Rel: May 6, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200590

Jarod Chase Cantrell

v.

Kate Eugenia Cantrell

Appeal from Winston Circuit Court
(DR-2017-900007.02)

PER CURIAM.

Jarod Chase Cantrell ("the father") appeals from a judgment of the Winston Circuit Court ("the trial court") denying his petition to modify

custody of the parties' child, who was born in 2013, declining to hold Kate Eugenia Cantrell ("the mother") in contempt, terminating his right to visit with the parties' child, and ordering him to pay the mother's attorney fee. We affirm in part, reverse in part, and remand with instructions.

In January 2017, the mother sought a no-fault divorce from the father. The record creates the inference that the mother believed that the father had engaged in extramarital affairs. In February 2017, the father was arrested for second-degree rape, for second-degree sodomy, for third-degree burglary, and for violating § 13A-6-81, Ala. Code 1975, which prohibits a school employee from engaging in a sex act with a student under the age of 19.[1] The charges were based on allegations that

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[1]Section 13A-6-81(a), provides:

> "A person commits the crime of a school employee engaging in a sex act with a student under the age of 19 years if he or she is a school employee and engages in sexual intercourse or sodomy, as defined in Section 13A-6-60, [Ala. Code 1975,] with a student, regardless of whether the student is male or female. Consent is not a defense to a charge under this section."

A violation of § 13A-6-81(a) is a Class B felony. § 13A-6-81(b).

on several occasions the 29-year-old father, an educator employed by the Winston County Board of Education, had entered the bedroom of K.B., a 15-year-old female student at Winston County High School, through a window and had engaged in sexual intercourse with her. On April 5, 2017, the trial court entered a judgment divorcing the mother and the father ("the divorce judgment"). The divorce judgment incorporated the parties' settlement agreement and awarded sole legal and sole physical custody of the child to the mother and visitation, as agreed upon by the parties, to the father. It is undisputed that the divorce judgment was entered while the father was incarcerated. No appeal was taken from the divorce judgment.

The record reflects that, in 2018, the father petitioned the trial court for a modification of the divorce judgment with regard to his visitation with the child. On October 30, 2018, the trial court entered a judgment, based on a settlement agreement between the parties, modifying the father's child-support obligation and awarding the father visitation with the child every other Sunday, from 2:00 p.m. to 5:00 p.m., in Cullman. That judgment further provided that the visitation would be supervised by Gene Aiken or anyone mutually agreed upon by both

parties. The trial court also ordered the parties to have no direct contact with one another. A copy of that judgment was admitted into evidence in this case.

On October 30, 2019, the father filed a verified petition for a modification of the divorce judgment and the October 30, 2018, judgment and a rule nisi. The father asked the trial court to award him standardized, unsupervised visitation and to find the mother in contempt for withholding visitation from him. The father alleged that a material change in circumstances had occurred since the trial court had entered its October 30, 2018, judgment, warranting a modification of the visitation schedule. Specifically, he alleged that the criminal charges against him had been dismissed with prejudice, that the mother had withheld his visitation with the child on multiple occasions, that Aiken was no longer available to supervise visitation, and that the mother would not communicate with him to amend the visitation schedule or inform him of the child's extracurricular activities. According to the father, he had not visited with the child since August 17, 2019, and the mother had not allowed him to visit with the child telephonically. The father alleged that it was in the best interests of the child for the trial

court to modify the divorce judgment by awarding him and the mother joint legal custody of the child and to modify the October 30, 2018, judgment by awarding him standard, unsupervised visitation, telephone visitation, and access to the child's health, educational, and social information. He further asked the trial court to find the mother in civil contempt for her alleged willful noncompliance with the trial court's divorce judgment and the October 30, 2018, judgment and to order the mother to reimburse him for his attorney fees, court costs, and expenses.

On December 3, 2019, the mother filed an answer and a counterpetition. In her answer, the mother denied most of the father's allegations. In her counterpetition, the mother, among other things, alleged that, since the entry of the October 30, 2018, judgment awarding her child support in the amount of $253 per month, a material change in circumstances had occurred because, she said, the father now earned substantially more money and could provide additional support for the child. She asked the trial court to modify the October 30, 2018, judgment and award her a reasonable sum for an attorney fee.

Before trial, at the mother's request, a subpoena was issued to Kim Miller, the chief law-enforcement officer for the Double Springs Police

Department, ordering him to produce "all records ... and confessions made by [the father] concerning or related to allegations of his improper sexual relations with a student or students at the school where he was employed." On March 3, 2020, the father filed a motion to quash the subpoena. In his motion, the father alleged that, because the criminal charges involving his misconduct with a student at the school where he had been employed had ended in a mistrial and the criminal charges against him had been dismissed, any evidence regarding those charges and his conduct that resulted in those charges was inadmissible in this case. The trial court ordered the parties to submit briefs addressing the admissibility of evidence pertaining to the prior criminal charges against the father. The trial court further ordered that a hearing to determine the admissibility of such evidence would be conducted before the trial began.

On March 27, 2020, the mother filed a motion to suspend temporarily the father's supervised visitation with the child due to concerns relating to the COVID-19 pandemic and the unavailability of Aiken to supervise the visitations. On April 5, 2020, the trial court entered an order suspending the father's visitation "until such time as

the parties agree upon a person suitable and willing to supervise said visitations."

The record reflects that the parties then entered into negotiations regarding a visitation supervisor and that, between April 5, 2020, and the trial, Caleb Snoddy and then Scott Flynn, the mother's brother-in-law, supervised the father's visitations with the child.

Before the trial began, the trial court held a hearing on the father's motion to suppress any evidence regarding the prior criminal charges against him, the conduct resulting in those charges, and his video-recorded statement made to law-enforcement officers. A transcript of that hearing is not included in the record. The trial court denied the motion. The father also objected at trial before any such evidence was admitted. The trial court overruled the father's objection, noting that it had latitude with regard to the admission of evidence in a civil case because the proponent's burden of proof is different than in a criminal case -- a preponderance of the evidence in a civil case as opposed to beyond a reasonable doubt in a criminal case -- and because the trial court in a custody case is charged with determining the best interests of the child, which includes consideration of the child's welfare in light of a

parent's conduct.

On January 25, 2021, the trial court conducted a trial, at which evidence was presented ore tenus. The mother testified that the child, a boy, was nine years old and lived with her and her husband, Blake Turner, whom she had married on June 1, 2018. The mother testified that, during her marriage to the father, the father had threatened her, had physically and emotionally abused her, and had, on at least one occasion, locked her in their bedroom. She recalled one incident when she had called Flynn to help her because the father was preventing her from leaving the house. The mother stated that, just before Flynn arrived at their house, the father had been on top of her holding her down. She further testified that in late 2016 the father's sexual needs had become "perverted," that he had started placing his hands around her neck in a choking manner during sexual intercourse, and that he had started recording them having intercourse.

The mother further testified that in December 2016, at the father's suggestion, 15-year-old K.B. and her brother had come over to their house to watch a movie and spend the night. K.B.'s parents were friends of the mother and the father, and K.B.'s family attended their church, at which

the father was a leader. The mother explained that the father and the guests watched the movie in the basement of their house and that she and the child did not watch the movie. When she asked the father why she and the child could not join them in the basement, the father stated:

> "We're watching it and you're staying up here and do not come downstairs. You will stay with [the child] in his room, in his bedroom. Don't come downstairs with us. We'll come upstairs, but you're not to come down with us and hang out."

The mother testified that, in January 2017, she filed a complaint for a no-fault divorce. In February 2017, the father was arrested for, among other things, sexually assaulting K.B., and the divorce judgment was entered in April 2017. The mother admitted that, when she learned of the criminal charges against the father, she did not seek to suspend the father's visitation with the child and that, after he was released from incarceration in June 2017,[2] she did not stop the father's contact with the child. She further admitted that, when the father was arrested, she did not want to believe the accusations made against him and that he had led her to believe that the charges were not true. She explained that she had continued to support the father at that time because he was the

[2]According to the father's testimony, he was incarcerated from February 26, 2017, through June 2, 2017.

father of the child and she still had affection for him. She testified that, while the father was incarcerated, she accepted his telephone calls, allowed the child to talk with him, added money to his jail account, communicated with his family, provided the father with emotional and financial support, and stated that she loved him. The mother and the child met the father after he was released from incarceration, and the mother allowed the father to have continuous unsupervised visitation with the child from then until late August 2017. When asked why she was not worried about protecting the child from the father after the father had been charged, incarcerated, and released, the mother responded, that, during that period, she thought the father was innocent of the charges. She did state, however, that, during one visit with the father, he had pushed her against a wall and forced her to perform oral sex on him. The mother stated that she had not engaged in sexual intercourse with the father since his release from incarceration, but she admitted that she had sent the father the following text message: "Although I'm so glad it happened. It was amazing. We can't sin." She stated that her support of the father during that summer had caused her family much distress and that, although she had allowed the child to have

visitation with the father, she had worried about how the charges against the father would impact the child.

The trial court admitted into evidence several text messages that were exchanged between the mother and Macall Cantrell, the father's sister, and between the father and the mother in which the mother stated that she loved the father, that she hoped that they could parent together, and that she would never keep the child from the father. The message exchanges occurred before late August 2017.

According to the mother, in late August 2017, the father told her before one of the exchanges of the child that if she did not come alone to pick up the child, he would keep driving with the child. She testified that he further admitted to her that the alleged criminal charges were true and that he had had intercourse with K.B. According to the mother, the father stated: "It's all true. You're going to have to forgive me. Just get over it." The mother stated that, after the father had threatened to refuse to return the child to her and had admitted to her that he had committed the alleged criminal charges, she stopped having affection for and supporting the father. She also stopped allowing the father to visit with the child because she believed that the visitation was not in the child's

best interests. When asked why she did not file a petition to terminate the father's visitation after the father confessed to committing the criminal charges, the mother responded that she thought that the father would be convicted of the charges in the near future and, consequently, that his visitation with the child would be moot.

The mother admitted that, in October 2018, she had agreed to allow the father to have supervised visitation with the child. She stated that she had agreed to the supervised visitation as an alternative to no visitation because at that time the criminal charges remained pending, but not proven, so, in her opinion, no visitation did not seem proper. The mother testified that the October 30, 2018, judgment, which incorporated the parties' agreement to supervised visitation, provided the father with three hours of visitation with the child to be supervised by Aiken every other Sunday. She explained that, when Aiken supervised the visits, he would pick up the child at her house and drive him to the visitation. She stated that she accommodated the father by agreeing several times to the father's request that the visitation occur in a location other than Cullman County. The mother explained that Aiken had supervised the visits for approximately a year and that the child had missed some of the

visitations due to Aiken's unavailability and one visitation due to a beach trip. When asked why the child had missed so many visits or was late to visits, the mother responded that Aiken had picked up the child from her home, so if the child was late for a visitation that had been due to Aiken's schedule. Additionally, she testified that, during that period, Aiken had been undergoing a divorce and that, on the weekends that he had his children, he had been unavailable to supervise the father's visitation because he had wanted to spend time with his own children. The mother denied that at least one month had passed without the father having visitation. The mother stated that, on at least on one occasion, the father had engaged in unsupervised conversation with the child after a ball game.

