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# ALABAMA COURT OF CIVIL APPEALS

**SPECIAL TERM, 2015**

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**2140140**

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**K.U.**

**v.**

**J.C. and R.C.**

**Appeal from Montgomery Juvenile Court**
**(JU-07-692.03)**

MOORE, Judge.

K.U. ("the maternal grandmother") appeals from a judgment of the Montgomery Juvenile Court ("the juvenile court") awarding custody of S.C. ("the child") to J.C. ("the father") and R.C. ("the stepmother"). We reverse and remand.

Procedural History

On January 29, 2008, the juvenile court entered a judgment ("the 2008 Montgomery judgment"), based upon an agreement of the parties, awarding the maternal grandmother and T.W. ("the paternal grandmother") legal and physical custody of the child, whose date of birth is December 19, 2005, and closing the case to further review.[1] On July 1, 2008, the Autauga Juvenile Court entered a judgment in a dependency case ("the 2008 Autauga judgment") awarding the

[1]The pleadings from that action are not before this court, and the 2008 Montgomery judgment does not specifically find the child dependent.

> "'[T]his court has held that when the evidence in the record supports a finding of dependency and when the trial court has made a disposition consistent with a finding of dependency, in the interest of judicial economy this court may hold that a finding of dependency is implicit in the trial court's judgment.' J.P. v. S.S., 989 So. 2d 591, 598 (Ala. Civ. App. 2008)."

M.W.H. v. R.W., 100 So. 3d 603, 607 (Ala. Civ. App. 2012).

In the present case, the evidence indicated that the child's parents were unable to take care of the child at the time the 2008 Montgomery judgment was entered, that the parties agreed for the maternal grandmother and the paternal grandmother to be awarded custody of the child, and that the juvenile court entered a judgment consistent with that agreement. Therefore, we conclude that a finding of dependency is implicit in the 2008 Montgomery judgment.

maternal grandmother and the paternal grandmother legal and physical custody of F.C., the child's sister, whose date of birth is November 22, 2004, and closing the case for further review. On February 15, 2013, the father and the stepmother filed, in the juvenile court, a petition to modify the custody of the child and F.C. On March 28, 2013, the maternal grandmother filed an answer to the petition. Subsequently, the petition to modify as to F.C. was transferred to the Autauga Juvenile Court. After a trial, the juvenile court entered a judgment awarding custody of the child to the father and the stepmother. On November 12, 2014, the maternal grandmother filed her notice of appeal to this court.

Discussion

On appeal, the maternal grandmother argues that the father and the stepmother failed to meet the standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984) ("the McLendon standard").[2] "After a juvenile court has placed a

[2]The father and the stepmother argue that the maternal grandmother did not preserve her arguments or make sufficient arguments in her brief in accordance with Rule 28, Ala. R. App. P. We have reviewed the record and the maternal grandmother's appellate brief and conclude that neither of the father and stepmother's assertions are meritorious. We specifically note that the juvenile court made specific findings of fact; thus, the maternal grandmother was not

dependent child into the custody of a proper caregiver, consideration of a change of custody is conducted pursuant to the [McLendon] standard...." Ex parte S.L.M., [Ms. 1130573, Sept. 19, 2014] ___ So. 3d ___, ___ (Ala. 2014).

> "The custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), requires that
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> > "'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)).'
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> "McCormick v. Ethridge, 15 So. 3d 524, 527 (Ala. Civ. App. 2008). It is not sufficient for a noncustodial parent seeking a modification of custody to show that he or she is a fit custodian. Id. The noncustodial parent must prove all three McLendon factors in order to warrant a modification of custody. Id."

Walker v. Lanier, [Ms. 2130895, April 24, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015). "[E]ven when an order finding

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required to file a postjudgment motion to preserve her argument regarding the sufficiency of the evidence. See Rule 52(b), Ala. R. Civ. P.

a child dependent and awarding custody to a relative contains indications that the custody award is 'temporary,' the parent must meet the McLendon standard in a subsequent modification proceeding." P.A. v. L.S., 78 So. 3d 979, 982 (Ala. Civ. App. 2011).

