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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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2200520

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L.W.

v.

B.C.D.

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2200521

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L.W.

v.

B.C.D.

**Appeals from Mobile Juvenile Court  
(CS-11-6078.03 and CS-11-6078.04)**

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HANSON, Judge.

L.W. ("the mother"), formerly known as L.T.N., appeals from a judgment of the Mobile Juvenile Court ("the juvenile court"), entered in two separate cases, modifying a 2012 judgment by awarding custody of L.D.N ("the child"), whose date of birth is July 27, 2011, to B.C.D. ("the father"). Because this court is unable to discern which substantive standard the juvenile court applied when deciding to modify the child's custody, we reverse the judgment and remand the causes to the juvenile court.

#### Procedural History

On March 28, 2012, the father was adjudicated by the juvenile court as the child's father and was ordered to pay child support; at that time, the mother was awarded sole physical custody of the child, and the father was awarded "standard" visitation rights. On December 10, 2018, the father initiated an action seeking to modify the child's custody, alleging in his complaint that there had been a material change of circumstances that warranted a change in custody of the child; he also moved for an award of pendente lite custody of the child. In addition to answering the

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father's complaint and responding to the father's motion for pendente lite custody, the mother initiated an action in which she sought to modify the father's child-support obligation and to hold the father in contempt for allegedly having failed to pay child support. The father's action was docketed as case number CS-11-6078.03, and the mother's action was docketed as case number CS-11-6078.04.

The juvenile court denied the father's motion seeking pendente lite custody and initially set the cases for a trial on June 19, 2019. The trial was reset on three occasions because of discovery delays, the father's retention of new counsel, and the onset of the COVID-19 pandemic, respectively. The trial was continued on three further occasions relating to the availability of parties or counsel.

The cases were finally tried on March 30, 2021, and, in April 2021, the juvenile court entered a judgment that addressed both cases, awarding custody of the child to the father (with the mother having "standard" visitation) and awarding the mother a monetary judgment

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against the father for a child-support arrearage.<sup>1</sup> In pertinent part, the juvenile court determined:

"The mother's actions have evidenced neglect for the child's welfare and at times have placed the child in danger. The mother's home place, particularly the outside grounds, present a danger to the child, and she has failed [to] remedy the problem despite having adequate time to do so. The mother's testimony lacks credibility on issues that are controverted. The Court accepts the father's position that the mother agreed to move with him when he joined the military, but thereafter reneged on this agreement. But for the mother's decision change, the father would not have been separated from the child during this time to the extent that he was. The mother's husband is an inappropriate caregiver for the child. A change in custody is necessary for the best interest of the child and circumstances have changed, as set forth above, since the [2012 judgment]."

The mother timely appealed from the April 2021 judgment entered in both cases, challenging only those aspects of the judgment pertaining to

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<sup>1</sup>We determine that the trial court implicitly ruled on the mother's contempt claim because the April 2021 judgment settled the issue the mother had raised without holding the father in contempt. See Gore v. White, 96 So. 3d 834, 840 (Ala. Civ. App. 2012); see also Faellaci v. Faellaci, 67 So. 3d 923, 925 (Ala. Civ. App. 2011) ("[B]efore making a determination regarding the finality of a judgment that does not explicitly address a pending contempt petition, this court will consider whether any part of the trial court's judgment implicitly rules on the pending contempt petition that was not explicitly ruled on in the judgment.").

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prospective custody of the child. Specifically, the mother raises as an issue that it is unclear whether the juvenile court applied the correct substantive standard in changing physical custody of the child. She raises as a separate issue whether the record contains sufficient evidence to support a determination that that standard was met. We consolidated her appeals ex mero motu.

### Analysis

Under Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), when a prior custody judgment awards one parent sole physical custody of a child, the noncustodial parent seeking a change in custody has the burden to show that that proposed change will materially promote the child's welfare and best interest such that the benefits of the requested change will more than offset the " 'inherently disruptive effect caused by uprooting the child.' " 455 So. 2d at 866 (quoting Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976)). The requirement that the noncustodial parent demonstrate that the benefits of the proposed change of custody would outweigh its inherently disruptive effects, which does not apply when the previous custody judgment does not favor one parent over another, see generally Ex

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parte Couch, 521 So. 2d 987, 989 (Ala. 1988), and Whitehead v. Whitehead, 214 So. 3d 367, 370 (Ala. Civ. App. 2016), is in addition to requirements applicable to custody-modification petitions in general, i.e., proof of the noncustodial parent's fitness to have custody and of the existence of a material change in circumstances occurring after the entry of the previous custody judgment:

"After custody has been awarded in a [previous] judgment, 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).

In the present cases, there existed a previous judicial determination awarding the mother sole physical custody of the child subject to the father's "standard" visitation rights. Because the mother previously had been granted physical custody of the child, we agree with her that the juvenile court was required to apply the McLendon standard in assessing

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the father's custody-modification claim. The mother argues, however, that it is unclear whether the juvenile court applied the McLendon standard because, she says, the April 2021 judgment failed to make reference to that standard; instead, the mother argues, the juvenile court's judgment simply refers to the "best interest of the child" while omitting references to the other essential elements.

In Turner v. Denney, 899 So. 2d 1016 (Ala. Civ. App. 2004), the pertinent judgment modifying custody and the record were each silent as to what substantive standard the trial court had applied in modifying custody; thus, this court was unable to determine whether the trial court had applied the proper substantive custody-modification standard. In that case, therefore, this court reversed the judgment of the trial court, and remanded the case to "to allow that court to evaluate the evidence pursuant to Ex parte McLendon." Id. at 1018. In contrast, in Dean v. Dean, 998 So. 2d 1060 (Ala. Civ. App. 2008), this court reviewed a trial court's judgment modifying custody, which judgment was likewise silent concerning the substantive custody-modification standard that had been applied. In that case, however, the record was not silent because the

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father's petition to modify custody had specifically asserted that conditions warranted a change in custody under the standard set forth in McLendon. In affirming the trial court's judgment modifying custody in Dean, this court stated:

"In the father's petition to modify custody, he stated 'the good brought about by modifying custody of said minor far outweighs any disruptive effects, in fact returning the child to her familiar homeplace. Further, modification of custody will materially promote the best interest of said minor child.' Although the trial court did not cite any caselaw tending to indicate which custody standard it had applied, the judgment clearly 'granted' the father's petition to modify custody; that petition set out the Ex parte McLendon standard. Considering both the judgment and the record, it can be ascertained that the trial court applied the standard set forth in Ex parte McLendon."

998 So. 2d at 1066.

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



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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 Couch, supra) was applied to the father's custody-modification claim.

Turner and Dean indicate that 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. The father averred in his complaint "that there has been a material change in circumstance since the initial determination of custody that warrants a permanent change in custody." Unlike in Dean, supra, wherein the trial court clearly granted a petition to modify custody that had properly set forth the McLendon standard, in these cases we cannot ascertain from the

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record whether the juvenile court applied the proper substantive custody-modification standard.

We agree with the mother that it is unclear from the April 2021 judgment entered in these cases whether the juvenile court applied the proper substantive standard (i.e., the McLendon standard) in modifying custody. As a result, we reverse the judgment entered in these cases and remand the cases to the juvenile court to apply the McLendon standard to the evidence it received and to enter an appropriate judgment based on that standard. Because of our conclusion regarding the first issue raised by the mother, we pretermit consideration of the second issue regarding the sufficiency of the evidence. See Wood v. Wood, 29 So. 3d 908, 912 n.2 (Ala. Civ. App. 2009).

2200520 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2200521 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore, Edwards, and Fridy, JJ., concur.