REL: AUGUST 23,2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180271 and 2180272

Bo.S. and L.P.

v.

Be.S.

Appeal from Chambers Juvenile Court
(JU-16-124.02 and JU-16-125.02)

HANSON, Judge.

The custodians of two minor children, K.M.S. and E.J.S. ("the children"), i.e., Bo.S. and his wife L.P. ("the custodians"), appeal from two judgments of the Chambers Juvenile Court awarding custody of the children to their

biological mother, Be.S. ("the mother"), as of June 1, 2019. We reverse and remand.

The record reflects the following pertinent facts.[1] The children, who were six years old and three years old at the time of trial in these cases, have been in the care of the custodians since August 2016. In January 2017, the children were judicially determined to be dependent, and custody of the children was awarded by the juvenile court to the custodians, subject to alternating-weekend visitation by the mother at the custodians' residence "upon mutual agreement of the parties."

In July 2017, the mother filed petitions in the juvenile court seeking a modification of the child-custody or, alternatively, the visitation provisions of the January 2017 judgments. The mother alleged in her petitions that a material change of circumstances warranting "a change in

[1]The procedural history set forth herein has been gleaned from documents contained in the original record in these appeals rather than from the first supplemental record on appeal, which contains documents purportedly filed in the actions in which the children's dependency was judicially determined. We have not considered the contents of the first supplemental record in reaching the merits of these appeals, and we therefore deny as moot the mother's motion to strike that first supplemental record without reaching the question whether the juvenile court acted outside its discretion under Rule 10(f), Ala. R. App. P.

custody and/or visitation" had occurred, averring that she "ha[d] completed rehabilitation for substance abuse/misuse issues," had "continue[d] to engage in [an outpatient] program" at a drug-rehabilitation center, was being tested for drug use "continually," could "demonstrate to the [juvenile court] that sh[e] has a history of sober living," had acquired "adequate housing," and had obtained work, all of which, she said, had "rectified the underlying concerns which [had led] to the dependency adjudication." The mother also posited in her petitions that a change in custody would materially promote the children's best interests and that such a change would more than offset any disruptive effect, alleging in that regard that "[t]he children [were] being systematically alienated from" the mother, that the custodians had (since May 2017) improperly restricted her visitation to three hours per month of supervised visitation in a public place, that the custodians were unwilling to grant further visitation without judicial intervention, and that the custodians had not kept the mother informed about any therapy sessions involving K.M.S.

In response to the mother's petitions, the custodians filed a responsive pleading in each case. In their responsive pleadings, the custodians, in pertinent part, denied that there had been a material change of circumstances, averred that the May 2017 visitation restrictions discussed by the mother had stemmed from the mother's tobacco use and had been prompted by the recommendation of the children's guardian ad litem, and denied having failed to inform the mother about the progress of therapy sessions involving K.M.S. After the filing of those responsive pleadings, the juvenile court held a hearing on whether to modify the mother's visitation with the children on a pendente lite basis, ultimately ordering in September 2017 that the parties were to utilize an Auburn-based court-appointed special-advocate center for four visitation sessions and that the mother was, before and after those visits, entitled to supervised weekend visitation for two hours twice per month. On December 15, 2017, the juvenile court again reviewed the mother's pendente lite visitation and awarded her unsupervised visitation with the children every first and third Saturday for 10 hours; however, the juvenile court stressed that the visitation was "personal to" the

mother and that the children were not to be around the mother's brother, a specified male person (M.S.), or any paramour of the mother.

On December 18, 2017, the custodians filed a motion in each case seeking the immediate suspension of the mother's unsupervised visitation with the children, averring that one of the children had stated to one of Bo.S.'s children that the mother, during an unsupervised-visitation session on December 16, 2017, had allowed an unknown man into the presence of the children at issue. The mother then filed written responses to the custodians' motions in which she averred that she had not violated the December 15, 2017, visitation order, posited that the custodians were attempting to "systematically alienate[]" the children from her and to prevent her "from having a relationship with [the] children," alleged that the custodians had compelled the older child to admit that "she had previously stated she didn't want to live with" the mother, and had changed one of the children's birthday-party plans to exclude the mother. Neither the custodians' motions nor the mother's responses were supported by any affidavits or evidentiary material, and the juvenile court entered orders on

December 19, 2017, denying the custodians' motions on the stated basis that no harm had apparently come to the children during the mother's unsupervised visitation on December 16, 2017. The juvenile court thereafter made further adjustments to the mother's pendente lite visitation schedule in June 2018 and set the cases for a final hearing to be held in November 2018.

