Rel: May 17, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171097

K.L.H.

v.

J.R.C.

Appeal from Madison Juvenile Court
(CS-14-900566.01)

THOMPSON, Presiding Judge.

On January 2, 2018, J.R.C. ("the father") filed in the Madison Juvenile Court ("the juvenile court") a petition seeking to modify custody of A.R.C.H. ("the child"), a child born of his relationship with K.L.H. ("the mother"). The

parties were never married. According to allegations in the pleadings, the father's paternity had been established by an earlier judgment of the juvenile court entered in an action that was assigned a different case number.[1] A later, April 3, 2015, judgment of the juvenile court entered in another action awarded the mother sole physical custody of the child and established visitation schedule for the father.[2]

The mother answered and opposed the father's January 2, 2018, modification petition. The father later amended his petition to allege that the mother was voluntarily underemployed for the purposes of a child-support

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[1]The date of the judgment establishing the father's paternity and his child-support obligation is not contained in the record on appeal. That judgment was entered in case number CS-13-900589.

[2]It appears that that action originated as a modification action. Although the parties refer to the award of custody of the child as one awarding the mother "primary physical custody," under § 30-3-151, Ala. Code 1975, that award constituted an award of sole physical custody to the mother. See Smith v. Smith, 887 So. 2d 257, 262 (Ala. Civ. App. 2003) ("[T]here is but one way to interpret a judgment that awards 'joint custody' with an award of 'primary physical custody' to one parent--such a judgment must be interpreted as awarding the parents joint legal custody and awarding one parent sole physical custody, the term used by [§ 30-3-151] to denote a parent being favored with the right of custody over the other parent, who will receive visitation.").

determination, and he asserted a claim for an award of an attorney fee. The mother opposed the father's amended petition. The mother later filed a counterclaim seeking to modify the father's child-support obligation.

The juvenile court conducted an ore tenus hearing on August 6, 2018. On August 10, 2018, the juvenile court entered a judgment in which it, among other things, awarded sole physical custody of the child to the father. The mother filed a postjudgment motion. The father filed an opposition to that motion or, in the alternative, a postjudgment motion of his own. The juvenile court entered an August 24, 2018, postjudgment order that slightly altered the August 10, 2018, judgment in ways not relevant to the issue presented in this appeal. The mother timely appealed.

The record on appeal indicates that, at the time of the August 6, 2018, ore tenus hearing, the parties' child was five years old and was about to begin kindergarten. Pursuant to the April 3, 2015, judgment, the father had visitation with the child from Wednesday night through Monday morning on alternating weeks, and on Sunday nights on the other weeks. The evidence is undisputed that the mother has afforded the

father additional visitation time with the child. The parties often worked together to switch custodial periods to accommodate each other's schedule. The father admitted that, with certain exceptions, the mother often granted his requests to alternate visitation days or to allow him additional time with the child. The father also conceded that the mother had offered him time with the child not provided for in the April 3, 2015, judgment during her period of extended summer custody of the child. In her testimony, the mother testified that she believed that it was "cruel" for both a parent and a child not to see each other for a period as long as three weeks.

In contrast, the father admitted that, for the most part, he did not allow the mother additional time with the child. The record indicates that, to some extent, the father had switched days under the visitation schedule in order to accommodate the mother's work schedule. However, the mother briefly worked out of state from December 2017 through January 2018 and again from February 2018 through April 2018. The child lived with the father during those periods. During one of those periods, the mother returned home on weekends, and the father refused to allow the mother to see the child during

weekends on which his visitation was scheduled under the April 3, 2015, judgment. Also, the father and the child traveled to visit his family in Pennsylvania for a week, and the mother, who was then working approximately two hours away, requested that she be allowed to visit the child for a few hours; the father refused that request.

