REL: 05/04/2012

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2101079

D.M.J.

v.

D.N.J.

Appeal from DeKalb Circuit Court
(DR-06-201.02)

THOMPSON, Presiding Judge.

D.M.J. ("the mother") appeals from a custody-modification judgment of the DeKalb Circuit Court that awarded D.N.J. ("the

father") sole physical custody of the parties' child ("the child") and ordered the mother to make monthly child-support payments to the father in the amount of $156.40.

The parties divorced on November 2, 2006. One child was born of their marriage. The child was in the third grade at the time of the trial in this action. By an agreement that was incorporated into the divorce judgment ("the 2006 child-custody agreement"), the mother and the father exercised joint custody of the child, with the father making monthly child-support payments to the mother in the amount of $269.00.[1] Following the entry of the November 2, 2006, judgment, the parties amicably alternated physical custody of the child every three days or every seven days, and the father made every child-support payment that was due.

It appears that on June 28, 2007, the trial court entered a judgment modifying the divorce judgment ("the 2007 modification judgment") to provide that the mother and the father were each to submit to a drug test upon the request of the other party. The pleadings, orders, and other documents

[1]The parties' judgment of divorce is not contained in the record on appeal, but the parties agree regarding the substance of the judgment.

relative to that proceeding are not included in the record of the present appeal.

On June 29, 2010, the State of Alabama, on behalf of the mother, filed an action against the father in which it sought an increase in the father's child-support obligation on the basis that his income had increased. The father filed an answer and a counterclaim in which he alleged there had been a material change in circumstances such that he should be awarded sole custody of the child. He also asked the trial court to enter an order requiring the mother to pay child support to him and to enter an order prohibiting the mother from having "overnight visitors of the opposite sex to whom she is not related or married in the presence of [the child]."

The trial court held a bench trial on April 19, 2011, at which it received ore tenus evidence. The mother testified that she is a hairdresser. Although the testimony is not entirely clear, it appears from the mother's testimony that, when the 2007 modification judgment was entered, she was living in an apartment in Rainsville. After the entry of that judgment, she moved out of that apartment and moved in with a friend and the friend's minor son in Dutton. She then moved

with that friend and the friend's minor son to a house in Scottsboro. At some point, she became romantically involved with her friend's minor son and began living with the minor son in a house in Fyffe that the minor son was using while he took care of chickens. Later, the mother moved into an apartment with the friend's minor son and, when the minor son was 17 years old, she and the friend's minor son married. That marriage appears to have lasted approximately three months.

In January 2009, apparently after she was divorced from her friend's minor son, the mother moved into a rental house where she remained until November 2010. During that approximately 23-month period, she had one live-in boyfriend for approximately four months and a second live-in boyfriend for more than a year. In November 2010, the mother moved in with her father while a house she intended to rent from him was renovated. In January 2011, she moved into her father's rental house, where she was living at the time of the trial in April 2011. At the time of the trial, she had a different boyfriend with whom she had been in a relationship for four months. The mother admitted that her constant moves were not

good for the child, although she also testified that she did not think that the moves had had an effect on the child.

The father testified that he worked for a telephone company and that he had worked for that company for the last 16 or 17 years. The father's testimony reflects that he married his present wife, who is a college professor, on June 8, 2007. His testimony indicated that, since the 2007 modification, he and his wife had moved one time--from the mobile home in which he and his wife had lived while they were building a house to the house that they built.

When it was pointed out to the father that he did not raise with the court his concerns relative to the mother until he filed his counterclaim in the present action, the father responded that he did not have money to come back to court every time the mother changed boyfriends. He indicated that he knew the mother would file something with the court at some point to increase his child-support obligation and that he had waited until she did so to seek custody of the child.

The child testified that he liked the present custody arrangement and that he would not want to change it.