In the present case, the evidence indicated that, at the time of the entry of the 2008 Montgomery judgment, the father was 22 years old, was going through a divorce with the child's mother, did not have a stable job, was living with the paternal grandmother, and was unable to care for the child. The child's mother was also unable to care for the child. All the parties testified that the agreement upon which the 2008 Montgomery judgment was based was intended to be temporary until the father could take care of the child. The father testified that, initially, the child lived with him and the paternal grandmother but that in March 2008 the child moved in with the maternal grandmother and he moved to Georgia. The evidence indicated that the child had resided primarily with the maternal grandmother since that time and that the father had exercised visitation with the child every other weekend. The father testified that, in 2009, he began discussing with

the maternal grandmother obtaining custody of the child. He testified that she had stated that he needed to be married and that, after he married, she had stated that he would have a better chance of her returning custody to him if he moved back to Alabama. The father testified that he moved back to Alabama in 2011 but that the maternal grandmother had not allowed him to regain custody of the child. At the time of the trial, the father and the stepmother had been married for five years, and they had a four-year-old son together. The father testified that the child has a good relationship with her half brother and that he and the stepmother have friends who have children the same age as the child. He testified that he and the stepmother have stable jobs, that they live in a three-bedroom house, and that they are able to care for the child without assistance. We note that, before the last day of the trial in this case, the Autauga Juvenile Court had entered a judgment, based upon an agreement of the parties, pursuant to which the maternal grandmother was to maintain primary physical custody of F.C.

The complaints that the father had regarding the maternal grandmother were that she had taken the child to a general

practitioner instead of a pediatrician, that she had not shared certain information about the child with him, and that she does not read with the child like he does. He also testified that the child shows signs of depression because she will start crying and throw a tantrum for no reason. He testified that, the more that the child is in his custody, the less the tantrums happen. The father also testified that the maternal grandmother had allowed the child and F.C. to be alone with their mother even though F.C. was allowed to have only supervised visitation with the mother pursuant to the 2008 Autauga judgment; the mother, however, was allowed by the 2008 Montgomery judgment to have unsupervised visitation with the child. The stepmother testified that the child is "a little bit behind" in reading but not enough to need special help. She also testified that the child does not have a social life. She testified that the father had asked the maternal grandmother to have the child telephone her half brother on his birthday but that she had not done so. The evidence indicated, however, that the maternal grandmother had taken the child to the half brother's birthday party, which had not been held on his actual birthday. The stepmother also

testified that the maternal grandmother had failed to pay for a field trip on time, resulting in the child's being unable to attend the field trip.

All the parties agreed that the maternal grandmother had taken proper care of the child for the previous seven years and that she was a wonderful grandmother. The maternal grandmother testified that she takes the child to school and picks her up, that she had hired a tutor for the child, that she takes the child to the doctor and the dentist, that she takes the child to church, where the child sings in the choir, and that the child plays soccer. The father admitted that there had not been much change in how the maternal grandmother had cared for the child since the child was placed in her custody and that the maternal grandmother had been consistent.

In Ex parte McLendon, our supreme court reasoned:

> "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.
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> "....

> "We have examined the record carefully and conclude that the parties are equally capable of taking care of the child, and that both would provide her with a nurturing, loving home. The most that the mother has shown is that her circumstances have improved, and she is now able to provide for the child in the same manner in which the grandparents have been providing for her. She failed to show that changing the custody materially promotes the welfare and best interest of the child."

455 So. 2d at 866.

In the present case, it is clear that the father has become a stable and capable parent and that both the maternal grandmother and the father and stepmother can provide the child with a loving home. However, the fact that the father and the stepmother can provide a stable and loving home is insufficient to meet the McLendon standard. The child has, along with F.C., lived with the maternal grandmother for the last seven years. All the evidence indicates that the maternal grandmother has provided for the child, that she loves the child, and that the child is bonded to the maternal grandmother and F.C. Based on the foregoing, we conclude that the juvenile court erred in determining that the McLendon standard was met. Therefore, we reverse the judgment of the juvenile court modifying custody of the child and remand the

cause for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman and Thomas, JJ., concur.

Donaldson, J., concurs in the result, without writing.