an automobile awarded to that party. Thus, it is important to examine the purpose for each debt.

One must remember that the parties' creditors are not parties to the divorce. Accordingly, an order directing a party to pay a debt on which the other spouse is contractually obligated does not stop the creditor from proceeding against that spouse in the event of a default. This should always be explained to the client. Any agreement providing for the payment of a debt on which your client is contractually obligated should contain a provision for indemnification of your client.

In dealing with the marital residence, it is critical to know the fair market value of the property and the balance on all mortgages. If the parties cannot agree to a disposition of the property, the court has the ability to order the property sold and the proceeds divided in an equitable manner. There are many options that may work to benefit your client and still effect a division of this asset by agreement where there are minor children. The custodial parent may retain the exclusive use and possession of the residence until the attainment of majority by the children, at which time, the house can be sold and the proceeds split. The house can be awarded outright to one party to the exclusion of the other. If the property is to continue to be jointly owned until the happening of a future event, it may be advisable to sever the joint tenancy and create a tenancy in common. If the house is to be sold in the future, it is important to establish clear time frames for this as well as a method for forced sale by the clerk or otherwise in the event that the house does not sell within a reasonable period of time.

In 1995, *Ala. Code §30-2-51* was amended to provide “discretionary inclusion of certain retirement benefits within a spousal estate when the Court determines an allowance upon the grant of a divorce if certain conditions are met”. This law became effective on January 1, 1996, and the conditions are as follows:

1. The award shall not exceed 50%;
2. There must be at least a 10-year marriage;
3. No amount of the retirement acquired prior to the marriage date can be included.

This may be significant in a low-income case, as the retirement may be the only asset of significance acquired during the marriage.

X. ENFORCEMENT

Support: The most effective way to enforce support provisions of a decree is by the filing of a petition for rule nisi which requests that the court hold the party in contempt for failure to pay support and/or medical expenses as directed by the decree. If the court finds the payor in contempt for failure to pay support, it may award an attorney's fee, enter a judgment for the arrearage, or enter such other orders appropriate to coerce the compliance, including incarceration. The Court must find that the payor wilfully and contumaciously failed to pay the support and had the ability to pay in order to find contempt. Thus, it is most important to subpoena all pay records for the applicable period in order to prove earnings during the relevant time period.

There are alternative ways to enforce the support provisions. With child support, if the income withholding order was not served on the employer in the initial decree, the recipient may request the service of the order upon the obligor's delinquency in a dollar amount equal to one month's support. This can be the most cost efficient alternative to your client. Child support and alimony arrearages may also be collected through the garnishment process or by obtaining a judgment which can be enforced by attachment on assets. A judgment should be recorded in the probate court.

Visitation: The judges across this state would probably unanimously agree that visitation disputes are best solved between the parties. With that caveat in mind, a petition for rule nisi can be brought to enforce the visitation provisions of a decree resulting in the same punishments as discussed above. A petition to modify custody is only warranted where there are repeated violations indicating the custodial parent's attempt to destroy or diminish the relationship between the child and the non-custodial parent. *Calabris v. Boone*, 470 So. 2d 1255 (*Ala. Civ. App.* 1985).

Interstate Considerations: Where custody, visitation and/or support disputes cross state lines, there are three statutes that provide guidance. The Uniform Child Custody Jurisdiction Act, *Ala. Code, §30-3-20, et seq. (1975)*, and the Parental Kidnaping Prevention Act [P.K.P.A.], *28 U.S.C. §1738A*, were passed in 1980 to deal with interstate "child snatching" and forum shopping. These laws mandate the recognition of sister state judgments regarding custody so long as certain requirements are met. The P.K.P.A was recently amended and now extends its protection to grandparent visitation rights. *28 U.S.C. §1738(a)*. When faced with a dispute across state lines, the attorney should thoroughly review these statutes for assistance in enforcing an Alabama custody decree. The Uniform Reciprocal Enforcement of Support Act, *Ala. Code §30-4-80, et seq. (1975)*, is a means to collect child support and/or alimony across state lines. Under this act, a petition may be initiated in this state with the responding state handling the action on behalf of the petitioner.

XI. ATTORNEY'S FEES, COSTS, AND EXPENSES.

The court may grant attorney's fees in a divorce or related domestic action pursuant to *Ala. Code § 30-2-54 (1975)*:

In all actions for divorce or for the recovery of alimony, maintenance or support in which a judgment of divorce has been issued or is pending and a contempt of court citation has been made by the court against either party, the court may, of its discretion, upon application therefor, award a reasonable sum as fees or compensation of attorney or attorneys representing both parties.

