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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-143

Filed: 19 December 2017

Wake County, No. 14 CVD 9151

NATALIE S. OWEN, Plaintiff,

v.

LOUIS JAMES DAVIS, II, Defendant.

Appeal by Defendant from order entered 4 March 2016 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 24 August 2017.

Tharrington Smith, LLP, by Jill Schnabel Jackson, for Plaintiff-Appellee.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Louis James Davis, II, ("Defendant-Father") appeals from a permanent child custody order entered on 4 March 2016. On appeal, Defendant-Father argues, *inter alia*, that the trial court committed reversible error by (1) making findings of fact that were unsupported by competent evidence in the record; (2) admitting the hearsay testimony of Holly Testerman, Rustyn Hyams, Dr. Kelly, Dr. Kane, and Dr.

Meisburger; (3) incorporating a finding of fact from a temporary custody order into the permanent custody order; (4) admitting the hearsay testimony of Dr. Spaulding; (5) admitting school records without Defendant-Father having the opportunity to examine the child's teacher who was not a witness; (6) allowing Plaintiff-Mother to introduce the aunt's recording of the child; and (7) ordering Defendant-Father to pay for Plaintiff-Mother's copy of the trial transcript. We affirm the trial court's Order in part and reverse the trial court's Order in part. Because we conclude, and the parties concede, the trial court has no jurisdiction over Defendant-Father's family, we vacate the portions of the trial court's order stating the minor children should not have contact with Defendant-Father's family. We also reverse the trial court's order requiring Defendant-Father to pay for Plaintiff-Mother's copy of the trial transcript.

I. Factual and Procedural History

Natalie Owen ("Plaintiff-Mother") and Defendant-Father were married on 16 August 2008. They had two daughters, Daisy[1], born 4 July 2009, and Lulu, born 26 September 2011. Plaintiff-Mother and Defendant-Father separated in November 2011. Prior to separation, Plaintiff-Mother and Defendant-Father lived in Carteret County, North Carolina. On 17 January 2012, the parties executed a Separation Agreement which provides that Plaintiff-Mother "shall exercise primary physical custody of the minor children and the Defendant-Father shall have visitation with

[1] Pseudonyms are used to protect the juveniles' identities.

the minor children every other weekend and during holidays." Plaintiff-Mother and her two daughters moved to Raleigh following the separation. Plaintiff-Mother married John Owen on 7 September 2013.

On 6 July 2014, Plaintiff-Mother checked into Fellowship Hall for treatment for alcohol abuse. According to the record, on 8 July 2014, the Plaintiff-Mother's Grandmother was giving Daisy a bath and said her father had repeatedly penetrated Daisy's anus and vagina and touched her breasts and asked her to touch his penis. On 9 July 2014, Plaintiff-Mother's husband, John, called Fellowship Hall. He told Plaintiff-Mother's counselor, Holly Testerman ("Testerman"), Plaintiff-Mother's daughter revealed she had been sexually abused by her father. Testerman and Plaintiff-Mother's family "made a plan to tell [Plaintiff-Mother] the following morning and have her mother come pick her up from treatment to take her back to Raleigh to file emergency custody." Plaintiff-Mother left Fellowship Hall for a few hours in order to file a complaint for a Domestic Violence Protective Order ("DPVO"). In the DPVO Plaintiff-Mother alleged:

> 9. Upon information and belief, Defendant has sexually abused the minor child, Daisy. Daisy disclosed to her maternal grandmother, Debbie Simpson, on or about July 8, 2014, details of repeated sexual abuse by Defendant which occurred during Defendant's custodial time. The disclosures made by Daisy were unsolicited and occurred while Ms. Simpson was bathing Daisy at Plaintiff's residence in Wake County. The disclosures made by Daisy to Ms. Simpson include but are not limited to Defendant having repeatedly penetrated Daisy's anus and repeatedly

> touched Daisy's breasts and vagina multiple times per day while she was in his care. Additionally, Defendant repeatedly requested that the minor child touch his penis.
>
> 10. Defendant has created a physically and emotionally injurious environment for the minor children, and there is a substantial risk of bodily harm to the minor children if Defendant has any contact with them. Defendant is currently unfit to exercise the care, custody, and control of the minor children.
>
> 11. Defendant has acted inconsistently with his constitutionally protected status as a parent to the minor children and is not a fit and proper parent to exercise custodial rights with the children.