The father testified that, since the entry of the April 3, 2015, judgment, the mother had had nine jobs and that her work schedule had resulted in a lack of stability for the child. Included in the father's count of the mother's jobs were two contract jobs, each of which lasted six to eight weeks. The mother testified that there were few high-paying jobs in her field of science in the area in which the parties lived; the mother has a degree in biochemistry and has worked in the pharmaceutical field. She explained that she had not wanted to relocate with the child for better employment because that would result in the child's having less frequent contact with the father. The mother testified that she believed that the child, a son, needed frequent contact with his father. The mother explained her reasons for quickly leaving some jobs; in one she was very unhappy, and she held

another for only a few days before she was offered a higher-paying job much closer to her home.

The mother's mother ("the maternal grandmother") lives with the mother and the child. It is undisputed that the maternal grandmother often takes care of the child for both parties and that she often takes the child to, or retrieves him from, his school for both the mother and the father.

The father was unemployed at the time of the August 6, 2018, ore tenus hearing. He stated that the company for which he had worked closed the workplace at which he had been employed. The father testified that, at that time, he was receiving income from a severance settlement that provided him income for six months. The father testified that he was looking for another job and that his search had included both local jobs and employment in other areas. The father denied that he planned to relocate with the child. However, the father later admitted both that he wanted to move and that he wanted custody of the child.

The father also cited as a basis for seeking to modify custody his allegation that the mother was financially irresponsible. He cited the fact that discovery in this

action had demonstrated that the mother was $300,000 in debt. In his testimony on cross-examination, the father admitted that the majority of that amount was the mother's mortgage indebtedness on her home and that the remainder was the mother's student-loan indebtedness. The mother confirmed that testimony and testified that she had minimal credit-card debt. The father also testified that, on one occasion, when the mother was behind in paying for the child's "after-school care," she had spent money at a craft fair.

The primary basis for the father's seeking the custody modification was his contention that the mother does not effectively discipline or parent the child. The father testified that the child does not listen to or obey the mother. He stated that the mother is not consistent with the child and that she often does not follow up with attempts to discipline the child. The father alleged that, when the child is with the mother, the child throws tantrums and that the child has hit and has bitten the mother. The father also presented evidence indicating that the mother often consults him about the child and asks for advice on how to handle the child's behavior.

As examples of the mother's inability to properly parent the child, the father testified to an incident he had witnessed when the father was "Facetiming"--i.e., conducting a on-line video conference--with the mother and the child when the child was three years old; the mother and the child were preparing to leave the house for the day. The father testified that the mother had instructed the child to put on his shoes but that, when the child did not do so, the mother put the child's shoes on the child's feet. The father also testified that, when the child refused to eat a bagel the mother had prepared for him, the mother instead gave the child a muffin. The father stated that, with regard to that incident, the mother had catered to the child rather than disciplining him.

The father also stated that, on one occasion, the mother told the child he could not play with his toys as a method of discipline and that she locked the door to the room in which the toys were located. The father believed that the mother should not have locked the door and that, by doing so, the mother had "kind of passed the decision for [the child] to be able to play in his toy room to an inanimate object rather

than saying 'you can't play with the toys because I said so.'" The father also testified that he has witnessed the child strike and bite the mother during a tantrum; he did not specify the age of the child when that occurred.

The mother testified that she has attempted to communicate frequently with the father and that the father rarely communicates with her. The mother testified that she has read three books on co-parenting with the father and that, that was the reason she attempts to communicate frequently with the father. The mother stated that she believes that, in order for co-parenting to succeed, it is better for one parent to attempt to communicate than having neither parent doing so.

The mother denied that the child "runs all over her." She stated that she disciplines the child by speaking with him about his actions and the consequences, by taking things away from him, and by occasional spankings. The mother testified that the child is a good child and that the father is the person who is hardest on the child. In his testimony, the father admitted that he is controlling over the child. The mother denied that she had had trouble putting the child to bed or with waking him up in the morning, and she stated that

the child is not any more defiant with her than other children his age are with their parents. The mother admitted that she had had a conference with the child's teacher about the child's behavior at home; she denied that she believed that the child's behavior at home was a problem, but she believed that she could benefit from some advice from the teacher.