Alabama courts have also held that an award of attorney's fees is proper in pendente lite situations, *Smith v. Smith, 57 Ala. App. 615, 330 So. 2d 439 (1976)*, bed and board divorce suits, *Torme v. Torme, 251 Ala. 521, 38 So. 2d 497 (1949)* and actions for contempt, *Grissett v. Grissett, 447 So. 2d 760 (Ala. Civ. App. 1984)*.

Attorney's fees are held not to be proper in cases where the parties reconcile, *McNutt v. Beaty, 370 So. 2d 998 (Ala. 1979)*, where the obligation upon which the matter is based is terminated, *Smith v. Smith, 365 So. 2d 88 (Ala. Civ. App. 1978)*, and in enforcement proceedings where there has been no finding of contempt, *Johnson v. Johnson, 469 So. 2d 116 (Ala. Civ. App. 1985)*; *Vickery v. Smith, 589 So. 2d 756 (Ala. Civ. App. 1991)*.

Pursuant to *Rule 15(b), A.R.C.P.*, if financial need is evidenced, the court may award attorney's fees even in the absence of a pleaded request. There must be express or implied consent that the issue be tried for the court to properly award attorney's fees. *Anthony v.*

Anthony, 582 So. 2d 1121 (Ala. Civ. App. 1991).

The party seeking attorney's fees should present proof of the value of the work done by the attorney, the time spent working on the case, expenses paid by the attorney (e.g. expert witnesses), and the effort on the part of the attorney. Expert testimony regarding attorney's fees or expenses is given great weight. *Grimsley v. Grimsley*, 586 So. 2d 20 (Ala. Civ. App. 1991).

Two things must be shown before a court will award attorney's fees: (1) need on the part of the party which would receive the award, and (2) the ability of the paying party to pay the fees. *Kurtz v. Kurtz*, 545 So. 2d 809 (Ala. Civ. App. 1989). As outlined in *Rosser v. Rosser*, 355 So. 2d 717 (Ala. Civ. App. 1977), cert. denied, 355 So. 2d 722 (Ala. 1978), None of the factors is decisive in and of itself, and the trial court is given a great deal of discretion in awarding attorney's fees. *Slater v. Slater*, 587 So. 2d 376 (Ala. Civ. App. 1991).

The courts apply the following factors to decide the amount of award of attorney's fees: the nature and value of the subject matter of the employment; the learning, skill, and labor necessary to the proper discharge of the employment; the time consumed; the professional ability, experience, and reputation of the attorney performing the services; the measure of his or her responsibility; the measure of success achieved; any reasonable expenses incurred; the fee customarily charged in the locality for similar legal services; opinion evidence of experts on the subject of fees; the Court's own knowledge and experience as to the value of the services performed; and, the earning capacity of the parties.¹ The primary focus is upon the performance of services by the attorney(s) rather than the actions or situations of the parties. The Court weighs the factors and determines the proper amount of attorney's fees. The trial court's decision will be overturned only for clear error. The court may include in the fee various expenses of litigation, including costs of expert witnesses, certified public accountants, depositions, and other costs. See, e.g., *Howard v. Howard*, 422 So. 2d 296 (Ala. Civ. App. 1982).

Attorney's fees may also be awarded in modification proceedings and contempt proceedings. The court applies the same factors in deciding whether to award the fees and the amount to be awarded. If the proceeding involves either the Uniform Child Custody Jurisdiction Act, or the Parental Kidnaping Prevention Act, then special provisions may apply to the awarding of attorney's fees, costs, and expenses. The practitioner in Alabama should reference these specific guidelines when their case involves these acts.

Ala. Code §30-2-54 (1975) gives courts in Alabama the authority to award attorney's

¹0*Family Law in Alabama §12.4; Rosser, supra.*

fees in contempt proceedings. There must be a finding of contempt before attorney's fees may be awarded. *Tatom v. Tatom*, 591 So. 2d 502 (Ala. Civ. App. 1991). A court may not allow parties to purge themselves in criminal contempt proceedings by paying attorney's fees. *Moody v. State ex rel. Payne*, 355 So. 2d 1116 (Ala. 1978). *But see, McKeever v. McKeever*, 528 So. 2d 856 (Ala. Civ. App. 1988).

