REL: June 11, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200088

N.T.C.

v.

M.S.C.

Appeal from Bibb Circuit Court
(DR-13-900063.03)

EDWARDS, Judge.

N.T.C. ("the father") appeals from a judgment entered by the Bibb Circuit Court ("the trial court") denying his petition to modify custody of

the parties' children. He argues that the trial court erred by not holding a hearing regarding his postjudgment motion and that the evidence required the trial court to grant his modification petition. We affirm.

The father and M.S.C. ("the mother") married in December 2006 and were divorced pursuant to a judgment entered by the trial court in August 2013 ("the divorce judgment"). Pursuant to the divorce judgment, the father and the mother were awarded joint physical custody -- "seven on/seven off" -- and joint legal custody of their two children, a son, who was born in early 2009, and a daughter, who was born in early 2010. Since the entry of the divorce judgment, the father and the mother have each remarried.

In 2014, the father filed a petition in the trial court regarding the children's education because he and the mother could not reach an agreement about where the children would attend school. The father and the mother resolved that disagreement, however, and the children were enrolled in a public school in Bibb County. The trial court's disposition of the 2014 petition is unclear from the record.

On May 7, 2019, the father filed a petition to modify custody, seeking both a pendente lite award of sole physical custody of the children based on an alleged emergency and, after a hearing, a permanent award of sole physical custody of the children. The father further requested that the mother's visitation be supervised, which, he alleged, would be consistent with a safety plan that had been established by the Bibb County Department of Human Resources ("DHR") following an incident at the children's school in late April 2019. Regarding that incident, Kayla Moore, a DHR service supervisor, testified at the trial of the custody-modification petition that DHR had

> "[r]eceived a report that there were some issues with [the daughter's] possibly viewing pornography, watching her mother engage in sexual activity with [the stepfather]. And then once we got involved with that and started talking to her, it was then brought out that [the stepfather] ... allegedly shot [the son] with an airsoft gun [as a disciplinary measure]."

Moore stated that DHR began an investigation and met with the children at the school. She continued:

> "[W]hen they were talking about [the daughter] seeing [the mother] engaging in sex with [the stepfather], it was stated that she took a knife and opened the door and that's how she saw that. And then the pornography, I think it was something

> on her tablet that was easily addressed by just saying, hey, look, put some parental controls on this.
>
> "And then when we talked to [the son] ..., that's when we got the allegations of [the stepfather's] shooting him with the airsoft gun. And we took that as an allegation, and we kind of ran with that."

The father alleged that the mother was not adequately supervising the children, that she had moved eight times in the last six years, that the children were underperforming at school when in the mother's care, that the mother had failed to administer the son's prescribed medication for attention-deficit/hyperactivity disorder when he had previously been prescribed that medication, and that the stepfather had used improper corporal punishment on the parties' son.

After the father filed his modification petition, the trial court entered an ex parte order awarding him sole physical custody of the children and awarding the mother supervised visitation, pending a hearing scheduled for August 13, 2019, which was subsequently rescheduled for September 5, 2019. On May 17, 2019, the Judicial Inquiry Commission ("the JIC") filed a complaint with the Court of the Judiciary ("the COJ") against Judge Marvin Wayne Wiggins, who was the Presiding

Judge for the Fourth Judicial Circuit and the judge to whom the father's modification petition had been assigned. Thereafter, Judge Collins Pettaway, Jr., temporarily presided over the case.[1]

On June 21, 2019, the mother filed an answer denying the allegations in the father's modification petition.[2] A few days later, the mother filed an emergency motion seeking the entry of a pendente lite order reinstating the custody arrangement from the divorce judgment because DHR had concluded that the allegations against her and the stepfather were "not indicated." She attached two letters from DHR dated June 17, 2019; those letters stated that DHR had not found sufficient evidence to support a finding of child abuse or neglect against the mother or the stepfather.

---

[1]The record does not include any order regarding an assignment of the case to Judge Pettaway, but the father has not argued that Judge Pettaway was not properly presiding over the case. Thus, we presume that an order was entered consistent with applicable procedural law. See Ex parte Atchley, 936 So. 2d 513, 516 (Ala. 2006).

[2]The mother also filed a counterclaim for a modification of the children's custody. She requested that the trial court enter an order awarding her sole physical custody of the children and allowing her to enroll them in the Tuscaloosa County school system. At trial, the mother abandoned her counterclaim for a modification of custody.

The father filed a response to the mother's emergency motion. He opposed the motion because DHR still had an open case to provide services to the mother and the stepfather, including requiring both of them to complete parenting classes and requiring the stepfather to complete anger-management classes. The father also filed a motion seeking the appointment of a guardian ad litem for the children, which the mother opposed.

Judge Pettaway set the mother's emergency motion and the father's motion for the appointment of a guardian ad litem for a hearing to be held on August 15, 2019. The record does not include a transcript of the August 2019 hearing. After that hearing, Judge Pettaway entered an order directing that, based on his consideration of the arguments and evidence presented at that hearing, and after consulting with Judge Wiggins (presumably regarding the basis for his ex parte order), the parties return to the custody arrangement provided in the divorce judgment. The order also set the case for a trial on November 21, 2019. On September 4, 2019, the father filed a renewed motion for the

appointment of a guardian ad litem for the children. Judge Pettaway granted that motion that same day.

