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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200906

J.S.

v.

S.B.

Appeal from Washington Juvenile Court
(CS-15-900038.03)

FRIDY, Judge.

J.S. ("the father") appeals from a judgment of the Washington Juvenile Court ("the juvenile court") denying his counterclaim seeking to

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modify a prior judgment regarding the custody of his child, K.R.S. ("the child"). For the reasons set forth herein, we reverse the judgment denying the father's custody-modification request.

Background

The father and V.L.L.W. ("the mother") are the parents of the child. In August 2018, the juvenile court entered a judgment ("the previous custody judgment") pursuant to which the father and S.B., the child's maternal grandmother ("the grandmother"), shared "joint legal and physical custody." The previous custody judgment set forth "custodial periods" for the father that essentially constituted a standard visitation schedule. The grandmother's residence was to be the child's "primary residence." The mother was awarded visitation with the child at the grandmother's discretion. The grandmother was ordered to be present at those visitations and to supervise each visitation "for its entire duration."

On August 24, 2020, the grandmother filed a petition to modify the previous custody judgment and the terms of the mother's visitation. In that petition, the grandmother alleged that, since the juvenile court had entered the previous custody judgment, the father had been using, buying,

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or selling illegal drugs. She also alleged that a member of the father's family had exposed the child to inappropriate behavior.¹ As a result, the grandmother requested that the father's "custodial periods" be supervised. Regarding the mother's visitation, the grandmother alleged that, since August 2018, the mother had made "numerous and significant positive changes to her lifestyle" such that her visitation periods with the child no longer needed to be supervised. In a separate motion, the grandmother sought an order directing the father to submit to a hair-follicle drug test. The juvenile court granted the motion, and the father submitted to the test as ordered. The test results were negative for the presence of illegal drugs.

On June 15, 2021, the father filed an answer denying the grandmother's allegations and a counterclaim seeking sole physical custody of the child. In his counterclaim, the father asserted that on June

¹The Washington County Department of Human Resources investigated claims that a member of the father's family had molested the child. The investigation resulted in a finding that the alleged molestation was "not indicated."

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4, 2021, the mother had been arrested for trafficking in opium. He alleged that the mother's boyfriend, T.L. ("the boyfriend"), had been arrested on June 2, 2021, and charged with several drug offenses. He further alleged that, at the time sheriff's deputies searched the mother's house, which had resulted in the arrests, the child had been visiting with the mother when the grandmother was not present. The father requested an emergency hearing on the issue of custody. On June 21, 2021, the juvenile court held an evidentiary hearing.² At that hearing, the father testified that he was concerned that the grandmother had allowed the child, who was seven years old at the time, to stay with the mother without supervision despite the juvenile court's order to the contrary.

Evidence adduced at the hearing showed that the grandmother's house was "next door and behind" the house where the mother lived with

²Although at the outset of the hearing the parties and the juvenile court referred to the hearing as an "emergency hearing," it does not appear that it was treated as a hearing for pendente lite custody pending a final decision on whether to modify the previous custody judgment. No subsequent hearings were scheduled, and the case-action summary indicates that the matter the grandmother initiated by her August 2020 petition to modify custody was disposed of after a bench trial.

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the boyfriend. Several witnesses described the houses as being close to each other. Blake Richardson, the chief investigator for the Washington County sheriff's office ("the sheriff's office"), testified that his office had received complaints from citizens in the neighborhood regarding "a large amount of traffic that was unusual for the area" and that some of that traffic had resulted in people going into the mother's house for short periods. Such conduct, Richardson said, is often "indicative of drug distribution" and other drug offenses.

Chief Deputy Sheriff Shone Holloway testified that he was involved in a six-month investigation of the mother and the boyfriend in connection with suspected drug activity. During that time, Holloway said, the mother's house was under daily surveillance. Holloway testified that, in addition to the neighbors' complaints, a confidential informant also had advised investigators about drug activity at the mother's house.