On April 21, 2011, the trial court entered a judgment in which it found that there had been a material change of circumstances and that it was in the child's best interest that sole physical custody of the child be awarded to the father. It awarded joint legal custody of the child to the parties, sole physical custody of the child to the father, and visitation to the mother. The father remained responsible for the child's health insurance and all other medical expenses not covered by the father's insurance and for the child's educational expenses. The mother was ordered to pay monthly child-support payments in the amount of $156.40 to the father. The judgment restricted both parties from having overnight visitors of the opposite sex to whom they are not related when the child is in their respective homes. The mother filed a postjudgment motion, which the trial court denied. The mother appeals.

In Ex parte Blackstock, 47 So. 3d 801, 804-06 (Ala. 2009), our supreme court set out the standard of review appropriate to the present case.

> "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:

> "'When this Court reviews a trial court's child-custody determination that was based upon evidence presented ore tenus, we presume the trial court's decision is correct: "'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. 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, ... 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....'"'

"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)).
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> "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))."

The mother contends that the trial court erred in modifying custody because, she argues, there is no evidence of a material change in circumstances and because the child stated that he was content with the joint-physical-custody arrangement. Because we conclude that the parties shared true

joint custody of the child, the trial court was required to consider whether, since the date of the last custody-modification order, there had been a material change in the circumstances of the parties such that it was in the best interests of the child to modify custody. See Ex parte Couch, 521 So. 2d 987, 989-90 (Ala. 1988); Morgan v. Morgan, 964 So. 2d 24, 34 (Ala. Civ. App. 2007). This court has stated that,

> "[i]n considering the best interests of the child, the court must consider the individual facts of each case, including the following factors: the sex and age of the child; the child's emotional, social, moral, material, and educational needs; the home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, and mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child; the interpersonal relationship between the child and each parent; the effect on the child of disrupting or continuing an existing custodial status; the preference of the child; available alternatives; and any other relevant matter the evidence may disclose."

Id.

Based on the evidence of record, we conclude that the trial court reasonably could have found a material change in circumstances such that it was in the child's best interest to award the father sole physical custody of the child. The

evidence reflects that, in less than four years, the mother moved seven times; cohabitated with, married, and, after three months, divorced a minor; and had multiple live-in boyfriends. Based on this evidence, the trial court was free to infer an impact on the child brought on by the mother's lack of stability such that an award to the father of sole physical custody was in the child's best interest. Holsombeck v. Pate, 47 Ala. App. 39, 42, 249 So. 2d 861, 864 (Civ. 1971).

Watters v. Watters, 918 So. 2d 913 (Ala. Civ. App. 2005), a case on which the mother relies, is not to the contrary. In Watters, the parties were awarded joint physical custody of their child in a divorce judgment. Later, the mother filed a petition seeking sole physical custody of the child, which the trial court granted. On appeal, this court noted that the mother's circumstances had changed: "she ha[d] remarried ...; she [was] no longer employed; and she [was] now residing in a large house in a nice residential neighborhood." Watters, 918 So. 2d at 916. However, we concluded that there was no evidence indicating "those changes [had] affected the child in anything more than a tangential way." Id. Thus, we reversed the trial court's judgment.

The changes in Watters, involving a remarriage and a single move by the mother to a nicer house, pale in comparison to those at issue in the present case. There is simply no way that any type of impact, positive or negative, appropriately could have been inferred from the slight changes described in Watters. Under the circumstances in the present case, however, involving changes that go to the very heart of, and call into serious doubt, the mother's ability to provide the child with a stable environment, the trial court was free to infer an impact on the child from the mother's constant relocations and ever changing housemates.

The mother would have us read Watters in a broader fashion and require in every case that there be direct evidence of a serious impact on a child brought on by changed circumstances before a trial court could modify custody under the Ex parte Couch standard. This is not the law. Indeed, this court has previously held that an impact on a child by material changes can be inferred from the nature of the changes themselves. See Holsombeck, 47 Ala. App. at 42, 249 So. 2d at 864. We find the drawing of such an inference to have been within the trial court's prerogative in the present

case, given that stability is plainly an important factor to be considered with regard to the best interests of a child. See Morgan, 964 So. 2d at 34.[2]

In her appellate briefs, the mother attempts to paint this case as one in which the trial court is depriving her of her right to carry on postdivorce romantic relationships, and she cites her constitutional rights to marry and procreate.