Plaintiff-Mother's action of filing the DPVO automatically triggered a report to Wake County Child Protective Services ("CPS"). Paula Hill was the CPS employee assigned to investigate Daisy's statements. After filing the Protective Order, Plaintiff-Mother returned to Fellowship Hall to comply with her treatment and finish the program.[2]

On 11 July 2014, the trial court filed an ex parte order giving Plaintiff-Mother temporary legal and physical custody of the minor children. On 29 July 2014, the Defendant-Father filed an Answer to Complaint for Temporary Custody Motion for a Domestic Violence Protective Order. The matter was continued, and subsequently Defendant-Father filed a more extensive answer and counterclaim again denying the allegations of the Complaint. On 27 August 2014, the trial court entered a memorandum order awarding temporary custody to the Plaintiff-Mother and

[2]Plaintiff-Mother successfully completed Fellowship Hall's program, and has been sober since 7 July 2014.

providing for therapists to counsel the children and set a date for a custody hearing. This order was superseded by a second temporary order entered on 13 November 2014, giving Plaintiff-Mother temporary sole legal and physical custody of the children and continuing temporary custody with the Plaintiff-Mother.

The permanent child custody hearing came on for trial on 20 July 2015. At trial, Plaintiff-Mother took the stand. When Plaintiff-Mother was at Fellowship Hall, Plaintiff-Mother's counselor, Testerman, called Plaintiff-Mother into her office. Testerman told Plaintiff-Mother that Daisy disclosed to her maternal grandmother she had been sexually abused by Defendant-Father. Defense counsel objected. Plaintiff-Mother's counsel replied Testerman's testimony was not offered for the truth of the matter asserted, "but to show [Plaintiff-Mother's] reaction and how [Plaintiff-Mother] learned about it. The trial court allowed Plaintiff-Mother's testimony as to what Testerman told her.

Plaintiff-Mother stated during the six months prior to her going to Fellowship Hall, she noticed Daisy "had some regression" in her potty training:

> She was fully potty trained, but she had started to wet the couch and go - - when she was fully awake. She still wears a pull-up at night. So, she would wet the couch fully awake. She would go to the bathroom right beside the toilet sometimes. She had started to complain that it hurt to wipe. That it hurt when she would wipe her back part especially.

Plaintiff-Mother also testified regarding Daisy's problems at school. Daisy's

teacher, Rustyn Hyams, was out of town the week of the trial. Plaintiff-Mother attempted to read Daisy's school records to the court, and defense counsel objected. Plaintiff-Mother's counsel stated the content of the school records "contains report card, it contains the weekly observations of Daisy and it also contains email correspondence as is typical when any parent corresponds with the teacher[.]" The documents also contained a certification of the records custodian. Plaintiff-Mother's counsel also stated:

> We subpoenaed these records. [Defense counsel] received a copy of the subpoena. [Defense counsel] received the records. If she wanted to subpoena the teacher, she had every right to do that. This is just like any normal case. Weekly observations are sent out to every kindergartner, first graders' parents on a weekly basis.

The court stated it would allow Plaintiff-Mother to read the records into evidence.

Plaintiff-Mother stated:

> Daisy had been spending lots of time in the bathroom. She asked to go about three times an hour. When she's in there, she spends a lot of time - - her assistant teacher, Debbie Davis, looked in to see if she was okay. She didn't answer. Daisy was fondling her private parts and not going to the bathroom.

Plaintiff-Mother called Dr. Diana Meisburger. Dr. Meisburger is Daisy's therapist. Plaintiff-Mother signed a consent for Dr. Meisburger to treat Daisy on August 8th. However, Defendant-Father initially did not give Dr. Meisburger consent

to work with Daisy, and on 20 August 2014, he "strongly advised [Dr. Meisburger] to cancel any appointments that [she] had with his daughter."

Plaintiff-Mother then told Dr. Meisburger:

> [T]hat she was requesting therapy for her five-year-old daughter Daisy. That there was an emergency 50(b) Order. That there was a court date of August 18th. That Child Protective Services and law enforcement were involved due to possible sexual abuse by the biological father. And that Child Protective Services told her to begin Daisy in therapy.