The child's pre-kindergarten teacher testified that, in addition to a conference, the mother had e-mailed her and spoken with her by telephone about the child's not doing things she asked him to do at home, such as dressing for school. The teacher stated that she asks parents to complete a behavior survey about their children and that the mother's responses to that survey indicated "red flags" that were not matched by her experience of the child's behavior at school. The teacher testified that she had seen the child be rude to the maternal grandmother and that she believed that the mother spoiled the child inappropriately. The teacher also stated that the child seemed short-tempered with the mother but that he was more calm with the father; she stated that the child's overall behavior had been more calm during the time he lived with the father while the mother worked out of state.

A pre-kindergarten school administrator testified that she had observed that the child is temperamental with the mother and that he had been violent with her; she also stated that the child was defiant with the maternal grandmother. The administrator stated that the child was better behaved and more settled with the father. We note, however, that, on cross-examination, the administrator stated that, other than speaking to the mother by telephone on one occasion, the only other contact she had had with the mother was observing her approximately five times in the school drop-off line.

The father, the mother, and the child's teacher all agreed that the child is not badly behaved and that his behavior is typical for children his age. Both parents agree that the child is healthy and smart. The teacher described the child as "well adjusted" and "resilient," and she stated that "I think he is going to do fine." The child's "grades" in his pre-kindergarten year were "exceeds expectations"; the teacher explained that letter grades were not assigned to children in that pre-kindergarten program.

In its August 10, 2018, judgment transferring sole physical custody of the child to the father, the juvenile court found, in pertinent part:

> "1. That the parties were before the court previously and received a final [judgment] granting them joint legal custody with primary physical custody to the Respondent Mother on April 3, 2015. In that [judgment], the child support, insurance and other matters regarding the child were set out.
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> "2. That since that time, the parties have continued to abide by that order and cooperate with each other to the extent that when the mother has the child she has made every effort to allow the father extra involvement. There were several occasions that because of her employment situation, she would leave the child with the father for extended periods.
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> "3. That the father has spent a great deal of time with the child and they have bonded to a great degree.
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> "....
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> "The court further finds:
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> "2. That concerning the issue of holiday visitation, the mother has voluntarily allowed the child to spend Christmas time and bond with his paternal relatives, at no time insisting upon any visitation for her and her family. It is obvious to the court that the mother still has feelings for the father and has made every effort to try to accommodate him, hoping that it would in some way change his feelings toward her. As noted in the previous order of the court, the father has no

emotional attachment to the mother and his only involvement appears to be due to the child they share together.[3] The court does note that they have been able to peacefully coexist concerning this matter but they both came into court desiring different results.

"3. That while the child has been in the mother's care, the mother has been unable to deal with the child's basic adolescent behavior,[4] none of which is out of the ordinary and is normal for a child of his age, but even with assistance from her mother and from her description of having used numerous child rearing books, she has been unable to gain control over his behavior demonstrating that she will be unable to appropriately parent him to the point of getting him ready to go to school and even due to his behavior at home she has sought the help from the school officials. It is noted that when the child is in the father's care for an extended amount of time, due to the mother's employment situation, ... his behavior drastically improves, even with the father present during the outings with the school it was demonstrated that the behavior was much different and he has shown himself better able to parent this child and help him to grow toward maturity.

"4. That there has been a material change in circumstance and the mother's ability to appropriately parent the child, none of which is brought on by her employment situation but by her inability to appropriately parent him.

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[3]This court could not locate any previous judgments contained in the record that refer to the parties' feelings for each other.

[4]The child is five years old and not an adolescent.

> "5. That there would be no disruptive effect for [there] to be a change in custody due to her inability to appropriately parent the child. ..."