On November 18, 2019, the COJ entered an order disposing of the disciplinary proceeding against Judge Wiggins. It is unclear from the record whether Judge Wiggins resumed presiding over the case after the COJ's decision in November 2019. However, at some point, the JIC filed a second complaint with the COJ against Judge Wiggins, and Judge Robert D. Bryant, a district judge in Perry County, which is in the Fourth Judicial Circuit, began presiding over the case on or before November 21, 2019, when he entered a discovery order and reset the case for trial. The record does not include an order regarding an assignment of the case to Judge Bryant, but the father does not argue that Judge Bryant was not properly presiding over the case. Thus, like with Judge Pettaway, we presume that an order was entered consistent with applicable procedural law. See Ex parte Atchley, 936 So. 2d 513, 516 (Ala. 2006); see also note 1, supra.

On January 27, 2020, Judge Bryant held ore tenus proceedings on the father's modification petition, which included interviewing the

children in chambers in the presence of the guardian ad litem.[3] At the close of the trial, Judge Bryant requested that each party submit a proposed order within seven days and that the children's guardian ad litem make a recommendation to the court. Each party timely submitted a proposed order. On February 3, 2020, based upon a joint motion of the JIC and Judge Wiggins, the COJ entered an order dismissing the JIC's second complaint against Judge Wiggins. Judge Wiggins again began presiding over the case, but it is unclear from the record when that occurred.

On February 4, 2020, the guardian ad litem filed her recommendation regarding custody. According to the guardian ad litem, based on the testimony and evidence presented at trial, particularly the

---

[3]During the interview, the children indicated that they felt "okay" when spending time with the father, and, when asked why, the daughter stated: "Because mostly ... I'm the one that always gets in trouble and stuff." When asked how they felt when spending time with the mother, the daughter responded "[b]etter" and the son responded "[k]ind of, yeah. Kind of close --." Judge Bryant apparently interpreted the responses as indicating that the children "lik[ed] to spend time with both" the father and the mother. Judge Bryant then asked the children if there was anything they wanted to tell him, and the daughter made a few statements criticizing the stepmother.

testimony of Moore and the mother, there was "clear evidence that the father is the more stable parent" and that the mother had a "history of bad parental decision-making." The guardian ad litem also made a few comments that appear to have been based on information she had gleaned from working with the parties and the children rather than from the evidence presented at trial. She summarized her opinion regarding the respective families as follows:

> "[The mother] is a loving mother and a capable one. However, she has repeatedly displayed poor judgment and seems to be a bit immature. Moreover, her relationship with [the stepfather] is not as stable as that of [the father] and [the stepmother]. This is not to say that the [the father and the stepmother] need no improvement. [The stepmother] needs to 'stay in her lane' and learn that part of loving these children is respecting the deep and unique bond they share with their natural mother. If she truly loves these children, as I believe she does, she should practice more silence and forbearing as the 'bonus' mother without needing affirmation or putting down [the mother].
>
> "Though I will not divulge the privileged and confidential disclosures of these minor children, neither party should rest easy thinking they have done no damage. The mother has obviously coached the children, [the stepfather] is an unstable figure in their lives (as he is in the mother's, in the [guardian ad litem's] opinion), and the father and [the stepmother] are far too fixated on their fears and worries to be properly encouraging the children's love and affection for their natural

> mother. No one is more keenly aware of this dynamic than these children. The children are anxious when they perceive that something they have said may negatively reflect on their mother, yet they are at ease referring to certain tendencies, as they know their father and [the stepmother] are always watching for the mother's missteps. This is a highly toxic environment and the parties, though cognizant of it, seem resistant to admit their roles in the dynamic that has become normal to all, even the children.
>
> "Even so, these children are remarkably well-adjusted and adept at navigating these muddy waters. They as all children wish to be pleasing to all those in their lives by whom they feel loved and on whom they rely for their needs. At their mother's, they enjoy more freedom and the natural affection children crave from their mothers. At their father's, they thrive with the structure and activity. These are high-spirited and intelligent children that have a natural and undeniable need to spend as much time as possible with their mother and father. Both parents love these children very much. Both parents are fit parents. However, fitness is not the standard here."

The guardian ad litem recommended that the father be awarded sole physical custody, that the mother be awarded "liberal visitation," that "[t]he wishes of the ... children ... be strongly considered with regard to the expansion of said visitation," and that visitation occur "at all such reasonable times and places as the parties may agree." Specifically, the guardian ad litem recommended that the mother have visitation every

other weekend from the end of school on Friday until the following Monday morning, a weeknight during the week that she has no weekend visitation, and every other week during the summer months; the father had requested that the mother be awarded visitation every other weekend and "a little extra time in the summer." As to modifying legal custody, which the father had not requested in his modification petition, the guardian ad litem recommended that

> "[t]he father should have priority over academics, psychological, dental, civic, and sports activity decisions. [The daughter] shall continue to be tutored in reading and mathematics. The [guardian ad litem] wants proof that she is in counseling by March 31, 2020.
>
> "The [m]other should have priority on medical decisions. She is a nurse and was correct that [the son] did not need the [attention-deficit/hyperactivity disorder] medication."