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[2]In his dissent, Judge Moore argues that direct evidence of a detrimental effect on the child by material changes in circumstances must be shown. Our supreme court has limited such a requirement to cases in which a change of custody is sought based solely on heterosexual misconduct by a parent. See Ex parte J.M.F., 730 So.2d 1190, 1194 (Ala. 1998). Although the evidence supports a finding of indiscreet conduct by the mother we do not affirm the change of custody in this case solely on the basis of "heterosexual misconduct" by the mother but, rather, on the totality of the evidence presented, including, most importantly, the mother's pervasive and ongoing lack of stability and her constantly changing residential arrangements. Moreover, we note that the cases on which Judge Moore relies in support of his argument, Rey v. Rey, 513 So. 2d 1 (Ala. Civ. App. 1986), and Judah v. Gilmore, 804 So. 2d 1092 (Ala. Civ. App. 2000), involve situations that are so entirely distinguishable from the facts in this case as to provide no real basis for the adoption of the broader proposition asserted by Judge Moore. Rey involved nothing more than a single move by a custodial parent; Judah involved nothing more than a single, temporary move by a custodial parent. Furthermore, both of those cases were decided under the standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), applicable to prior custody awards that favor one of the parents, not under the standard set forth in Ex parte Couch that is applicable in the present case.

Clearly, the evidence does not support this contention. Without reciting all the evidence, it is sufficient to note that the evidence demonstrates substantially more than that the mother dated a few men after her divorce; it demonstrates poor judgment and a substantial lack of stability in the mother's personal relationships, a lack of stability in her housing arrangements, and a lack of stability in her living arrangements.

The mother also argues that the trial court failed to give appropriate weight to the child's desire to keep the joint-physical-custody arrangement in place. Although we recognize, as the mother points out, that the wishes of a child who is of a sufficient age are entitled to "much weight" in deciding custody, Toler v. Toler, 947 So. 2d 416, 422 (Ala. Civ. App. 2006), a trial court is required to consider a number of factors, see Morgan, supra, and the child's wishes are not dispositive, see Toler, 947 So. 2d at 422. Given the facts of this case, we cannot say that the trial court erred in concluding that the wishes of the child did not outweigh the other factors the trial court considered, such as the parties' relative stability and home life.

The mother also contends that this court should overrule or choose not to follow the supreme court's decision in Ex parte Couch, supra, applying, instead, the rationale set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). Because we are bound by supreme court precedent, see § 12-3-16, Ala. Code 1975, we find no merit in this final argument. We note that the mother, in her briefs, recognizes that this court is bound by supreme court precedent, and she notes that she has raised this argument in this court so as to preserve the argument for further appellate review.

As previously noted, the Ex parte Couch standard provides that, in a case such as the present case, the trial court, to modify custody, only need find that there has been a material change in circumstances and that a modification of custody is in the child's best interest. Ex parte Blackstock, 47 So. 3d at 804. The evidence supports such a finding in this case. As a result, we conclude that the trial court did not err when it awarded sole physical custody of the child to the father, and the trial court's judgment is therefore affirmed.

AFFIRMED.

Pittman, J., concurs.

Bryan, J., concurs specially.

Thomas and Moore, JJ., dissent, with writings.

BRYAN, Judge, concurring specially.

I concur in the main opinion, but I write specially to note that I do not agree with the holding in Ex parte J.M.F., 730 So. 2d 1190, 1194 (Ala. 1998), as set forth in note 2 of the main opinion. However, I am bound by the decisions of the Alabama Supreme Court. See State Farm Mut. Auto. Ins. Co. v. Carlton, 867 So. 2d 320, 325 (Ala. Civ. App. 2001) ("[The Court of Civil Appeals] is bound by the decisions of the Alabama Supreme Court, see § 12-3-16, Ala. Code 1975, and we have no authority to overrule that court's decisions.").

