



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION**

ERICKA PHILLIPS POE,

Plaintiff,

v.

VAUGHN POE,

Defendant.

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Case Number: DR-2016-900018.00

RESPONSE TO DEFENDANT'S MOTION TO ALTER, AMEND OR VACATE

Comes now the Plaintiff, Ericka Phillips Poe, by and through her attorney of record, Candice J. Shockley, and in response to the Defendant's Motion to Alter, Amend, or Vacate this Honorable Court's Judgment entered April 4, 2018, would show unto the Court as follows:

FACTS

The Plaintiff agrees with the Defendant's statement that the trial was held on February 21, 2018, and that the parties were married on April 19, 2003, while both were in the military. The Defendant/Husband has totally misstated the remaining "facts" that the parties submitted into evidence at trial through testimony and exhibits.

As this Court will recall, the parties met in 2001 while living in Missouri. After dating for 2 years, the parties married on April 19th, 2003. The Husband was in the Marines at the time of the marriage. After the marriage, the Husband entered Marine Corp Officer Training and transferred to Quantico, Virginia. For the next four years, the parties were stationed in different states, but saw each other frequently, except for the year that the husband was deployed overseas.

In 2006, the husband was reassigned to Montgomery, Alabama and the Wife was stationed in Florida. In 2007, in order to be closer to the Husband, the Wife moved to Tuscaloosa, Alabama. The parties spent most weekends together. The Husband and Wife both wanted a child, and the

minor child, Catlynn was born on July 15, 2008. Due to problems in the delivery of the child, the child spent the first two and one-half months in NICU. The child was then transferred to Children's Hospital. At the time of the Trial, the child was 9 years old. The child suffers from a myriad of health problems, including Cerebral Palsey, Hydro Encephalitis and Bilateral Bracheoplexis (shoulders and hips were separated from the spine at birth). She is confined to a wheel chair and has some use of her left arm, but only minimal use of her right arm and legs. Catlynn is clearly a "Special Needs" child.

Following the birth, the Wife purchased a home in McCalla, Alabama, near her parents, and continued to work in Tuscaloosa. The Husband worked in Montgomery, but spent weekends in McCalla with the wife and the child. Both the wife and her uncle testified that the Husband attended family gatherings during this time and spent weekends with the Wife in McCalla.

In 2010, the Wife had an automobile accident while on her way to work in Tuscaloosa. Her car flipped over into a ravine, and the Wife was severely injured. She broke her neck, back, left leg and hands. For the first six months after the accident, the Wife was blind and totally incapacitated. She was required to undergo multiple surgeries and physical therapy. Her parents and siblings helped to take care of her and the child. During this time, the Husband's visits on the weekends became less frequent. He came to McCalla for the minor child's birthday in July, but left in the middle of the night, leaving the wife and child alone in the home, while the Wife was still immobilized and in a wheel chair.

Since that time, the parties have been separated, but continued to maintain a joint bank account. The Husband has only visited the child five or six times, but he has contributed money in various amounts to the wife and the child.

The Wife remains totally disabled and receives a disability check from DFAS. She continues

to suffer from health problems and had to have surgery on her shoulder as recently as 2017. The Wife submitted to the Court a list of her current living expenses, and the Court questioned the Wife about these expenses because the Wife's income was significantly less than her monthly expenses. The Wife testified that her family helped with some of these expenses, but the Wife requested that the Court order the Husband to pay periodic alimony to assist with these expenses.

The child has undergone multiple surgeries, and the Wife has paid for all of the child's medical expenses that were not covered by insurance, including the cost of travel to Atlanta and to the Shriner's Hospital in South Carolina. The Wife submitted a list of these expenses at trial. Both parties have maintained health insurance for the child since her birth.

Because the child is a "special needs" child, she has many additional living expenses, including physical therapy, back, hand and leg braces, a motorized wheel chair, seizure medication, special education needs and pull-ups, to name only a few. The child requires full time care and special schooling because of her disabilities.

The Court met with the minor child, in camera, and had an opportunity to observe the child's physical condition and "special needs."

The wife testified that it was difficult to get the child and her wheel chair in and out of the Wife's vehicle and that she was going to have to purchase a van equipped with a wheel chair lift. The Wife testified that she did not have sufficient funds to pay for this van, as the cost was \$66,000.00.

