

Rel: July 28, 2023
Corr: September 15, 2023

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is published in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2023

CL-2022-1010

L.B.

v.

V.T.W.

**Appeal from Lee Juvenile Court
(CS-11-431.03)**

THOMPSON, Presiding Judge.

On April 5, 2022, V.T.W. ("the father") filed in the Lee Juvenile Court ("the juvenile court") a petition seeking to modify custody of the minor child born of his relationship with L.B. ("the mother"). The child reached the age of 12 during the pendency of this matter. In his custody-

modification petition, the father also sought an award of pendente lite custody of the child. The mother filed an answer opposing the father's custody-modification claim. On May 3, 2022, the juvenile court entered an order awarding the father, pendente lite, physical custody of the child.

The juvenile court conducted a hearing over the course of two days in August 2022. On August 25, 2022, the juvenile court entered a judgment in which it found:

"The mother was the primary physical custodian informally and by implication.^[1] However, she is unable to adequately monitor the child at night, and the child has struggles and needs more supervision. The child has recently gotten into serious trouble and his education, if not his entire future, has become at risk. The child needs both parents involved as a team if he is to gain his full potential and placing him in their joint care is a net improvement over the prior situation. This court therefore finds that a change of the custody arrangement is appropriate."

In its August 25, 2022, judgment, the juvenile court awarded the parties joint legal custody and joint physical custody of the child on an

¹An award of "primary physical custody" of a child is, under Alabama law, actually an award of sole physical custody, as that term is defined in § 30-3-151(5), Ala. Code 1975. S.J.H. v. N.T.S., 301 So. 3d 843, 847 n.4 (Ala. Civ. App. 2020); Whitehead v. Whitehead, 214 So. 3d 367, 371 (Ala. Civ. App. 2016). Section 30-3-151(5) defines the term "sole physical custody" as a situation in which "[o]ne parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court."

alternating weekly schedule. See § 30-3-151(2) and (3), Ala. Code 1975 (defining the terms "joint legal custody" and "joint physical custody"). The mother filed a timely postjudgment motion that was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. The mother timely appealed.

The mother argues on appeal that the evidence does not support the juvenile court's August 25, 2022, judgment. In her argument, the mother maintains that the standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), applies. This court has explained the standard set forth in Ex parte McLendon as follows:

""[The McLendon standard] is a rule of repose, allowing the child, whose welfare is paramount, the valuable benefit of stability and the right to put down into its environment those roots necessary for the child's healthy growth into adolescence and adulthood. The doctrine requires that the party seeking modification prove to the court's satisfaction that material changes affecting the child's welfare since the most recent [judgment] demonstrate that custody should be disturbed to promote the child's best interests. The positive good brought about by the modification must more than offset the inherently disruptive effect caused by uprooting the child. Frequent disruptions are to be condemned.'

"McLendon, 455 So. 2d at 865-66 (quoting Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976))."

McElheny v. Peplinski, 66 So. 3d 274, 279 (Ala. Civ. App. 2010).

The custody-modification standard to be applied in a case depends on the nature of the custody award set forth in the judgment that the petitioner seeks to modify. In this case, no documentation concerning the initial paternity and child-support action, or any modifications of the judgment entered in that original action, were submitted into evidence.² However, the parties testified at the final hearing in this matter that they had returned to court several times on the issue of the enforcement of the father's child-support obligation.³ The parties' testimony also indicates that before the entry of the pendente lite order in this matter, the child had lived with the mother and had occasionally visited the father. Thus, the only evidence in the record on appeal indicates that the original judgment entered in the paternity and child-support action implicitly

²The current action has a ".03" designation in its juvenile-court case number, which indicates that there exists at least one judgment entered after the judgment entered in the original paternity and child-support action. However, it is not clear whether that subsequent judgment or judgments addressed the issue of custody of the child.