When Aiken informed the parties that he could no longer supervise the visits, the father contacted the mother through her attorney about a new visitation plan. The mother admitted that she did not offer or suggest a different supervisor and did not offer any makeup visits to the father.

In his October 30, 2019, petition to modify the divorce judgment and the October 30, 2018, judgment, the father alleged that he had not visited

with the child since August 2019. According to the mother, Aiken had stopped supervising the visitations and the parties could not agree on a replacement supervisor. She testified that she had suggested that visits be supervised by the Winston County Department of Human Resources, but, she said, the father did not agree. The mother insisted that they had had a difficult time finding someone who was appropriate and was willing to give up a Sunday afternoon to supervise the visits. The mother testified that, at her request, Flynn agreed to supervise the visitations. The mother maintained that she had not restricted any of the visitations and had asked others to help accommodate the father's visitations. The mother admitted that she did not notify the father of any of the child's extracurricular activities, academic activities, medical appointments, etc. She stated that she had refused to communicate directly with the father because the October 30, 2018, judgment provided that the parties should have no direct contact with one another. According to the mother, her communications with the father had been through either her attorney or the visitation supervisor.

The mother testified that, in October 2018, she had agreed to the supervised visitation but that she subsequently came to believe that any

exposure of the child to the father would not be in the best interests of the child. Specifically, the mother stated that she believed that visitation with the father, in light of the father's prior sexual conduct with another child, was not in the best interests of the child. The mother acknowledged that on February 21, 2019, the criminal charges against the father had been dismissed with prejudice. The trial court admitted into evidence the February 21, 2019, judgment in the criminal case, which stated that the case was dismissed based on the father's motion for a mistrial due to prosecutorial misconduct. The mother further testified that, although the criminal charges had been dismissed, she did not believe that it was in the child's best interests to have the father involved in his life. She stated that if the visitations had to continue, she wanted the father's visitation to remain limited to 3-hour supervised visits twice a month until the child was 19 years old. She admitted that she had not filed any pleading asking the trial court to prevent the father from visiting with the child or from attending the child's extracurricular activities. After the mother had acknowledged that the father had remarried, had had a daughter, was employed, and was current on his child support, the father's counsel asked: "What more does [the father] need to do in your

eyes to be able to take that next step with [the child] and to continue to grow his relationship with [the child]?" The mother responded:

> "I think [the father's] a very unstable person. [The child] is very nervous after he has been on visitation or before visitation and it's out of character for [the child] to act like that. He only acts like that before he sees [the father].
>
> "[The father] tells [the child] things that [the father] does not need to tell [the child] to make him nervous. The fact that [the father] got off [of the criminal charges] somehow. He still did it to the fifteen-year-old child. And it's my thought to protect my innocent child until the day that I die."

The mother explained that the child had had visitation with the father the previous day, stating:

> "[Flynn] took [the child] to the visitation and I was at [Flynn's] house. [The child] came in and I asked him if he had fun like I always do, asked him how his dad was and he says -- starts tearing up and says, 'My dad told me that y'all have court tomorrow and it's a very important day and for me to be praying about it.' He said they'll make a decision about if I get to go to his house on the weekends. And [the child] starts crying. And I told him that's nothing for him to worry about, it's not his weight to carry."

The mother testified that it was 100% in the child's best interests to discontinue the father's visits with the child.

Kelsey Cantrell, the father's current wife, testified that she and the father married on April 4, 2018, that they have a two-year-old daughter,

and that she is currently pregnant with another daughter. She explained that, when she is working her 12-hour weekend shifts, the father takes care of their daughter and that she has no concerns about his parenting. She admitted that she was aware that the father had been charged with sexually assaulting a 15-year-old girl, but she stated that she had no fear that the father would abuse or neglect their children. According to Kelsey, the father had never acted inappropriately around the child and had never abused her or treated their daughter or her inappropriately or disrespectfully.

Kelsey testified that she would like her children to have a relationship with the child. Her daughter had attended some of the visitations and had started building a relationship with the child. She stated that the child did not appear fearful during the visitations, acted excited to see his father, and seemed pleased when the father attended his ball games. She stated that the mother had even introduced herself to her after one of the games. Kelsey testified that if the trial court was inclined to award the father overnight visitation with the child, she would change her work schedule so that she could be present to assist the father with the child's care.

Debbie Dearen testified that she and her husband had served as the father's surrogate parents since the father was in middle school and that she cares for the father like a son and for the child like a grandchild. According to Dearen, after the father was released from jail, the father lived in her basement and the mother would bring the child to visit him. She stated that the child spent the night with the father a few times, and she believed that the mother had spent the night with the father at least one night. She based this belief on the fact that the mother's car was in her driveway when she went to bed and was in her driveway when she awakened around 7:00 a.m. the next morning.

According to Dearen, the father informed her in late August 2017 that he had engaged in a verbal altercation over the telephone with Turner, the mother's current husband. The father told her that he had informed Turner that he, the mother, and the child had spent the night in Tupelo, Mississippi, and that, when Turner learned that it was true, Turner became angry with the mother and then the mother became angry with him for telling Turner. The father stated that the verbal altercation with Turner was the reason that the mother had refused to

let him visit with the child from late August 2017 until the agreement was reached that was incorporated into the October 30, 2018, judgment.

Dearen testified that, in October 2017, she visited with the mother and the child and encouraged the mother to allow the child to have a relationship with the father. According to Dearen, while she was visiting, the mother tried to contact the father but then stopped because the mother knew contact with the father would upset her family. Dearen testified that the mother never told Dearen that she was keeping the child from the father because the father had admitted to committing the criminal charges. Dearen stated that, about a week later, the mother sent her a text message that stated that the mother's "hands were tied and [the mother] didn't know what to do about anything."

Dearen testified that, even though she knew about the alleged facts underlying the prior criminal charges against the father, she was still involved in his life. She stated that the father had never professed guilt or innocence regarding the charges to her and that her knowledge about the offenses was based on what the father had told her. She admitted that, because she had testified at the father's criminal trial, she had not been allowed in the courtroom during the trial and had not heard the

evidence presented by the State. She, however, stated that she was shocked by the text messages between the father and K.B. that the district attorney had shown her during her testimony.[3] According to Dearen, the father had never given her any indication that he had engaged in that type of relationship with K.B. She stated that she believed that the father did not lie and was a good Christian man. When asked if her opinion of the father would change if it were true that the father was guilty of acts of sodomy and rape with a 15-year-old child, she responded that if he had done that, "we all make mistakes ... and I know what kind of dad he is."

Dearen testified that she had observed the father interact with the child before the father was incarcerated and after he was released. She stated that the father was a great father and that the child was happy and never appeared fearful during the visits.

Macall Cantrell, the father's sister, testified that she and the father had a close relationship. She stated that, during the father's incarceration, the mother had contacted her multiple times a week and

[3]It appears that the text messages contained professions of love by both the father and K.B. and a discussion of plans for the father and K.B. to move to Florence and marry.

had asked her to remind the father of certain scriptures and to tell him that the mother loved him and was praying for him. Macall testified that, in a text message sent to her by the mother between January 2017 and August 2017, the mother had stated that she would never prevent the father from talking or visiting with the child.

Macall testified that, when she first learned about the criminal charges against the father, she was shocked and that she waited until he was released from incarceration to discuss them with the father. She stated that the father denied all the charges. Macall testified at the father's criminal trial, did not hear the State's evidence, and remains supportive of him.

According to Macall, the father is an amazing father and the child adores him. On the visits that she had witnessed, the child was excited to visit with the father and did not appear anxious, nervous, or scared. She testified that she had witnessed the father encouraging the child and discussing school, sports, and the Bible with the child. She stated that Christianity and faith are an important part of the Cantrell family, and she did not believe that the father would be an improper influence on the child.

Turner testified that he and the mother started dating in May 2017. Turner stated that he knew that the mother and the father were communicating when he and the mother started dating, but he did not know that the mother had made professions of love for the father during the summer of 2017. He admitted that he was aware that, after the father was released from incarceration, the father and the mother had had sexual contact. According to Turner, during the verbal altercation that occurred between him and the father, the father had told him about the sexual contact between the father and the mother. Afterward, the mother told him that the father had pushed her head against a brick wall at Dearen's house and had forced her to perform sexual acts on him. Turner stated that he tried to persuade the mother to report the incident to law-enforcement officers but that she had refused to do so.

When asked about the child's behavior before and after visits with the father, Turner testified that, before the child goes to a visitation, the child becomes anxious and nervous, biting on his shirt and his fingers, asking incessantly about when he would be leaving, how long he would be away, when he would be returned, etc. Turner explained that when the child returned from a visit, the child exhibited the same type of

anxiety. Frequently, Turner said, after a visit, the child would state that the father had told him not to tell the mother "about things." According to Turner, one such specific incident occurred after the father had taken the child boating in a kayak without a life jacket and had told the child that they were not supposed to be in those waters and could "get into trouble" if they were caught. Additionally, Turner testified that, based on the child's comments, the father has made the child believe that the mother was preventing the father from having telephone communication with the child. Specifically, Turner said, the father had told the child that the mother was blocking his phone calls. Turner stated that the child's anxious behavior lasted for several days after each visit.

When asked if the mother had refused to allow the father to exercise any of the supervised visitations, Turner responded that the missed visitations were a consequence of the supervisor's unavailability, the child's being sick, or a beach trip. Turner testified that as far as he knew the mother had complied fully with the no-contact order.

When asked whether he believed that it was in the child's best interests to have more exposure to the father, Turner responded "no." When asked to explain his response, Turner stated:

> "The way [the child] is at home, the way he acts, how nervous he is. If he goes long periods of time without seeing [the father] he gets better. When I first came in [the child] was a nervous wreck and the longer he goes without seeing the father the more stable he gets."

Flynn testified that he is married to the mother's sister. He stated that, while the parties were married, the mother on one occasion called him, told him that the father had been holding her down and had locked her in their bedroom, and asked him for help. He explained that when he arrived the father had moved away from the mother and was trying to talk to her. The mother, however, picked up the child and walked straight to Flynn's vehicle. According to Flynn, the father did not want the mother to leave, but he intervened and told the father to let her go and that the father could talk with the mother the next day. Flynn stated that the father kicked a lamp and "busted" a wall when he told the father that it was not the time for a conversation.

According to Flynn, he, at the mother's request, had agreed to supervise the father's visits with the child. Flynn stated that, before he agreed to be the visitation supervisor, he had a "man-to-man" conversation with the father. Flynn explained that in January 2017, after the parties had separated, the father had moved out of the marital

residence and into a duplex apartment. During his incarceration, the father's lease expired. At the mother's request, Flynn assisted the mother in moving the father's belongings and his truck to Dearen's house. When the father was released from incarceration, the father did not thank Flynn for his help; rather, he told others that Flynn and the mother had stolen some of his property. During the "man-to-man" conversation, Flynn confronted the father with the untruthful accusations. Flynn testified that, by the conclusion of the conversation, the father had apologized for his disparaging statements and appeared contrite. Flynn stated that since the conversation the father had been respectful to him and continued to be respectful during the visitations.