Dr. Meisburger then spoke with Defendant-Father on the phone and requested an intake meeting with him. Defendant-Father also told Dr. Meisburger "he knew what was being said by his in-laws and that wasn't accurate and couldn't be further from the truth." Defendant-Father also wanted Dr. Meisburger to know that his ex-mother-in-law "had been in UNC Chapel Hill for electric shock treatment." Defendant-Father finally consented to Dr. Meisburger's treatment of Daisy.

Dr. Meisburger's first session with Daisy was on 14 August 2014. Dr. Meisburger explained to Daisy it was "my job was to help her and that my name is Dr. Diana Meisburger and that I would help her with any worries or things that scared her or things that she didn't like." Dr. Meisburger also told Daisy "we talk about true things that have really happened."

Defense counsel objected to this testimony:

> It's in the mind of the patient whether or not they understood that they were there for the purposes of

> medical treatment. And it's the same sort of situation where she shows up and someone is a doctor with their first name and says that they're there to help her and there's no physical exam. They just began to talk to her.

The trial court overruled Defendant-Father's objection.

Dr. Meisburger stated Daisy "seem[ed] to understand that she was there to get help." Daisy noticed there were boxes on the window and asked if other children made them. Dr. Meisburger explained they were "worry boxes" and children put their worries in them and "that helps the worries not bother them so much." Dr. Meisburger asked Daisy if she had any worries she wanted to put in the box. Daisy said she did. Daisy stated her first worry was about E.T., and the movie scared her. Dr. Meisburger then stated:

> And I asked her if there were any other worries to go in the box today and Daisy said yes, my daddy put his finger up my bottom. I was asleep when he done that. And I wondered if she was asleep how she knew that her daddy put his finger up her bottom. And she said because he woke me up when he done it. I asked her if she told anyone her daddy did that and she said I told my grandma Yaya.

During another session with Daisy, Dr. Meisburger asked "if anyone else had reached her bottom." Daisy responded, "[N]o, just dad." Dr. Meisburger asked Daisy which dad, and Daisy said "Jay, the one that lives in Morehead."

Dr. Meisburger then testified that Daisy's questions and behavior are consistent with a child who exhibits symptoms from sex abuse.

During another session with Dr. Meisburger Daisy wanted to discuss her

underwear. Daisy had seen her mother wearing thong underwear under her bathrobe, and "Daisy had tried to replicate that and she was very fixated on wanting to have thong underwear." Dr. Meisburger and Daisy then had "quite a long discussion about appropriate underwear." Dr. Meisburger affirmed it was unusual for a child of Daisy's age to "fixate" on thong underwear.

During another session Daisy told Dr. Meisburger she touched her daddy's "pee pee." Dr. Meisburger asked Daisy "what did daddy say when you touched his pee pee and Daisy said[,] he said Daisy come in and touch my pee pee."

Dr. Meisburger then stated that during another session:

> [Daisy was] kind of scared and [said] the police came over to her house because her dad broke a very big rule and asked me to put it in the worry box. I asked her if the police scared her and she said no. I asked her what scared her and she said kind of scary to tell. It's a scary thing to tell other people.
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> . . . .
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> [Daisy stated her dad] did stick his pee pee up my front hole and back hole. [Daisy said] [t]hat's the part that was hard to tell.

Daisy told Dr. Meisburger she did not tell this to Dr. Kane because it was too hard to talk about. Daisy did tell Dr. Meisburger she told Plaintiff-Mother. Dr. Meisburger said, "I asked [Daisy] how she felt after she told her mom and she said better. Dad knows the rules and he broke them."

Daisy also told Dr. Meisburger that he showed her pictures on his computer of

"naked girls and boys hugging each other."

Daisy stated to Dr. Meisburger she was worried about her dad "coming to school and telling her to hop into his car instead of her mommy's and that he might take her to Morehead and that he would keep doing it." Daisy then told Dr. Meisburger she was worried her dad would keep "touching my bottom."

Dr. Meisburger concluded this was a case of "substantiated sexual abuse." As to any reunification between Daisy and Defendant-Father, Dr. Meisburger stated:

> Best practice would dictate that [Defendant-Father] had completed a relevant assessment and complied with treatment and I think the association for treatment of sex abusers, you know, the Order is that the perpetrator do their assessments and begin genuinely working in therapy at the Order on cases that I've been involved is at the point that that person has made considerable progress that appropriate releases would be signed and the child's therapist is contacted. And then at that point and time, we see where the child is in their treatment and see if clarification can occur prior to any type of reunification assessment or reunification work being done.
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> . . . .
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> Clarification is when the person that is the perpetrator has done enough work that they can take total - - total responsibility and explain it to the child in an age-appropriate developmentally clear manner, whether that would be in a letter or sometimes face-to-face depending on the child's needs.