THOMAS, Judge, dissenting.

I respectfully dissent. My review of the record does not lead me to the determination that the evidence before the trial court supports its conclusion that a modification of the parties' joint-custody arrangement, which our legislature requires us to favor, was warranted. Ala. Code 1975, § 30-3-150.[3] I do not agree that, in this case, the trial court could have "inferred" that D.N.J. ("the father") had offered proof to the trial court of a material change of circumstances affecting the best interest and welfare of the child.

The majority of this court is convinced that the father presented sufficient evidence to the trial court of a material change in circumstances and that the trial court properly

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[3] Alabama Code 1975, § 30-3-150, reads in its entirety:

> "Joint Custody. It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage. Joint custody does not necessarily mean equal physical custody."

inferred that that change in circumstances affected the best interest and welfare of the child. However, I am wholly unconvinced the trial court could have rightly inferred an effect on the best interest and welfare of the child in light of the utter lack of evidence from which it could have made such an inference.

The majority has relied upon Holsombeck v. Pate, 47 Ala. App. 39, 249 So. 2d 861 (Civ. 1971), for the proposition that a trial court is "free to infer" an impact on a child when it finds a material change in circumstances. ___ So. 3d at ___. The testimony indicating an "impact," or an effect upon the best interest and welfare of the child, in the present case, pales in comparison to the inferred effects upon the child in Holsombeck. Unlike the changes in circumstances and the inferred effects in this case, the material changes upon which the Holsombeck court had permitted an inferred effect upon the child had presented (1) a risk to the life of the child and (2) a continuing effect at the time of the trial.

In Holsombeck, a trial court had awarded custody of one child ("the son") to the mother and custody of two other children to the father in the parties' divorce judgment. The

father sought a modification of the custody of the son. Testimony revealed that, soon after the divorce, the mother had married a man who did "not enjoy a good reputation for peace and quietude." 47 Ala. App. at 40, 249 So. 2d at 862. Immediately following that marriage, the parents had "difficulty" with visitation exchanges. 47 Ala. App. at 42, 249 So. 2d at 863. The trial court awarded custody of the son to his father. 47 Ala. App. at 41, 249 So. 2d at 862. This court said:

> "Perhaps the evidence as to one change of circumstances could not be considered to materially affect the welfare and best interest of [the son], but we think there was evidence and reasonable inferences to be drawn therefrom of more than one change of circumstance and conditions materially affecting the best interest and well-being of [the son]."

47 Ala. App. at 41-42, 249 So. 2d at 863.(emphasis added). This court listed the evidence presented to the trial court of changes in circumstances that had led that trial court to its reasonable inference of an effect upon the welfare and best interest of the son. Those changes in circumstances were (1) the mother's continuing marriage to a man who had a reputation for violence, (2) the mother's continuing changes in address, (3) the birth of a half sibling, and (4) the parents'

conflicts at visitation exchanges that had culminated with the "firing of guns and threats of violence" in the presence of the son. 47 Ala. App. at 42, 249 So. 2d at 863. Furthermore, in Holsombeck, the son had expressed his preference for a change in his custody. Id.

In Holsombeck, we determined that the trial court had not "strayed" too far in inferring an effect on the son although the evidence presented had not "directly shown [the changes in circumstances] to have materially affected adversely the welfare of [the son]." 47 Ala. App. at 42, 249 So. 2d at 864. We determined that the trial court must have discerned that the parents were "so imbued with their personal feelings against one another, and their efforts to exercise them, they [had forgotten] the effect their actions and emotions ha[d] upon the children involved." Id. We said that the "[c]ustodial and visitation privileges with the children [had been] abused as a club to punish one another." Id. Furthermore, we stated a belief that "[t]he primary consequence of such acts is permanent harm to the children. Conflict between parents is more damaging to the children after divorce than during cohabitation." Id.