Flynn testified that the visitations he supervised began in June 2020 and occurred based on his availability. He admitted that, due to his work and parenting responsibilities, he was responsible for the child missing some of the visits. He stated that, when he had been unavailable, the mother had not suggested that the visitation occur on another day but that, even if she had, his work schedule as a teacher and a football coach and his parenting responsibilities to his children would have prevented him from rescheduling on other days. He stated that, when he

had been unable to supervise a visitation on a scheduled Sunday, he had conducted the visitation the following Sunday. Additionally, although the October 30, 2018, judgment provided that visitation would occur in Cullman County, he said that he had driven the child to Jasper and Decatur, in Walker County and Morgan County, respectively, at the father's request. Flynn testified that he made the accommodations and supervised the visits for the child, so the child could see his father, and for the mother, because she trusted Flynn to return the child. According to Flynn, a typical visitation consisted of a fun activity, such as playing at a trampoline park, a fast food meal, a visit to a store to purchase a prize, and then home. He explained that, when they arrived at the visitation location, the child usually walked up to the father, said "Hey, Dad," and gave him a hug. According to Flynn, the child appeared to have genuine affection for the father and to be comfortable around the father. When asked if the child was nervous, anxious, or uncomfortable being around the father, Flynn stated that, "[s]ometimes, he's nervous whenever we leave. I mean, he likes to be around his mother." He further testified that, on their drives home, the child would sometimes share conversations that he had had with the father, such as the recent

conversation about the court date. Flynn stated that he found many of the conversations between the father and the child to be inappropriate because they caused the child to experience doubt and fear. He, however, stated that he had not witnessed the father acting physically inappropriate with the child during the 10 visits he had supervised.

When asked whether he would recommend that the relationship between the father and the child to continue, Flynn responded that, based on his in-depth interactions with the parties and with the child, and his discussions with the child's teachers after visitations had occurred, he did not think the visitations should continue. Flynn stated that he thought that the father, as a consequence of his conduct, had created a distance between the father and the child. Flynn further testified that he did not believe that the father was an honest individual and that, as a parent, he would not allow his children, especially his 13-year-old daughter, to visit alone with or be influenced by the father. Flynn explained that on more than one occasion the child's teachers had approached him after a visitation had occurred, asking if the child had been around the father because the child was not being his usual cordial and respectful self to the teacher and/or his classmates.

When asked about whether the mother had told the child about the criminal charges against the father, Flynn stated that he had never heard the mother or his wife, the mother's sister, state that the mother had told the child about the father's conduct. According to Flynn, the mother hid the father's alleged criminal conduct from the child. For example, he said, when the father had been incarcerated, the mother had told the child that the father had gone "off to work." He stated that he was unaware of the mother's denying the father visitation out of spite or anything of that nature.

When asked by the father's counsel whether he knew that the criminal case against the father had been dismissed, Flynn stated that he knew that there had been a mistrial. When asked if the fact that the case had been dismissed with prejudice would change his opinion of the father, he responded "no" and explained: "I know the situation. I know the little girl -- the victim -- and I know what she's gone through."

The father testified that he currently lived in Jasper with his wife and his two-year-old daughter in a three-bedroom house. The child has his own bedroom at the father's house. The trial court admitted into evidence pictures of the house, the child's bedroom, and the child's toys,

which included a dirt bike. The father testified that, after he was released from incarceration, he had been employed as a parts manager at a mobile-home business. He, however, had been fired from that job because, he said, one of the employees was a good friend of K.B.'s father and had talked with his employer. The father testified that he is employed through a contractor service; he repairs and renovates houses and has a flexible work schedule. According to the father, he maintains a stable and safe home environment and takes care of his daughter when his wife is working. He stated that he had never had another allegation of child abuse or neglect made against him and that he would never do anything to hurt his children or to put them in harm's way.

The father testified that, during the divorce litigation, he had been incarcerated, had agreed for the mother to have custody of the child, and had not thought a visitation schedule was necessary in the divorce judgment because, he believed, he and the mother had a good relationship. He further testified that at the mother's suggestion, he had not told the child, who was four years old at the time, that he was incarcerated; rather, he had told the child that he was away at work. He stated that, when he was released from incarceration, the mother and the

child were waiting on him when he arrived at Dearen's house and that, after his arrival, the mother stayed for about 15 minutes and then left. According to the father, the mother allowed the child to spend the night with him.

The father testified that, during the summer of 2017, he and the mother engaged in a sexual relationship, i.e., had oral sex and intercourse more than once, and that occasionally she and the child had spent the night with him. The father disputed the mother's testimony that he had thrown her against a brick wall and forced her to perform oral sex on him. He insisted that their sexual relationship was consensual.

The father testified that in late August 2017, after he had told Turner that he and the mother had been engaging in a sexual relationship, the mother stopped permitting him to visit with the child. The father denied that he had told the mother that he was guilty of the criminal charges and stated that, when she asked, he had told her that it did not happen. According to the father, the mother's testimony that she had stopped allowing visitation because he had confessed to the criminal charges provided a convenient excuse.

The father testified that, after the mother had denied him visitation for about eight months, he filed the petition to modify the divorce judgment that resulted in the October 30, 2018, judgment. He stated that, in that action, he had agreed to a limited, restricted visitation schedule because the criminal case against him remained pending and he believed that any time with the child was better than no time. However, after the criminal case was dismissed in February 2019 and the supervised visitations were not occurring as ordered in the October 30, 2018, judgment, he filed the current petition for modification and for a rule nisi. According to the father, since August 2017, he had probably missed two years of seeing the child. He testified that, since the October 30, 2018, judgment was entered, the child had missed 10 scheduled visitations for known reasons, 12 visits for unknown reasons, and had been late 15 times. The trial court admitted into evidence the father's log of the missed visitations, which also referenced the child's late arrivals.

The father testified that, because he had not been able to visit with the child regularly, he had not been able to develop a meaningful relationship with the child. He stated that he believed that the child felt

nervous and anxious about the visitations because the child did not want to hurt anybody's feelings. For example, he testified that he believed that the child was happy to see him at ball games but was uncomfortable talking with him because of the mother. He admitted to taking the child to Sportsman Lake to kayak, but he denied that they had boated in an area where boating was prohibited, stating that he did not tell the child that they had to wait to launch the boats until the park rangers had left the area. He also admitted that the child did not wear a life jacket on that occasion, but he insisted that the child was safe because the water was less than a foot deep, he was a certified lifeguard, and the kayaks were connected by a rope.

The father testified that he had told the child at a visitation in late November or early December 2020 that he and the mother had an upcoming court date and that, hopefully, the child could visit him at his house for Christmas and that he had discussed the court hearing with the child. When asked about the conversation, the father said that he told the child: "Hey, just be in prayers, that we've got court tomorrow and, hopefully, after this, we can -- you can get to come to the house." According to the father, he had had the discussion only because the child

had asked him about visiting at the father's house. When asked if such a conversation with the child was appropriate, the father responded:

> "I'm torn on that fact because, you know, we want obviously to be honest and tell our kids the right things growing up and do the moral right thing. And, if [the child] asks it's hard for me to lie to [the child] about why [the child] can't come to my house or -- now, I've never said it was, you know, 'The mother's not letting [the child] come. It's all the mother's fault.' I have never blamed her to the child."

The father stated, however, that he did believe that the child was uncomfortable during those conversations. When asked by the mother's counsel if he had told the child that the mother refused to let the child visit Dearen's house,[4] he responded "no" and insisted that he always told the child that "[m]e and your mother are trying to work out a schedule."

The father admitted that the mother did not bring the child to visitations, but he insisted that, even though he did not know if the mother caused the "no-shows," on those occasions he would end up waiting at the designated locations and, ultimately, was unable to visit with the child. According to the father, when it became apparent that Aiken could no longer supervise the visitations, the mother refused to

[4]The record reflects that the house had a swimming pool that the child enjoyed.

work with him to find another supervisor. He stated that he had suggested the best man at their wedding and a few others to supervise the visitations but that she had rejected each one. He admitted that it was difficult for someone to give up three hours of his or her weekend every other week, but he reasoned that the difficulty of finding a supervisor provided an additional reason to stop the requirement that the visitations be supervised. He insisted that the mother could "lift" the requirement that the visitations be supervised and sign a paper agreeing to let him have visitation like she did in the summer 2017. He further insisted that, because the mother had not filed a petition to limit or terminate his visitation, the mother did not want to terminate his relationship with the child.

The father testified that in 2016 and early winter 2017, he had worked as an employee of the Winston County Board of Education and that K.B. was a student at Winston County High School. He further testified that, due to what he called "his relationship" with K.B., he had been charged with three counts of second-degree rape, three counts of second-degree sodomy, three counts of burglary, and three counts of being a school employee who had engaged in a sex act with a student

under the age of 19 years old, in violation of § 13A-6-81. He stated that, after he was arrested on those charges, he made a video-recorded statement to law-enforcement officers. He insisted that he did not admit in the statement to engaging in sexual intercourse with K.B. and explained that the court had suppressed the video-recorded statement at his criminal trial because the court had held that law-enforcement officers had failed to properly provide him notice of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). According to the father, he gave the video-recorded statement because he did not have an attorney present and "the whole time the officers were telling him that if he did not start talking he would never see his child or the mother again." The father testified that he did not have sexual relations with K.B. He admitted, however, that he had talked and exchanged text messages with K.B. and that "it's the worse mistake I've ever made in my entire life."

The father disagreed with portions of the mother's testimony. When asked about the incident between him and the mother when she had called Flynn, the father stated that, although he did block the mother from leaving the room, the door was never locked. According to the father, the incident occurred because the mother had been informed that

he was having an affair with another school employee. He stated that he did not engage in sexual intercourse with anybody else while he was married to the mother but that the mother had not believed him. Additionally, the father disputed the mother's testimony regarding the movie night with K.B. and her brother, stating that he did not tell the mother that she could not come downstairs. He further insisted that he never told the mother that he would flee with the child and that he had never choked the mother.

The father asked the trial court to modify the divorce judgment to award joint legal custody of the child to the mother and the father; to modify the October 30, 2018, judgment to award him regular, standardized visitation with the child, to award him telephone communication with the child, to allow communication between the parties so they can cooperate in parenting the child, and to hold the mother in contempt for violating the October 30, 2018, judgment. With regard to coparenting, the father stated: "I want to get along for the child's sake. I'm thankful that [Turner] has been there in my absence. And, the absence from the child was not my decision. I want to be involved in the child's life."