On November 29, 2018, the juvenile court held an ore tenus hearing on the mother's petitions. At that hearing, the mother, the mother's roommate, two representatives of the Birmingham drug-rehabilitation center where the mother was residing, the manager of the center's thrift store (at which the mother had been employed), and L.P. each testified. The representatives from the drug-rehabilitation center testified that the mother had not tested positive for drug use over the preceding year; had "graduated" from the center's program and had moved into a two-bedroom apartment reserved for such graduates, where she had lived with a roommate for the preceding 16 months; that the mother had taken supplemental religious, financial, and vocational classes offered by the center; that the mother's progress toward being able to be "a

full-time mother" had been by "tremendous leaps and bounds"; that the mother was free to leave the center; and that the center's staff desired the mother to be successful and to be able "to go on and move on with her life" rather than "stay[ing] plugged in to [the center for] the rest of her life." Further, the thrift-store manager testified that he had not observed the mother's having had any problems with her work ethic or with substance abuse, and the mother's roommate testified that she had not observed the children's having had any issues during visitation sessions at the mother's apartment.

The mother, during her testimony, stated that she was close to having completely satisfied, through payments and community service, her penal obligations stemming from criminal charges in Lee County and that she had acquired a general-educational diploma from a community college near the drug-rehabilitation center. The mother testified on direct examination that her relationship with the custodians was "wonderful"; expressed gratitude to the custodians for their care of the children, opining that the custodians had "done something for them that [she] couldn't do" and had "given them

a life that [she did not] know if [she would] ever fully be able to give them"; and stated that the younger's child's practice of calling L.P. "Mommy" did not bother the mother. On cross-examination by counsel for the custodians, the mother admitted that, at the time that the custodians had taken custody of the children in August 2016, the children had been "in pretty bad shape" but that, as of the time of trial, the mother had "never seen them better." On further cross-examination by the guardian ad litem, the mother admitted that she had no concerns arising from the custodians' care of the children; although she stated that "I want my kids to come home," she agreed that the custodians had taken good care of the children.

L.P. testified at trial that she and Bo.S. (who is the biological paternal grandfather of K.M.S., the older of the children) had been "put[ting] all of [their] time" into the children since they had been placed in the custodians' care. According to L.P.'s testimony, K.M.S.'s daily routine typically included attending Huguley Elementary School, coming home via school bus, and doing homework while in the after-school care of Bo.S. or L.P.'s parents (who live adjacent to

the custodians), whereas E.J.S. attended day-care sessions until being picked up by L.P. after her working hours. L.P. testified that the custodians' and the children's usual evening activities included household chores, occasional school activities, and preparation for the following day. The children's weekend activities, according to L.P.'s testimony, involved cleaning, attending football or baseball games played by an older child of hers, and participation in worship services and Sunday-school sessions at a nearby Methodist church; L.P. added that, at the time of trial, the children had been practicing at the church on Wednesday nights for a winter-holiday presentation and had previously participated in a similar spring presentation. L.P. opined that the children had "established roots in [the Chambers County] community" and that "[e]verybody knows them and ... loves them," and she observed that K.M.S. had earned no lower than a 97% mark in any of her subjects in elementary school while "still getting a lot of reading done." L.P. testified that the children did not typically pose discipline problems, but she added that the custodians "have more issues" with the children, and especially "out of the norm" behavior from E.J.S., when they

"come back from [the mother's]" apartment, although she admitted on cross-examination by the mother's counsel that "they look like they are well cared for when they come back."