In the case at hand, I believe that the trial court has "strayed" too far in inferring an effect upon the welfare and best interest of the child. D.M.J. ("the mother") testified concerning what the main opinion has called her "instability." I might agree with the majority, and with the mother, that she had moved too many times and that those moves were not "good" for the child, yet I, unlike the majority, credit the mother with a pattern of stability beginning in January 2009. That year, the mother began renting a house that she resided in for 23 months.[4] She moved because the owner of the house had sold it. At the time of the trial, she had already settled into a second rental house, owned by her father. Finally, I note that, unlike the son in Holsombeck, who desired to live with his father, in this case the child testified that he is content and that, if given a choice, he would prefer to remain in the joint-custody arrangement.

I am mindful of the ore tenus standard; however, I cannot agree with the majority of this court that the trial court's

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[4]The mother testified that she had had 2 live-in boyfriends during 16 of the 23 months that she had lived in that rental house. The majority characterizes two live-in boyfriends as "multiple live-in boyfriends." ___ So. 3d at ____.

judgment is due to be affirmed. The parties shared joint custody, triggering the trial court's proper use of the best-interest standard, which was explained in Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988). The father had the burden to prove that there had 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....'" 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)). A trial court is not required to, and, in this case, did not, provide specific findings of fact in its judgment modifying the custody of the child, so, under the ore tenus standard, this court will presume that the trial court made findings that would support its judgment, but only if those finding are supported by the evidence at trial. Marsh v. Smith, 67 So. 3d 100, 105-06 (Ala. Civ. App. 2011).

I believe that the evidence before the trial court fails to support its inference that the mother's lifestyle has affected the best interest and welfare of the child; therefore, I conclude that the decision to award sole physical custody of the child to the father 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)). I have neither reweighed the evidence presented to the trial court nor substituted my opinion for that of the trial court regarding disputed evidence, because, after my careful review of the record, I have discovered no evidence presented to the trial court to reweigh or upon which to substitute my judgment of an effect upon the best interest and welfare of the child. In my opinion, the father has simply failed to carry his burden because he failed to present any evidence from which the trial court could have determined, or even inferred, that the mother's lifestyle had affected the best interest and welfare of the child.

Furthermore, I believe that today's decision is in direct conflict with former decisions of this court and of our supreme court. In Watters v. Watters, 918 So. 2d 913 (Ala. Civ. App. 2005), we cited Ex parte Couch, supra, and acknowledged that this court should not

> "undercut our supreme court's pronouncement that we are to encourage parents to work together for the benefit of the family, see Ex parte Couch, 521 So. 2d at 990, and the requirement that a party seeking a modification of custody prove a material change of circumstances affecting the best interest and

> welfare of the child that warrants a modification of custody. Ponder[v. Ponder], 50 Ala. App. [27,] 30, 276 So. 2d [613,] 615 [(Civ. 1973)]."

918 So. 2d at 917 (emphasis added).

The main opinion has easily distinguished the facts in Watters; however, I do not believe that it has distinguished its legal conclusions. In Watters, we reversed a trial court's modification of a custody arrangement based upon our determination that the party seeking a modification of an agreed upon, joint-custody arrangement had not provided evidence to the trial court of a material change of circumstances that warranted a change in the custody of a child. Id. The Watters court was not required to infer an effect upon the best interest and welfare of the child; the mother testified to her improved situation -- that she had remarried, that she could stay at home with the child, and that she had moved into a nicer house. Id. at 915. Despite the evidence presented, we reversed, saying:

> "The child appears, based on all the evidence of record, to be happy and well-adjusted. The changes in his mother's life have existed since July 2003. No evidence reveals that those changes, although positive in nature, have affected the welfare and best interest of the child to such an extent that a change in custody is warranted."

