REL: September 30, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210291

Sarah Rachelle Robinson

v.

Anthony Michael Robinson

Appeal from DeKalb Circuit Court
(DR-15-900260.02)

EDWARDS, Judge.

Sarah Rachelle Robinson ("the mother") appeals from a judgment entered by the DeKalb Circuit Court ("the trial court") in favor of Anthony Michael Robinson ("the father"), granting his petition to modify

custody of the parties' children and awarding him child support from the mother.

The parties had two sons ("the children"), who were born in January 2013 and July 2014, respectively. On November 23, 2015, the trial court entered a judgment divorcing the parties. The divorce judgment awarded the parties joint legal custody of the children, awarded the mother sole physical custody, awarded the father visitation, and required the father to pay the mother $400 per month as child support.

After the entry of the divorce judgment, the father twice filed petitions seeking to enforce his visitation with the children in accordance with the terms of the divorce judgment. According to the father, the mother had been unwilling to adjust his visitation to accommodate his work schedule, which changed from time to time. The father's second enforcement action resulted in the trial court's entry of a judgment on September 15, 2020, modifying the divorce judgment based on an agreement of the parties. The September 2020 judgment retained the award of sole physical custody to the mother but awarded the father visitation on an alternating schedule of Wednesday evening until Friday

morning of one week and Thursday evening until Monday morning the following week. The September 2020 judgment required the parties to work together to preserve the father's visitation, to the extent possible, if the father's work schedule changed.

On April 19, 2021, the father filed a "Petition for Contempt and Modification." The father alleged that a material change in circumstances had occurred, specifically, that the mother had changed the school that the children attended and that the change in schools had "greatly affected" the children's grades.[1] He requested an award of "the full care, custody, and control of the ... children." The father also requested that the trial court find the mother in contempt for withholding his visitation "once again" and award him attorney fees.

The mother filed an answer denying the father's allegations and a "Counterclaim for Contempt and Modification." She alleged that, based on a material change of circumstances, specifically, that the father had

[1]At trial, the father testified about several school changes but acknowledged that only one school change had occurred before he filed his petition. See discussion, infra.

spent less time with the children than the September 2020 judgment allowed, the father's visitation with the children should be reduced and his child-support obligation should be increased based on his failure to spend his allotted visitation with the children. The mother requested that the trial court hold the father in contempt because, she alleged, he had refused to pay child support since December 18, 2020, and had not reimbursed her for one-half of the expenses associated with the children's extracurricular activities, as required by the divorce judgment, since November 2020. The mother also requested an award of attorney fees. She subsequently amended her contempt request by alleging that the father had failed to provide medical insurance for the children, as required by the divorce judgment. The father filed a reply to the counterclaim denying the mother's allegations.

The trial court received ore tenus evidence at a trial conducted on September 22, 2021. The mother appeared pro se; her counsel had been permitted to withdraw on August 19, 2021. The mother and the father were the only witnesses who testified at the trial. On September 25, 2021, the trial court entered a judgment granting relief requested in the

father's petition with respect to custody and child support and denying all other requested relief. The September 2021 judgment awarded the parties joint legal custody of the children, awarded the father sole physical custody, awarded the mother visitation, and ordered the mother to pay the father $675 per month as child support, based on the application of the child-support guidelines provided in Rule 32, Ala. R. Jud. Admin. The trial court stated that it had calculated that amount using the mother's "ability to earn," as reflected by her earnings at her previous employer.

On October 15, 2021, the mother, who had retained new counsel after the trial, filed a postjudgment motion challenging the sufficiency of the evidence and noting that the trial court had erroneously denied her claim for past-due child support, which the father had admitted that he owed at trial. The father filed a response in opposition to the postjudgment motion. The trial court held a hearing on the mother's postjudgment motion, and, on December 14, 2021, the trial court entered an order amending the September 2021 judgment by ordering the father to pay to the mother $2,400 as a child-support arrearage but otherwise

denying the mother's postjudgment motion. On January 4, 2022, the mother filed a notice of appeal to this court.

The mother argues that the trial court erred because, she says, the evidence did not support a modification of custody. It is well settled that a trial court's judgment in a child-custody case based on testimony presented ore tenus is presumed to be correct. See Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996). Also, the evidence and inferences to be drawn therefrom must be viewed in a light most favorable to the judgment. Id.; see also Casey v. Casey, 283 So. 3d 319, 328 (Ala. Civ. App. 2019). As our supreme court has explained, "[t]he trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses." Ex parte Bryowsky, 676 So. 2d at 1324. Accordingly, "[i]n child custody cases especially, the perception of an attentive trial judge is of great importance." Williams v. Williams, 402 So. 2d 1029, 1032 (Ala. Civ. App. 1981). As an appellate court, we are not permitted to reweigh the evidence or to substitute our judgment for that of a trial court. Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App 1993); see also Ex parte Bryowsky, 676 So. 2d at 1324. This court can

reverse a trial court's judgment awarding custody when ore tenus evidence has been presented only when that judgment is so unsupported by the evidence that the judgment is plainly and palpably wrong or when an abuse of a trial court's discretion is demonstrated. Phillips, 622 So. 2d at 412.

