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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150775

Tandra Gordon

v.

Brian Gordon

Appeal from Tuscaloosa Circuit Court
(DR-10-751.01 and DR-10-751.02)

THOMAS, Judge.

Tandra Gordon ("the mother") and Brian Gordon ("the father") are the parents of a child ("the child") born in October 2006. In 2007 the mother began attending medical school in Illinois; the child and the father remained in

Alabama. At some point in 2011, the mother graduated from medical school and returned to Alabama to begin a medical-residency program.

On March 10, 2012, the parties were divorced by a judgment entered by the Tuscaloosa Circuit Court. The circuit court adopted the parties' mediated agreement and, among other things, awarded the parties joint legal custody of the child, named the father as the sole physical custodian, and ordered the mother to pay child support.[1] The father, an assistant professor at the University of Alabama, worked and resided in Tuscaloosa; the mother practiced medicine in the Birmingham area, resided in Birmingham, and leased an apartment in Tuscaloosa to facilitate her visitation with the child.

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[1]The judgment actually awarded the father "primary physical custody" of the child.

> "[T]here is but one way to interpret a judgment that awards 'joint custody' with an award of 'primary physical custody' to one parent -- such a judgment must be interpreted as awarding the parents joint legal custody and awarding one parent sole physical custody, the term used by [§ 30-3-151, Ala. Code 1975,] to denote a parent being favored with the right of custody over the other parent, who will receive visitation."

Smith v. Smith, 887 So. 2d 257, 262 (Ala. Civ. App. 2003).

In September 2014, the father filed a petition seeking, among other things, a modification of the child's custody and a recalculation of the mother's child-support obligation. The father's action was assigned case number DR-10-751.01 ("the .01 action"). That same month, the mother filed an answer to the father's petition and a counterclaim seeking a modification of the child's custody and a termination of her obligation to pay child support. The mother's action was assigned case number DR-10-751.02 ("the .02 action"). On March 13, 2015, the mother filed a motion seeking, among other things, consolidation of the .01 action and the .02 action. On March 19, 2015, the circuit court entered an order, which provides, in pertinent part:

> "It is hereby ORDERED, ADJUDGED and DECREED that [the .01 action] and [the .02 action] shall be consolidated for trial purposes and that all future pleadings shall be filed under DR-10-751.01."

A trial was held on November 4, 2015, and January 12, 2016. On March 17, 2016, the circuit court entered a judgment, increasing the amount of the mother's child-support obligation and denying her request for a modification of custody upon its express determination that the mother had failed to provide evidence to meet the custody-modification

requirements set out in Ex parte McLendon, 455 So. 2d 463 (Ala. 1984)("the McLendon standard"); however, the circuit court increased the mother's "parenting time."

The record reflects that the mother filed her postjudgment motion on Sunday, April 17, 2016.[2] The circuit court held a postjudgment hearing, and, on May 20, 2016, it entered an order in which it amended certain custody-exchange and visitation provisions. On June 8, 2016, the mother filed a timely notice of appeal, seeking this court's review of two issues.[3]

The Propriety of the Child-Support Modification

The mother contends that the circuit court erred by increasing her child-support obligation "solely on income and not the needs of the child."

> "'Our standard of review in a case involving a modification of a child-support order is well settled. Matters related to

[2]The 30th day after the judgment was entered was Saturday, April 16, 2016. Therefore, the mother had until Monday, April 18, 2016, to file a postjudgment motion. See Rule 59(b), Ala. R. Civ. P., and Rule 6, Ala. R. Civ. P.

[3]We reject the father's assertion that the mother's appeal is untimely. The notice of appeal, in this consolidated action, was properly filed with the appropriate case-numbers.