Chief Miller testified that, at 2:26 a.m. on February 27, 2017, K.B.'s father called him at his house[5] and stated that the father had entered his house without his knowledge and had been in K.B.'s bedroom. Chief Miller drove to the house and talked with K.B. and K.B.'s father about the incident. According to Chief Miller, K.B. told him that she and the father had engaged in sexual intercourse on that night, that previously they had engaged in sexual intercourse five times, and that each time the father wore a condom.[6] Later that morning, Chief Miller discussed the incident with the deputy district attorney, who, because it is an offense to have sexual relations with a minor child and an offense for an educator to engage in sexual relations with a student, advised Chief Miller to charge the father with burglary, rape, sodomy, and violation of § 13A-6-81 and to arrest him. Law-enforcement officers arrested the father at Winston County High School and interviewed him in a room at Double Springs City Hall. The trial court admitted into evidence a copy of the father's video-recorded statement that he had made to law-enforcement

[5]K.B.'s father and Chief Miller's wife are first cousins.

[6]K.B.'s clothes were seized and sent to a forensics lab. No semen was found on the clothing.

officers. In the statement, the father admitted exchanging text messages with K.B. and going to her house. The father did not directly admit to having sexual relations with K.B., but, when Chief Miller informed the father that K.B. had stated that she and the father had engaged in sexual intercourse a couple of times, the father replied: "It's not a couple of times." Subsequently, the father admitted that he and K.B. had had sexual contact, i.e., had kissed.

K.B. testified that, during the fall of 2016 and the winter of 2017, when she was 15 years old, she had lived in Double Springs with her parents and had attended Winston County High School. She stated that the father's parents and her parents were friends and that she had known the father since she was four years old. Additionally, the father was a leader in the church that she and her family attended. According to K.B., during the latter part of 2016, the father "lured" her into a sexual relationship with him. She explained that, in early December 2016, the father expressed his love to her, but, she said, he did not make any sexual overtures to her when she and her brother watched a movie with him in the basement of his house. On December 31, 2016, she and the father exchanged several text messages and the father asked if he could come

over to her house. Later that night, the father, who was then 29 years old, came to her house and entered her bedroom through the window. She stated that the father had told her how much he loved her and had kissed her and that, then, they had engaged in sexual intercourse. The relationship then continued with discussions about them running off to Florence and "getting married" when she was of age. They also exchanged frequent text messages about how much he loved her, how much she loved him, and their plan to spend their lives together. According to K.B., after their first sexual encounter, the father entered her bedroom through the window eight more times and they had intercourse five more times. She testified that, on February 27, 2017, after the father had entered her bedroom through the window, had sexual intercourse with her, and had left, her parents entered her room and confronted her, asking who was in her bedroom. She told them that it was the father.

When asked why she had engaged in the relationship with the father, K.B. stated that she had been flattered that an older man, who was a church leader and had held a position at her school, was interested in her. According to K.B., the father used her religion and her devotion

to God to persuade her to have a relationship with him. K.B. explained that the father had convinced her that their relationship was appropriate by telling her that his brother and sister-in-law, who had an age gap between them, had a relationship that worked and that God had told the father that he and K.B. were supposed to be in love and marry. K.B. stated that she realized now that the father had taken advantage of her youth and vulnerability.

On cross-examination, K.B. admitted that she had stated that she knew it was wrong to have a relationship with the father. She further admitted that she had wanted to marry him. She also admitted that, subsequently, she had stated that she hated the father and that she did not want to have anything to do with him.

> At the close of her testimony, the following exchange occurred:
>
> "THE COURT: [K.B.,] before you leave, have you come here today to testify untruthfully or say anything that is not truthful ... solely to prevent [the father] from having a relationship with this child?
>
> "[K.B.]: No sir. I don't come here with a vendetta, zero percent. I come here concerned about a child because what happens one day when the child gets a girlfriend, you know, what happens to her? What happens when [the father] teaches his child these things that he's been taught all through his life, you know. So, that's why I'm here today."

At the close of the evidence, the trial court judge stated:

"The testimony you heard earlier in the case [from the mother.] She's stood by [the father], for a long time, extended period of time. As a matter of fact, it cause[d] stress on her family, not only by her testimony, but [by the father's]. Then something happened and then all of a sudden, she completely breaks her contact.

"And, there's only one thing that makes sense to me, that [the father] believed in his mind that his marriage was, in fact, salvageable. She knew about these charges that were against him, but he had told her, 'I didn't do anything. I didn't do anything.' I take that second part out, but he said, 'I never did anything.'

"I think he had a moment of weakness. He thought that his marriage could survive anything, and he finally broke down and he told her. And, that was the one thing that she couldn't hear.

"She could not hear that he had, in fact, had relations with this girl. What -- can we all agree on that at a minimum? He was telling her, 'We're going to get married and we're going to Florence.' That is clear. That is not in dispute.

"A fifteen-year-old girl. Not only that, but a girl, that, by her own testimony, he knew since she was four. She was four years old.

"So, I feel like -- a lot of stuff and the fact that [the mother] stood by him at the very beginning. [He] said he didn't do anything. Then he tells her the truth, one of the few times.

"I don't think he's been credible today. I think that he has continuously engaged in talking to [the child] anytime he has an opportunity about his case. I believe, firmly and absolutely

> that he has said, I think, it's your mom. I know that and by the way, he talked to his son about this case.
>
> "And, how did we get here? We got here because he sent a text to a fifteen-year-old girl saying, 'We're going to get married.' He said, 'Because I love you.' And, she was sending him a text back. She's fifteen, only fifteen.
>
> "So, as far as this petition to modify visitation that's going to be granted. I'm going to modify that there's no visitation. There's no contact. I believe he's a detriment and a danger to this child.
>
> "....
>
> "This whole thing started as [a proximate] cause of your actions, [the father]. You did this. All I've heard today is that you're a victim. Everything is somebody else's fault.
>
> "I've heard he accepts no responsibility. He never accepted responsibility for these text messages. That would be reason enough for [the mother] to be upset with you. ...
>
> "I believe you're a danger to [the child.] I believe that you're a potential offender. I believe that you offended against [K.B.] and that's independent of that. ...
>
> "....
>
> "But, at the end of the day, my job is to look after [the child] and that's what I believe I'm doing here today. I just -- I think you're a manipulator and, I'm just not going to be manipulated and stick [the child] in that."

On February 8, 2021, the trial court entered a judgment in which, based on the testimony and evidence, it found that "any further contact

between [the father] and the [child] would be detrimental to the health, safety and well being of [the child] based on the prior conduct of [the father]." The trial court then, among other things, terminated the father's visitation and contact with the child, modified the father's child-support obligation by ordering the father to pay the mother $332 per month for the support and maintenance of the child, awarded the mother an attorney fee in the amount of $2,443.50, and denied any other requests for relief not specifically addressed.

On March 10, 2021, the father filed a postjudgment motion, arguing, among other things, that the trial court had erred by terminating his visitation with the child and by awarding an attorney fee to the mother. Specifically, he argued that the evidence supported an award of standardized, unsupervised visitation and a finding of contempt against the mother. On March 31, 2021, the trial court denied the father's motion. On May 7, 2021, the father filed this appeal.

> "'"Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. '"When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be

presumed correct and will not be disturbed on appeal except for a plain and palpable error."' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).

> "'"'"The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala.1995). The ore tenus standard of review, succinctly stated, is as follows:
>
> > "'"'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's

> conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."

> "'"Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000)(quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). However, 'that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)."

"'Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010). Furthermore, where there are no disputed facts and where the judgment is based entirely upon documentary evidence, our review is de novo. Weeks v. Wolf Creek Indus., Inc., 941 So. 2d 263, 268-69 (Ala. 2006).'

> "E.B. Invs., L.L.C. v. Pavilion Dev., L.L.C., 212 So. 3d 149, 162 (Ala. 2016)(emphasis added)."

Sims v. Sims, 218 So. 3d 1285, 1288-89 (Ala. Civ. App. 2016).

On appeal, the father contends that the trial court exceeded its discretion by admitting into evidence testimony about the prior criminal charges against him, his alleged conduct underlying those charges, and a copy of the video-recorded statement he had made to law-enforcement officers. Specifically, the father argues that because the prior criminal charges were dismissed with prejudice and the video-recorded statement that he made to law-enforcement officers was suppressed in the criminal action, the trial court erred in admitting the evidence in this civil proceeding.

The record reflects that the court in the father's criminal case granted the father's motion to suppress the father's video-recorded statement made to law-enforcement officers during a custodial interview. Specifically, the court denied admission of the father's statement at the criminal trial because, it held, the State had failed to prove that the father had waived his right to remain silent and his right to counsel. A copy of the court's order is in the record. Additionally, the trial court

admitted into evidence a copy of the order dismissing with prejudice the criminal case against the father. The trial court also admitted into evidence testimony about the father's conduct underlying the criminal charges, testimony about the circumstances surrounding the father's arrest, and a copy of the father's video-recorded statement.

> "Two fundamental principles govern the standard by which this Court reviews a trial court's rulings on the admission of evidence. Middleton v. Lightfoot, 885 So. 2d 111, 113 (Ala. 2003). '"'The first grants trial judges wide discretion to exclude or admit evidence.'"' 885 So. 2d at 113 (quoting Mock v. Allen, 783 So. 2d 828, 835 (Ala. 2000), quoting in turn Wal-Mart Stores, Inc. v. Thompson, 726 So. 2d 651, 655 (Ala.1998)). However, 'a trial court exceeds its discretion where it admits prejudicial evidence that has no probative value.' 885 So. 2d at 113 (citing Powell v. State, 796 So. 2d 404, 419 (Ala. Crim. App. 1999), aff'd, 796 So. 2d 434 (Ala. 2001)).
>
> "'"'The second principle "is that a judgment cannot be reversed on appeal for an error [in the improper admission of evidence] unless ... it should appear that the error complained of has probably injuriously affected substantial rights of the parties."'"' Middleton, 885 So. 2d at 113 (quoting Mock, 783 So. 2d at 835, quoting in turn Wal-Mart Stores, 726 So. 2d at 655). See also Rule 45, Ala. R. App. P. '"The burden of establishing that an erroneous ruling was prejudicial is on the appellant. "'Middleton, 885 So. 2d at 113-14 (quoting Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991))."

Baldwin Cnty. Elec. Membership Corp. v. City of Fairhope, 999 So. 2d 448, 453 (Ala. 2008). Additionally, it is well settled that

> "[a]n acquittal in a criminal case is not dispositive of the issues presented in a civil proceeding arising out of the same set of operative facts. Aetna Life Ins. Co. v. Dowdle, 287 Ala. 201, 250 So. 2d 579, 587 (1971); Mobile Light & R. Co. v. Burch, 12 Ala. App. 421, 68 So. 509, 512 (1915). If the basis of the trial court's order was an assumption that the criminal trial resolved the questions of fact surrounding the alleged defalcation, we cannot agree. 'By definition, an acquittal in a criminal case does not resolve all factual issues, but leaves factual issues doubtful .... [A] judgment of acquittal is only a determination that guilt has not been established beyond a reasonable doubt, although a preponderance of evidence might point thereto.' Bredeson v. Croft, 295 Ala. 246, 326 So. 2d 735, 737 (1976) (citations omitted). For instance, if A filed suit against B seeking recovery of money which B allegedly took from A during a robbery, B's acquittal in a criminal proceeding for robbery would not constitute a bar to A's suit. Austin v. Clark, 247 Ala. 560, 25 So. 2d 415, 416 (1946). A judgment in a criminal case cannot be res judicata in a civil action because the parties to the actions are different, the rules of evidence are different, and a different standard of proof is involved. Bredeson v. Croft, supra."