The mother filed a motion to strike the recommendation of the guardian ad litem.

On April 10, 2020, the father filed a motion seeking the reassignment of the case to Judge Bryant on the ground that he had presided over the trial; the mother filed a response opposing the father's motion. Judge Wiggins held a virtual hearing on the father's motion on

May 4, 2020. During that hearing, the father asked that the final judgment regarding his modification petition and any ruling on pending motions be entered by Judge Bryant because Judge Wiggins had not presided over the trial. Judge Wiggins indicated that he had spoken to Judge Bryant, who apparently had been assigned several of Judge Wiggins's cases before the resolution of the second COJ proceeding, and, according to Judge Wiggins, Judge Bryant had stated that

> "he would need a transcript of the case because he may not recall all of the details about it. But it was my understanding if we wanted to send it back to him to make that first ruling -- and I don't mind getting it to him to let him make that ruling, but I'm going to retain the case and rule on other issues after that."

After the hearing, Judge Wiggins entered an order temporarily reassigning the case to Judge Bryant for him to enter a judgment and directing the parties to purchase a transcript of the trial, to file it with the circuit-court clerk, and to forward a copy to Judge Bryant.

On May 18, 2020, the father filed a "Motion for Immediate Custody," requesting a hearing and immediate custody of the children pending the entry of a judgment on his modification petition. The father alleged that

he had been told by the parent of another child, who he later identified as B.P., that the parties' daughter, B.P.'s daughter, and another 10-year-old girl had been involved in a "group chat" that allegedly discussed a "porno video, sexual acts, and an inappropriate picture of the parties' [daughter]." According to the father, the group chat at issue took place while the daughter was in the mother's care and the incident represented another instance of the mother's failing to supervise the daughter's use of electronics and social media. The father requested immediate custody of the children "pending a hearing on this new information that further supports the father's [modification petition]."

The mother filed an objection to the father's motion for immediate custody on the grounds that the allegations were hearsay and that the father had included no evidence "to verify the allegations of a group chat ...." Thereafter, the father filed an affidavit from B.P. that included averments supporting the father's allegations. The mother then filed a motion to strike the affidavit on the ground that it contained, and was based on, hearsay.

On June 27, 2020, Judge Bryant entered a judgment regarding the father's modification petition. The June 2020 judgment stated:

> "This child custody modification matter came before the court on January 27, 2020, for a trial. After consideration of the evidence presented by the parties, the recommendation of the guardian ad litem, an in-camera consultation with the minor children, and application of the 'best interest standard,' the court finds that it is in the best interests of the minor children that the court's 2013 [custody award], adopting the parties' joint custody agreement, remain the same."[4]

The father's May 2020 motion for immediate custody was set for a hearing to be held on August 10, 2020, before Judge Wiggins, who erroneously treated the matter as if a new action had been filed, although no filing fee had been paid. See Ex parte Bragg, 237 So. 3d 235, 238 (Ala. Civ. App. 2017). For example, on July 13, 2020, Judge Wiggins entered

---

[4]At trial, the father initially objected when the mother proposed that Judge Bryant interview the daughter, although he appears to have acquiesced after it was agreed that the son also would be interviewed. The father has not argued on appeal that Judge Bryant erred by considering the in-camera discussion with the children in making his decision. See, e.g., Galaxy Cable, Inc. v. Davis, 58 So. 3d 93, 99 (Ala. 2010) ("Failure by an appellant to argue an issue in its brief waives that issue and precludes it from consideration on appeal."). Instead, the father argues that the children's statements should not be given much weight.

a "Pre-Trial Order" that stated that Judge Bryant had entered the June 2020 judgment and that the case was set for a final hearing on August 10, 2020.

On July 27, 2020, the father filed a postjudgment motion describing the trial testimony and evidentiary submissions that were favorable to his argument for a modification of custody. The father also made reference to the alleged May 2020 group-chat incident involving the parties' daughter. He requested that the trial court alter, amend, or vacate the June 2020 judgment or that it order a new trial because, he said, the judgment was against the weight of the evidence.[5]

---

[5]In the introductory paragraph of the father's postjudgment motion, he also sought "relief from the judgment pursuant to Rule 60(b)[, Ala. R. Civ. P.,] based [on] the newly discovered evidence ...," relying on the following allegation in his postjudgment motion:

> "That months after the trial but before the judgment of this Court, the mother displayed a continuance of her poor parenting choices when she allowed the parties' minor child to engage in online chats without any parental controls or supervision. This resulted in the child being exposed to pornography and inappropriate sexual conversations. This information was not discoverable at the time of the trial and therefore, was not presented. Such evidence would further support and persuade this Court that the father's [modification

On August 10, 2020, Judge Wiggins held a virtual hearing, at which the father, the mother, and B.P. testified. At the beginning of the hearing, Judge Wiggins indicated that he would address all motions other than the father's postjudgment motion, which, he said, was "before Judge Bryant." The father then referenced his May 2020 motion for immediate custody, which he described as a posttrial motion, and the following colloquy occurred:

---

petition] should be granted."