Finally, money spent locating and returning children in parental kidnaping cases, *Rayford v. Rayford*, 456 So. 2d 833 (Ala. Civ. App. 1984), travel fees to reimburse a party for returning to Alabama to successfully prosecute a contempt action, *Rigsby v. Akin*, 498 So. 2d 851 (Ala. Civ. App. 1986), and certain other expenses may be recovered as costs.

Attorney's fees are awarded to the client. Therefore, a proceeding to collect the fees, e.g. garnishment, must be made in the name of the client. However, the client may assign his or her right to attorney's fees to the attorney. Attorney's fees may also be collected through an Income Withholding Order.

XII. PROTECTION FROM ABUSE ACT

The Protection from Abuse Act applies to following categories of persons: spouses, parents, children and/or other persons related by consanguinity or affinity who are in need of protection from abuse. *Ala. Code §30-5-1, et seq. (1975)*. This act may be used in conjunction with a divorce or as a separate proceeding without filing for divorce. Each county may have its own rules as to where the petition should be filed, so it is advisable to check with the clerk's office in the appropriate county. The court is empowered to grant any protection order to bring about a cessation of abuse and may include: directing the defendant to refrain from abusing the plaintiff or minor children; granting the plaintiff exclusive possession of the residence by evicting the defendant and/or restoring possession to the plaintiff; awarding temporary custody and/or setting temporary visitation rights to minor children; ordering temporary support for the plaintiff or children in the plaintiff's custody. This Act mandates a fourteen day hearing after the filing of a petition at which the plaintiff shall prove the allegation of abuse by a preponderance of the evidence.

XIII. MISCELLANEOUS

Waiting Period. As of January 1, 1997, Alabama has a thirty day waiting period before a divorce judgment can be entered. This runs from the time a divorce complaint is filed.

Mediation. *Ala. Code §6-6-20* mandates mediation upon motion by either party. It is important to note that a party who is alleged to be the victim of domestic violence cannot be ordered into mediation. The party moving for mediation must pay the costs.

XIV. FORMS

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE,)	
DEFENDANT.)	

COMPLAINT

Comes now the Plaintiff and would aver as follows:

1. That Plaintiff is over the age of nineteen (19) years and has been a bona fide resident citizen of the State of Alabama for more than six (6) months next preceding the filing of this Complaint for divorce. The Defendant is over the age of nineteen (19) years and has been a bona fide resident citizen of the State of Alabama for more than six (6) months next preceding the filing of this Complaint for divorce.
2. That Plaintiff and Defendant were married on ____, and they have lived together as husband and wife until, to-wit, ____, after which time they separated and have not lived together as husband and wife.
3. That there __ children born during this marriage, namely _____. _____ is not pregnant.
4. That Plaintiff avers that there is a complete incompatibility of temperament such that the Plaintiff and Defendant can no longer live together. Plaintiff states that there has been an irretrievable breakdown of the marriage and that further attempts at reconciliation are impractical or futile and not in the best interests of the parties.
5. That parties have accumulated, during the marriage, an interest in or title to certain properties including cash, furniture, furnishings, automobiles, real property and other property.
6. That the parties have incurred certain debts during the marriage of the parties.
7. That Plaintiff states that she is without sufficient funds with which to pay her attorney of record.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that this Honorable Court will enter a Final Judgment granting therein relief to the Plaintiff as follows:

- a. That **the said _____ be made a party Defendant to this Complaint by appropriate process**;
- b. That the bonds of matrimony existing between the Plaintiff and Defendant be forever dissolved;
- c. That the care, custody and control of the minor child of the marriage be awarded to the Plaintiff;
- d. That the Defendant be required to pay to the Plaintiff a reasonable sum of money for the support and maintenance of the parties' minor child;
- e. That the Court order a fair and equitable division of all property acquired by the parties during the marriage;
- f. That the Court order a fair and equitable division of the debts incurred during the marriage of the parties;
- e. That the Court award to the Plaintiff a fair amount as alimony, both periodic and in gross;
- g. That the Court award a sufficient sum to be paid to the Plaintiff by Defendant with which to pay her attorneys of record;
- h. That the Court order such other, further and general relief as may be just and proper.

Attorney for Plaintiff
(Address)
(Telephone)

PLAINTIFF'S ADDRESS:

DEFENDANT'S ADDRESS:

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE,)	

DEFENDANT.