At the close of testimony, the juvenile court invited the guardian ad litem to make a recommendation. While acknowledging her admiration for the progress that the mother had already made, the guardian ad litem nonetheless opined that she was "not sure [the mother] is quite ready to take on the challenge of a six-year-old and a three-year-old" in terms of financial care, expressed concerns that the mother's Birmingham apartment (which the guardian ad litem had visited) was "not in ... the best area of town," and voiced further concerns about the mother's continuing dependence upon the resources of the drug-rehabilitation center. After the guardian ad litem had made the foregoing recommendation, the juvenile-court judge stated his opinion that the mother had met her burden of proof and that she was "ready to have [the] children back" as of the end of K.M.S.'s first-grade year. The juvenile court then entered judgments in each case on December 10, 2018, awarding custody of the children to the mother as of June 1, 2019, stating the view of that court that

"a material change in circumstance has occurred since the last custody order and the change in custody will materially promote the welfare of the children." Following the denial of the custodians' postjudgment motions to alter, amend, or vacate the judgments modifying custody, the custodians timely appealed to this court, after which the juvenile court designated a court reporter to transcribe the proceedings and determined that a sufficient record for appellate review existed; thus, this court has appellate jurisdiction pursuant to Rule 28(A)(1)(c)(i), Ala. R. Juv. P.

The custodians assert on appeal that the judgments of the juvenile court transferring custody of the children from them to the mother are contrary to principles of custodial repose most notably set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), and most recently applied by our supreme court in Ex parte D.B., 255 So. 3d 755 (Ala. 2017), because, the custodians say, the mother did not prove, among other things, that the positive good brought about by the modification will more than offset the inherently disruptive effect caused by uprooting the children from their existing custodial arrangement. Based upon our reading of Ex parte D.B., a case

that, like Ex parte McLendon, constitutes binding authority under Ala. Code 1975, § 12-3-16, we conclude that the custodians are correct and that the judgments must be reversed.

We start our analysis by observing that Ex parte McLendon, like these cases, involved a custody dispute between a biological, noncustodial mother who had formerly served as a custodian of the child at issue and nonparent custodians who had been awarded custody of that child pursuant to a previous judgment. Further, in Ex parte McLendon, it was "also undisputed that the [biological] ... mother ... [was] able to provide a stable and wholesome environment for the child" at issue as of the time she had sought modification of custody; that she had the ability, along with her new husband, to earn "an income adequate to support both" the child and another, after-born child; that "[t]he [biological] mother's new husband ... would assist in the care and support of the child"; and that the child's nonparent custodians would be afforded "all reasonable visitation rights," including extended summer visitation. 455 So. 2d at 865. In the view of our supreme court, however, none of the undisputed facts in

Ex parte McLendon constituted a proper basis for affirmance of the trial court's judgment divesting the child's custody from the nonparent custodians, notwithstanding the generally applicable proposition that "[a] natural parent has a prima facie right to the custody of his or her child." Id. Rather, as our supreme court noted, "th[at] presumption does not apply after ... a prior [judgment] removing custody from the natural parent and awarding it to a non-parent" such that "[t]he superior right of the [biological] mother in [Ex parte McLendon] was cut off by the prior [judgment] awarding custody" of the child to the nonparent custodians in that case. Id.

Ex parte McLendon further rejected the conclusion of this court that the trial court's custody-modification judgment should be affirmed on the basis that "the [biological] mother had met her burden 'to show a change in circumstances since the divorce [judgment] in 1980 and that the grant to her of custody was in the best interest of her child.'" Ex parte McLendon, 455 So. 2d at 866 (quoting McLendon v. McLendon, 455 So. 2d 861, 863 (Ala. Civ. App. 1984)). In doing so, our supreme court expressly rejected the proposition that, when a

noncustodial parent seeks to modify a judgment awarding custody of a child to one or more nonparent custodians, a trial court should apply a pure best-interests standard: "Although the best interests of the child are paramount, this is not the standard to be applied in this case." Ex parte McLendon, 455 So. 2d at 866. Rather, in enunciating the proper substantive standard, our supreme court drew an analogy from the standard previously applied in the context of voluntary transfers of custody from parents to nonparents:

> "The correct standard in this case is:
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> "'Where a parent has transferred to another [whether it be a non-parent or the other parent], the custody of h[er] infant child by fair agreement, which has been acted upon by such other person to the manifest interest and welfare of the child, the parent will not be permitted to reclaim the custody of the child, unless [s]he can show that a change of the custody will materially promote h[er] child's welfare.'
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> "Greene v. Greene, 249 Ala. 155, 157, 30 So. 2d 444, 445 (1947), quoting ... Stringfellow v. Somerville, 95 Va. 701, [707,] 29 S.E. 685, 687, 40 L.R.A. 623 (1898).
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> "Furthermore,
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> "'[This] 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 [custody 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.'
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> "Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976).
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> "It is not enough that the parent show that she has remarried, reformed her lifestyle, and improved her financial position. Carter v. Harbin, 279 Ala. 237, 184 So. 2d 145 (1966); Abel v. Hadder, 404 So. 2d 64 (Ala. Civ. App. 1981). The parent seeking the custody change must show not only that she is fit, but also that the change of custody 'materially promotes' the child's best interest and welfare."

Ex parte McLendon, 455 So. 2d at 865-66 (emphasis added). Thus, even though the record in Ex parte McLendon indicated that "the parties are equally capable of taking care of the child," that both the noncustodial parent and the nonparent custodians "would provide her with a nurturing, loving home," and that "the [noncustodial parent's] circumstances ha[d] improved[] and she [was] now able to provide for the child in the same manner in which the [nonparent custodians had] been

providing for her," our supreme court nonetheless determined that the judgment in the noncustodial parent's favor should be reversed because the petitioning noncustodial parent had "failed to show that changing the custody materially promotes the welfare and best interest of the child." 455 So. 2d at 866.

In Ex parte D.B., the most recent decision of our supreme court to address the custody-modification standard set forth in Ex parte McLendon, our supreme court again considered the correctness of a judgment of a juvenile court modifying a custody judgment in favor of a petitioning noncustodial biological mother, a judgment that was based upon a determination by the pertinent juvenile court that the nonparent custodians' "'home was not what it once was,'" that there had "'been some illness'" in their home, and that "'there[had] been some other things going on at the house'" warranting the conclusion that "'not only had [the noncustodial mother]'s situation improved, but the [nonparent custodians]' situation had diminished.'" 255 So. 3d at 759 (emphasis omitted). Although this court had affirmed the juvenile court's judgment, see D.B. v. K.S.B. (No. 2150850,

February 3, 2017), 241 So. 3d 669 (Ala. Civ. App. 2017) (table), our supreme court unanimously concluded that this court's affirmance "conflict[ed] with the custody-modification standard set forth in Ex parte McLendon." 255 So. 3d at 760.

Notably, in Ex parte D.B., our supreme court explored the sufficiency of the evidence to support the juvenile court's judgment and rejected the applicability of precedents that this court had cited in its judgment of affirmance[2] that stand for the propositions that a petitioning noncustodial parent's "heavy" burden[3] under Ex parte McLendon can potentially be satisfied, in an appropriate case, by adducing evidence tending to show that, following a nonparent's acquisition of custody of a child, (a) the nonparent custodian's health has diminished or (b) the child whose custody is at issue gets

[2]See generally Dailey v. State Farm Mut. Auto. Ins. Co., 270 So. 3d 274, 280 (Ala. Civ. App. 2018)(Pittman, J., concurring specially, joined by Thomas, J.) (noting this court's practice, in cases decided pursuant to Rule 53(a), Ala. R. App. P., of "routinely includ[ing] a short statement of additional authorities upon which this court has relied in affirming the pertinent judgment").

[3]See Ex parte Cleghorn, 993 So. 2d 462, 468 (Ala. 2008) (stating that "[t]he burden imposed by the McLendon standard is typically a heavy one, recognizing the importance of stability").

