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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210345

C.T.

v.

E.R.

**Appeal from Cullman Juvenile Court
(JU-10-600.03)**

HANSON, Judge.

C.T. ("the paternal grandfather") appeals from a judgment of the Cullman Juvenile Court ("the juvenile court") modifying a 2012 judgment of that court so as to award custody of B.T. ("the child") to E.R. ("the mother"). Because the juvenile court failed to apply the substantive

standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), we reverse the judgment and remand the cause, with instructions, to the juvenile court.

Procedural History

The mother, who was unmarried, gave birth to the child on October 23, 2009. The mother had abused prescription drugs before the child was born and, by her own admission, had struggled with drug addiction for about 10 years of her life; pursuant to a safety plan implemented by the Alabama Department of Human Resources, the child was placed with the parental grandfather and E.T. ("the paternal grandparents"), with whom the child has resided since he was approximately one year old. In 2012, the juvenile court entered a judgment adjudicating the child dependent and awarding custody of the child to the paternal grandparents, with the mother having supervised visitation.

The mother was arrested on a charge of possession of a controlled substance in 2014. In 2015, the mother entered a drug-recovery program in Hartselle; the mother completed a 14-month program offered by Milestones Recovery Ministries in July 2016. Thereafter, the mother

completed a one-year drug-court program in Cullman County. The mother has reportedly been sober since May 15, 2015.

On August 14, 2018, the mother filed in the juvenile court a "petition for return of custody," alleging, in pertinent part, that the mother had been drug-free for nearly four years; that the mother had had no new criminal charges against her since 2014; that the mother had maintained contact and had exercised supervised visitation with the child as had been allowed by the paternal grandparents; that the mother had maintained a stable home and employment for over two years; that the mother was fit and proper to have custody of the child; and that the child was not dependent at that time because the mother was willing and able to provide for the child's physical, emotional, and financial needs. A hearing was conducted on October 18, 2018, and the parties agreed upon a pendente lite unsupervised-visitation schedule for the mother, which the juvenile court ratified in an order. A second hearing was conducted on August 20, 2020, after which the juvenile court entered a second order that increased the mother's pendente lite visitation with the child.

On March 10, 2021, the juvenile court conducted a virtual hearing using videoconferencing technology. The juvenile court subsequently entered an order, stating:

"The [c]ourt held a virtual hearing with the parties to discuss the return of custody to the mother. The parties will endeavor to work out a solution for return of custody with liberal visitation in the paternal grandparents/custodians as the [c]ourt recognizes their significant role in the rearing of the child. If the parties are unsuccessful in reaching a resolution[,] the [c]ourt will set a hearing for testimony from the parties."

In May 2021, the mother filed a motion for a special trial setting, and the case was finally tried in September 2021. On December 22, 2021, the juvenile court entered a judgment that awarded custody of the child to the mother, with the paternal grandparents having visitation alternating weekends. In pertinent part, the juvenile court determined: "The [c]ourt finds the child is no longer dependent and custody shall be returned to the mother, [E.R.]" In a timely filed postjudgment motion, the paternal grandparents challenged the juvenile court's judgment, asserting that there had been no evidence presented that would show that the child's best interests would be materially promoted by changing custody from the paternal grandparents to the mother so as to satisfy the substantive standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). The

paternal grandparents' postjudgment motion was denied by operation of law, see Rule 1, Ala. R. Juv. P., and the paternal grandfather appealed. We have jurisdiction pursuant to Rule 28(A)(1)(c)(i), Ala. R. Juv. P., because there exists a trial transcript prepared after the fact by a court reporter and a determination by the juvenile court that an adequate record exists.

Standard of Review

"[T]he question of whether the trial court applied the proper custody-modification standard is a question of law; thus, our review on that question is de novo." Wood v. Wood, 29 So. 3d 908, 911 (Ala. Civ. App. 2009).

Analysis

As a preliminary matter, we note that the paternal grandfather's first challenge to the substantive legal standard applied by the juvenile court to the mother's custody-modification claim was raised after the juvenile court had entered a judgment changing custody of the child to the mother. Because the error alleged on appeal by the grandfather occurred, if at all, in the juvenile court's judgment, he was entitled to bring the issue to the juvenile court's attention by filing a postjudgment

motion. See Prescott v. Prescott, 6 So. 3d 552 (Ala. Civ. App. 2008). Because such a postjudgment motion expressly raising the issue of the proper substantive standard applicable to the mother's custody-modification claim was filed, we conclude that the issue has been preserved.

Under Ex parte McLendon, supra, when a previous custody judgment awarding sole physical custody of a child has been entered, a 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 interests 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)). That additional element of proof, which applies when a previous custody judgment favors a parent or nonparent over a child's parent (see generally Ex 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 those elements that must be proven to succeed on a custody-modification petition in general, i.e., proof of the petitioner'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). Further, after the entry of a final dispositional judgment in a dependency proceeding, a parent may reclaim custody of the child only by meeting the McLendon standard, *i.e.*, by proving that a material change of circumstances has occurred since the entry of the judgment that awarded custody and ended the dependency of the child and that the best interests and welfare of the child would be materially promoted by awarding custody of the child to the petitioner. *See* D.E.F. v. L.M.D., 76 So. 3d 834 (Ala. Civ. App. 2011), and A.H. v. R.M., 793 So. 2d 799 (Ala. Civ. App. 2001).

In the present case, there existed a previous judicial determination in the 2012 dependency action awarding the paternal grandparents custody of the child. The paternal grandfather argues that the juvenile court treated this custody-modification case as a dependency case, applied the wrong custody-modification standard, and thereby erred in awarding the mother custody of the child. In seeking a reversal of the juvenile court's judgment, the paternal grandfather relies on, among other cases, S.G. v. P.C., 853 So. 2d 246 (Ala. Civ. App. 2002). In S.G., a juvenile court had previously established paternity, had awarded physical custody of the subject child to a parent, and had awarded visitation to a noncustodial parent; however, that court applied the best-interests-of-the-child standard rather than the McLendon standard in a subsequent custody-modification proceeding brought by the non-custodial parent. In S.G., this court concluded that the juvenile court had erroneously treated the case as a dependency action, rather than a custody-modification action, and we reversed the judgment of the juvenile court because the custody-modification standard established in Ex parte McLendon had not been applied.

In the case before us, the juvenile court's final judgment determined that "the child is no longer dependent and custody shall be returned to the mother." That wording indicates that the juvenile court erroneously considered this case to be a resumption of the previous dependency action. We agree with the paternal grandfather that the juvenile court was required to apply the McLendon standard in assessing the mother's custody-modification claim, as the paternal grandparents had asserted in their postjudgment motion. As a result, we reverse the judgment entered in this case and remand the case to the juvenile court to apply the McLendon standard to the evidence it received and to enter an appropriate judgment based on that standard.¹

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

¹In light of our conclusion as to the paternal grandfather's argument concerning the juvenile court's misapplication of the substantive law applicable to the mother's petition, we pretermitt consideration of the paternal grandfather's argument regarding the potential applicability of Ala. Code 1975, § 12-15-316, to the mother's petition.