City of Gadsden v. Head, 429 So. 2d 1005, 1007 (Ala. 1983).

The trial court did not exceed its discretion by admitting evidence regarding the criminal charges against the father and his alleged conduct underlying those charges. The dismissal of the criminal charges against the father, under the facts presented in this case, did not establish, as a matter of law, that the father did not commit the acts in question. The criminal charges against the father were dismissed because the court in the criminal case held that the father's Miranda rights had been violated,

not because he did not commit the offenses. Consequently, the dismissal of the criminal charges did not furnish a complete answer to the underlying charges, i.e., it did not establish that the father had not engaged in inappropriate behavior with a child. Because the dismissal of the criminal charges was not based on a finding that the father was not guilty beyond a reasonable doubt of the alleged misconduct with a child and because the burden of proof in a civil action -- a preponderance of the evidence -- is less than the burden of proof in a criminal trial, the trial court did not exceed its discretion by admitting evidence regarding the criminal charges against the father and his alleged conduct underlying those charges. The evidence constituted relevant evidence necessary to a determination of whether a relationship between the father and the child was in the child's best interests. Cf. Goolsby v. Green, 431 So. 2d 955, 959 (Ala. 1983)(holding that dismissal of criminal charges against a former employee did not preclude consideration of the conduct underlying those charges as a basis for the employer's dismissal of employee).

Because we have determined that evidence regarding the criminal charges and the alleged conduct underlying those charges was

admissible, we must now consider whether the trial court exceeded its discretion by admitting into evidence the father's video-recorded statement made to law-enforcement officers that had been suppressed during his criminal trial.

In support of his argument that the trial court exceeded its discretion by admitting into evidence a copy of his video-recorded statement made to law-enforcement officers during a custodial interview, the father cites Johnson v. State, 667 So. 2d 105 (Ala. Civ. App. 1995). Johnson addressed whether a defendant had to relitigate in a civil-forfeiture/condemnation proceeding an issue that had previously been decided in a criminal action. This court opined:

> "It is well settled that a judgment in a criminal action cannot be res judicata in a civil action, since the parties, the rules of evidence, and the standard of proof may be different. See Kucera v. Ballard, 485 So. 2d 345 (Ala. Civ. App. 1986). Johnson cites, for support, Nicaud v. State ex rel. Hendrix, 401 So. 2d 43 (Ala. 1981). There, our Supreme Court held that '[e]quity will not sanction the forfeiture of property based upon evidence obtained in violation of fundamental constitutional rights.' Nicaud at 45. We note, however, that the trial court in Nicaud, which heard the evidence as to the forfeiture, also heard the evidence concerning the lawfulness or unlawfulness of the search that had resulted in the seizure of the property sought to be forfeited. Thus, while the exclusionary rule may apply to civil proceedings where the State seeks a forfeiture of property, the determination of whether the evidence has been illegally seized is made based

upon evidence presented in that civil proceeding. See e.g., Moynes v. State, 555 So. 2d 1086 (Ala. Civ. App.1989).

"Johnson also appears to argue that the doctrine of collateral estoppel precludes the court from considering in the condemnation case, the issue of the legality of the search, in view of the ruling on that question in the criminal case. The doctrine of collateral estoppel is of no avail to Johnson. The only evidence introduced in this condemnation case relating to the ruling in the criminal case is a copy of the criminal case action summary, which contains a bench note stating simply, 'Motion to suppress granted -- case dismissed.' No transcript of testimony or other evidence was presented reflecting the basis for the ruling in the criminal case. In this condemnation case, upon overruling Johnson's objection to testimony regarding the fruits of the search of the vehicle in question, the trial court correctly noted, 'I have no idea of what the nature of the motion [to suppress] was or what was taken in the testimony and I don't even know whether we are dealing with the same set of facts.' As the State correctly notes, this argument was rejected by the United States Supreme Court in Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), which held that a defendant seeking to foreclose relitigation of an issue in a later case has the burden of demonstrating that the issue sought to be foreclosed was actually decided in the first proceeding. No basis having been established in the condemnation case for the granting of the motion to suppress in the criminal action, Johnson failed to satisfy her burden of proving that the issue regarding the fruits of the vehicle search, which relitigation she sought to foreclose in this case, was actually decided in the criminal proceeding. Dowling, supra."

667 So. 2d at 106-07.

The father also cites Durham v. State, 730 So. 2d 235 (Ala. Civ. App. 1999). In Durham, the State sought the forfeiture of a vehicle allegedly

used in the sale of marijuana. The Durhams, a father and a son, sought to have evidence indicating that the substance seized from the vehicle was marijuana suppressed in the civil-forfeiture action because, he said, the trial court in his criminal case had suppressed the evidence after determining that it had been obtained as the result of an unlawful search. This court opined:

> "The Durhams next argue that the trial court erroneously allowed the admission of evidence (testimony about the marijuana found as a result of the search) that had been obtained as a result of an unlawful search. Apparently, the Durhams challenge the validity of the search warrant under which the search of the son's home and the father's vehicle was conducted. In their brief, they state that the warrant was declared invalid in the criminal case; this comment is disputed by the State, which states in its brief that the grand jury failed to indict, but that the warrant was never declared invalid in a judicial proceeding. Even if the warrant had been declared invalid in a prior criminal proceeding, the Durhams could not have had the evidence excluded from the civil forfeiture case on that basis alone. See Johnson v. State, 667 So. 2d 105, 106 (Ala. Civ. App. 1995). To keep the evidence out, the Durhams would have had to produce, in the forfeiture action, evidence that the warrant was invalid. See Johnson, 667 So. 2d at 107. Although counsel fervently argued that the warrant was invalid, the Durhams produced no evidence indicating that it was; therefore, the trial court did not err by allowing in evidence obtained in the search conducted under the warrant."

730 So. 2d at 236-37.

According to the father, the trial court erred by admitting his video-recorded statement because, unlike Johnson and the Durhams, who did not present evidence indicating the reasons for suppressing the evidence in their criminal cases, he produced evidence establishing that the court had suppressed his video-recorded statement in the criminal proceeding because the father had not been properly advised of his Miranda rights. The father, however, fails to recognize that the suppression of his statement at the criminal trial does not foreclose its admission in a civil proceeding.

In Malholtra v. State, 717 So. 2d 425 (Ala. Civ. App. 1998), this court in a civil-forfeiture case addressed an analogous situation. During the criminal trial that provided the underlying facts for the forfeiture action, the trial court found that Malholtra's statement had been coerced improperly by law-enforcement officers and suppressed the statement. We stated:

> "The Alabama Supreme Court has held that the rules of evidence applicable in civil actions also apply in forfeiture proceedings. Riggs v. State ex rel. Jones, 217 Ala. 102, 102, 115 So. 1, 1 (1927). 'No predicate [is] required for the introduction of the declarations of the owner [of a forfeited vehicle] tending to connect him with the illegal act. They are admissible as declarations against interest in civil actions, not as confessions in criminal prosecutions.' Id.

> "In McNeese v. State ex rel. Cramer, 592 So. 2d 615 (Ala. Civ. App. 1992), a sheriff's deputy said that he told McNeese that he would make a recommendation of leniency to the district attorney if McNeese cooperated with the sheriff's investigation. McNeese's statement provided the only evidence linking his car to drug transactions; the trial court ordered a forfeiture of the car. This court, relying on Riggs, supra, held that the rule of evidence applied in criminal cases to exclude a defendant's statement made in response to a promise of leniency does not apply in civil forfeiture cases. Based on Riggs and McNeese, we conclude that the trial court did not err in [admitting] Malholtra's statement that he had traveled to Miami to purchase marijuana."

717 So. 2d at 427.

Applying the reasoning set forth in Malholtra to the facts of this case, the trial court did not exceed its discretion by admitting the father's video-recorded statement because it constituted a declaration against interest in this civil action and the fact that the court had suppressed the statement in the criminal proceeding did not impact its admissibility in this action. Therefore, the trial court did not exceed its discretion in this regard.

Lastly, the father argues that, even if the foregoing evidence was relevant and admissible, the probative value of the evidence was outweighed by its unfair prejudice. The father maintains that the statements of the trial-court judge at the close of the evidence indicate

that the trial court's decision to terminate his visitation with the child was heavily influenced by the evidence regarding the father's prior conduct. The father insists that the evidence of his alleged prior criminal conduct should have been excluded as being unfairly prejudicial.

Rule 403, Ala. R . Evid., which is entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time," provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

With regard to a danger-of-unfair-prejudice determination, the Advisory Committee's Note to Rule 403 states:

> "The judge is to place the probative value or relevancy of evidence on one side of imaginary scales and its prejudicial impact on the other. When the prejudicial impact substantially outweighs the probative value, then the evidence may be excluded."

In Ex parte Vincent, 770 So. 2d 92 (Ala. 1999), our supreme court discussed Rule 403, and its application, stating:

> "When considering the trial court's ruling, this Court must decide whether the trial court abused its discretion in excluding the proffered document. See State Farm Mut. Auto. Ins. Co. v. Griffin, 51 Ala. App. 426, 286 So. 2d 302 (Ala. Civ.

> App.1973). ... Mere prejudice is not a basis for exclusion under Rule 403, because evidence can be harmful, yet not unfairly prejudicial. State v. Parker, 740 So. 2d 421 (Ala. Crim. App. 1996), reversed on other grounds, 740 So. 2d 432 (Ala. 1999). The proper test for determining whether relevant evidence has been properly excluded under Rule 403 is to determine whether 'its probative value is substantially outweighed by the danger of unfair prejudice.' (Emphasis added.) McElroy's Alabama Evidence clarifies the Rule 403 standard by stating: 'This principle does not empower the trial judge to exclude evidence simply because it is prejudicial or because its prejudice outweighs its probative value. Rather, exclusion is merited only when the prejudice substantially outweighs the probative value.' Charles W. Gamble, McElroy's Alabama Evidence, § 21.01(4) (5th ed. 1996) (footnotes omitted) (emphasis original).
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> "'Unfair prejudice' under Rule 403 has been defined as something more than simple damage to an opponent's case. Dealto v. State, 677 So. 2d 1236 (Ala. Crim. App. 1995). A litigant's case is always damaged by evidence that is contrary to his or her contention, but damage caused in that manner does not rise to the level of 'unfair prejudice' and cannot alone be cause for exclusion. Jackson v. State, 674 So. 2d 1318 (Ala. Crim. App. 1993), reversed in part on other grounds, 674 So. 2d 1365 (Ala. 1994). 'Prejudice is "unfair" if [it] has "an undue tendency to suggest decision on an improper basis."' Gipson v. Younes, 724 So. 2d 530, 532 (Ala. Civ. App. 1998), quoting Fed. R. Evid. 403 (Advisory Committee Notes 1972). See, also, Rule 403, Ala. R. Evid."