Dr. Meisburger concluded, "I can only say that I would have concerns about that based on everything that Daisy said and my understanding that [Defendant-Father]

may not be taking responsibility."

Dr. Jean Spaulding took the stand. Dr. Spaulding is a child psychiatrist Plaintiff-Mother retained in May 2015 to perform a psychiatric evaluation of Daisy. Dr. Spaulding has experience performing evaluations with children "who are victims of trauma and/or sex abuse." Dr. Spaulding knew Plaintiff-Mother retained her to offer an opinion in court, even though she was initially retained to determine Daisy's psychological state . However, "had [Plaintiff-Mother] not been going to court, not a thing would have changed in my evaluation of this child."

Defense counsel objected because Dr. Spaulding was going to testify about statements made to her by Daisy. Defense counsel stated, "[I]t really matters whether or not this was something made for medical treatment or whether it was something that was made specifically for litigation." Plaintiff-Mother's counsel responded Dr. Spaulding's testimony is "offered for the purpose of treatment." The trial court overruled Defendant-Father's objection.

A portion of Dr. Spaulding's office contains toys, games, art supplies and dolls of every size, gender, age and race. During Daisy's session:

> The first thing that Daisy did after checking the room out was that she immediately gravitated toward a male Barbie doll who actually is - - is known as Flynn Rider in the Rapunzel story and that's what she called him. And she took his clothes off. And she said that he had been very - - [.]
>
> . . . .

> So she said that Flynn Rider had been very bad and that he had to go into the trashcan. . . . So, she threw the doll in head down and crotch up and she said that he had to stay in the trashcan forever. And she did this over and over and over again, approximately nine times. She'd taken out of the trashcan, say he was bad, throw him back in trashcan. Take him out and throw him back in the trashcan.
>
> And then she next proceeded to take him out of the trashcan and she lined up three of the princess Barbie dolls. One of whom was Cinderella who was in the middle and she identified her as the girl to whom Flynn Rider had mean. And then she had Flynn Rider and she took him and she had him stomp across the pelvic areas of all the three female Cinderella, Rapunzel and Arielle dolls.
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> . . . .
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> That's unusual behavior. It's unusual for a little girl her age to fixate first on a male Barbie doll. They - - they just ignore the male Barbie dolls. Secondly, it's unusual for the child to disrobe the male Barbie doll immediately and then to throw him in the trashcan and specifically every single time, the crotch is up and then she comments in the subsequent sessions on why - - why that was the particular way that she wanted him to be.

Dr. Spaulding told Daisy she was a doctor. Daisy referred to Dr. Spaulding as "Dr. Jean." Dr. Spaulding told Daisy, "and you know that we're here to work and play together. You can – we can work and play on anything you want and we cannot tell lies, because that's a big rule."

Daisy did not have a normal sense of personal boundaries for a child her age. Dr. Spaulding testified:

> [Daisy] would continue to go around and approach me and get closer and closer and closer to the point where I wouldn't say anything. But I would just say okay, let's go put you back in your seat and I'm in my seat. And she tried to crawl in my lap. No, you can't crawl in my lap. You can't touch me. I'm not going to touch you. Go back to your seat and I'll stay in my seat.

During Dr. Spaulding's second session with Daisy:

> Daisy walked into the playroom and immediately went to the trashcan where Flynn Rider - - where she had placed Flynn - - Flynn Rider. And so I had put him back in there in the same posture that she left him in. And again, head down, private parts up. And she commented that he was still in there and he was going to stay in there forever. And then she said his private parts are still up in the air.
>
> And then she said that if she had her way, he would live there forever and there'd be animals from the farm . . . that would eat his private parts. And then she started to play out the same scenario that she had done before, but this time, she focused on Arielle . . .
>
> She played almost exclusively with Arielle and said several times Flynn Rider had hurt Arielle. And when I said well, where? And she said that he had hurt Arielle's private parts.