The evidence concerning the posttrial incident referred to in both the father's May 2020 motion for immediate custody and his postjudgment motion amounted to new evidence rather than newly discovered evidence. See Greene v. Greene, [Ms. 2190816, Mar. 26, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021) (stating that evidence is "new evidence," rather than "newly discovered evidence," if the events the evidence concerns occurred after trial). A trial court may not grant relief based on "new evidence [that] comes into being following the conclusion of the trial. ... [T]rials would have the potential to become never-ending." Bates v. State, 503 So. 2d 856, 858 (Ala. Civ. App. 1987); Greene, __ So. 3d at __ (reversing an order based on the "trial court's consideration of 'new evidence' after the entry of the ... [final] judgment ...."). Thus, the new evidence could not have been used to support the father's postjudgment motion or a motion pursuant to Rule 60(b)(2), Ala. R. Civ. P. See, e.g., Marsh v. Smith, 67 So. 3d 100, 108 (Ala. Civ. App. 2011); see also Moody v. State ex rel. Payne, 344 So. 2d 160, 163 (Ala.1977).

> "[Judge Wiggins]: All of the issues around custody, Judge Bryant heard and ruled on.
>
> "[Counsel for the father]: But this -- but this is an incident that occurred after trial.
>
> "[Judge Wiggins]: I can address that incident."

Over the mother's hearsay objection, Judge Wiggins then proceeded to receive evidence regarding the father's May 2020 motion for immediate custody, including B.P.'s testimony regarding the alleged group chat. During B.P.'s testimony, the father introduced copies of screen shots of the alleged group chat that B.P. had sent him. The screen shots referenced the parties' daughter having "made" one participant show something to another participant who then deleted whatever had been sent. That participant also had stated that she "was scared to watch" what was sent. The screen shots also included a selfie of the parties' daughter with her shirt pulled up to expose her chest, but with emoji stickers covering the breast area. That screen shot is referenced as having been sent by the parties' daughter. The screen shot continues with a discussion including references to oral sex on a male.

At one point during a colloquy, the mother stated that the father had not made her aware of what had occurred or provided her with a copy of the screen shots, although, she said, the daughter had told her what had happened. The mother stated that she had taken the daughter's cellular telephone away following her discussion with the daughter. Also, although the mother reiterated her hearsay objection as to the screen shots, the father subsequently testified, without objection, that "the daughter told me, herself, what she had done when I asked her about it" and that the deleted item was "a nasty video," a "porn-type video."[6] The father further testified that, after B.P. had contacted him in May 2020, he had talked to the daughter

> "and told her how -- the importance of taking pictures and how once it's out there, it's out there. And, you know, just really, really upset with what I saw. And I was very upset that she has the opportunity to just sit around at 10 years old and play on her phone and send inappropriate pictures and

[6]The mother's counsel also made certain arguments regarding authentication, suggesting that it was not possible to confirm whether the alleged group-chat participants actually included the daughter and her two friends and that the son or some other person could have been posing as the daughter for the group chat.

> inappropriate language. There was talks of performing sexual acts, and it was just very, very disturbing.
>
> "When we talked to [the daughter], [she] had told us that -- that her mother had got onto her about it, that she had got in trouble, and so I knew that from [the daughter's] saying that and saying that she wasn't allowed to be on her phone, I knew that -- I heard [the daughter] telling me that her mother knew."[7]

On August 25, 2020, the mother filed a response opposing the father's postjudgment motion. In her response, the mother argued, in part, that "the new information regarding the pornography and inappropriate sexual conversations [was] heard before ... Judge Wiggins on August 10, 2020, and does not warrant a new trial ...." Neither Judge Wiggins nor Judge Bryant entered any further orders in the case, and the father's postjudgment motion was denied by operation of law. See Rule 59.1, Ala. R. Civ. P. On October 26, 2020, the father filed a timely notice of appeal to this court.

---

[7]When the daughter was in the father's custody, she apparently was seeing a counselor, but the mother stated that she had not been made aware of that. The mother stated that she had no objection to the daughter's being involved in counseling.