770 So. 2d at 95-96.

In Gipson v. Younes, 724 So. 2d 530 (Ala. Civ. App. 1998), this court recognized:

> "'[W]hen reviewing a Rule 403 determination, [an appellate court's] task is not to reweigh the prejudicial and probative elements of the evidence, but rather to determine if the [trial court] clearly abused its discretion in [admitting] the evidence. Duncan v. Wells, 23 F.3d 1322, 1323-24 (8th Cir. 1994); see United States v. Long, 574 F.2d 761, 767 (3d Cir.)("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."), cert. denied, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978). See also United States v. Vetter, 895 F.2d 456, 459-60 (8th Cir. 1990)(per curiam).'
>
> "Williams v. Nebraska State Penitentiary, 57 F.3d 667, 670 (8th Cir. 1995)."

724 So. 2d at 533.

Here, evidence of the father's alleged prior conduct did not influence the trier of fact to make its decision on an improper basis. The trial court was charged with determining the best interests of the child. The father's argument that the criminal charges against him, which were based on conduct unrelated to the child, should not have been the basis of the trial court's determination regarding the father's visitation overlooks the fact that the character of the father and the influence that he has on the child are key factors in determining whether visitation is in the best interests of the child. Thus, the father's prior conduct with regard to other children was relevant to that determination. Cf. A.M. v. M.G.M., 315 So. 3d 584,

590 (Ala. Civ. App. 2020)(recognizing that, "in general, the mental health of a parent is a relevant consideration in a custody determination"). Therefore, although the evidence was harmful to the father's case, it did not rise to the level of "unfair prejudice" because it did not move the trier of fact to decide the case on an improper basis. Additionally, the trial court in its judgment focused on the father's recent conduct -- his refusal to take responsibility for his circumstances, his discussions with the child about court proceedings, his blaming the mother for his lack of a significant relationship with the child -- which were proper factors for consideration that were independent of the father's alleged prior bad acts. Consequently, we cannot say that the trial court exceeded its discretion by admitting the evidence.

The father further contends that the trial court's determination that he did not demonstrate that a material change in circumstances had occurred warranting an increase in his visitation with the child is plainly and palpably wrong. Specifically, he argues that the trial court erred by refusing to expand his visitation because, he says, he submitted

substantial evidence[7] showing a material change of circumstances affecting the child's welfare and showing that increased visitation with him would bring a positive good that would more than offset the disruptive effect caused by uprooting the child.

> "The matter of visitation rests soundly within the broad discretion of the trial court, and a trial court's determination regarding visitation must be affirmed absent a finding that the judgment is unsupported by any credible evidence and that the judgment, therefore, is plainly and palpably wrong."

Watson v. Watson, 634 So. 2d 589, 590 (Ala. Civ. App. 1994). The burden rests on the petitioner for a modification of a visitation order to prove a material change of circumstances since the entry of the most recent judgment concerning visitation and that the modification would serve the best interests of the child. See Griffin v. Griffin, 159 So. 3d 67, 70 (Ala. Civ. App. 2014). This court presumes the correctness of a judgment modifying the visitation privileges of a noncustodial parent following a bench trial at which the fact-finder received oral testimony. See S.M.M. v. J.D.K., 208 So. 3d 1118, 1120 (Ala. Civ. App. 2015).

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[7]"[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).

In support of his argument that he should be awarded unsupervised visitation, the father observes that § 30-3-150, Ala. 1975, encourages interaction of both parents with a child by providing:

> "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."

(Emphasis added.)

The father also cites S.M.M., which, he says, requires this court to reverse the trial court's judgment. In S.M.M., the father, a pastor, had been charged with the rape of a 15-year-old girl, who was a member of his church's youth group. The father confessed to the offense, pleaded guilty, and was convicted. After his conviction, the father and his wife divorced. In the agreement incorporated into their divorce judgment, the father was awarded visitation with his children at the sole discretion and supervision of his wife, the children's mother. Subsequently, the father moved to modify his visitation to allow him unsupervised visitation because, he said, the mother had essentially alienated the children from him. Several witnesses, lay and expert, testified that the father had expressed remorse for his offense, that he did not have any ongoing

mental illness, and that he posed no risk to the children. The mother's expert witness, however, testified that she had tested the father and that he had sexual fantasies of underage girls. Evidence was presented indicating that the mother had alienated the children from the father. The trial court, after considering the evidence, found that "'[t]here was no credible and/or reliable evidence that the parties' minor children have been, nor are in future danger of being, sexually or physically abused by the [father].'" 208 So. 3d at 1121. The trial court further observed that no evidence indicated that the father's prior illegal sexual relationship had had a detrimental effect on the children. The trial court held that the evidence had demonstrated that a material change in circumstances had occurred since the entry of the divorce judgment that justified awarding the father unsupervised visitation and that the change was in the best interests of the children. This court affirmed.

The father also cites Bosarge v. Bosarge, 628 So. 2d 709 (Ala. Civ. App. 1993). The father in Bosarge had been granted supervised visitation at the Family Exchange Center in the divorce judgment. Because he could not afford to pay the fees charged by the center and he wanted to visit with the child, the father petitioned to modify the divorce judgment

with regard to his visitation. The father testified that he had suffered an on-the-job injury, was unemployed, and had applied but not yet qualified for Social Security disability benefits. He further testified that, although he was taking a prescribed medication for his pain resulting from the injury, the dosage had been reduced and the medication did not prevent him from taking care of his stepchildren and, thus, he could also take care of the child during visitation. The mother in Bosarge testified that the father's visits should remain supervised because, she said, the father abused his prescription pain medications. Evidence was also presented indicating that the mother had restricted the father's contact with the child. The trial court found that a material change in circumstances had occurred since the entry of the divorce judgment and awarded the father standardized, unsupervised visitation. On appeal, the mother argued that evidence indicating that the father was taking a reduced amount of the pain medication and his desire to visit with the child did not amount to a material change in circumstances warranting a modification of visitation. This court affirmed the trial court's judgment, observing that no evidence indicating that unsupervised visitation would not be in the child's best interests had been presented.

According to the father in this case, he presented substantial evidence demonstrating that a material change in circumstances has occurred since the entry of the October 30, 2018, judgment so as to support a change in the visitation schedule. He observes that evidence was presented indicating that, since the entry of the October 30, 2018, judgment, the criminal charges against him have been dismissed with prejudice; he has remarried, had a daughter, and maintained a stable, steady income and housing; supervised visitation has become unfeasible due to the parties' inability to find a reliable supervisor; and he has developed a relationship with the child. Additionally, he reminds this court that the mother allowed him visitation with the child even though he had been charged with the criminal offenses and had agreed to supervised visitation while the charges remained pending. He reasons that, because the mother did not seek to terminate his visitation with the child after he allegedly confessed to committing the criminal charges to her, her actions belie her testimony that visitation with the father is not in the child's best interests. He further states that the evidence indicates that he expressed remorse for having a relationship with K.B. and

maintains that the record does not reflect that his alleged prior conduct with K.B. has harmed the child.

Applying the appropriate standard of review, a thorough review of the evidence supports the trial court's determination that the father did not present substantial evidence demonstrating that a material change in circumstances had occurred since the entry of the October 30, 2018, judgment so as to warrant changing his visitation with the child from supervised visitation to unsupervised, standard visitation. The criminal charges against the father were dismissed due to a violation of his right to due process, not because he was found not guilty of the charges. The father did not acknowledge that his prior conduct with K.B. was wrong; that it violated, at a minimum, § 13A-6-81; or, most significantly, that his conduct was detrimental to K.B., who was a child. The father expressed no remorse that he -- as a father, a church leader, and an educator -- had engaged in conduct that manipulated a child and had harmed her. The father's statement that his relationship with K.B. was "the worse mistake I've ever made in my entire life" focuses more on how the mistake impacted his life and does not reflect that he comprehends the gravity of the impropriety of his behavior with regard to that child. Although the

father is correct that the evidence indicates that he currently parents another child and that several witnesses testified that he is a good father to the child, the father ignores the evidence indicating that his conversations with the child caused the child to have anxiety, that the child's teachers noticed a negative change in the child's behavior after visitations with the father, and that an educator had testified that he would not let the father visit alone with his children. In light of the foregoing evidence and the deference given to the trial court's determinations of credibility, we cannot say that the trial court's determination that a material change in circumstances had not occurred so as to warrant a modification in the October 30, 2018, judgment from supervised to unsupervised visitation is plainly and palpably wrong.

The father also contends that the trial court exceeded its discretion by terminating his right to visitation with the child. Specifically, he contends that no evidence was presented demonstrating that his alleged criminal conduct had any substantial direct or negative impact on the child.

Initially, we observe that the mother's failure to file a counterclaim asking the trial court to terminate the father's visitation is not

determinative of this issue. The father's counsel elicited testimony from the mother indicating that she believed that it was in the best interests of the child to terminate the father's visitation. Similar testimony was elicited from Turner and Flynn. The father did not object to the foregoing testimony.

> "[W]here an issue not pleaded by a party is tried before the trial court without an objection by another party, that issue is deemed to have been tried by the implied consent of the parties. Rule 15(b), Ala. R. Civ. P.; Hosea O. Weaver & Sons, Inc. v. Towner, 663 So. 2d 892 (Ala. 1995)."

A.L. v. S.J., 827 So. 2d 828, 833 (Ala. Civ. App. 2002)(holding that a claim for custody was tried by the implied consent of the parties when the testimony demonstrated that an intervening party wanted custody); C.B. v. J.W., 325 So. 3d 829 (Ala. Civ. App. 2020)(holding that whether a child should be forced to resume visitation with the father was tried by implied consent of the parties due to elicited testimony at trial). Because testimony was presented regarding whether the father's visitation with the child should be terminated, this issue was tried by implied consent.

In support of his contention that the trial court erred by terminating his visitation, the father cites C.B. v. J.W., a case in which the trial court terminated a father's right to visitation with his 11-year-

old child. The father had been exercising supervised visitation with the child for five years at a visitation center. The testimony indicated that during the visits the father had become angry in front of the child, had upset the child, and had said inappropriate things in front of the child, such as "'it won't be long'" and "'I got your room fixed up. '" 325 So. 3d at 833. The child's custodian testified that the child did not want to visit with the father and that she had to force the child to go to the visitations. After the last visit before the ore tenus proceedings, the child became very upset. The child testified that the father had told her that he wanted her on his side and that, when the father had been admonished at the last visitation, she had been uncomfortable. The juvenile court, finding that the father's "'interactions with the child ha[d] been characterized as not healthy,'" 325 So. 3d at 835, and that its findings were supported by the father's demeanor in court and the child's testimony, terminated the father's visitation. This court reversed the judgment, observing that none of the evidence indicated that the child had suffered any significant or lasting emotional upset from contact with the father or that the father posed a threat to the child. This court ordered the trial court to reinstate the father's supervised visitation.