The mother argues on appeal that the juvenile court erred in modifying custody of the child. The parties did not dispute that the April 3, 2015, judgment awarded the mother sole physical custody and, therefore, that, in seeking to modify that custody award, the father was required to meet the burden set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). This court has explained:

> "The law is well settled that '[a] parent seeking to modify a custody judgment awarding [sole] physical custody to the other parent must meet the standard for modification of custody set forth in Ex parte McLendon[, 455 So. 2d 863 (Ala. 1984)].' Adams v. Adams, 21 So. 3d 1247, 1252 (Ala. Civ. App. 2009). Ex parte McLendon requires that
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> > "'the noncustodial parent seeking a change of custody must demonstrate (1) "that he or she is a fit custodian"; (2) "that material changes which affect the child's welfare have occurred"; and (3) "that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting the child." Kunkel v. Kunkel, 547 So. 2d 555, 560 (Ala. Civ. App. 1989) (citing, among other cases, Ex parte McLendon, 455 So. 2d 863, 865-66 (Ala. 1984) (setting forth three factors a noncustodial parent must demonstrate in order to modify custody)).'

> "McCormick v. Ethridge, 15 So. 3d 524, 527 (Ala. Civ. App. 2008). It is not sufficient for a noncustodial parent seeking a modification of custody to show that he or she is a fit custodian. Id. The noncustodial parent must prove all three McLendon factors in order to warrant a modification of custody. Id."

Gordon v. Gordon, 231 So. 3d 347, 352-53 (Ala. Civ. App. 2017).

The mother argues that there was no material change in circumstances that warranted a change in custody of the child. The juvenile court attributed its determination that a material change in circumstances had occurred to its finding that the mother could not appropriately parent the child; it also concluded that there would be no disruption to the child by changing custody.

The evidence indicates that the father is more strict and consistent with the child. The father criticized the mother's discipline of the child, and he speculated that the mother's method of parenting "could" lead to the child's having behavioral problems in the future. The father testified that the child failed to obey the mother, but the mother stated that the child was no more defiant than a typical child of his age. The juvenile court might have found the father's

testimony more credible. See D.M. v. Walker Cty. Dep't of Human Res., 919 So. 2d 1197, 1214 (Ala. Civ. App. 2005) ("'The [juvenile] court, as the finder of fact, is required to resolve conflicts in the evidence.'" (quoting Ethridge v. Wright, 688 So. 2d 818, 820 (Ala. Civ. App. 1996))).

However, the record contains no indication that the child had exhibited behavioral problems at the father's home, at school, during extracurricular activities, or with friends. The evidence was that the child was exceeding expectations in his pre-kindergarten year. Both parents agreed that the child is happy, healthy, and well adjusted under the custody provisions of the April 3, 2015, judgment. The child's teacher confirmed that testimony.

In order to demonstrate a material change in circumstances, "the party seeking the modification of custody must prove 'a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child or children involved.'" Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005) (quoting Ponder v. Ponder, 50 Ala.

App. 27, 30, 276 So. 2d 613, 615 (Civ. 1973)) (emphasis added).

In Bishop v. Knight, 949 So. 2d 160 (Ala. Civ. App. 2006), the trial court granted the father's petition to modify an earlier judgment that had awarded the mother sole physical custody of the parties' children; he sought an award of sole physical custody of only the oldest child. The father testified that he objected to several of the mother's disciplinary methods, which included paddling the children and cutting their hair as a punishment. Also, the oldest child had been reprimanded five times for misbehaving on the school bus, and he had been suspended from school twice for his misconduct on the bus. After the second suspension, the mother made the oldest child walk the three-mile trip to and from school for three days. On appeal, this court concluded that the trial court had based its modification judgment on its findings that the mother had inappropriately disciplined the oldest child. 949 So. 2d at 166. This court reversed the trial court's judgment, concluding that, although the members of this court might not agree with all of the mother's methods for disciplining the child, the evidence did not support the

trial court's determination that the mother's discipline of the child was sufficient to warrant a modification of custody. Bishop v. Knight, supra.