Id. at 917 (footnote omitted).

In this case it also appears that the child is happy and well-adjusted, based on the testimony provided by the mother, the father, and the child. It is apparent that the child feels loved and is loved by the mother and the father. In Watters, we reiterated that "the testimony at trial did not establish that [the changes in the mother's life had] affected the child in anything more than a tangential way." Id. at 916.

In Watters, the mother in that case, the party seeking the change in custody, testified as to what she "thought" and to problems she had "noticed"; however, we determined that her testimony was unconvincing because she had not offered specific explanations to the trial court.[5] Id. at 915.

In this case, the father has offered only his perceptions that the child has been affected by the mother's lifestyle; the father does not testify to a single concrete example of an effect upon the best interest and welfare of the child. My

[5]This court also relied on Watters in Kilgore v. Kilgore, [Ms. 2100951, Jan. 20, 2012] ___ So. 3d ____, ____ (Ala. Civ. App. 2012); in Kilgore, we determined that a parent's general testimony that a joint-custody arrangement is "hard" on a child, without a more specific explanation, is "speculative at best" and does not indicate an effect upon the child.

search of the record has failed to yield an inference of a tangential effect, much less a direct effect, upon the best interest and welfare of the child.

In addition, to the extent that the majority of this court has expressed its belief that there was evidence presented to the trial court of a material change of circumstances from which an effect on the best interest and welfare of the child could be inferred, this court may also be in direct conflict with additional decisions of this court and our supreme court. The following opinions do not support the majority's conclusion that it was in the child's best interest to modify the parties' joint-custody arrangement because the mother was unstable due to her changes in residence. Rey v. Rey, 513 So. 2d 1, 1-2 (Ala. Civ. App. 1986) (reversing a trial court's judgment determining that a parent's sudden move to another state reflected instability); Judah v. Gilmore, 804 So. 2d 1092, 1097 (Ala. Civ. App. 2000) (quoting Patchett v. Patchett, 469 So. 2d 642 (Ala. Civ. App. 1985))(noting that a mere change in residence does not necessarily justify a change in custody); and C.M.M. v. S.F., 975 So. 2d 975, 980 (Ala. Civ. App. 2007)(noting that past instability was insufficient

to deny a parent of custody of a child when the parent had been stable for a period at time of the trial).[6]

In conclusion, this court should have required what I believe Alabama law requires -- in a custody modification action, a party must provide not an inference but evidence of a material change in circumstances affecting the best interest and welfare of a child. Therefore, I dissent.

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[6]The opinions listed reviewed changes of custody and were subject to the heightened McLendon standard, which requires proof that a change of custody will materially promote the best interest of the child, Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). However, the McLendon standard also requires a party seeking a modification of custody to first prove a material change of circumstances prompting the need for a change in the existing custody arrangement.

MOORE, Judge, dissenting.

Once a trial court has entered a judgment establishing the physical-custody arrangement for a child, that judgment

> "is conclusive of the interest of the child and the rights of the parents, so long as the status at the time of the decree remains without material change, or unless pertinent facts existing, but not disclosed, at the time of the final decree are brought to light."

Messick v. Messick, 261 Ala. 142, 144, 73 So. 2d 547, 549 (1954). A change of circumstances is considered "material" under Alabama law if that change "'affect[s] the welfare and best interests of the child or children involved.'" Ford v. Ford, 293 Ala. 743, 744, 310 So. 2d 234, 235 (1975) (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. 1973)).