On appeal, the father argues that the trial court erred by not holding a hearing on his postjudgment motion and by denying his modification petition. However, before addressing the father's arguments, we will address his reliance, in part, on the allegations in and proceedings regarding the May 2020 motion for immediate custody.[8] As discussed in

---

[8]We wish to be clear that the evidence presented at the August 2020 hearing regarding the alleged May 2020 group chat and the picture of the daughter is very troubling. Also troubling are statements made in the mother's brief to this court regarding the pornography-related incidents. For example, she states that "[t]he [father] alleged that he was called to the daughter's school after she had made comments about sexual activities. This was subsequently determined to be mere fodder amongst pre-adolescent girls who are coming into womanhood and are curious about their sexuality, which is certainly not uncommon." The fact that DHR recommended the use of parental controls on the childrens' electronic devices precludes any conclusion that what allegedly occurred involved "mere fodder," and there absolutely is no factual support in the record for the mother's conclusion. The mother likewise attempts to excuse the daughter's conduct relating to the alleged May 2020 incident, which she describes as "normal behavior for pre-teen girls." The mother states:

> "Between the initial filing of the petition and the final order denying the same, [the father] also alleged that [the mother] should lose weekly access to her children and become a 'weekend mom' because their daughter ... sent a picture to her girlfriends in a group chat where she had smiley face emojis covering her breasts. [The mother] asserts this was merely pre-adolescent girls experiencing their transition into

note 5, supra, the evidence presented at the August 2020 hearing regarding the alleged May 2020 group chat concerned events that occurred after trial, i.e., it was new evidence rather than newly discovered evidence.[9] We cannot consider that evidence, or the mother's characterization of that evidence, when determining whether Judge Bryant erred by denying the father's modification petition or by allowing

---

> womanhood and trying to cope with the ever-constant body growth and changes."

The mother makes no reference to the purported pornographic video that had been deleted or the oral-sex references that accompanied the daughter's picture.

[9]In his appellate brief, the father has cited no authority supporting the proposition that, after the submission of a case, a new trial could have been granted at common law or in equity based on new evidence, see Rule 59(a), Ala. R. Civ. P., or that the evidence could have been reopened to allow the consideration of new evidence, as opposed to newly discovered evidence, see Campbell v. Campbell, 55 Ala. App. 444, 446, 316 So. 2d 693, 695 (Civ. App. 1975) ("[T]he trial court erred to reversal by, in effect, reopening the case and considering additional evidence which helped form the basis of its decree."); see also Ex parte Alabama Marble Co., 216 Ala. 272, 274, 113 So. 240, 241-42 (1927); cf. Davis v. State, 20 Ala. App. 463, 466, 103 So. 73, 75 (1925) (construing a predecessor statute to Ala. Code 1975, § 6-8-103, and noting that the legislature had created a "restraint upon the laxity of the common-law practice of permitting trial judges at any stage of a trial, before judgment, to reopen cases for the admission of evidence").

his postjudgment motion to be denied by operation of law. See, e.g., Marsh v. Smith, 67 So. 3d 100, 108 (Ala. Civ. App. 2011); see also Moody v. State ex rel. Payne, 344 So.2d 160, 163 (Ala.1977). Instead, that evidence must be presented in a new, properly filed action for a modification of custody, should the father still believe a modification of custody is warranted. Marsh, 67 So. 3d at 108 (noting that "new evidence [may] properly form[] the basis of a contempt action or a modification action").

Turning to the father's arguments, he first argues that the trial court erred by failing to conduct a hearing on his postjudgment motion. The father appears to be confused as to whether Judge Bryant or Judge Wiggins considered his postjudgment motion. However, the record reflects that the postjudgment motion was to be considered by Judge Bryant, and, despite the father's confusion as to which judge considered his postjudgment motion, the father did not request a hearing on his postjudgment motion. The father requested a hearing only as to the new evidence described in his May 2020 motion for immediate custody, which Judge Bryant could not consider. "[I]f a party fails to request a hearing

on his or her postjudgment motion, failure to hold a hearing is not error." Combs v. Combs, 4 So. 3d 1141, 1150 (Ala. Civ. App. 2008) . Thus, we will not further consider the issue whether Judge Bryant should have held a hearing on the father's postjudgment motion.

Turning to the merits of the June 2020 judgment, excluding any consideration of the alleged May 2020 incident, we likewise must reject the father's argument that the evidence presented at trial did not support the trial court's denial of his custody-modification petition.

> "Where, as in the present case, there is a prior judgment awarding joint physical custody, ' "the best interests of the child" ' standard applies in any subsequent custody-modification proceeding. Ex parte Johnson, 673 So. 2d 410, 413 (Ala. 1994) (quoting Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988)). To justify a modification of a preexisting judgment awarding custody, the petitioner must demonstrate that there has been a material change of circumstances since that judgment was entered and that ' "it [is] in the [child's] best interests that the [judgment] be modified" ' in the manner requested. Nave v. Nave, 942 So. 2d 372, 376 (Ala. Civ. App. 2005) (quoting Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987)).
>
> "Also, we note the presumption of correctness accorded to a trial court's judgment:
>
> > " '... " 'A custody determination of the trial court entered upon oral testimony is accorded a

> presumption of correctness on appeal, and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong....' " Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993) (citations omitted). This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility. This opportunity to observe witnesses is especially important in child-custody cases. "In 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).'

"Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001).

"As this Court stated in Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996), quoted in part in Lamb [v. Lamb, 939 So. 2d 918 (Ala. Civ. App. 2006)], in an ore tenus proceeding,

> " '[t]he trial court is in the best position to make a custody determination -- it hears 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. ...'