In K.U. v. J.C., 196 So. 3d 265 (Ala. Civ. App. 2015), the father and the stepmother commenced an action seeking to modify an earlier judgment that had awarded custody of the father's child to the child's maternal grandmother. The juvenile court in that case granted the petition and awarded custody of the child to the father and the stepmother. The evidence indicated, among other things, that the maternal grandmother had taken the child to a general practitioner and that she had initially resisted taking the child to a pediatrician for testing for attention-deficit-hyperactivity disorder. However, when that testing was recommended by the guardian ad litem, the maternal grandmother assisted the father in locating a suitable pediatrician. The record also indicated that the child was reading just below grade level and that the father and the stepmother were reading often with the child. The record also demonstrated that the maternal grandmother was also assisting the child and had obtained a tutor for the child. The father and the stepmother believed

that the child did not have a sufficiently wide social life; however, the maternal grandmother testified that the child had friends from church and extracurricular activities. There was also evidence indicating that the maternal grandmother had allowed the child's mother unsupervised visitation with the child, which violated the terms of the earlier custody judgment. This court noted that no evidence was presented indicating that the contact with the mother had endangered the child. 196 So. 3d at 276.

This court reversed the custody-modification judgment, concluding, in part:

> "The foregoing critiques of the maternal grandmother's parenting style may prove that she is an imperfect custodian in the eyes of the father, the stepmother, and the guardian ad litem. That same evidence may also show that the child would be raised differently by the father and the stepmother; however, in order to meet the McLendon standard, a noncustodial parent must prove more than his or her disagreement with the particular methods selected by a custodian for meeting the medical, educational, social, and other needs of a child. See Bishop v. Knight, 949 So. 2d 160 (Ala. Civ. App. 2006) (reversing judgment modifying custody based on parental disagreement over disciplinary measures). The noncustodial parent must show that his or her plan of care would improve the life of the child."

K.U. v. J.C., 196 So. 3d at 277.

In order to warrant a modification of custody under the McLendon standard, the party seeking the modification must also demonstrate that the proposed modification will materially promote the child's best interests. In Andrews v. Andrews, 495 So. 2d 688 (Ala. Civ. App. 1986), the father sought to modify an earlier judgment awarding the mother custody of the parties' children. The trial court entered a judgment modifying custody of the children, and the mother appealed. The evidence indicated that, during the summer, the mother left the children, who were 13 and 11 years old, at a country club while she worked during the day. This court noted, however, that, although more supervision of the children might have been desirable, the mother's leaving the children at the country club did not show "any lack of concern or caring on the part of the mother, with whom the children had frequent telephone contact during the day." Andrews v. Andrews, 495 So. 2d at 690. In that case, the father also criticized the mother's discipline of the children, saying that he would be more strict with them. The record indicates that one of the children had had several discipline issues, including a shoplifting incident. A psychologist reported

that neither child in that case wanted to live with the father and that the mother's method of disciplining the children was different from that of the father. This court reversed the trial court's modification judgment, concluding that the father had failed to present sufficient evidence that a modification of custody would materially promote the children's best interests. This court explained:

> "The father has simply not shown that the mother's actions or inactions or her lifestyle and method of parenting were such that taking the children from her custody and placing them with him would materially promote their interests. The evidence shows that the children are basically well adjusted. To be sure, the record reflects that they have had some problems, particularly the son. He has had disciplinary problems, including an attempt to 'shoplift' at the local mall, and some problems with his grades, apparently due in part to a slight learning disability related to hyperactivity. The evidence, however, does not show that these problems are the result of any lack of care or concern on the part of the mother. Put another way, the evidence does not show that a change in custody would alleviate these or other such problems."

Andrews v. Andrews, 495 So. 2d at 690. See also P.A.T. v. K.T.G., 749 So. 2d 454, 458 (Ala. Civ. App. 1999) (reversing a custody-modification judgment awarding the mother custody and explaining that, "[i]n this present case, the mother presented evidence indicating that the child was happy, was

well-adjusted, and was performing well in school while in the mother's custody. However, no evidence indicated that the child was not happy and well-adjusted and would not perform well in school while in the custody of the father."); but see Jones v. McCoy, 150 So. 3d 1074, 1082 (Ala. Civ. App. 2013) (affirming a custody-modification judgment awarding the father custody when "the trial court heard evidence indicating that the mother was not meeting the social and athletic needs of the child and that the mother's behavioral rules were stifling the ability of the child to mature into an independent and self-reliant young adult. That evidence, as accepted by the trial court, demonstrated that, since the last custody judgment, a material change of circumstances had occurred that had negatively impacted the welfare of the child.").