Daisy also explained to Dr. Spaulding that her family consisted of her mom and her dad. "Her stepfather whom she calls John-John. And she said that he's her daddy." Daisy then told Dr. Spaulding her other dad lived in Morehead City and that "he had broken the rules." Dr. Spaulding continued:

> And I asked her what rules he had broken and she said the ones about touching her. And she said - - then she volunteered, unprompted, that he had touched her bottom

> in the back and the front. And I asked her with what he had touched her bottom in the back. And she said it was his finger and he put it in her all the way up.

Dr. Spaulding's opinion was that Daisy's actions and statements were "[n]either rehearsed nor coached."

Dr. Spaulding also heard Defendant-Father say he did nothing to Daisy, and "that he's refusing to take any treatment and that he has no weaknesses as a parent[.]" In light of this, Dr. Spaulding felt Daisy's reunification with her father would be difficult, and Dr. Spaulding even had "concerns" regarding Daisy having supervised visits with her father.

Plaintiff-Mother called her sister, Blake Fricks ("Fricks"), to the stand. Fricks and her mother took Daisy to the pediatrician the morning after Plaintiff-Mother's mother learned from Daisy that Daisy had been abused by her father. One evening Daisy went upstairs with Fricks and Daisy initiated a conversation about her father's abuse. Fricks then got a cell phone and recorded Daisy's statements. Daisy did not know Fricks was recording her.

Defendant-Father objected to Plaintiff-Mother's introduction of the recording of Daisy's statements. Plaintiff-Mother's counsel stated the recording is self-authenticating because it is Daisy's voice. Plaintiff-Mother's counsel also stated the tape shows the child's state of mind at the time. The trial court allowed Plaintiff-Mother to play the recording as evidence of Daisy's state of mind.

Plaintiff-Mother also introduced into evidence a records custodian affidavit executed by Daisy's kindergarten teacher, Rustyn Hyams ("Hyams"). Included with the affidavit were Daisy's school records, one email from Plaintiff-Mother to Hyams, and weekly observations about Daisy sent by Hyams to Plaintiff-Mother. Defendant-Father objected to the introduction of this evidence, but the trial court overruled Defendant-Father's objection.

Plaintiff-Mother called John Owen. Owen is Plaintiff-Mother's husband and Daisy's step-father. Owen heard Defendant-Father's prior testimony in court Defendant-Father had not had a laptop computer since college, or at least in the last four years. However, Owen was in Defendant-Father's home on 12 October 2013 and saw a laptop there. Owen was aware Defendant-Father's laptop computer was subpoenaed, and that Defendant-Father had not produced it.

Plaintiff-Mother called Dr. Laura Kelly, a pediatrician at Oberlin Road Pediatrics. Dr. Kelly recalled her appointment with Daisy on 10 July 2014. Daisy was with her maternal grandmother and her maternal aunt, Fricks. Outside of Daisy's presence, Daisy's grandmother told Dr. Kelly what Daisy had disclosed to her regarding her father's abuse. Dr. Kelly contacted Child Protective Services at the conclusion of her conversation with Daisy's grandmother. Defendant-Father objected, and Plaintiff-Mother's counsel stated:

> An appropriate response after a child discloses sex abuse is to take them to the pediatrician. They took her to Dr. Kelly

> for the purpose of finding out what to do from Dr. Kelly. Dr. Kelly in her discretion decided not to conduct a medical exam. We don't - - we don't know yet why that was. But Daisy knew she was at the pediatrician. She'd been to the pediatrician before. It's a medical office. It helped her in determining treatment and what to do. So, I think it clearly falls within the medical records exception.

The trial court overruled Defendant-Father's objection. Dr. Kelly stated:

> I asked her where - - I asked her where does her father touch her. She was talking about the touching and I said where - - where is that? And she said where she pees and then I asked her a question about - - I was trying to figure - - figure out what was happening and I said how - - how does he touch you there? And she - - she said with a play knife. And then I - - I didn't understand what she meant. And so I was thinking plastic knife, play-doh knife, so I asked her that if that's what she meant and she said yes.

Daisy also told Dr. Kelly that her father touched her at "breakfast, rest time, night time." Dr. Kelly also stated "with this particular child, my feeling was that she wasn't coached." Defendant-Father again objected, and the court overruled that objection and made "a finding that as a pediatrician that deals with children that [Dr. Kelly] has the ability to discern as a pediatrician whether she thinks her patient is being coached or not coached."