> child support, including subsequent modifications of a child-support order, rest soundly within the trial court's discretion and will not be disturbed on appeal, absent a showing that the ruling is unsupported by the evidence and thus is plainly and palpably wrong. Berryhill v. Reeves, 705 So. 2d 505 (Ala. Civ. App. 1997); Williams v. Braddy, 689 So. 2d 154 (Ala. Civ. App. 1996). A child-support award may be modified upon a showing of a material change of circumstances that is substantial and continuing. Id.; State ex rel. Shellhouse v. Bentley, 666 So. 2d 517 (Ala. Civ. App. 1995). "Factors indicating a change of circumstances include a material change in the needs, conditions, and circumstances of the child." Id. at 518. The primary consideration in awarding child support is the welfare and best interests of the child. Balfour v. Balfour, 660 So. 2d 1015 (Ala. Civ. App. 1995).
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> "'This court has further held that a trial court is required to determine if a deduction is to be allowed in a monthly child-support obligation based on the fact that health-insurance premiums are being paid on behalf of the child in accordance with Rule 32(B)(7), Ala. R. Jud. Admin. See Jordan v. Jordan, 688 So. 2d 839 (Ala. Civ. App. 1997), Kennamore v. State ex rel. Jinnette, 686 So. 2d 295 (Ala. Civ. App. 1996).'
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> "Jackson v. Jackson, 777 So. 2d 155, 158 (Ala. Civ. App. 2000)."

Volovecky v. Hoffman, 903 So. 2d 844, 847-48 (Ala. Civ. App. 2004).

> "Rule 32(A) and (C), Ala. R. Jud. Admin., provide a method for determining the amount of child support according to the parents' combined incomes and a schedule of basic child-support obligations. There is a rebuttable presumption that the amount of child support calculated pursuant to the Rule 32 guidelines is the 'correct amount of child support to be awarded.' Rule 32(A), Ala. R. Jud. Admin."

Batchelor v. Batchelor, 188 So. 3d 704, 707 (Ala. Civ. App. 2015).

The mother had been obligated to pay $678 per month in child support. The parents each submitted a CS-41 Child-Support-Obligation Income Statement/Affidavit form. In its Form CS-42, the circuit court correctly indicates that the father had reported a monthly gross income of $6,131 and that the mother had reported a monthly gross income of $10,769.24. After certain deductions, the mother's share of the child-support obligation, pursuant to the child-support guidelines, is $929, which is the amount the circuit court ordered her to pay.

> "The purpose of child support is to provide support for dependent children. Self v. Self, 685 So. 2d 732 (Ala. Civ. App. 1996). 'Child support is always subject to modification based upon changed circumstances and a parent's ability to pay.' Gordy v. Glance, 636 So. 2d 459, 461 (Ala. Civ. App. 1994)."

Lo Porto v. Lo Porto, 717 So. 2d 418, 421 (Ala. Civ. App. 1998).

The mother does not present any argument to this court regarding changed circumstances or an inability to pay. Instead, in her first sub-argument, the mother refers to § 30-3-155, Ala. Code 1975, as "the child support statute," and she argues that § 30-3-155 is unconstitutional.[4] Section 30-3-155 provides, in its entirety: "In making a determination of child support, the court shall apply Rule 32 of the Alabama Rules of Judicial Administration." Rule 32(A) provides, in pertinent part:

> "Guidelines for child support are hereby established for use in any action to establish or modify child support, whether temporary or permanent. There shall be a rebuttable presumption, in any judicial or administrative proceeding for the establishment or modification of child support, that the amount of the award that would result from the application of these guidelines is the correct amount of child support to be awarded. A written finding on the record indicating that the application of the guidelines would be unjust or inappropriate shall be sufficient to rebut the presumption."

[4]Assuming without deciding that the mother properly raised a constitutional challenge, the record contains an acceptance and waiver pursuant to § 6-6-227, Ala. Code 1975, which is dated March 25, 2015, filed by the attorney general for the State of Alabama.

According to the mother, the Rule 32 child-support guidelines usurp the authority of fit parents to determine the extent of support that assures that "necessaries are provided for a child." The alleged usurpation, according to the mother, violates the separation-of-powers doctrine and her right to equal protection and due process. The mother fails to develop a legal argument or to provide a relevant citation for her assertion that the Rule 32 child-support guidelines usurp the authority of fit parents. The mother cites Young v. Weaver, 883 So. 2d 234, 235 (Ala. Civ. App. 2003), for her assertion that this court has held that "children do not have a right to more than the necessities." However, Young, which examines whether a contract made with a minor is voidable, is inapposite. It is well settled that "[t]his court will address only those issues properly presented and for which supporting authority has been cited." Asam v. Devereaux, 686 So. 2d 1222, 1224 (Ala. Civ. App. 1996). "Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support that party's position. If they do not, the arguments are waived." White Sands Grp., L.L.C. v. PRS II, LLC, 998 So.