Based on what was learned during the investigation, sheriff's deputies executed a search warrant at the mother's house at about 7:00 p.m. on June 2, 2021. Richardson, who was present at the search of the house, said that a "large amount" of illegal drugs, ranging from codeine

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syrup to methamphetamine and marijuana, drug paraphernalia, and firearms were discovered throughout the house, including in what he described as a children's bedroom, and, he said, three children were in the house at the time of the search.³ Richardson added that drugs and firearms were found in places within the childrens' reach. Richardson said that, based on his sixteen years' experience in law enforcement investigating drug cases, he considered the drugs and firearms taken from the mother's house as indicative of a large drug operation. The boyfriend was arrested on numerous drug charges the evening the search warrant

³The record indicates that mother has two children younger than the child. We are unable to discern from the record who is the father of those children. Pursuant to the safety plan, the two younger children had been removed from the mother's home in October 2020 and placed in the grandmother's home. The grandmother was to supervise visitation and interactions between those children and the mother and the boyfriend. Time limits on the initial safety plan expired. Elaine Philon, who worked for the Washington County Department of Human Resources ("DHR"), testified that, because DHR continued to have safety concerns regarding the younger children, it filed a petition for their custody. In May 2021, the younger children returned to live in the mother's house, but DHR retained custody.

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was executed. The mother was arrested on June 4, 2021, and charged with trafficking in opium.⁴

Holloway testified that the mother said that the three children who were in the house that evening, which included the child, were hers. He said that deputies did not remove the children from the mother's house, but they contacted the Washington County Department of Human Resources ("DHR") about the children. The mother's arrest was delayed for two days so that she could make arrangements for the children, Holloway said.

Both Richardson and Holloway said that the grandmother was not present at any time during the search, which they estimated took about an hour. During the time the mother's house was under surveillance, deputies did not observe the grandmother at the mother's house. Holloway testified that, during the course of the investigation, he had seen two or

⁴Some testimony during the trial indicated that the mother was arrested the day after the boyfriend, i.e., June 3, 2021. However, that testimony appears to be based on a mistaken belief that the search warrant was executed on June 3, 2021. Court documents submitted into evidence indicate that the search was conducted on June 2, 2021.

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three children playing outside at the mother's house at various times. He said that he had seen the mother but had never seen the grandmother. Holloway testified that the grandmother had no knowledge about the information that the confidential informant had provided to deputies, but he clarified that he was not saying she would not have had any knowledge of the excessive traffic going in and out of the mother's house. He also testified that that traffic rose to a level that made neighbors wonder what was going on there.

The grandmother testified that she was unaware of the drugs in the mother's house or that drugs were being trafficked from the house. She said that she had seen people come to the mother's house on a regular basis but that she had assumed that they were friends of the mother's boyfriend. Elaine Philon, a service supervisor with DHR, testified that she did not believe that the grandmother was unaware of the drug activity taking place at the mother's house and which other neighbors had seen and reported to law enforcement.

Philon said that, as a result of the mother's arrest after the search, the mother's two younger children were placed in DHR's physical custody.

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The father and the grandmother continued to share joint custody of the child, who was living with the grandmother at the time of the hearing. Philon testified that the grandmother had acknowledged to her that the child was at the mother's house at the time the search warrant was executed. According to Philon, when she asked about why the child was there unsupervised, the grandmother became "really argumentative and defensive." Philon testified that the grandmother told her that the mother had gone to the house where the search occurred only to get her belongings because, the grandmother explained, the mother and the mother's boyfriend were breaking up, and the mother was living in the grandmother's house with the three children. However, Philon testified that, based on DHR's investigation, she knew that the three children had been living in the mother's house within two weeks of the execution of the search warrant.

Philon said that she was concerned with the child's remaining in the grandmother's care. She said that the previous custody judgment had explicitly directed that the child was not to be left alone with the mother and that the grandmother was to be present during the mother's visits.

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The mother was incarcerated at the time of the hearing, but, Philon said, if she were released on bail, DHR would not permit the mother to live in the home with the grandmother.