along well with other children cared for by the petitioning noncustodial parent and residing in that parent's home. 255 So. 3d at 760-62 (discussing Scroggins v. Templeton, 890 So. 2d 1017, 1022 (Ala. Civ. App. 2003), and M.R.J. v. D.R.B., 34 So. 3d 1287, 1291–92 (Ala. Civ. App. 2009)). In Ex parte D.B., our supreme court further adverted to "the deference owed to the juvenile court's judgment in light of the ore tenus standard" of appellate review, citing Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), as an exemplar of that appellate standard. 255 So. 3d at 763. However, notwithstanding the existence of evidence in Ex parte D.B. tending to show that one of the nonparent custodians had undergone chemotherapy to treat breast cancer and that the child at issue had gotten along with other children of the noncustodial parent to the point of loving them, our supreme court concluded "that 'the evidence ... fail[ed] to support' the juvenile court's judgment modifying custody of the child" such that the judgment was "'plainly and palpably wrong.'" 255 So. 3d at 763 (quoting K.U. v. J.C., 196 So. 3d 265, 268 (Ala. Civ. App. 2015)). The following passage from our supreme court's opinion is perhaps the most pertinent here:

> "The [noncustodial parent] conceded that the [nonparent custodians] had taken good care of the child, and she expressed no concerns in the juvenile court regarding [the nonparent custodians' service] as custodians of the child; the [noncustodial parent] simply testified that she believed that she could take care of the child and love her just as well as the [nonparent custodians]. Ex parte McLendon requires more."

Ex parte D.B., 255 So. 3d at 763.

We are faced in these cases, as our supreme court was in Ex parte McLendon and Ex parte D.B., with a judgment of a trial court that has transferred custody of a minor child from nonparent custodians who have provided a stable and happy home for that child to a noncustodial parent who has made significant progress in rectifying a situation that had warranted an award of custody to those nonparent custodians. In this instance, for all that appears in the record, the mother has successfully graduated from a drug-rehabilitation program and obtained a high-school-equivalency certificate on her way to maintaining a sober and productive lifestyle in a manner that would fully merit the guardian ad litem's wish, expressed at the close of trial, that all of her own clients would do what the mother has done. That said, we are constrained by the holdings of our supreme court to the effect

that an improvement in the circumstances of a petitioning noncustodial parent, such as the mother in these cases, is insufficient to warrant a modification of custody of a child who has been placed in the charge of fit and caring nonparent custodians such as the custodians in this case. See Ex parte McLendon, 455 So. 2d at 866, and Ex parte D.B., 255 So. 3d at 763. Stated another way, the mother's showing of improvement in her circumstances was not sufficient to meet her burden of proof in the juvenile court in these cases.

Apparently now cognizant of the true extent of the burden imposed by Ex parte McLendon and its progeny, the mother seeks to demonstrate on appeal the correctness of the juvenile court's judgments through reliance on aspects of the record other that those tending to show improvement in her personal and vocational circumstances. The mother asserts, for example, that, by virtue of her current residence in an apartment for graduates of her drug-rehabilitation center in Birmingham, she can provide the children with access to private schooling, summer camps, counselors, playgrounds, day care, movie viewings, visits to zoological and botanical gardens, and trampoline-park outings.

However, at the time of trial, only K.M.S. was old enough to attend elementary school (E.J.S., for her part, is already enrolled in day care), and there was no dispute that K.M.S. had attained exemplary academic marks and had participated appropriately in her current school's activities while under the care of the custodians; further, there was no evidence presented tending to show that the private schools that the children would conditionally be eligible to attend while living with the mother in her current apartment were better than (or were worse than) the elementary school attended by K.M.S. and for which E.J.S. was presumably also zoned, and the mother cites no authority that would compel affirmance in the absence of such evidence. Cf. Estrada v. Redford, 855 So. 2d 551, 554 (Ala. Civ. App. 2003) (declining to reverse judgment denying custody modification notwithstanding testimony of child that, among other things, schools in noncustodial petitioner's district were "better" than in custodian's district).

Similarly, the evidence of record does not support the proposition that the custodians cannot themselves provide the children access to summer camps, counselors, and playgrounds

in the manner the mother claims she can. In any event, the mother's contentions regarding her potential superior ability to provide "'more of the luxuries of life than'" the custodians, such as the excursions afforded to the children by the mother during her visitation sessions, are ultimately immaterial with respect to her burden of demonstrating that the "'inherently disruptive effect caused by uprooting the child[ren]'" would be offset in these cases. Ex parte McLendon, 455 So. 2d at 866 and 865 (quoting Carter v. Harbin, 279 Ala. 237, 240, 184 So. 2d 145, 148 (1966), and Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976), respectively).