2d 1042, 1058 (Ala. 2008). Accordingly, we need not address this sub-argument further.

In her second sub-argument, the mother contends that the circuit court erred by increasing her child-support obligation because, she says, "it is undisputed that the child's needs were being met." The mother's argument is framed largely within the context of awards of joint physical custody; however, in this case, the circuit court awarded the father sole physical custody. To the degree that the mother's citation to authority is relevant, we note that Rule 32 contemplates that a deviation from the child-support guidelines may be appropriate in some cases, and it provides discretion for trial courts to deviate from the guidelines for seven enumerated reasons. Furthermore, Rule 32(A)(1) allows a deviation, when justified in writing, "even if no reason enumerated in this section exists, if evidence of other reasons justifying deviation is presented." Clearly, the circuit court could have entered any child-support order it deemed appropriate based upon the evidence presented. The circuit court's award of child support was properly based upon the evidence presented, including the parents' reported

income. The evidence presented was insufficient to rebut the Rule 32 presumption or to amount to proof of a denial of the mother's right to due process or equal protection.[5] Thus, the circuit court did not err by increasing the mother's child-support obligation.

The Propriety of the Custody Modification

The mother complains that the McLendon standard is based on a misconception, violates public policy, and is a barrier to custody awards that are in the best interest of the child.[6]

> "When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears

[5]We note that the mother did not develop any argument on appeal regarding an alleged violation of the separation-of-powers doctrine.

[6]Although our legislature has indicated that joint-custody arrangements are favored, see § 30-3-150, Ala. Code 1975, and should be considered in every child-custody case, see § 30-3-152(a) Ala. Code 1975, the McLendon standard does not violate that policy by requiring, in child-custody-modification actions, evidence demonstrating that a parent is a fit custodian, that material changes which affect a child's welfare have occurred, and that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting a child. "[T]he McLendon standard is not unconstitutional[, and] the McLendon standard has not been superseded by statute." Gallant v. Gallant, 184 So. 3d 387, 405 (Ala. Civ. App. 2014).

> the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), wherein this Court, quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993), set out the well-established rule:
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> > "'"Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989), and Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow. Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990); Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985)."'
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> "It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous."

Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996).

The law is well settled that "[a] parent seeking to modify a custody judgment awarding [sole] physical custody to the other parent must meet the standard for modification of

custody set forth in Ex parte McLendon[, 455 So. 2d 863 (Ala. 1984)]." Adams v. Adams, 21 So. 3d 1247, 1252 (Ala. Civ. App. 2009). Ex parte McLendon requires that

> "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). 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.

The judgment reads, in pertinent part:

> "Custody. In order to modify the preexisting custody judgment entered on March 10, 2012, the Mother must demonstrate that there has been a material change in circumstances, that the proposed change in custody would materially promote the child's best interests, and that the benefits of the change will more than offset the inherently disruptive effect caused by uprooting the child. Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). Based on the matters presented,

> the Court does not find that all of those elements have been met. Thus, the Mother's petition to modify custody is hereby denied and custody of the child will remain as previously ordered. However, the Court does find that the Mother's parenting time with the minor child is due to be modified."

The father testified that, when the child was 10 months old, the mother moved to Illinois to pursue a medical degree, and he became the child's primary caregiver. By the time the child was five years old, the mother had graduated from medical school and had returned to Alabama, and the parents had divorced one another. As already mentioned, the father worked and resided in Tuscaloosa; the mother worked in the Birmingham area, resided in Birmingham, and leased an apartment in Tuscaloosa. The father said that the mother's residency schedule had been inflexible; thus, for a period, he and the mother had cooperated so that the mother could have the child whenever she could "work it out." The father married Erica Gordon ("the stepmother"); there is one child ("the half sister") of that marriage. According to the father, the child and the half sister are "very close," and the child is proud of being a big sister. He said that the child attends church and enjoys good health.

The father testified that the child had attended preschool at "CDRC" on the campus of the University of Alabama, then a pre-kindergarten program at North River Christian Academy, then kindergarten at "Northington," then first grade at the Tuscaloosa Magnet School, then second grade at Saint Aloysius in Hoover (because the father had, at that time, intended to relocate to Jefferson County), and then third grade at North River Christian Academy. He said that the child was a well-adjusted third-grade student. The mother testified that she had not contributed to the child's private-school tuition; however, it was undisputed that the father had not consulted her before enrolling the child in a private school.