)

ANSWER AND COUNTERCLAIM

Comes the Defendant in the above-styled cause and avers as follows:

- 1. Defendant admits the allegations of Paragraphs ____ .
- 2. Defendant denies Paragraphs ____ .

Now, having answered the Plaintiff's Complaint, your Defendant avers as follows:

1. That the Defendant is over the age of nineteen (19) years and is a bona fide resident citizen of the State of Alabama and has been for more than six (6) months next preceding the filing of this Counterclaim for divorce. Defendant states that the Plaintiff, is over the age of nineteen (19) years and has been a bona fide resident of the State of Alabama for more than six (6) months next preceding the filing of this Counterclaim for divorce.

2. That Plaintiff and Defendant were married on ____, and they have lived together as husband and wife until, to-wit, ____, after which time they separated and have not lived together as husband and wife.

3. That there __ children born during this marriage, namely _____. _____ is not pregnant.

4. That Defendant avers that there is a complete incompatibility of temperament such that the Plaintiff and Defendant can no longer live together. Defendant states that there has been an irretrievable breakdown of the marriage and that further attempts at reconciliation are impractical or futile and not in the best interests of the parties.

5. That parties have accumulated, during the marriage, an interest in or title to certain properties including cash, furniture, furnishings, automobiles, real property and other property.

6. That the parties have incurred certain debts during the marriage of the parties.

WHEREFORE, PREMISES CONSIDERED, your Defendant asks that this Court take jurisdiction of this Counterclaim for divorce; that upon a final hearing Your Honor will grant Defendant relief as follows:

- a. That the said ____ be made a party Defendant to this Complaint by appropriate process;
- b. That the bonds of matrimony existing between the Plaintiff and Defendant be forever dissolved;
- c. That the Court ascertain the appropriate custodian for the minor child of the marriage;
- d. That the Court ascertain a reasonable sum of money for the support and maintenance of the parties' minor child;
- e. That the Court order a fair and equitable division of all property acquired by the parties during the marriage;
- f. That the Court order a fair and equitable division of the debts incurred during the marriage of the parties;
- e. That the Court award a sufficient sum to be paid to the Defendant by Plaintiff with which to pay his attorneys of record;
- h. That the Court order such other, further and general relief as may be just and proper.

 Attorney for Defendant
 (Address)
 (Telephone)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer and Counterclaim upon ____, by first class U. S. Mail, properly addressed and postage prepaid this ____ day of _____, 19__.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
)	
PLAINTIFF,)	CIVIL ACTION NUMBER
)	
v.)	
)	
JOHN DOE,)	
)	
DEFENDANT.)	

ANSWER AND WAIVER

Comes now the Defendant in the above-styled cause and accepts service of the Complaint filed in said cause, the same as if regularly served upon (him/her), and submits to the jurisdiction of said Court and for answer to the Complaint filed in this cause, Defendant says:

1. Defendant admits the allegations as to age, residence and marriage.
2. Defendant denies each and every other allegation contained in said Complaint.

Defendant waives the requirements and provisions of Alabama Rules of Civil Procedure 43 and Rule 28(d), and expressly waives the requirement that testimony in this cause be taken before the Clerk. The Defendant expressly agrees that said testimony may be taken by affidavit or affidavits, by ANY Notary Public or other officer authorized to administer oaths, at any time whether prior to, concurrent with or subsequent to this Waiver, and may be submitted in this cause at any time and place hereafter. Defendant hereby consents that this may proceed to final judgment without further or other notice to the Defendant.

Defendant

WITNESS:

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE.)	
DEFENDANT.)	

TESTIMONY OF PLAINTIFF

Comes now the Plaintiff in the above styled cause, and respectfully presents to the Court the following testimony:
My name is _____, and I am the Plaintiff in the above-styled cause. I am over the age of nineteen (19) years and reside in Jefferson County, Alabama. I have been a resident citizen of the State of Alabama for more than six (6) months next preceding the filing of my complaint for divorce.

The Defendant is over the age of nineteen (19) years and resides in ____ County, Alabama and has been a resident citizen of the State of Alabama for more than six (6) months next preceding the filing of my Complaint for divorce. The Defendant and I were married on ____, and we lived together as husband and wife until, to wit, ____, after which time we separated and have not lived together as husband and wife. There were child__ born during this marriage, namely, ____. (I/The Defendant) (am/is) not pregnant.