³At the time of the August 2022 hearing, the father was more than \$14,000 in arrears in his child-support obligation. However, the mother testified that, at the request of the father, she had "dropped" the issue of enforcing her right to that child-support arrearage so that the father could again obtain a driver's license and his professional license; the record indicates that the father installs heating and air-conditioning units.

awarded the mother sole physical custody of the child. See note 1, *supra*. See also R.W. v. D.S., 85 So. 3d 1005, 1007 (Ala. Civ. App. 2011) ("[A] paternity judgment awarding child support to a particular individual constitutes an implied award of custody of the child to that recipient.") (citing T.B. v. C.D.L., 910 So. 2d 794, 795-96 (Ala. Civ. App. 2005)); and Ex parte W.C., 241 So. 3d 22, 26 (Ala. Civ. App. 2017) (same). Also, as explained above, in its August 25, 2021, judgment, the juvenile court found that the mother "was the [sole] custodian informally and by implication." See note 1, *supra*. Accordingly, based on the record on appeal, we conclude that the mother had sole physical custody of the child when the father filed this custody-modification action. McElheny v. Peplinski, 66 So. 3d at 276.

In his custody-modification petition, the father sought to modify a custody award of sole physical custody to the mother; therefore, the father was required to meet the standard set forth in Ex parte McLendon, *supra*. See Machado v. Machado, 329 So. 3d 634, 636-37 (Ala. Civ. App. 2020) (when a trial court modifies an award of sole custody of a child to award the parents joint physical custody, the McLendon standard applies); and McElheny v. Peplinski, 66 So. 3d at 279 (affirming a

modification judgment awarding the parents joint physical custody and stating that "[b]ecause the record ... reflects that the mother retained [sole] physical custody of the child at the commencement of the proceedings in the trial court, the father's request for a change in custody was due to be considered by the trial court in light of McLendon.").

The juvenile court's August 25, 2022, judgment does not contain language specifically stating which custody-modification standard that it utilized in concluding that custody of the child should be modified. To determine which standard the juvenile court applied, "a reviewing court should look to both the judgment and the record in ascertaining whether the trial court has applied the proper substantive custody-modification standard." L.W. v. B.C.D., [Ms. 2200520, Mar. 18, 2022] ___ So. 3d ___, ___ (Ala. Civ. App. 2022). Several cases provide guidance on the issue.

In Turner v. Denney, 899 So. 2d 1016 (Ala. Civ. App. 2004), a divorce judgment awarded the mother sole physical custody of the child born of her marriage to the child's father. The mother in that case petitioned to modify the divorce judgment, and the father filed a counterclaim seeking an award of custody of the child based on his allegation that the mother was interfering with his visitation with the

child. After receiving ore tenus evidence, the trial court entered a judgment that awarded the father sole physical custody of the child. 899 So. 2d at 1017. However, the judgment did not set forth language reflecting which custody-modification standard the trial court had applied, and the allegations in the custody-modification petition in that case did not contain language referencing a custody-modification standard. This court concluded that it was unable to determine from the allegations in the parties' pleadings or from the record which custody-modification standard the trial court had applied in reaching its judgment, and we reversed the judgment, explaining:

"In the instant case, the April 20, 2000, divorce judgment awarded the parties joint legal custody, with the mother having primary physical custody of the child. The father sought to modify that judgment and to obtain primary physical custody of the child. In order to obtain a change in custody, the father was required to meet the standard set forth in Ex parte McLendon[], 455 So. 2d 863 (Ala. 1984)]. Spears v. Wheeler, 877 So. 2d 607 (Ala. Civ. App. 2003); C.A.M. v. B.G.H., 869 So. 2d 507 [(Ala. Civ. App. 2003)], and Dodd v. Dodd, 655 So. 2d 1000 (Ala. Civ. App. 1994). Under Ex parte McLendon, a party seeking a change in custody must show a material change in circumstances since the trial court's most recent order, that the change in custody will materially promote the best interests of the child, and that the benefits of the change in custody will more than offset the disruptive effect of uprooting the child. Ex parte McLendon, 455 So. 2d 863.

"From the record before us, we are unable to determine what standard the trial court applied in modifying custody. The judgment entered by the trial court and the record are silent in that respect."

Turner v. Denney, 899 So. 2d at 1017.