The Wife testified that the Husband had only visited the child six or seven times since 2010, and that he had not seen the child at all since September of 2016. The Husband admitted that he only visited the child "several times per year." He testified that it was "cumbersome" to see Catlynn and that everything was "drama and frustration." The Husband acknowledged that

during the Court proceedings, offers had been made through the office of the Husband's attorney, for the Husband to visit with the child, but the Husband had declined these offers.

The Husband acknowledged that he was still working and drawing a military pension and earning \$8716.00 per month. He acknowledged that he owned a house and a farm and that he had four vehicles, two tractors, and various farm equipment and cows. The Husband did not submit a list of his living expenses, nor did he testify about those expenses.

At the conclusion of the Trial, the Court admonished the Husband that he needed to step up and be a father to his child. The Court advised the Husband that he had a responsibility to the child and that the child needed her Father in her life. The Court stated that it was unfair that the Wife had to depend solely on her family to help her with the child, without any assistance from the Husband.

ARGUMENT

1. Custody

The Court granted sole legal and physical custody of the child to the Wife. The Husband argues that he should be awarded Joint Legal Custody of the child and that he should be given "equal authority and responsibility over major decisions affecting the child."

This argument is without merit. The Husband has had no contact with the child in almost two years. Prior to that time, he only visited "several times per year" according to his testimony, or six or seven times over a six year period according to the Wife's testimony.

The Husband has no idea about the special needs of the child, or the child's daily activities, disabilities, or health problems. He does not communicate with the wife, and he has made no effort to participate in the child's medical care.

The Husband has the right to receive and or inspect all records containing information

regarding the child pursuant to Alabama Code Section 30-3-154 (1975). There was no testimony that the Husband had ever attempted to access any of those records or attend any of the child's medical appointments. The Husband has taken no interest in the child's education or extra-curricular activities. The Wife has been the caretaker of the child since the child's birth. The Husband has chosen not to participate. This Court was correct in granting the Wife sole legal and physical custody of the child.

The Court encouraged the Husband to visit with the child on a regular basis, and the Wife to make these visits as pleasant as possible. Should the Husband decide to "step up" and become actively involved in the child's life, he can petition the Court at a later time to grant him joint custody of the child.

2. Child Support

The Court ordered the Husband to pay \$1250 per month to the wife for child support. The Court stated, "This amount is in excess of the amount provided by Rule 32 ARJA. However, due to the special needs of the child, this court finds that this amount is fair and equitable."

There was extensive evidence presented at trial about the additional costs incurred by the Wife for the child, due to the child's special needs. The Court met with the child, and had the opportunity to observe the child and witness the extent of those "needs."

Rule 32 (A)(1) of the Alabama Rules of Judicial Administration provides that the Court may deviate from the Child Support Guidelines if there is evidence of:

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

"The factors to be considered in determining an award of child support have been and

continue to be the needs of the children and the parents ability to respond to those needs.

McGinnis v. McGinnis, 567 So. 2d 390 (Ala. Civ. App. 1990). Although the Rule 32 Child Support Schedule sets out the amount that will generally meet these criteria, the trial court may deviate from the schedule if it makes a finding of fact, based on the evidence, that “the application of the guidelines would be manifestly unjust or inequitable” Rule 32(A) (ii). *Elliott v. Williams*, 631 So. 2d 1020 (Ala. Civ. App. 1993). In the present case, this court complied with the mandates of Rule 32 by determining that, “The amount is in excess of the amount provided by Rule 32 ARJA. However, due to the special needs of the child, this court finds that this amount is fair and equitable.”

Contrary to the Husband’s assertion, the Husband did not offer any testimony regarding his monthly expenses, or make any showing, whatsoever, that he would be unable to pay an amount in excess of the child support guidelines. The Husband earns \$8716 per month, which is certainly sufficient to pay the child support as ordered by this Court.

3. Alimony

The Husband contends that the Wife is not entitled to periodic alimony. This contention is not supported by the evidence that was submitted at trial. The Wife was disabled in 2010, and has been unable to work since that time. There was no evidence offered that the Wife’s condition would improve. Additionally, the Wife is the caretaker of the parties’ disabled child, who requires constant care. It is clear that the Wife cannot maintain employment.