"676 So. 2d at 1324; see Lamb, 939 So. 2d at 922; see also Ex parte Foley, 864 So. 2d 1094, 1099 (Ala. 2003) ('[A]n appellate court may not substitute its judgment for that of the trial court. To do so would be to reweigh the evidence, which Alabama law does not allow.' (citation omitted)).

> " ' "[T]he trial court is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence, and to decide the issue of custody." ' Ex parte Patronas, 693 So. 2d 473, 475 (Ala. 1997) (quoting Ex parte Bryowsky, 676 So. 2d at 1326). 'Thus, appellate review of a judgment modifying custody when the evidence was presented ore tenus is limited to determining whether there was sufficient evidence to support the trial court's judgment.' Cheek v. Dyess, 1 So. 3d 1025, 1029 (Ala. Civ. App. 2007) (citing Ex parte Patronas)(emphasis added). Under the ore tenus rule, where the conclusion of the trial court is so opposed to the weight of the evidence that the variable factors of a witness's demeanor and credibility and the inferences that can be drawn from the evidence, even after considering those factors, ' "'could not reasonably substantiate it, then the conclusion is clearly erroneous and must be reversed.' "' Cheek, 1 So. 3d at 1029 (quoting B.J.N. v. P.D., 742 So. 2d 1270, 1274 (Ala. Civ. App. 1999), quoting in turn Jacoby v. Bell, 370 So. 2d 278, 280 (Ala. 1979) (emphasis added)).
>
> "Further, where, as in the present case, the trial court does not make detailed written findings of fact, we ' "will assume that the trial court made those findings [of fact] necessary to support its judgment, unless such findings would be clearly erroneous." ' Ex parte Fann, 810 So. 2d at 636 (quoting Lemon v. Golf Terrace Owners Ass'n, 611 So. 2d 263, 265 (Ala.1992))."

Ex parte Blackstock, 47 So. 3d 801, 804-06 (Ala. 2009). " 'We are not allowed to substitute our judgment for that of the trial court, even when this court might have reached a different result, unless the trial court's resolution of the facts is plainly and palpably wrong.' " Hughes v. Hughes,

253 So. 3d 423, 438 (Ala. Civ. App. 2017) (quoting J.B. v. Cleburne Cnty. Dep't of Hum. Res., 992 So. 2d 34, 39 (Ala. Civ. App. 2008)).

In evaluating what custody arrangement is in the best interest 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).

In addition to her testimony regarding DHR's initial involvement with the family, Moore also stated that DHR had required that the mother and the stepfather attend parenting classes, that the stepfather attend

anger-management classes, and that the mother and the stepfather submit to drug screens. Moore stated that the drug screen on the mother was negative, that the drug screen on the stepfather was "clean," and that DHR "didn't have any concerns with drug abuse." She likewise stated that DHR did not have enough evidence to indicate that the children were being left at home alone in a manner that suggested abuse or neglect, as opposed to "a bad parenting decision" by the mother. Moore stated that the mother admitted that she had left the children alone at her house. With regard to the son, Moore stated: "[I]f I'm remembering correctly, [the son] was left at home briefly while she went to a Dollar General [store]," but, she said, DHR "just didn't have enough per our policy to indicate" abuse or neglect.

When asked about whether she thought the mother had made bad parenting decisions, Moore stated that the mother had made "some questionable parenting decisions, as has the [stepfather], which has kind of led us to this room." Moore confirmed that abuse and neglect were "not indicated" and that DHR did not "ha[ve] enough on our end to indicate that [the mother] was a threat to her children or that ... their safety was

being affected." She also stated that, based on her few months of supervising the ongoing case in the summer of 2019, "I think [the mother] loves her children. I think she's a good mom. I think she makes questionable decisions. Through working with [the father], he is the more stable parent from my interactions with him." She stated that DHR "never had any concerns about [the father's] parenting decisions" "or the stepmother's parenting decisions." As for the stepfather, Moore added on cross-examination by the mother's counsel:

> "[S]hooting your child with an airsoft gun, it's not a good [parenting] decision. It's a terrible decision. I would not recommend that to anybody. Can I say that that is abuse or neglect per my policy? I could not. There were not marks that I could see. I had no -- I didn't have any pictures of any marks, and I didn't have a clear, yes, this is what happened from the child, from any potential witnesses, or anything.[10] So per my

[10]Moore affirmed that the parties' son had disclosed that the stepfather had shot him with an airsoft gun because the son was not cleaning up the yard fast enough or because the son had stopped while cleaning up the yard. Moore believed that the incident occurred, as described by the parties' son. Moore also stated that the stepfather did not admit that the incident had occurred but that he had agreed that disciplining a child with an airsoft gun could be inappropriate and that "he was very emotional. He, you know, expressed love for all of his kids, which I believe. I believe everybody involved in this case loves these children." She added: "I just think it was a bad parenting decision, and we talked about that."