The father testified that he and the mother had exercised "50/50" custody of the child during certain summers. He said that, as a result, the child had suffered "very close to some mental and emotional stuff" because, he testified, the mother had encouraged the child to lie, the child had missed the half sister, the child had had difficulty readjusting to the family's schedule and rules, and the child had been "distant" with the father and the stepmother. The mother testified that

the stepmother wanted to replace her as the child's mother, that the child called the stepmother "mom," that the mother had taught the child to tell the truth, and that the child had enjoyed spending time with her.

The mother testified that "some big changes have happened" since the divorce judgment was entered. She said that she had completed her medical residency, that her current employment schedule was flexible, that the father had interfered with her ability to access the child's school records, that the child had "grown and changed," and that the mother could offer stability rather than yearly changes to the school the child would attend. When asked for any other circumstances that had arisen since the time the divorce judgment was entered, the mother said: "I would have to think on that and get back with you."

The circuit court viewed the video deposition of the mother's expert witness, Linda Nielsen, Ph.D., a professor of adolescent and educational psychology at Wake Forest University. Dr. Nielsen has published 5 books and 13 articles in scholarly journals on the topic of children of divorce, and she has provided continuing-legal-education courses on the

same topic. She testified that, for 20 years, she had reviewed and compiled research comparing the outcomes of children who had lived in various types of custody arrangements, including joint-custody arrangements, which she referred to as "shared parenting" and defined as living with each parent "thirty-five percent to fifty percent of the time year round." Dr. Nielsen explained that a large research study had conclusively shown that children in shared-parenting arrangements, even when their parents had been in "high-conflict," had had equal or better "outcomes" than children in other types of custody arrangements in five areas: (1) the quality of their postdivorce relationships with both parents, (2) behavior (i.e., aggression, drug use, alcohol use, and hyperactivity), (3) mental or emotional health (i.e., anxiety and depression), (4) physical illness (i.e., stress-related illness), and (5) academic performance. According to Dr. Nielsen, 80% of divorced parents remarry or "re-partner" within three years of a divorce; thus, her opinions had taken into account the effect of "blended" families and stepparents. When asked if studies had proved that moving from a "single

parent situation into a shared parent situation" was inherently disruptive to a child, Dr. Nielsen said:

> "It's a change, but it does not have a negative outcome, otherwise, you would not find the positive outcomes that you did in the forty studies. All of the forty studies, those children changed from a -- living with one parent to living with both parents. All forty studies, the children made a change, they switched."

Dr. Nielsen said that, even if a child is "fine" or "okay" in a certain custody arrangement, shared parenting creates a better outcome even when parents do not share the same parenting style. Dr. Nielsen testified: "[I]t's a universal rule that shared parenting is preferable so long as both of the parents are fit."

Dr. Nielsen had never met the child; however, she said that the child could easily adapt to shared parenting because she was well adjusted and loved both parents. Moreover, Dr. Nielsen labeled the parents as cooperative or, in her words, not "a high-conflict couple." The mother characterizes Dr. Nielsen's testimony as "undisputed factual and scientific evidence," which, she says, "demands an award of shared parenting."

We do not agree. The circuit court received Dr. Nielsen's testimony and the testimony of the parents. "When the evidence is presented to the trial court ore tenus, it is the trial court's duty to determine the weight and credibility of the witnesses and their testimony." Smith v. Smith, 196 So. 3d 1191, 1202 (Ala. Civ. App. 2015) (citing Ex parte Hayes, 70 So. 3d 1211, 1215 (Ala. 2011), and Wheeler v. Marvin's, Inc., 593 So. 2d 61, 63 (Ala. 1991)). The circuit court was required to apply the McLendon standard and could have concluded that a change of custody would have had a disruptive effect on the child or that no material change in circumstances had occurred, based upon the evidence presented. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. T.O.B. v. C.J.B., 986 So. 2d 433, 440 (Ala. Civ. App. 2007)(citing Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994)).

In conclusion, the circuit court did not err by increasing the mother's child-support obligation or by declining to modify the child's custody. The judgment of the circuit court is affirmed.

AFFIRMED.

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

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