There exists such a complete incompatibility of temperament between the Defendant and myself that we can no longer live together. There has been an irretrievable breakdown of our marriage and further attempts at reconciliation are impractical or futile and not in the best interests of the Defendant or myself.

JANE DOE

Attorney for Plaintiff
(Address)

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me the undersigned, a Notary Public, in and for said County and State, personally appeared JANE DOE , who under oath, swore that the matters contained in the foregoing are true and correct.

SWORN TO AND SUBSCRIBED before me this ____ day of _____, 19__.

Notary Public

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)
PLAINTIFF,) CIVIL ACTION NUMBER
v.)
JOHN DOE,)
DEFENDANT.)

MOTION FOR ORDERS PENDENTE LITE

Comes now the _____, by and through her attorneys of record, and moves this Court for an order granting to her temporary custody of the minor children, temporary support and temporary exclusive occupancy of the marital residence and avers as follows:

- 1. That Plaintiff and Defendant are separated;
2. That a Bill of Complaint has been filed in this matter;
3. That _____ is without sufficient monies to support herself and the minor children of the parties during the pendency of this action;
4. That the _____ is in need of the residence of the parties for herself and the minor children of the parties.
6. That the _____ should be awarded temporary custody of the minor children.

Attorney for
(Address)
(Telephone)

NOTICE OF HEARING

The foregoing Motion for Orders Pendente Lite is set before the Hon. _____, on the _____ day of _____, 19__, at 9:00 A.M.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)
PLAINTIFF,) CIVIL ACTION NUMBER
v.)
JOHN DOE,)
DEFENDANT.)

TEMPORARY EX PARTE RESTRAINING ORDER

WHEREAS, it has been considered by the Circuit Court of Jefferson County, Alabama, on the sworn pleadings of the Plaintiff in the above cause against the Defendant, and the Court having further considered this cause, it is, ORDERED, ADJUDGED and DECREED by the Court that:

- 1. The Defendant is hereby restrained from harassing, intimidating, or committing any acts of violence upon the Plaintiff during the pendency of this action.
2. The Defendant is hereby restrained and enjoined from disposing, transferring, giving away, spending, or otherwise dissipating any assets or monies belonging to the parties, whether individually, or separately, except that the Defendant is allowed to spend a sufficient sum for his normal and customary day to day living expense.
3. The above orders entered by this Court shall be effective immediately pending further and additional orders of the Court.

DONE and ORDERED this the _____ day of _____, 19__, at _____ M.

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)
 PLAINTIFF,) CIVIL ACTION NUMBER
 v.)
 JOHN DOE,)
 DEFENDANT.)

PETITION TO INTERVENE

Come now the Interveners in the above-styled cause and respectfully present to the Court this Petition for Modification of custody of the minor children born during the marriage between Plaintiff and Defendant. As grounds therefore, Petitioners state as follows:

1. That a Complaint for divorce is presently pending in the above styled cause.
2. It has become apparent that neither Plaintiff nor Defendant are fit and proper persons to have custody of the minor children.
3. That the Interveners hereto are in a financial and physical condition to promote the best interests of the children and can provide the necessary testimony to overcome the natural parents' prima face right to custody.
4. That it is not in the best interests of the minor children involved to remain in the custody of the natural parents.

WHEREFORE, PREMISES CONSIDERED, the Interveners hereto respectfully request the Court to enter an order as follows:

- (a) By awarding the care, custody and control of the minor children to the Interveners;
- (b) By ordering the Plaintiff and Defendant to pay child support for the minor children;
- (c) By allowing both Plaintiff and Defendant to exercise reasonable visitation rights with the minor children;
- (d) By ordering the Plaintiff and Defendant to pay a reasonable fee to Interveners' attorney of record;
- (e) By granting any other, further, different or general relief to which Interveners may be entitled in this cause including visitation rights should custody be awarded to Plaintiff or Defendant.

 Attorney for Interveners
 (Address)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer and Counterclaim upon _____, by first class U. S. Mail, properly addressed and postage prepaid this ___ day of _____, 19____.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)
 Plaintiff,) CIVIL ACTION NUMBER
 v.)
 JOHN DOE,)
 Defendant.)