> policy, I didn't have enough to indicate it. Do I think it happened? Yes, I do, and I think that was a poor parenting decision. Do I think that the children were left home alone? Yes, I do. Do I think that that is abuse or neglect? It depends on who you ask. In this day and time, I don't think you need to leave your children at that age at home. But, again, that is my opinion, and we all have those. Do I think [the mother] was potentially trying to put her kids at risk by leaving them at home if she did? No, I don't think that, but I do think that that was a poor parenting decision."[11]

Moore added that "that is not enough for me to sit here and recommend that she not have her children. It's enough to make me question some things that she does, but that's not enough to allow me to testify that she's an unfit parent."

Regarding the parties, Moore stated:

> "[T]hey bicker back and forth entirely too much. They really want -- it gets to the point where we're just trying to see who can be heard, and I feel that that is the main discord in this whole situation. If we could sit down at a table and be adults, then it would work out better for the kids.
>
> "Now, in saying that, I had a better response when I come at that angle with [the father] than I did with [the

[11]According to Moore, the son had indicated in a forensic interview that he had not felt safe at his mother's house "[b]ecause they get left home alone, and it scares him because he d[idn't] have a phone or anything, so if something bad happened ...."

> mother]. He did own up to, like, hey, look, I understand that I do that. And I don't think I kind of got that same response from [the mother]."

Moore also stated that the children were at ease when discussing the father and the stepmother but that the children tensed up when discussing the mother and the stepfather. She added, however, that "that could be 150 different reasons. They were in the middle of an investigation. ... There was a lot going on for them, and they're young," and, "as I stated, that could be a million different reasons "for the tension.

Moore further noted that "there was some conversation about how [the mother] negatively talked about [the stepmother], and they didn't like that. It really hurt their feelings. More so [the daughter], I believe, was the one that discussed that." Also, when the guardian ad litem stated that there had been some allegations that the children got in trouble for talking about the stepmother in the mother's home, Moore confirmed that DHR's notes reflected that the children had been grounded for mentioning the father and the stepmother and that the mother had referred to the stepmother as a "[f]at bitch." Moore also stated that, during an interview

at the school, the daughter had "made the comment that [the mother] said that kids get taken away for talking about what happens at home."

Regarding the children's education, the father testified that, during the summer of 2019, when the children had been placed in the sole custody of the father pursuant to DHR's safety plan, he had discovered that the daughter, who was going into the fourth grade, was reading at a second-grade level. He retained a tutor to help the daughter with reading. The mother stated that no one had discussed with her the daughter's reading problems or the decision to retain a tutor. She admitted that she had canceled the tutoring service when the joint-custody arrangement had resumed, stating that she felt "like for the reading portion that I can do that. I am college educated. I feel like I can teach her how to read and how to spell. So I didn't really feel the need for a tutor and, plus, the $20 each session." Nevertheless, the mother also admitted that the daughter's reading grade had fallen from an A to a B after the joint-custody arrangement had resumed and that all of the daughter's grades had fallen in the most recent grading period. The record includes no details regarding how much the daughter's grades had fallen, other than her

grade for reading falling from an A to a B. Likewise, there is no indication that the son's grades had fallen.

Regarding the children's purportedly being left home alone, the mother stated: "[W]hen I was first interviewed, I told the caseworker that I could not remember a time that I had ever left them home alone. I said if I did, I said, it would have been just to run up the road or something. And that's the exact words out of my mouth. I never said that I did." The mother admitted that on one occasion she had dropped the parties' son off at a ballpark without confirming that the father, who was the coach, was there. The mother explained: "I assumed [the father] was going to be there. He didn't tell me he was out of town. I did not know that he wasn't there. So when I found out, of course I went and got him." The mother admitted that she should have made sure the father was present, but she added: "[T]hat was a one-time thing." The mother's admission apparently related to an incident when the father was not present at the ballpark and the second game to be played by the son's team was canceled after he was dropped off by the mother for the first game. Thereafter, according to the father, other parents had had difficulty contacting the mother so she could

pick up the son. Another incident had occurred the previous evening when the mother had dropped off the son without confirming that the father was present, but she stated that "the adult ... coach ... was there." The father stated that, when he arrived approximately one hour later, the son was watching other players play.

Regarding electronic devices, the mother testified that, after the joint-custody arrangement had resumed, she had provided cellular telephones to the children, but, she said, the phones had "a thing on [them] where if [the children] want something, they have to send a request to the parent phone, and then the parent has to agree with it or deny it." She also stated that the iPad tablet computer that had been available to the children had had restrictions placed on it, although she admitted that it had not had restrictions before the April 2019 incident that precipitated the father's filing his modification petition.

The mother also indicated that she would follow a court order requiring the children, particularly the daughter, to receive counseling. She also affirmed that she was agreeable to tutoring and stated that she would cooperate with the father so that the daughter could continue to

receive math tutoring and that she would comply with any court order regarding the continuation of tutoring for reading.