The grandmother testified that, on the evening of June 2, 2021, when the search warrant was executed at the mother's house, she had gone to a different town "to clean out a trailer." She said that she had left the child playing in the mother's yard and had told her son to watch the child. She said that, because DHR had permitted the mother's two other children to return to live with the mother in May 2021, she did not believe "it would be a big deal" for the child to go to the mother's house for a few hours. The grandmother conceded that she had left the child alone with the mother on numerous occasions and had allowed the mother to pick up the child from school without the grandmother's being present.

The grandmother told the juvenile court that she did not believe it would be in the child's best interest to live with the father. When asked why living with the father would not be in the child's best interest, the grandmother said that it was because she had "several things scheduled" for the child and because she was trying to have the child prepared for

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second grade. She said that the child also had doctors' appointments scheduled to help her with her dyslexia, as well as regular health and dental checkups. The grandmother said that she knew that the father and the child were close and loved each other and that the child looked forward to going with the father during his custodial periods. She admitted that the father was current with his child-support obligation and that he always exercised visitation with the child as scheduled, even though he had moved to Louisiana. She also acknowledged that the results of the hair-follicle drug test she had demanded of the father had been negative.

The father said that he believed that the child was at risk when she stayed with the mother and was concerned that the grandmother had allowed the child to visit the mother without supervision. He said that he believed that it would be in the child's best interest for him to obtain custody. The father testified that he was married, employed full time, and lived in Mandeville, Louisiana. He said that his wife worked at a children's day-care facility. The father said that the drive from his house to the Jackson, Alabama, police station where he and the grandmother

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exchanged custody was approximately three hours, so sometimes, if their time together was limited, he and the child stayed with his parents in Alabama. When the child visits at his house, the father said, she has friends in the neighborhood. He said that he is aware that the child has dyslexia and has talked with teachers at the elementary school that the child would attend to ensure that she will get the extra help she needs.

On July 30, 2021, the juvenile court entered a judgment concluding that "there is not enough credible evidence against [the grandmother] to justify a change of custody at this time" and ordered that the previous custody judgment was to remain in effect as to the father and the grandmother. In support of its ruling, the juvenile court found that the officers involved in the surveillance of the mother's house had stated "that they had no reason to suspect that [the grandmother] knew what was going on" in the mother's house. The juvenile court also ordered that the mother was to have no visitation.

The father filed a timely notice of appeal to this court on August 11, 2021. He contends on appeal that the juvenile court erred in refusing to award him custody of the child. The grandmother neither filed a cross-

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appeal from the denial of her petition to modify custody nor favored this court with a brief on appeal.

Analysis

We must first determine the legal standard to apply in reviewing the judgment. Determining the legal standard to be applied when deciding whether to modify custody is an issue of law, and the standard applied by the trial court is afforded no presumption of correctness. Daniel v. Daniel, 842 So. 2d 20, 21 (Ala. Civ. App. 2002).

"There are different standards for a trial court to use in ruling on questions of child custody. If one parent has previously been granted primary custody or if one parent has 'given up' legal custody, then an existing custody arrangement will be modified only if the modification materially promotes the best interests and welfare of the child. Ex parte McLendon, 455 So. 2d 863, 865-66 (Ala. 1984). If neither parent has previously been given primary physical custody, then 'the best interests of the child' standard applies. Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988)."

Ex parte Johnson, 673 So. 2d 410, 413 (Ala. 1994).

When the standard set out in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), applies, a party seeking modification of a prior custody determination must show that there has been a material change of

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circumstances since the entry of the prior judgment and that it is in the child's best interest to modify that judgment. Ex parte Blackstock, 47 So. 3d 801, 805 (Ala. Civ. App. 2009). Put another way, when, as the previous custody judgment did in this case,

"a judgment award[s] custody of [a] child to a nonparent ... and the custodian has ' "acted upon" ' his or her newfound custody ' "to the manifest interest and welfare of the child, the parent will not be permitted to reclaim the custody of the child, unless [he] can show that a change of the custody will materially promote [his] child's welfare." ' [Ex parte McLendon,] 455 So. 2d [863] at 865 [(Ala. 1984)] (quoting Greene v. Greene, 249 Ala. 155, 157, 30 So. 2d 444, 445 (1976)) (emphasis added). As the McLendon Court explained, this heightened burden of proof on the natural parent is based upon 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." ' 455 So. 2d at 865 (quoting Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976))."