As our supreme court has clarified on repeated occasions, in order to be material, the change of circumstances does not have to be adverse to the best interests of the child, but may be a beneficial change. See Ex parte Murphy, 670 So. 2d 51, 53 (Ala. 1995); Ex parte McLendon, 455 So. 2d 863, 866 (1984); and Ford v. Ford, 293 Ala. at 744, 310 So. 2d at 235. Nevertheless, our supreme court has also recognized that alleged heterosexual misconduct by a parent will not justify

a change of custody in the absence of evidence indicating that the misconduct has detrimentally affected the child. Ex parte J.M.F., 730 So. 2d 1190, 1194 (Ala. 1998). In this case, D.N.J. ("the father") criticized D.M.J ("the mother") for engaging in multiple romantic relationships and cohabiting with her romantic partners in the presence of the child. The father also hypothesized that her conduct may not be good for the child; however, the father did not present any evidence of any actual detrimental effect the mother's conduct had had on the child. Consequently, the trial court did not have any evidentiary basis for modifying custody based on the mother's alleged unstable romantic relationships.

The father also presented no evidence indicating that the child had been detrimentally affected by the mother's various residence changes since the parties' divorce. Although our prior caselaw has not explicitly stated that such evidence is required, numerous cases have at least implied as much. In Rey v. Rey, 513 So. 2d 1 (Ala. Civ. App. 1986), this court, in reversing a judgment modifying the custody of a child, rejected Mr. Rey's argument that Mrs. Rey's change in residence reflected instability that was adversely affecting

the welfare and best interests of their child. In Judah v. Gilmore, 804 So. 2d 1092 (Ala. Civ. App. 2000), this court, in reversing a judgment modifying custody, noted that the moving parent had not proven any adverse effect on the children based on a temporary change in their residency while in the custody of the nonmoving parent. 804 So. 2d at 1097. On the other hand, this court and our supreme court have affirmed judgments modifying custody based on the custodial parent's residential instability in light of additional evidence of behavioral, emotional, or developmental problems for the child or children whose custody was at issue. See Ex parte Murphy, 670 So. 2d 51 (Ala. 1995); Pitts v. Priest, 990 So. 2d 917 (Ala. Civ. App. 2008); and Taft v. Taft, 553 So. 2d 1157 (Ala. Civ. App. 1989).

Additionally, it defies logic to require proof of a detrimental effect in cases involving alleged indiscreet sexual behavior, but not to do so in cases involving alleged residential instability. In the former line of cases, the morals of the developing child are at issue, yet the appellate courts of this state have recognized that a trial court cannot infer moral endangerment in every case so the burden remains

on the noncustodial parent to present actual evidence of a detrimental effect. In the hierarchy of judicial concerns, the stability of a child does not hold greater importance than the morals of a child. Likewise, it cannot be inferred that a child's healthy development is automatically threatened by the residential instability of his or her custodial parent; if that was the case, the courts would have to deny petitions for custody filed by parents whose professions require constant relocation, such as military personnel. Moreover, if such inferences could be made from the mere fact of residential instability, it would place no great burden on a noncustodial parent to present actual evidence of a detrimental effect as this court explicitly requires in cases involving alleged sexually indiscreet behavior.

In this case, the father undoubtedly proved that the mother had often moved and had lived in varying arrangements with third parties since the parties divorced. The father also clearly proved that, during that same period, he had moved far less and had engaged in only one romantic relationship. However, the father did not prove that the child had experienced any difficulties while in the former

joint-custody arrangement as a result of the mother's living arrangements, much less that those arrangements had stunted his natural development. The majority opinion likewise concludes that the trial court had no evidence before it indicating that the mother's unstable living arrangements had harmed the child, but it maintains that the trial court could have inferred such an impact, based on Holsombeck v. Pate, 47 Ala. App. 39, 42, 249 So. 2d 861, 864 (Civ. 1971). ___ So. 3d at ___. For the same reasons as asserted by Judge Thomas in her dissent, ___ So. 3d at ___, I find Holsombeck inapposite and the reasoning of the majority opinion unpersuasive.

The record before this court contains no evidence indicating that the child is anything other than a normal child who is thriving under the custody arrangement originally chosen by the trial court and which the child desires to maintain. Based on the record before this court, I find no evidentiary basis for modifying custody. Therefore, I respectfully dissent.