PETITION FOR RULE NISI

COMES NOW the Plaintiff in the above-styled cause and would aver as follows:

1. That on _____, this Honorable Court entered a Final Judgment of Divorce granting to the parties a decree of divorce.
2. That Paragraph ___ thereof provided as follows:
3. That Paragraph ___ thereof provided as follows:
4. That the Defendant has failed to comply with the said Final Judgment of Divorce in the particulars referred to in Paragraphs 2 and 3 herein by failing to _____.
5. That, at all times complained of, the failure to do so was intentional and contumacious and not based on an inability to perform.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays as follows:

- a. That this Honorable Court will issue a Rule Nisi to the Defendant, _____, ordering him to appear before this

Honorable Court and there show cause, if any he has, why he should not be held in contempt for his willful refusal to comply with the terms of said Final Judgment of Divorce.

- b. That, upon a final hearing hereof, this Honorable Court will enter an order holding the Defendant to be in contempt of court for his failure to _____.
- c. That this Honorable Court will order the Defendant to pay the Plaintiff's attorney for her representation in this matter and to pay the costs of court.
- d. Plaintiff prays for such other, further, different and general relief to which, in equity, she may be entitled.

(Client's name)

(Attorney)
Attorney for Plaintiff
(address)
Telephone:

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

Before me, the undersigned authority, a Notary Public in and for said County in said State, personally appeared _____, who, after being first, by me, duly sworn, deposes and says that the foregoing allegations are true and correct.

Sworn to and subscribed before me on this the _____ day of February, 2000.

Notary Public

PLAINTIFF'S ADDRESS **SERVE DEFENDANT AT:**

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE,)	
DEFENDANT.)	

REQUEST FOR PRODUCTION

Comes now the _____ pursuant to Rule 34 of the Alabama Rules of Civil Procedure, and requests within the time prescribed to produce the following:

- 1. A copy of your Federal and State Income Tax Returns for the preceding five (5) years, together with your W-2 forms for the same period.
- 2. The original or legible copies of all documents reflecting your ownership or interest in any real estate for the preceding five (5) years, specifically including any deeds and leases, and the terms and conditions of any and all sales of said property if applicable. Include as part of your response the most recent tax evaluation notice you have received.
- 3. The original or legible copy of any document reflecting your ownership of motor vehicles, boats or airplanes during the preceding five (5) years, specifically including bills of sale, tag notices, and documents of title.

4. The original or legible copies of any life insurance policies insuring your life, together with any and all amendments or modifications or beneficiary designations with regard to said life insurance policies and further, a statement reflecting the cash value of such life insurance policies and whether such policies are pledged to secure any loans to you.

5. The original or legible copy of any checkbook or books including monthly statements and canceled checks from which checks are drawn on any bank account kept or maintained by you, individually or jointly, in any bank for the preceding three (3) year period.

6. The original or legible copy of any passbook, certificate of deposit, or other document evidencing bank accounts, savings and loan accounts, or credit union accounts or accounts at any financial institution, in your name, or in the name of anyone else which are maintained for your use or benefit, for the preceding three (3) years.

7. The original or legible copy of any document indicating any indebtedness currently owed by you.

8. The original or legible copy of any and all financial statements prepared by you, or on your behalf, during the preceding three (3) year period.

9. The original or legible copy of any report of benefits provided by your employer to you, including health care benefits, disability benefits, death benefits, insurance benefits, stock option benefits, employee savings benefits, pension plans, and/or retirement benefits.

10. The original or legible copy of any photograph, file, records, letter, diary, card, document, recording, or statement which you intend to introduce or use in the trial of this matter.

11. The original or legible copy of any document reflecting your ownership of stock during the preceding three (3) years, specifically including stock certificates or monthly statement from stock broker reflecting contents and transactions in your portfolio.

12. The original or a legible copy of any and all documentation evidencing funds received by you for the current calendar year to date, including income, wages, salary, bonuses, commissions, interest, dividends, annuities, pensions, loans, and or gifts from all sources, or any additional sums of whatever kind.

Attorney for

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Request for Production upon , by placing a copy of same in the U. S. mail, properly addressed and postage prepaid, this the ____ day of , 19__.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)
) **PLAINTIFF,**) **CIVIL ACTION NUMBER**
v.))
JOHN DOE,) **DEFENDANT.**)

INTERROGATORIES

Comes now the , and desiring the testimony of , propounds the following interrogatories to be answered separately and severally, in the manner and form provided by law: viz:

1. State each job or employment which you have held in the last five (5) years, listing the name of your employer, job title, salary or wages, years employed and reason for leaving said employment.