This case is governed by the standard discussed in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), which requires that the noncustodial parent seeking a change in custody demonstrate that a material change in circumstances has occurred since the entry of the previous custody judgment, that the child's best interests will be materially promoted by a change of custody, and that the benefits of the change in custody will more than offset the inherently disruptive effect resulting from that change. 455 So. 2d at 866; see also Ex parte Cleghorn, 993 So. 2d 462, 466-67 (Ala. 2008). "The burden imposed by the McLendon standard is typically a heavy one," Ex parte Cleghorn, 993 So. 2d at 468 (footnote omitted), but nevertheless the controlling principle is the best interests of the child.

In evaluating whether a custody arrangement is in the best interests of a child, a trial court must

> "consider the individual facts of the case. The sex and age of the children are indeed very important considerations; however, the court must go beyond these to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose."

Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981).

The mother argues that the father failed to present evidence that would support a change of custody under the standard discussed in Ex parte McLendon and in light of the factors described in Ex parte Devine. After reviewing the limited testimony presented at trial in a light most favorable to the September 2021 judgment, we agree. The father testified that he resides in Trenton, Georgia, which is in Dade County. He stated

that he was working third shift but that his schedule changed occasionally, which is why, he stated, he had insisted that the September 2020 judgment include language about adjusting his visitation when his work schedule changed. According to the father, the mother had violated the September 2020 judgment by refusing to adjust his visitation in response to changes in his work schedule. For example, he testified that, when his days off work had changed on one occasion in March 2021, the mother had refused to abide by the terms of the September 2020 judgment requiring the parties to adjust the father's visitation accordingly because, according to the father, "she decided that it wasn't working for her." Thereafter, the father stated, the mother did not let him have visitation for two weeks, which was immediately before he filed his modification petition. The father offered no testimony as to the frequency of such incidents, however, or how they had impacted the children or his relationship with the children.

The father also testified that he and the mother had a meeting spot for exchanging the children, but, he said,

> "she never arrives on time. She's always 30 minutes to 40 to an hour [late]. Sometimes even a little longer. And it's been going on for years.
>
> "And it has been the same with my parents also when I wasn't able to pick [the children] up. I think my mom had stayed there over an hour to wait just, you know, because [the mother is] never on time."

He then affirmed, however, that it would be better if the parties did not use the exchange location and simply picked up the children from the other party's residence to exchange custody. Also, the father affirmed that he and the mother "need[ed] to do a better job communicating with one another" and that they could use the "Talking Parents app" if the mother wanted to, but he believed "just texting would be fine."

The father further testified that the mother had "chang[ed] the [children] in and out of different schools." He stated that, after the entry of the September 2020 judgment and before he had filed his modification petition, she had changed the children's school from a school in North Sand Mountain to a school in Ider. According to the mother, that change was based on her purchase of a house in Ider, where she and the children were living at the time of their enrollment in the school in Ider; apparently, they had been living in an apartment owned by the mother's

parents in North Sand Mountain. The evidence indicates that, at some point after that change of school, the parties agreed that the children would attend school in Dade County, Georgia, beginning in August 2021.

The father enrolled the children in a school in Dade County for the 2021-2022 school year, and they began attending that school. The father stated that things had been "going well" in the Dade County school, that the children enjoyed it, and that they enjoyed seeing the two daughters of the father's fiancée; the children attended the same Dade County school as the two daughters. However, according to the father, the mother withdrew the children from the school in Dade County after a few weeks without discussing the matter with him. She subsequently reenrolled the children in their previous school in North Sand Mountain; according to the mother, she had sold her home in Ider during the summer so that the children would not be as far away from her parents and the father. Thereafter, she and the children apparently resumed living in the apartment owned by her parents, which was located approximately 20 minutes from the father's house in Trenton. According to the father, the mother's

> "excuse [for the change from the school in Dade County] was that her parents did not want to drive down there all the time, which I picked up the kids every single day, and I could have picked them up.
>
> "And I told them one day, because the [children] got in the truck with the girls, and I told them that, hey, I'm here every day. I can get the kids so y'all don't have to drive all the way down here. I understand on her days, you know, in the morning. But every afternoon, I could pick them up. I can meet y'all. Y'all don't have to drive down here.
>
> "And her mom sa[id], okay. I'll discuss it with her. And nothing. The next thing I know, he [apparently referring to the oldest child] got put in quarantine for school [because of COVID-19]. So I didn't get to see them for two weeks because my fiancée has an autoimmune issue, and they got quarantined on [the mother's] watch. So the next thing I know, after they get out of quarantine, they're going to North Sand Mountain."