In Dean v. Dean, 998 So. 2d 1060 (Ala. Civ. App. 2008), the father filed a petition in which he, among other things, sought to modify a divorce judgment that had awarded the mother sole physical custody of the parties' minor child. In his petition, the father alleged that "'the good brought about by modifying custody of said minor far outweighs any disruptive effects'" and that "'modification of custody will materially promote the best interest of said minor child.'" Dean v. Dean, 998 So. 2d at 1064. The trial court in that case entered a judgment in which it modified the divorce judgment and awarded the father sole physical custody of the child. This court affirmed, concluding that

"the trial court could have reasonably concluded that the father presented sufficient evidence to support his contentions [made in that part of his petition in which he sought a custody modification] that awarding him custody would materially promote the child's best interests and would outweigh any disruptive effect so as to satisfy the standard set out in Ex parte McLendon[, 455 So. 2d 863 (Ala. 1984)]."

Dean v. Dean, 998 So. 2d at 1065.

In L.W. v. B.C.D., supra, a juvenile court entered a judgment adjudicating the father's paternity of a child, awarding the mother sole custody of the child, and ordering the father to pay child support. The father later petitioned to modify custody of the child, alleging that "there had been a material change of circumstances that warranted a change in custody." ___ So. 3d at ___. The mother in that case filed a separate action seeking to modify the father's child-support obligation and to have the father held in contempt for allegedly failing to pay child support. The juvenile court in that case heard both actions at a hearing and entered a judgment addressing both actions in which it, among other things, awarded custody of the child to the father. The mother appealed, arguing that it was unclear if the juvenile court in that case had applied the correct custody-modification standard.

On appeal in that case, this court held that, because the earlier judgment had awarded the mother sole physical custody of the child, the appropriate standard to be applied to the father's custody-modification action was the McLendon standard. L.W. v. B.C.D., ___ So. 3d at ___. However, this court concluded that it was not clear whether the juvenile court in that case had properly applied the McLendon standard, stating:

"In the cases before us, the juvenile court's April 2021 judgment determined that '[a] change in custody is necessary for the best interest of the child' and that circumstances had 'changed ... since the previous' custody judgment. (Emphasis added.) After stating certain specific findings of fact, the juvenile court acknowledged that the matter concerned a modification of custody rights established in a previous judgment and that the child's best interest is of prime concern in connection with a change in circumstances. However, the April 2021 judgment modifying custody is silent as to whether the benefits of the ordered child-custody modification outweigh the disruptive effects of uprooting the child. The wording in the April 2021 judgment -- 'necessary for the best interest of the child and circumstances have changed' -- does not clearly indicate that the heightened McLendon standard (as opposed to the 'best interest' standard set forth in [Ex parte] Couch, [521 So. 2d 987, 989 (Ala. 1988)]) was applied to the father's custody-modification claim."

L.W. v. B.C.D., ___ So. 3d at ___.

We note that the standard set forth in Ex parte Couch, 521 So. 2d 987 (Ala. 1988), cited in L.W. v. B.C.D., *supra*, is applicable to initial custody determinations between two fit parents. Under Ex parte Couch, *supra*, in an initial custody determination, parents stand on equal footing and custody is determined based on the best interests of the child or children. 521 So. 2d at 989.

The Couch "best interests" standard is also applicable to the modification of a judgment that awarded joint physical custody of a child to the parents. In the context of such a modification, however, in addition

to meeting the Couch best interests standard, the petitioning parent must also demonstrate that a material change in circumstances has occurred since the most recent custody judgment. As is explained in L.W. v. B.C.D., supra, the requirement in the McLendon standard that "the noncustodial parent demonstrate that the benefits of the proposed change of custody would outweigh its inherently disruptive effects" is not applicable if "the previous custody judgment does not favor one parent over another," i.e., if the Couch standard applies because the previous custody judgment awarded the parents joint physical custody of the child. ____ So. 3d at _____. See also Williams v. Williams, 243 So. 3d 826, 828 (Ala. Civ. App. 2017).