The father also cites V.C. v. C.T., 976 So. 2d 465 (Ala. Civ. App. 2007)(per Moore, J., with Thompson, P.J., and Pittman, J., concurring in the result, without opinions). In V.C., a mother had engaged in a physical altercation and had used profanity in front of her child. The trial court suspended the mother's visitation. This court, however, observing that the evidence presented at trial did not indicate that the mother posed a threat of harm to the child to the degree that all visitation between her and the child should cease, reversed the juvenile court's judgment and remanded the case for the trial court to reinstate the mother's supervised visitation.

M.R.D. v. T.D., 989 So. 2d 1111 (Ala. Civ. App. 2008), another case cited by the father, addresses the propriety of a trial court's judgment denying a father visitation with his child. The father in M.R.D. had filed a petition to modify custody and visitation. The mother claimed that the father had sexually abused the child. Additionally, the evidence indicated that the father had been verbally abusive to the child, had exposed the child to inappropriate things, and had caused the child anxiety to such a degree that the child did not want to visit with him. The trial court held that ample evidence supported a finding that " 'there

is a probability that the sexual abuse did occur'" and terminated the father's visitation rights. 989 So. 2d at 1113. This court held that the trial court's decision was overly restrictive under the facts of the case, reversed the trial court's judgment, and remanded the case for that court to determine appropriate conditions for visitation.

Lastly, the father directs this court to Judge Moore's writing, concurring in the result, in Y.N. v. Jefferson County Department of Human Resources, 67 So. 3d 76 (Ala. Civ. App. 2011). In his writing, Judge Moore emphasized that, when a trial court suspends visitation between a noncustodial parent and a child, this court will "carefully scrutinize" the decision because, without visitation, a noncustodial parent would have no opportunity to maintain a meaningful relationship with his or her child. 67 So. 3d at 86. Judge Moore explained that termination of visitation is appropriate only in "unusual and extreme cases," such as when a parent has physically assaulted the child; a parent has a history of substance abuse, domestic abuse, and/or mental instability; a parent is serving a lengthy term of imprisonment; or a parent has kidnapped a child and removed the child to another state. Id. Judge Moore opined that, in "those cases, the courts basically concluded

that any interaction between the parent and the child would not be beneficial, but would, in fact, be harmful, to the child." Y.N., 67 So. 3d at 87.

The father maintains that the facts in C.B., V.C., and M.R.D., which warranted reversal of the judgments terminating visitation, are more compelling than the evidence presented in his case. He contends that, because no evidence was presented indicating that he had physically harmed the child, that he had forced inappropriate physical contact with child, that he had engaged in profanity in front of or toward the child, or that he had sexually abused the child, the trial court's decision to terminate his right to visitation is plainly and palpably wrong. According to the father, the only evidence presented regarding the negative effects of his behavior on the child was the mother's testimony that the child was nervous before visits, that the child had stated that he had discussed the upcoming trial with him, and that the child had acted disruptively after visitations with the father. The father insists that the foregoing evidence does not demonstrate that his visits with the child are harmful to the child, especially in light of the evidence demonstrating that he has remarried and his wife does not consider him a danger to

their daughter or the child, the testimony of his surrogate mother that the father has a good relationship with the child, and the testimony of his sister that he is "an amazing dad." The father argues that because, he says, no evidence was presented indicating that his supervised visitation with the child had emotionally or physically harmed the child, a less drastic measure, i.e., supervised visitation, is appropriate.

In C.B., this court opined:

> "'"It is well settled that matters regarding both custody and visitation rest soundly within the discretion of the trial court, and that judgments regarding those matters will not be disturbed on appeal absent an abuse of discretion. A trial court's determination regarding visitation must be affirmed absent a finding that the judgment is unsupported by credible evidence and that the judgment, therefore, is plainly and palpably wrong. Visitation cases require an examination of the facts and circumstances of the individual situation, which the trial court is able to observe."
>
> "'Denney v. Forbus, 656 So. 2d 1205, 1206 (Ala. Civ. App. 1995) (citations omitted).
>
> "'Nevertheless, the law presumes that it is in the best interest of a child to have complete and unrestricted association with his or her parents.

See Jackson v. Jackson, [999 So. 2d 488, 494 (Ala. Civ. App. 2007)] (quoting Johnita M.D. v. David D.D., 191 Misc. 2d 301, 303, 740 N.Y.S.2d 811, 813 (Sup. Ct. 2002)). When the parents are deemed fit and proper persons, the parents should have reasonable visitation rights. Naylor v. Oden, 415 So. 2d 1118 (Ala. Civ. App. 1982). As we have recently noted, the reasonableness of visitation rights and any restrictions on visitation depend on the circumstances of the case. Jackson, [999] So. 2d at [494]. In deciding appropriate restrictions on visitation, "[t]he trial court is entrusted to balance the rights of the parents with the child's best interests to fashion a visitation award that is tailored to the specific facts and circumstances of the individual case." Nauditt v. Haddock, 882 So. 2d 364, 367 (Ala. Civ. App. 2003).

"'A trial court exceeds its discretion when it selects an overly broad restriction on visitation that does more than address a particular threat to the best interests of the child and thereby unduly infringes upon the parent-child relationship. Jackson, [999] So. 2d at [495]. In Alabama, a total denial of visitation rights has been upheld only rarely. Compare Baugh v. Baugh, 567 So. 2d 1358 (Ala. Civ. App. 1990) (this court affirmed a divorce judgment denying the father any visitation with his 7-year-old child because he was incarcerated and serving a 20-year prison sentence), with In re Norwood, 445 So. 2d 301 (Ala. Civ. App. 1984) (reversing the trial court's judgment that failed to award some restricted or limited visitation privileges to mother who had recently been released from prison for killing the child's father).'

> "V.C. v. C.T., 976 So. 2d 465, 468-69 (Ala. Civ. App. 2007) (per Moore, J., with Presiding Judge Thompson and Judge Pittman concurring in the result).
>
> > "Furthermore,
> >
> > > "'[i]n light of the strong public policy favoring visitation, ... in cases where a final judgment (as opposed to a pendente lite order) indefinitely divesting a parent of all visitation rights is entered, that judgment should be based on evidence that would lead the trial court to be reasonably certain that the termination of visitation is essential to protect the child's best interests. Thus, notwithstanding the discretionary role of our learned trial judges, this court will continue to carefully scrutinize judgments divesting parents of all visitation rights with their children. See In re Norwood, 445 So. 2d 301, 303 (Ala. Civ. App. 1984) (reversing judgment denying all visitation to child's mother) ....'
>
> "M.R.D. v. T.D., 989 So. 2d 1111, 1114 (Ala. Civ. App. 2008)."

C.B. v. J.W., 325 So. 3d at 836-37.

In this case, the mother had the burden of proving that, since the entry of the October 30, 2018, judgment, a material change in circumstances had occurred affecting the welfare of the child that warranted a termination of the father's visitation. The father is correct that the mother had to demonstrate that the father's conduct negatively impacted the child. The mother is correct that a court's denial of

visitation rights is within the broad discretion of the trial court and that the trial court, in reaching its decision, must determine the best interests of the child. Fricks v. Fricks, 428 So. 2d 80 (Ala. Civ. App. 1983).

Our review of the evidence, which was conducted in a light most favorable to the trial court's judgment, see Zarr v. Zarr, 201 So. 3d 559, 566 (Ala. Civ. App. 2016), leads us to conclude that the trial court exceeded its discretion by terminating the father's right to visitation. Specifically, the evidence does not indicate that continuing the father's supervised visitation would have led "'the trial court to be reasonably certain that the termination of visitation [was] essential to protect the child's best interests.'" C.B., 325 So. 3d at 837 (quoting M.R.D. v. T.D., 989 So. 2d at 1114). Evidence was presented from which the trial court could have concluded that the father had engaged in an inappropriate relationship with a 15-year-old student, that the parties had had difficulty finding a mutually agreed upon supervisor for the supervised visitations, and that the child had exhibited some anxiety before and after visits with the father. Evidence was also presented indicating that the child exhibited affection for the father and enjoyed spending time with the father. Additionally, no evidence was presented indicating that

the father had harmed the child, that the father had placed the child at risk of harm, or that continuing the father's supervised visitations would cause the child harm. Therefore, the record does not support the trial court's determination that termination of the father's visitation protected the child's best interests, and the trial court exceeded its discretion by terminating the father's right to visitation. Accordingly, we reverse the judgment insofar as it terminated the father's supervised visitation with the child. On remand, the trial court is instructed to reinstate the father's supervised visitation.

Next, the father argues that the trial court erred by failing to find the mother in contempt.[8]

"In the case of civil contempt, we have often explained that

> "'whether a party is in contempt of court is a determination committed to the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm.'

[8]Although the father, in his brief to this court, argues that the trial court erred in refusing to find the mother in criminal contempt, the record reflects that the father, in his petition for a rule nisi, only asked that the mother show cause as to why she should not be held in civil contempt; moreover, the father did not ask the trial court to fine or imprison the mother during the ore tenus proceeding.

> "Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994); see also Hammock v. Hammock, 867 So. 2d 355, 359-60 (Ala. Civ. App. 2003)."

Kizale v. Kizale, 254 So. 3d 233, 237 (Ala. Civ. App. 2017); see also Kyle v. Kyle, 128 So. 3d 766 (Ala. Civ. App. 2013).

The ability of a court to enforce its decrees through contempt proceedings is integral to the administration of justice. Thomas v. Thomas, 406 So. 2d 939, 941 (Ala. Civ. App. 1981). "The scope of review in contempt cases is limited to questions of law and does not extend to the weight and sufficiency of the evidence, but only to the question of whether any evidence supports the trial court's decree." Thomas, 406 So. 2d at 942. "The failure to perform an act required by the court for the benefit of an opposing party constitutes civil contempt." Carter v. State ex rel. Bullock Cnty., 393 So. 2d 1368,1370 (Ala. 1981).

According to the father, the evidence establishes that the mother willfully disobeyed the October 30, 2018, judgment. The father, however, ignores the evidence that supports a finding that the supervisor for each of the visitations drove the child to the visits and that most missed visitations, with the exception of a beach trip and when the child was sick, were a consequence of the supervisor's unavailability. Additionally,

the father disregards his admission that he did not know if the "no-show" visits were caused by the mother. Thus, contrary to the father's assertion in his brief, the record does not establish that the mother willfully disobeyed the October 30, 2018, judgment. Because a review of the record supports the trial court's determination that the mother was not in contempt, the father has failed to establish that the trial court exceeded its discretion in this regard.

The father also contends that the trial court exceeded its discretion by ordering the father to pay the mother an attorney fee. He notes that he was not held in contempt of court and that evidence of the factors that a trial court must consider to award an attorney fee was not admitted. He further notes that the child-support affidavits submitted by the parties establish that the mother earns more income than he earns.[9] According to the father, "the mother did everything in her power to cut [him] out of the child's life" and he was forced to seek relief from the court. Therefore, he reasons that the trial court erred in awarding the mother an attorney fee.