The Husband argues that the parties “only lived together for four months in 2003” and that the Wife has never been “a dependent spouse.” Clearly, the wife has been “a dependent spouse” for the last eight years. While the parties may not have lived together in recent years, it

is clear that they acted as married couple and maintained a marital relationship until the Wife's automobile accident in 2010.

The Husband testified that even after that time he had given the wife various amounts of money, at various times over the past eight years, and that the parties had maintained, through the date of trial, a joint bank account.

The Wife submitted a list of her monthly expenses, and evidence of her disability income, and it was clear that the wife did not have sufficient funds to pay those monthly expenses. The wife testified that her family helped with those expenses.

As stated above, the Husband earns \$8716 per month, and there was no evidence presented that the Husband did not have sufficient funds to meet the wife's needs.

As the Alabama Appellate Court has held:

“.....(i)ssues concerning alimony and child support are matters committed to the sound discretion of the trial court..... “It is well settled that a trial court has no rigid standards on which to base the determination of alimony, but is free to consider the facts and circumstances unique to each individual case. Some of the factors to be considered are the parties' financial circumstances, their ages and the length of their marriage, their standard of living during the marriage, their future prospects, and in appropriate situations, their conduct with reference to the cause of the divorce. *Hughes v. Hughes*, 362 So. 2d 910 (Ala. Civ. App. 1976).

After considering those factors, in *Lemon v. Lemon*, 597 So. 2d 229 (Ala. Civ. App. 1992)

The Court of Civil Appeals held:

“Because of the disparity in the earnings of the parties, and in view of the other terms of the divorce decree we cannot consider the trial court's award of periodic alimony to be palpably wrong or unjust.” *Lemon* at page 230.

In the instant case, this Court correctly determined that the wife was in need of alimony and the Husband had the ability to meet that need.

4. **Contribution to the Wheel Chair Accessible Van**

The Husband contends that he should not have to contribute to the cost of a van that “will accommodate a lift for the minor child’s battery powered wheel chair.” The Husband contends that this payment is tantamount to “alimony in gross”.

While the Court did not classify the husband’s contribution, it is clear that the van is for the benefit of the child and not the wife. The wife testified that it was becoming more and more difficult to get the child and the child’s non-motorized wheel chair in and out of her vehicle, and she needed a vehicle with a lift so that she could transport the child and her motorized wheel chair.

The Husband had not contributed significantly to the support of the child for the past eight years. The Wife had requested, at trial, that the court award a sum to her for child support that the Husband had failed to pay over that eight year period. The Court’s Order that the Husband contribute to the cost of the van could just as easily be considered past support as opposed to alimony in gross.

Alternatively, the Husband testified that during the marriage he had acquired a house, a farm, four vehicles, two tractors, various farm equipment and cows, while the wife had only a home and a vehicle which were both mortgaged. The Husband offered no testimony about his debts or living expenses. The Court could easily have found that the wife was entitled to be compensated for the loss of her rights in this property, as the Court awarded all of the property acquired by the husband to the husband.

5. **Attorney’s Fees**

“The allowance of attorney’s fees in divorce cases is within the sound discretion of the Trial Court. In determining the propriety of awarding such fees, the trial court may consider

the parties conduct, as well as their financial circumstances and earning capacities. *Goree v. Dark*, 550 So. 2d 436 (Ala. Civ. App. 1989).

The Court is not required to include findings of fact to justify awarding attorney's fees. However, the wife's disability and inability to maintain employment because of the special needs of the child, coupled with the disparity in the earnings of the parties, clearly supports the award of attorney's fees to the wife.

Conclusion

This Court correctly determined child support, alimony, the Husband's required contribution to the wheel chair accessible van and attorney's fees. The Husband's Motion to Alter, Amend or Vacate should therefore be denied.

The only amendments to the Final Decree that the Wife would request is that the spelling of the minor child's name be corrected from "Katlynn" to "Catlynn" and that the Court include a provision allowing the Wife to resume the use of her maiden name "Ericka Wynn Phillips".

Respectfully submitted this the 24th day of May, 2018.

/s/ Candice J. Shockley
Candice J. Shockley (SHO007)

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CERTIFICATE OF SERVICE

I hereby certify that on the May 24, 2018, I electronically filed the foregoing with the Clerk

of Court using the Alafile system, which will send notification of such filing to the following Alafile participant:

Ralph B. Mayes
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/s/ Candice J. Shockley
Candice J. Shockley (SHO007)