Our supreme court has explained:

"Where, as in the present case, there is a prior judgment awarding joint physical custody, "the best interests of the child" standard applies in any subsequent custody-modification proceeding. Ex parte Johnson, 673 So. 2d 410, 413 (Ala. 1994) (quoting Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988)). To justify a modification of a preexisting judgment awarding [joint physical] custody, the petitioner must demonstrate that there has been a material change of circumstances since that judgment was entered and that "it [is] in the [child's] best interests that the [judgment] be modified" in the manner requested. Nave v. Nave, 942 So. 2d 372, 376 (Ala. Civ. App. 2005) (quoting Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987))."

Ex parte Blackstock, 47 So. 3d 801, 804-05 (Ala. 2009) (emphasis added).

In this case, in his modification petition, the father alleged that there had been "a material change in circumstances since the [last judgment] such that it is in the best interests of the minor child" to be placed in the father's sole physical custody. That language is similar in some respects to the standard set forth in Ex parte McLendon, *supra*. However, the language used by the father in his modification petition is also similar to the standard set forth in Ex parte Couch, *supra*, which is applicable to the modification of a judgment that awarded the parents joint physical custody of a child. Ex parte Blackstock, *supra*.

In this case, the juvenile court made several factual findings, including that, at the time the father initiated his custody-modification claim, the mother had been the child's sole physical custodian. See note 1, *supra*. Thus, we do not presume that the juvenile court applied the Couch standard in the context that this was an initial custody determination between the mother and the father. G.E.A. v. D.B.A., 920 So. 2d 1110, 1114 (Ala. Civ. App. 2005) ("[T]his court will not presume such error on the part of the trial court.").

However, the juvenile court's judgment contains no language indicating the custody-modification standard it utilized in reaching that judgment. Further, the parties did not argue or address before the juvenile court the custody-modification standard he or she contended was applicable to the dispute. The record is silent with regard to which custody-modification standard the juvenile court applied, and, consequently, this court is unable to determine whether the juvenile court properly applied the McLendon standard to the facts of this case. L.W. v. B.C.D., supra; Turner v. Denney, supra. Accordingly, we reverse the judgment and remand the cause for the juvenile court "to apply the McLendon standard to the evidence it received and to enter an appropriate judgment based on that standard." L.W. V. B.C.D., ___ So. 3d at ____.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Hanson and Fridy, JJ., concur.

Moore, J., dissents, with opinion, which Edwards, J., joins.

MOORE, Judge, dissenting.

I respectfully dissent.

In his custody-modification petition filed in the Lee Juvenile Court ("the juvenile court"), V.T.W. ("the father") alleged that the factors set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), warranted a change in the custody of the minor child born of his relationship with L.B. ("the mother"). In paragraph 3 of his petition, the father averred that there had been a material change of circumstances since the last custody determination such that it was now in the best interest of the child to change custody. In paragraph 7 of the petition, the father claimed that "any inherent disruptive effect caused by modifying custody is more than offset by the positive good that will come about from such modification." The mother filed an answer denying the material allegations of the petition and demanding strict proof thereof. From the pleadings, the juvenile court was informed that the parties were litigating the case pursuant to the McLendon standard.

As noted by the main opinion, the juvenile court entered a judgment on August 25, 2022, finding that placing the child in the joint custody of the mother and the father "is a net improvement over the prior situation."

By referring to a "net" improvement, the juvenile court impliedly determined that the positive good from the change of custody outweighed the disruptive effects on the child. I can discern no other meaning the juvenile court intended to convey from that specific language.

In making its custody determination, the juvenile court was presumed to know and properly apply the law. See Gallant v. Gallant, 184 So. 3d 387, 402 (Ala. Civ. App. 2014). That presumption can be overcome only by an affirmative showing that the juvenile court used some different, incorrect custody-modification standard. This court cannot assume error; the appellant has an affirmative duty of showing error. Perkins v. Perkins, 465 So. 2d 414, 415 (Ala. Civ. App. 1984). I believe that the record shows that the juvenile court applied the McLendon standard or, at the very least, that it fails to show that the juvenile court did not apply the McLendon standard. In the absence of such a showing, I do not believe that this court should reverse the judgment and remand the case for the juvenile court to clarify its judgment. Instead, I believe that we should consider this appeal on its merits and decide whether sufficient evidence supports the judgment.

Edwards, J., concurs.