R.K. v. R.J., 843 So. 2d 774, 778 (Ala. Civ. App. 2002).

In denying the father's counterclaim seeking to modify custody, the juvenile court did not indicate the standard it applied. The previous custody judgment purported to award the father and the grandmother "joint legal and physical custody" of the child; however, the juvenile court

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then established a so-called "standard-visitation schedule" as to the father's "custodial periods" and stated that the grandmother's house was to be the child's "primary residence." Thus, the language of the previous custody judgment and the actual implementation of that judgment, pursuant to which the grandmother has "primary" physical custody subject to the father's visitation, are at odds.

Alabama's joint-custody statutes, §§ 30-3-150 to -157, Ala. Code 1975 ("the joint-custody statutes"), provide guidance to this state's courts in custody matters. Section 30-3-150 informs us that the state's policy seeks

"to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage."

That section also emphasizes that "[j]oint custody does not necessarily mean equal physical custody." Section 30-3-151 defines the various types of parental custody.

"(1) Joint Custody. Joint legal custody and joint physical custody.

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"(2) Joint Legal Custody. Both parents have equal rights and responsibilities for major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training. The court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.

"(3) Joint Physical Custody. Physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time.

"(4) Sole Legal Custody. One parent has sole rights and responsibilities to make major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training.

"(5) Sole Physical Custody. One parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court."

Based on the definitions provided in § 30-3-151, we interpret the operative provisions of the previous custody judgment, including the provision that the grandmother's house would be the child's "primary residence," to have awarded the grandmother sole physical custody subject to the father's visitation, § 30-3-151(5), which would result in the application of the McLendon standard in determining whether a

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modification of custody was warranted. See also Berrey v. Berrey, 622 So. 2d 1316 (Ala. Civ. App. 1993) (holding that judgment directing that mother would provide "primary residence" triggered application of McLendon standard in modification proceeding).

As to questions of fact in matters seeking to modify a custody award,

"[w]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.' Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002). ' "The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment." ' Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985))."

Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005).

Here, the juvenile court concluded that there was "not enough credible evidence against [the grandmother] to justify a change of custody." As support for that conclusion, the juvenile court wrote in its judgment that Richardson and Holloway had "stated that they had no reason to suspect that [the grandmother] knew what was going on" in the

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mother's house. The officers' trial testimony, however, does not reflect the juvenile court's recitation of the officers' testimony.

It is true, as the juvenile court found, that neither Richardson nor Holloway saw the grandmother during the surveillance of the mother's house. However, the record demonstrates that neither officer testified that he had no reason to suspect that the grandmother knew what was happening in the mother's house. Holloway testified that the grandmother had no knowledge of what the confidential informant told investigators. He made clear that he was not saying that she would not have had any reason to suspect that drug activity was taking place in the mother's house. He observed that the traffic going in and out of the mother's house rose to a level that aroused suspicion in the mother's neighbors. Both Holloway and Richardson testified that the grandmother's house was close to the mother's house, and it is undisputed that other neighbors who did not go into the mother's house were aware that possible drug activity was occurring there. Thus, it appears that at least part of the juvenile court's reason for refusing to modify custody was based on a finding that was not supported by the evidence.

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Although this court will not reverse a trial court's judgment for error that did not "injuriously affect[] substantial rights of the parties," Rule 45, Ala. R. App. P., we cannot say here that the juvenile court's error in its recitation of the testimony before it was harmless. It may very well be that, when the juvenile court reviews the officers' testimony, it will reach a different conclusion on the question of custody modification. Of course, it may very well not. Such a decision will be for the juvenile court on remand.

Conclusion

Because the juvenile court's misunderstanding of the trial testimony potentially affected its findings of fact and its ultimate judgment, we reverse the judgment and remand the cause to the juvenile court to reconsider its decision in light of this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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