2. Please list all income, revenue, monies, or sums, from whatever sources, which you have received during the preceding three (3) years, stating the source and amounts which you have so received, and dates received.

3. Please list each and every bank account or account with any other financial institution, whether savings, checking, or otherwise, which you have maintained during the preceding three (3) years, or presently maintain, alone or together with any other person, or persons, in your own name or in any other name. As part of your answer, give the name and address of each bank or financial institution, the name in which the account was maintained and the account number.

4. Have you kept or made any books of accounts, personal financial statements, or loan applications or records of your financial affairs, during the last three (3) years? If so, give the names, addresses and telephone numbers of any persons having custody of those records.

5. Do you have an accountant? If so, please list his name and office address. List this information for any accountant you have used in the past five (5) years.

6. List, describe, and give present market value and the original purchase price of any of the following items that you own or have any interest in, directly or indirectly:

(a) Negotiable and non-negotiable instruments and securities of any description, including stock, bonds,

mutual funds, treasury instruments, money market accounts, annuity contracts, and the like.

(b) Profit sharing trusts; pension plans, retirement plans, individual retirement arrangements.

© Household goods and furniture and equipment, household stores, wearing apparel and jewelry.

7. List all debts due to you by any corporations, partnerships, persons or other entities. Give the amounts of the debts, and the names and addresses of the persons or corporations owing you the debts or open accounts.

8. State whether you are the beneficiary of any estate, trust, insurance policy, or annuity. If so, describe the nature and amount of each of those benefits.

9. Please state with specificity each and every credit card, charge account, or other credit account which you presently have, including as part of your answer the name or names in which said card or account is maintained, the credit card or account number, the name of the card or account, and the current amount due on said card or account.

10. Please list each and every automobile or motor vehicle, boats, or airplanes, which you currently own, possess, control, or drive, stating the make, model and body style, the license plate number for the current year, and the owner of said vehicle.

11. Please list all real property which you own or have any interest in at the present time or for the preceding three years, giving in your answer the following information:

(a) The legal description of each tract or parcel;

(b) The date on which each tract or parcel was acquired or sold;

© If your ownership in each said tract or parcel is less than complete ownership, the extent of your interest and the names and addresses of the person or persons who own the remaining interest;

(d) The purchase or sale price of each parcel or tract;

(e) Any lien, encumbrance, or indebtedness against each parcel or tract, giving the name and address of the holder of such lien, encumbrance or indebtedness, the present principal balance outstanding, and the form of payment;

(f) The present fair market value of each tract or parcel;

(g) The names of the grantors, grantees, buyers, and sellers.

12. Please state, to the best of your ability, your present net worth.

13. During your marriage to your spouse, have you had sexual relations with any individual or individuals other than your spouse? If your answer is in the affirmative, please state the name and address of such person or persons, and the dates and places where such relations took place.

14. Please state whether you have ever hit, kicked, struck, or otherwise physically abused your spouse. If your answer is in the affirmative, please state the dates and places such physical abuse occurred, the facts surrounding such abuse, and the nature or type of injuries inflicted. Please state whether any person or persons have been present on such occasions, giving their names and addresses.

15. Please state whether you contend that your spouse committed wrongdoing of any nature during the term of your marriage. If so, state the nature of the alleged misconduct, giving in detail the facts and circumstances which support your allegation.

16. Have you conducted any surveillance, whether personally, by an investigator, by any other person, or by electronic means, including intercepting or taping telephone calls of your spouse within the past five (5) years, or has any person or persons conducted such surveillance on your behalf? If so:

(a) State what surveillance you have conducted, including the date, time and place of such surveillance and what you observed.

(b) If some other person or persons conducted such surveillance in your behalf, state the name and address of such person or persons, the date, time and place of such surveillance, and state what was related to you as to what was observed.

17. Are you aware of any documentary evidence, photographs or testimony by any witness that you intend to use at the trial of this case or on deposition in this case which tends to prove that your spouse has had sexual relations with any person other than yourself from the date of your marriage down to the date you answer this interrogatory? If so:

(a) State what documentary evidence you intend to use, including the nature of what is depicted in any photograph.

(b) State the name and address of the person or persons who will so testify together with a synopsis of the expected testimony.

18. If you claim you have any disability of any nature, please state:

(a) The nature or type of the disability;

(b) Please list the name, address and telephone number of each doctor, dentist, or other physician by whom you have been treated within the last five (5) years.