The father stated that, in light of the school changes, he believed "the [children] would be ... more stable if [he] w[as] the primary custodian." He also affirmed that it would "work better" for him if he had sole physical custody of the children and the mother had visitation.

We see no need to provide a detailed summary of the mother's testimony. To the extent that her testimony contradicted the father's testimony, we presume that the trial court determined that the mother was not credible. The trial court also could have concluded that the

mother was largely responsible for the communication problems between the parties, which had apparently become more significant in the year before trial. Further, although there appears to have been some truth in the mother's testimony that the father had not been as involved as he should have been in the children's extracurricular activities, during his testimony in rebuttal to the mother's testimony, the father testified that "[m]issing the games and stuff here recently, I didn't know when the games were this past fall because I've always taken them to their baseball games. Tried to as much as I could. At the time, I was working second shift, so it was hard for me to make it." According to the father, he had missed the children's sporting events only because of work or because he was unaware of the event because the mother would not provide him with the schedules. He stated that "[u]sually we have the coaches -- it would be, like, a group text message or something. I was never on the baseball one or this past base -- or basketball. I'm sorry. And this baseball season, I didn't know anything about it."

Assuming, without deciding, that the foregoing testimony reflected a material change of circumstances since the entry of the September 2020

judgment, the father was also required to prove that the children's best interests would be materially promoted by a change of custody and that the benefits of the change would more than offset the inherently disruptive effects resulting from that change in custody. See Ex parte McLendon, supra. This court has repeatedly stated that visitation disputes alone are not a basis for a change of custody and that when such disputes exist the record must still "contain evidence sufficient to compel the conclusion that a change of custody would materially promote the child's best interests." Wood v. Gibson, [Ms. 2210060, Apr. 8, 2022] ___ So. 3d at ___, ___ (Ala. Civ. App. 2022); see also McLendon v. Mills, 204 So. 3d 361, 364 (Ala. Civ. App. 2015) (Although "evidence presented regarding the parties' lack of communication and cooperation indicated that a change of custody might benefit the mother, ... the mother failed to demonstrate that a change of custody would serve the best interest of the children. The touchstone for custody decisions 'is the welfare and best interests of the child.' Willing v. Willing, 655 So. 2d 1064, 1065 (Ala. Civ. App. 1995)."); Vick v. Vick, 688 So. 2d 852, 856 (Ala. Civ. App. 1997).

In Vick, we noted that "[a] change in the custodial parent's residence is also insufficient to warrant a change of custody," 688 So. 2d at 856, particularly absent some evidence sufficient to support the conclusion that, in light of such a change, the child's best interests would be served by a change of custody. See Judah v. Gilmore, 804 So. 2d 1092, 1097 (Ala. Civ. App. 2000). The father, however, failed to present evidence sufficient to support such conclusions, either in regard to the mother's changes of residences, the changes in the children's schools, or the parties' visitation disputes. As to the issues of changing residences and schools, we note that the father presented no evidence regarding the children's grades, socialization, or home life that would support a conclusion that the children had been negatively impacted by those changes, that such changes were likely to continue, or that, in light of those changes, the children's best interests would be materially promoted by a change in custody to him. See Ex parte McLendon, 455 So. 2d at 866 ("It is not enough that the parent show that [he or] she has remarried, reformed [his or] her lifestyle, and improved [his or] her financial position. ... The parent seeking the custody change must show not only

that [he or] she is fit, but also that the change of custody 'materially promotes' the child's best interest and welfare."). Likewise, the father failed to present evidence sufficient to support the conclusion that a change in custody to him would overcome the inherently disruptive effects caused by uprooting the children, who had been in the mother's custody since the entry of the divorce judgment. Id. Accordingly, we conclude that the trial court erred by entering a judgment granting the father's request to modify custody.

Based on the foregoing, the September 2021 judgment is reversed insofar as it awards sole physical custody of the children to the father and awards the father child support from the mother, and the cause is remanded for the entry of a judgment in accordance with this opinion. In light of our determination regarding the custody award, and the mother's failure to raise any issue regarding the trial court's denial of her counterclaim for a modification of both the father's visitation and his child-support obligation, the provisions of the pertinent previous

judgments addressing the father's visitation and child-support obligation remain in effect.[2]

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

[2]The September 2020 judgment addressed the issue of the father's visitation rights. It appears that his child-support obligation was last addressed in the divorce judgment.

Also, because of our reversal of the custody award to the father, we pretermit consideration of the mother's argument that the trial court also erred by imputing income to her for purposes of its child-support award to the father.