The mother also suggests on appeal that her enhanced religious devotion following her arrival at the drug-rehabilitation center would materially promote the welfare of the children. To the extent that the mother is asserting to this court that the juvenile court could properly have concluded that the children's spiritual needs were not being met by the custodians, we would simply note the existence of undisputed evidence to the effect that the children, while in the care of the custodians, had participated in weekly

religious activities on both Sundays and Wednesdays to the point of being "very active" in their current church. On the other hand, to the extent that the mother is contending on appeal that her "profession of faith" is, in and of itself, a material factor in her dispute with the custodians regarding whether custody of the children should or should not be modified in her favor, we are compelled to reject her contention on the authority of Clift v. Clift, 346 So. 2d 429 (Ala. Civ. App. 1977), in which this court held that issues of custodial contestants' religious convictions are properly to be considered "when reasonably related to the determination of whether [a] prospective custodian's convictions might result in physical or mental harm to the child[ren]" at issue. 346 So. 2d at 435 (emphasis added); see also Ex parte Hilley, 405 So. 2d 708, 711 (Ala. 1981) (involvement of potential custodian in religious activities that "will threaten the welfare of the child" may be considered in custody disputes). Suffice it to say that at no point in these cases has the mother pleaded or proved that the custodians are threatening or causing physical or mental harm to the children as a result of their religious involvement or noninvolvement.

Finally, we turn to the mother's contention that she demonstrated in the juvenile court that the children were being harmed by the custodians' behavior. In support thereof, the mother asserts (a) that K.M.S. was compelled by L.P. to state on one occasion that she did not want to live with the mother, (b) that the custodians scheduled a birthday party for K.M.S. on a day on which the mother could not attend it, (c) that the custodians improperly and in an "overly dramatic" fashion had sought to curtail the mother's unsupervised visitation in December 2017 without notifying her in advance upon their having heard from one of the children about a potential violation of the pendente lite visitation order then in effect, and (d) that the custodians excluded the mother from knowledge of therapy sessions involving K.M.S.. The mother's citations to the record in support of the first two assertions direct this court to the unsworn filing of counsel for the mother,[4] and no evidence set forth in the trial transcript supports the mother's assertions. With respect to the mother's assertion in her petitions to modify that the

[4]"Motions, statements in motions, and arguments of counsel are not evidence." Ex parte Merrill, 264 So. 3d 855, 860 n. 4 (Ala. 2018).

custodians had excluded her from knowledge of therapy sessions involving K.M.S., the custodians specifically denied having done so in their answers, and those "substantive and meaningful" responsive pleadings had the effect of placing upon the mother "[t]he burden of proof" as to that averment, see Ex parte LKQ Birmingham, Inc., 159 So. 3d 766, 775 (Ala. Civ. App. 2014), which she made no apparent attempt to carry at trial. Finally, to the extent that the custodians' December 2017 filings seeking to suspend the mother's unsupervised visitation may properly be interpreted as an improper or "overly dramatic" attempt to limit the mother's contact with the children, "[t]his court has repeatedly held that visitation disputes are not a reason to modify custody." M.B. v. S.B., 41 So. 3d 79, 83 (Ala. Civ. App. 2009). Thus, the four assertions of the mother in her brief on appeal for the proposition that, contrary to the mother's own trial testimony, the children were being harmed by the custodians are not supported by substantial evidence of record and/or do not constitute valid legal grounds under Ex parte McLendon upon which a custody modification may properly be based.

After a careful review of the facts of these cases and the applicable precedents in this area, we are compelled to conclude that the juvenile court's December 2018 judgments, which modified its January 2017 custody judgments so as to place the children in the custody of the mother rather than the custodians, are unsupported by the evidence so as to be plainly and palpably wrong. See Ex parte D.B., 255 So. 3d at 763. The December 2018 modification judgments are, therefore, reversed, and the causes are remanded for further proceedings, to include the entry of judgments that, among other things, deny the mother's petitions to the extent that she has sought a change in custody as to the children. We express no opinion regarding the mother's alternative requests for modification of the visitation provisions of the January 2017 custody judgments.

2180271 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2180272 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, and Edwards, JJ., concur.

Thompson, P.J., concurs in the result, without writing.