19. Please give the name and addresses of all witnesses whom you intend to call for any purpose in the trial of this cause.

20. Completely list and describe all documents or other physical evidence (tapes, photographs, records, diaries, files, etc) which you intend to use in the preparation or trial of this case.

21. Have you been advised that your answers are made under oath, may be used as material testimony in the event of a trial or hearing, and must be updated if your foregoing responses change?

Dated this the ____ day of, 19 ____.

Attorney for

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Interrogatories upon , by placing a copy of same in the U. S. mail, properly addressed and postage prepaid this ____ day of _____, 19__.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE,)	
DEFENDANT.)	

ACKNOWLEDGMENT OF REPRESENTATION

Comes now the Defendant, _____, in the above-styled cause, and says to this Honorable Court as follows:

1. I have been informed by the Plaintiff's attorney, _____, that she/he does not and cannot represent me and (s)he is the attorney for the Plaintiff, .
2. I have been informed by the Plaintiff's attorney that she/he will use his/her best efforts to protect the interests of his/her client.
3. I have been informed that I have the right to employ counsel of my own choosing and have also been advised that it may be in my interest to do so.
4. I have read all of the papers of this divorce and agree that they can be filed, and understand they will be submitted to the Court without further notice to me.
5. I have signed an Answer and Waiver which was prepared at my request, and an Agreement, and have had both explained to me and I understand both instruments and their purposes.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JANE DOE,)	
PLAINTIFF,)	CIVIL ACTION NUMBER
v.)	
JOHN DOE,)	
DEFENDANT.)	

PETITION TO MODIFY

Comes now the _____, in the above styled cause, and shows unto Your Honors as follows:

1. That the Plaintiff and Defendant were divorced on _____.
2. That said Final Decree of Divorce provided, inter alia, as follows:
""
3. Since the date of said Final Decree of Divorce, there has been a material change in circumstances, which calls for modification of said Decree.
4. That your petitioner herein can introduce evidence which will show that the best interests of the minor child____ can be promoted by a change of custody.
5. That your petitioner herein can introduce evidence that will overcome the inherent disruptiveness caused by a

change of custody of the minor child_____.

6. That your petitioner herein is without sufficient funds with which to pay her attorney of record for services in this matter.

WHEREFORE, PREMISES CONSIDERED, requests this Court, that at final hearing in this matter, enter an order providing, inter alia, as follows:

- A. That the care, custody and control of the minor child_____ of the parties be awarded to the _____ .
- B. That the _____ be ordered to pay a reasonable amount to _____ for support of the minor child.
- C. That the _____ be required to pay a reasonable amount as an attorney fee plus all expenses connected therewith.
- D. That the _____ be granted such other, further, different, and general relief to which she may, in equity and good conscience, be entitled.

Attorney for Petitioner
(Address)
(Telephone)

PLAINTIFF'S ADDRESS:

DEFENDANT'S ADDRESS:

DOCUMENT CHECK LIST

- 1. Custody
- 2. Visitation
- 3. Child Support
- 4. Alimony
- 5. Medical & Dental Insurance -- Evidence of Coverage
- 6. Non-covered -- Medical, Dental, Orthodontic, Optometric and Prescription Drugs
- 7. Life Insurance -- Evidence of Coverage
- 8. Real Property
 - a. Payment of Mortgage, Taxes and Insurance
 - b. Occupancy
 - c. Upkeep
 - d. Sale
 - e. Division of Proceeds of Sale
 - f. Household goods, Furniture & Furnishings
- 9. Automobiles
 - a. Payment, if any
 - b. Execute Documents to Convey Title (direct)
- 10. Bank Accounts
- 11. IRA's
- 12. Pensions
- 13. Payment of Debts, Indemnify and Hold Harmless
- 14. College
- 15. Each Party Execute Documents to Effect Transfers (directed)
- 16. Tax Exemptions
- 17. Attorney fees and Court costs
- 18. Harassment and Interference
- 19. Release
- 20. Recitation of Incorporation of Agreement
- 21. Recitation of Income Withholding for Support
- 22. Resuming Former Name
- 23. Leaving Jurisdiction of the Court
- 24. Waiver of Alimony
- 25. Provide Copies of Tax Returns
- 26. Filing of Joint Tax Returns
- 27. Indemnity for Prior Tax Years
- 28. COBRA
- 29. Guidelines --- CS-41, CS-42, CS-43