The evidence regarding the mother's home environment indicated that the mother and the stepfather have two children, one of whom apparently has cerebral palsy, and that the stepfather has an elementary-school-age son who stays with the mother and the stepfather every other weekend and one or two nights during the week. The parties' daughter has her own bedroom; the child with cerebral palsy stays in his parents' bedroom; and the parties' son shares a bedroom with his half brother and his stepbrother when he visits.

It is unclear when the mother remarried. However, since the entry of the divorce judgment in August 2013, the mother had moved with the children approximately seven times. It appears that they had moved several times in the years immediately following the divorce; their most recent move had been in March 2019, into a house in McCalla that the mother and the stepfather were renting from the mother's sister. Before that move, the mother had lived in another house in McCalla for approximately two years and in a house in West Blocton for the three

years before that. The mother noted that, despite the moves, the children had not had to change schools and had never moved far from the father's house. There was no evidence indicating that the children had been affected by the moves.

The evidence regarding the father's home environment indicated that the father had moved twice after the parties' divorce and had lived in his most recent residence for four years. He and the stepmother have a son, who was four years old at the time of trial. We deem a further discussion of the evidence regarding the father's situation unnecessary, however. In analogizing cases to support his argument, the father relies on cases in which this court affirmed a judgment as to the respective custody award at issue, i.e., cases in which we decided whether the trial court "reasonably could have found" as it did. D.M.J. v. D.N.J., 106 So. 3d 393, 398 (Ala. Civ. App. 2012); see also Casey v. Casey, 283 So. 3d 319 (Ala. Civ. App. 2019); Cowperthwait v. Cowperthwait, 231 So. 3d 1101 (Ala. Civ. App. 2017); and Alexander v. Alexander, 65 So. 3d 958 (Ala. Civ. App. 2010). In the present case, the father must establish that the trial court reasonably could not have found as it did -- in other words, that the

trial court reasonably could not have found that leaving the joint-physical-custody award in the divorce judgment undisturbed was in the children's best interests. He must demonstrate that the trial court erred regarding its determination despite, rather than in light of, the ore tenus rule and its attendant presumptions. However, he consistently assumes that the trial court was required to accept evidence as supporting his contentions (for example, he states that "[t]he evidence would support the inference that the mother and stepfather learned little from the parenting classes and anger management class the stepfather took," the father's brief at p. 56 n.10), rather than accounting for the fact that the evidence and inferences to be drawn therefrom must be viewed in a light most favorable to the June 2020 judgment. See Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996) (holding that, when "disputed evidence ... was presented ore tenus before the trial court in a custody hearing," an appellate court does not make credibility determinations, reweigh the evidence, or "sit in judgment of [that] disputed evidence"); Casey, 283 So. 3d at 328 (" 'This Court will reverse only if it finds the judgment to be plainly and palpably wrong, after considering all of the evidence and making all inferences that

can logically be drawn from the evidence. ... This Court will affirm the trial court's judgment if, under any reasonable aspect of the testimony, there is credible evidence to support that judgment.' " (quoting Jantronic Sys., Inc. v. Brock, 646 So. 2d 1337, 1337-38 (Ala. 1994))).

Likewise, in making his argument, the father focuses on a few of the many factors that a trial court must consider in making a custody decision and essentially requests that this court make credibility determinations and reweigh the evidence, which we cannot do. See Ex parte Blackstock and Hughes, supra. Restricting our review to the evidence presented at trial, it is arguably true that the father provided more stability and consistency as a custodian, that the mother had a history of occasionally making bad parenting decisions, that the father has been more attentive to the children's extracurricular activities and is more committed to the daughter's educational success, and that the father is more vigilant regarding the children's moral environment and needs. The fact remains, however, that both Moore and the guardian ad litem noted that the major issue regarding custody was the parents' bickering and lack of cooperation, which is amply supported by the record. Also, the guardian

ad litem, who had been very proactive in her involvement with the parties and the children, noted that the stepmother's actions were problematic (the father did not object to the guardian ad litem's report) and that the mother was a loving, fit, and capable parent. Further, in light of the evidence presented at trial, the guardian ad litem recommended that sole physical custody be awarded to father, but that liberal visitation be awarded to the mother, and that "[t]he wishes of the ... children ... be strongly considered with regard to the expansion of said visitation." Judge Bryant could have considered that recommendation in support of a conclusion that the benefits of any change from the "seven on/seven off" joint-physical-custody arrangement would have been marginal and that a change in custody was not warranted in light of the totality of the evidence presented and his determinations as to credibility and the weight of the evidence. Further, the evidence would support the conclusion that no change in custody was warranted regarding the son, and there was no

evidence indicating that separating the children would be in their best interests.[12]

Based on the foregoing, and in light of the presumptions that attend the ore tenus rule, we cannot conclude that Judge Bryant's determination that maintaining the joint-custody arrangement was in the children's best interests was so against the weight of the evidence presented at trial as to be clearly erroneous. The June 2020 judgment is therefore affirmed.

AFFIRMED.

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

[12]The father has not argued to this court, and he did not argue to Judge Bryant, that, even if no change was warranted regarding joint physical custody, a change was nevertheless warranted regarding joint legal custody.