[9]According to the affidavits, the father's monthly gross income is $3,288 and the mother's monthly gross income is $3,732.

"Whether to award an attorney fee in a domestic relations action is a matter within the sound discretion of the trial court and, absent an abuse of that discretion, a trial court's ruling will not be reversed." Thompson v. Thompson, 650 So. 2d 928, 931 (Ala. Civ. App. 1994). "Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney." Figures v. Figures, 624 So.2d 188, 191 (Ala. Civ. App. 1993). When there is no evidence as to the reasonableness of the attorney fee, a trial court is presumed to have knowledge from which it may set a reasonable attorney fee. Taylor v. Taylor, 486 So. 2d 1294 (Ala. Civ. App. 1986).

Applying the foregoing law to the facts of this case, the trial court did not exceed its discretion by awarding the mother an attorney fee. The record indicates that, despite the father's admission to her that he had committed the sexual offenses against a child and despite the anxiety that the visitations caused the child, the mother had attempted to provide the father with visitation with the child to comply with the

October 30, 2018, judgment. Flynn's testimony supported the mother's testimony indicating that she had attempted to comply with the judgment even though both she and he felt that visitations between the father and the child were not in the child's best interests. Additionally, evidence was presented from which the trial court could have inferred that the father had refused to recognize that his conduct caused the strain on his relationship with the child and that the mother had acted in the best interests of the child. Moreover, the mother was the prevailing party in the litigation, and the trial court implicitly found that the services of the mother's attorney were valuable.

Because the trial court has wide discretion in awarding an attorney fee to parties, see Hansen v. Hansen, 401 So. 2d 105, 107 (Ala. Civ. App. 1981), and because evidence was presented from which the trial court could have concluded that an award of an attorney fee to the mother was justified, we cannot conclude that the trial court exceeded its discretion in this regard.

Lastly, the father contends that the trial court exceeded its discretion by denying his request for an award of an attorney fee. Because we conclude that the trial court did not err by denying the

father's request for a modification of visitation or by failing to find the mother in contempt, we cannot conclude that the trial court exceeded its discretion by denying the father's request for an award of an attorney fee. See Thompson, supra.

Based on the foregoing, the trial court's judgment is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Moore, Edwards, and Fridy, JJ., concur in the result, without opinions.

Thompson, P.J., concurs in part and dissents in part, with opinion, which Hanson, J., joins.

THOMPSON, Presiding Judge, concurring in part and dissenting in part.

I concur with the decision to affirm the judgment of the Winston Circuit Court ("the trial court") insofar as it denied the petition filed by Jarod Chase Cantrell ("the father") seeking to modify visitation with the parties' child and seeking to hold Kate Eugenia Cantrell ("the mother") in contempt for failing to abide by a previous visitation judgment. I respectfully dissent from the decision to reverse the portion of that trial court's judgment terminating the father's visitation with the child.

This state encourages and supports parents "who have shown the ability to act in the best interest of their children" to interact with their children. See § 30-3-150, Ala. Code 1975. This court has recognized the importance of parents who are deemed fit to have reasonable visitation with their children. In V.C. v. C.T., 976 So. 2d 465, 468 (Ala. Civ. App. 2007)(per Moore, J., with Thompson, P.J., and Pittman, J., concurring in the result, without opinions), the main opinion stated:

> "[T]he law presumes that it is in the best interest of a child to have complete and unrestricted association with his or her parents. See Jackson v. Jackson, 999 So. 488, 494 (Ala. Civ. App. 2007)(quoting Johnita M.D. v. David D.D., 191 Misc. 2d 301, 303, 740 N.Y.S. 2d 811, 813 (Sup. Ct. 2002)). When the parents are deemed fit and proper persons, the parents should have reasonable visitation rights. Naylor v. Oden, 415 So. 2d 1118 (Ala. Civ. App. 1982). ... [T]he reasonableness of

> visitation rights and any restrictions on visitation depend on the circumstances on the case. Jackson, 999 So. 2d at 494. In deciding appropriate restrictions on visitation, '[t]he trial court is entrusted to balance the rights of the parents with the child's best interests to fashion a visitation award that is tailored to the specific facts and circumstances of the individual case.' Nauditt v. Haddock, 882 So. 2d 364, 367 (Ala. Civ. App. 2003)."

(Emphasis added.)

Although S.M.M. v. J.D.K., 208 So. 3d 1118, 1120 (Ala. Civ. App. 2015)(per Pittman, J., with Donaldson, J., concurring and Moore, J., concurring in the result, with opinion), which is discussed in the main opinion in this case, did not address the propriety of a trial court's termination of a parent's visitation, I find the case instructive because the underlying facts in that case regarding the father's fitness for visitation with his children are similar to the facts in this case. In reaching the decision in S.M.M. to affirm the trial court's judgment that a material change in circumstances had occurred that warranted a modification in the visitation schedule to permit the father in that case unsupervised visitation with the children, the main opinion found that the following facts constituted credible evidence supporting the judgment:

> "the father's continuing psychiatric treatment, his remorse for his indiscreet behavior with a child significantly older than his own, the absence of any ongoing risk to the children of sexual contact from the father, the mother's denial of visitation, and the children's inhibited relationship with the father."

208 So. 3d at 1122. The facts that the main opinion found determinative focused on two factors: the father's fitness to parent and the risk of harm to the children caused by visitation with the father. The main opinion cautioned that "this court should not be perceived as somehow condoning the father's past conduct to the extent that that conduct amounted to violations of applicable laws governing sexual contact between minors and adults," 208 So. 3d at 1122, but stated that

> "[o]ur conclusion is instead based upon the proposition that the circuit court, and not this court, is in the best position to decide, based upon comparison of the weight and materiality of both favorable and unfavorable evidence adduced, whether the father demonstrated a material change in the pertinent circumstances warranting the alteration of the conditions initially imposed by the circuit court upon his visitation with his children."

208 So. 3d at 1122-23. In S.M.M., the main opinion implicitly concluded that the record supported a conclusion that the father's proactive actions to address his inappropriate behaviors with a child and his acknowledgment of the inappropriateness of those behaviors reflected

that the father had modified his conduct and, thus, demonstrated that he was a fit and proper person to have visitation with his children.

Whether to modify visitation restrictions is a question of fact for the trial court to decide "'"on a case-by-case basis,"'" depending on the particular facts and personalities involved, J.S. v. L.M., 251 So. 3d 61, 68 (Ala. Civ. App. 2017)(citations omitted), and this court cannot substitute its resolution of disputed facts for the trial court's resolution of those facts. See K.D.H. v. T.L.H., 3 So. 3d 894 (Ala. Civ. App. 2008); Alonzo v. Alonzo, 628 So. 2d 749, 750 (Ala. Civ. App. 1993)("Our standard of review is not what we might have done had we been the trial judge, but whether we find from the evidence that the trial judge was so in error as to constitute an abuse of his discretion.").

The record in this case contains ample evidence from which the trial court could have concluded that visitation with the father is not in the child's best interests and that no less restrictive option is available. From the evidence presented regarding the father's past conduct -- i.e., his inappropriate interaction with another child -- and his current conduct -- i.e., his interactions with the child during the visitations -- the trial court could have inferred that termination of the father's visitation with

the child was in the best interests of the child. Unlike the father in S.M.M., who engaged in ongoing therapeutic counseling regarding his past inappropriate sexual conduct with a child, the record does not reflect that the father in this case recognized or assumed responsibility for the inappropriateness of his conduct with a 15-year-old student, whom he had known since she was 4 years old. The record establishes that the father was not a young person who exercised bad judgment on one occasion. Rather, the father was 29 years old, a parent, an educator, and a church leader when he failed to maintain an appropriate boundary between himself and a child and violated the trust of that child. Evidence was also presented from which the trial court could have inferred that the separation between the father and the child was a consequence of the father's conduct and that the one reason the child was not emotionally harmed by the father's conduct was the mother's instinct to protect the child by telling the child that the father was at work instead of incarcerated. Further evidence was presented creating the inference that the father had engaged in conduct with the child during a visitation that was not safe for the child and that his interactions with the child had caused the child to suffer anxiety and doubt and had resulted, in the

opinion of other educators, in the child's acting disrespectfully toward his teachers and peers. The foregoing constitutes substantial evidence from which the trial court could have concluded that the father's conduct was detrimental to the emotional well-being of the child and that termination of the father's visitation with the child was in the best interests of the child. "The judgment of one who is familiar with the circumstances and who is charged with the duty to aid the child is always presumed to be correct when reviewed on appeal. Fassina v. Fassina, 401 So. 2d 113 (Ala. Civ. App. 1981)." Cole v. Cole, 507 So. 2d 1333, 1335 (Ala. Civ. App. 1987).

Further, evidence was presented from which the trial court could have concluded that no less restrictive option was feasible. The father and the mother presented evidence indicating that supervised visitations had become difficult. The father had refused to agree to visitations supervised by the Winston County Department of Human Resources, and the parties had trouble finding someone to supervise visitations on weekends. The evidence further reflects that, with the exception of Scott Flynn, who testified that he could not make every scheduled visitation and who believed that it was in the best interests of the child to terminate

the visitations, the father was not satisfied with the selected supervisors and their inconsistent availability. The father did not proffer any supervisor at trial who could satisfy his request for consistent visitation. From this evidence, the trial court could have concluded that supervised visitation was no longer a viable, less restrictive option and that the father's own choices and conduct had resulted in that conclusion.

The record contains evidence indicating that the father's behavior that resulted in the loss of his relationship with the child had not changed, that the visitations were having a negative impact on the child, and that the trial court was concerned that visitation with the father was not in the best interests of the child. "[A] trial court establishing visitation privileges for a noncustodial parent must consider the best interests of the child, and, when appropriate, it must set conditions on visitation to protect the child." Casey v. Casey, 85 So. 3d 435, 440 (Ala. Civ. App. 2011). The trial court's decision to terminate the father's visitation was based upon ore tenus evidence, and the judgment is not so clearly erroneous as to be "clearly and palpably wrong." Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001)(quoting Ex parte D.W.W., 717 So. 2d 793, 795 (Ala. 1998))("'[B]ecause the trial court has the advantage of

observing the witnesses' demeanor and has a superior opportunity to assess their credibility, [a reviewing court] cannot alter the trial court's judgment unless it is so unsupported by the evidence as to be clearly and palpably wrong.' "). I further note that the judgment terminating the father's visitation does not preclude the father from petitioning the trial court, at a later date, to modify the judgment terminating his visitation by demonstrating that a material change in circumstances warrants an award of visitation to him. Because I conclude that the trial court did not exceed its discretion by terminating the father's visitation and that the father may petition the trial court to modify the judgment when and if he can prove a material change in circumstances, i.e., that visitation would be in the best interests of the child, I respectfully dissent from the reversal of the trial court's judgment in this regard.

Hanson, J., concurs.