Essentially, this case involves a difference in parenting styles of the parents. The evidence indicates that the child is calmer when he is with the father, who is the more strict disciplinarian of the two parents. "Although some of the members of this court may not agree with all of the mother's disciplinary methods," Bishop v. Knight, 949 So. 2d at 168, we conclude that, although the child might be better behaved when

with the father, there is nothing in the record to support a conclusion that the mother's parenting style is so deficient that there has been a material change in circumstances or that a change in custody would materially promote the best interests of the child. Andrews v. Andrews, 495 So. 2d at 690 ("The father has simply not shown that the mother's actions or inactions or her lifestyle and method of parenting were such that taking the children from her custody and placing them with him would materially promote their interests.").

We recognize that this court's review of the evidence is limited and that an appellate court may not substitute its judgment for that of the trial court. Haynes v. Haynes, 109 So. 3d 179, 186 (Ala. Civ. App. 2012). "This court is keenly aware of the presumption of correctness that attaches to a trial court's judgment that is based on evidence presented ore tenus. However, when the evidence contained in the record does not support the judgment, we have no alternative; we must reverse it." P.A.T. v. K.T.G., 749 So. 2d 454, 458 (Ala. Civ. App. 1999).

The record in this case indicates that the father disagreed with the mother's parenting style and method of

discipline and that he was the more strict parent of the two. The father presented no evidence to support his testimony concerning what problems "could" result later as a result of the mother's method of discipline. It is undisputed that both parents are fit parents for custody of the child. The father was required to demonstrate both that a material change in circumstances that affects the welfare of the child had occurred and that the benefits of a change in custody would more than offset the disruptive effect of that change. Gordon v. Gordon, 231 So. 3d at 353; Ex parte McLendon, supra. We cannot agree with the juvenile court that the evidence presented by the father met that burden. Accordingly, we reverse the judgment and remand the cause for the entry of a judgment in compliance with this court's opinion.

The father's request for an attorney fee on appeal is denied.

REVERSED AND REMANDED.

Moore and Hanson, JJ., concur.

Donaldson, J., dissents, with writing.

Edwards, J., dissents, without writing.

DONALDSON, Judge, dissenting.

I continue to think that the standard espoused in Ex parte Mclendon, 455 So. 2d 863 (Ala. 1984), should be treated at trial as an evidentiary rebuttable presumption under Rule 301(b)(2), Ala. R. Evid., and analyzed on appeal accordingly. See Gallant v. Gallant, 184 So. 3d 387, 405-06 (Ala. Civ. App. 2014) (Donaldson, J., concurring specially). Nevertheless, even under the current manner in which modifications of physical custody of children are reviewed on appeal, I would affirm the judgment, and, therefore, I respectfully dissent.

A child was born to K.L.H. ("the mother") and J.R.C. ("the father) in 2013. In March 2015, a trial was held in the the Madison Juvenile Court ("the trial court") at which testimony was presented on the issue of which party should have custody of the child. In April 2015, the trial court entered a judgment providing, among other things, that the mother and the father would have joint legal custody of the child and the mother would have sole physical custody.

In January 2018, the father filed a complaint to modify the 2015 judgment, seeking, among other things, sole physical custody of the child. A trial was held on August 6, 2018,

before the same trial judge who had presided at the 2015 trial. The trial judge recognized this, observing during the trial that "I know who my people are when they're coming back, so I am very familiar with you both. And I don't know what you've done since I [have] last seen you." The trial judge heard testimony from the mother, the father, the administrator at a preschool attended by the child, and a teacher at the same preschool. On August 10, 2018, the trial court entered a judgment modifying the 2015 judgment to provide, among other things, that the father would have sole physical custody of the child. The trial court made several findings of fact in the 2018 judgment, including:

> "2. That since [the entry of the 2015 judgment], the parties have continued to abide by that order and cooperate with each other to the extent that when the mother has the child she has made every effort to allow the father extra involvement. There were several occasions that because of her employment situation, she would leave the child with the father for extended periods.
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> "3. That the father has spent a great deal of time with the child and they have bonded to a great degree.
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> "The court further finds:
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> "3. That while the child has been in the mother's care, the mother has been unable to deal with the child's basic adolescent behavior, none of which is out of the ordinary and is normal for a child of his age, but even with assistance from her mother and from her description of having used numerous child rearing books, she has been unable to gain control over his behavior demonstrating that she will be unable to appropriately parent him to the point of getting him ready to go to school and even due to his behavior at home she has sought the help from the school officials. It is noted that when the child is in the father's care for an extended amount of time, due to the mother's employment situation, ... [the child's] behavior drastically improves, even with the father present during the outings with the school it was demonstrated that the behavior was much different and he has shown himself better able to parent this child and help him to grow toward maturity.
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> "4. That there has been a material change in circumstance and the mother's ability to appropriately parent the child, none of which is brought on by her employment situation but by her inability to appropriately parent him.
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> "5. That there would be no disruptive effect for [there] to be a change in custody due to her inability to appropriately parent the child."

I believe that the findings are sufficient to support the decision of the trial court to modify the physical custody of the child and that the judgment must be affirmed on appeal unless those findings are "plainly and palpably wrong" based on the evidence presented. See Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)("'"A custody determination of the trial court

entered upon oral testimony is accorded a presumption of correctness on appeal, and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong...."'" (quoting Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), quoting in turn Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993))).

The mother and the father presented conflicting testimony about their respective parenting styles. Because a trial court is "'unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility'" when presented with ore tenus evidence, Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007) (quoting Ex parte Fann, 810 So. 2d at 633), we accord a trial court's factual findings a presumption of correctness when based on conflicting ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008). The trial court's characterization of the mother's parenting style and her "inability to appropriately parent [the child]" is supported by the father's testimony and other ore tenus evidence, if that evidence was found to be credible by the trial court. Testimony was also presented from the administrator at the preschool the child attended during the 2017-2018 school year

and the child's teacher. Those witnesses described their observations of the child and interactions with the parents and the child. In addition to other observations, the administrator described the child as "violent," "temperamental," and "defiant" while with his mother or the maternal grandmother; expressed concerns about the mother's "ability to make consistent decisions with regard to [the child]"; and described interactions between the child and father as "[t]ypical, positive, normal." The administrator testified that, among other things, the child's behavior improved while with the father, as the child was more calm, settled, and expressive.

The teacher described the child as being "short tempered" with his mother but more patient and "even keel[ed]" with his father. She described seeing the child have temper tantrums while with the mother. She testified: "Based on what I've observed he has more of a schedule with his dad and dad doesn't seem to struggle with getting him to bed and getting him to do various things around the house that mom did." The teacher further described uncertainties with the mother about

whether the child would be picked up after school, with many "last minute changes."

The child was two years old when the 2015 judgment determining custody of the child was entered, and the child was five years old at the time of the trial of this case. The testimony at trial supports the trial court's findings that the parents had different parenting styles, that the child exhibits different behaviors with each parent, and that the mother's parenting style has resulted in the child's negative behavior while he is around the mother. Therefore, the evidence supports a finding that a material change in circumstances has occurred.

I also note that the father presented evidence indicating that the child had been in his custody approximately two-thirds of the time in 2017 and 2018 (65% of the time in 2017 and 66% in 2018). Therefore, the trial court's finding that a change of physical custody to the father with the mother having visitation would not be disruptive to the child is supported by the evidence.

Although the evidence certainly supports a finding that the mother loves and cares for the child, and although the

trial judge could have decided to leave the child in the physical custody of the mother without there being an immediate danger or threat to the child's welfare, the issue was whether a "change of custody [would] 'materially promote[]' the child's best interest and welfare." Ex parte Mclendon, 455 So. 2d at 866. The trial court found that the benefit from a change of custody was more than hypothetical, specifically that a change of custody would remedy what the trial court determined were behavioral issues exhibited by the child. We might have reached a different result if we had been in the position of the trial judge, but I cannot say, from an appellate-review perspective, that the trial court's findings are "plainly and palpably wrong" without reweighing the evidence.