Plaintiff-Mother next called Dr. Heather Kane, an expert in child psychology. Dr. Kane conducted a child and family evaluation for Daisy in November 2014. Dr. Kane was first contacted by Paula Hill of Wake County Human Services regarding Daisy. Hill gave Dr. Kane a list of referral questions:

> She asked was Daisy sexually abused and if so, by whom? Was Daisy exposed to sexual behavior and if so, by whom. What are the treatment recommendations for Daisy? And are there any recommendations about further contact between Daisy and her father?

Dr. Kane told Daisy she was a doctor, and talked to Daisy about the importance of telling the truth. Defendant-Father objected on hearsay grounds. The court allowed Dr. Kane to continue her testimony based on the Rule 803(4) hearsay exception.

Dr. Kane had talked with Hyams, Daisy's kindergarten teacher. Defendant-Father objected to this testimony, and the trial court overruled Defendant-Father. Hyams told Dr. Kane Daisy had behavioral issues at the beginning of the school year. Daisy "was having difficulty with transitions, she was daydreaming, she's getting into some physical conflicts with her peers . . . and was using the restroom like four times an hour and that one of the times the teacher assistant discovered Daisy was fondling herself." Dr. Kane also noted that when a child fondles her private parts at that age repeatedly at school it is a concerning symptom of sexual abuse.

Mr. Christopher Boyle ("Boyle") took the stand.[3] Boyle is a licensed psychological associate at Clinical and Forensic Associates in Craven County. Boyle performs "[p]sycho-sexual evaluations, psycho-sexual evaluations with risk assessment, [and] evaluations of sexual interest." In this case, Boyle administered for Defendant-Father a "mental status evaluation," a "psycho-sexual life history

[3] Defendant-Father's expert Mr. Boyle testified early during the hearing since he had a scheduling conflict.

questionnaire," and an "assessment of sexual interest." On direct, Boyle testified Defendant-Father's primary sexual interests were in adult Caucasian females. Defendant-Father's secondary sexual interest was in "14 to 17-year-old adolescent females." Boyle's test also showed Defendant-Father received a "50% probability of past child sex abuse behavior score." "[T]hat means it's equally likely that he falls in the category of a sexual abuser as it is that he falls outside that category."

Defendant-Father took the stand. Defendant-Father admitted to an affair which resulted in the subsequent separation from Plaintiff-Mother and their divorce. Just prior to Daisy's allegations, Defendant-Father's relationship with Daisy and Lulu was the best it had been since the separation. Defendant-Father stated:

> And so I almost went overboard trying to make sure that I was, you know, constantly there by - - for example, I never missed a - - in two years, I never missed a facetime call with my daughters. I called them every other day. I called them from Mexico. I called from the ACC tournament. They came first.

Defendant-Father stated he never molested his daughters.

Defendant-Father took a polygraph test and passed. Defendant-Father stated to Lieutenant Guthrie of the Morehead City Police Department he would also take an SBI polygraph test. Defendant-Father however did not take that test:

> I had every intention when I made that statement to take the test after the trial, in reviewing the case with family members and my uncle who is a criminal attorney, it was - - it obviously did not help me in my case up here because the girls were being taken from for a year. And it

> was decided that you've already taken the test, it didn't help you, we're not taking any more tests. And so from - - from that day forward, with the advice from my uncle, we chose not to take any more tests.

Defendant-Father also has refused to go to therapy:

> I've taken the assessment test and the therapy part is everything that I have heard, everything from this week listening being a part of that therapy involves me taking a class and admitting to something - - admitting guilt to something I haven't done. And for that reason alone, if I have to do that in that class, I will never take that class. I will not admit to something I have not done.

Defendant-Father also believed "somebody was telling my daughter to say certain things which she was repeating."

Defendant-Father also had to apply medicine to Daisy for yeast infections and rashes six months prior to her disclosure. Daisy could be "dramatic" if she did not want to do something. Defendant-Father never purchased Vaseline or KY jelly, but did apply Desitin and Aquaphor to Daisy's rash.

Defendant-Father's mother also testified for Defendant-Father:

> Daisy and Lulu were precious children that I would have protected from anything. If I had thought for a minute that my son, Jay Davis, had harmed them in any way, I would have immediately tried to protect them, asking him, confronting him, going from there to wherever I needed to go to get to the bottom of this situation.

Defendant-Father's mother does not believe Daisy's statements that Defendant-Father abused her. She also believes the doctors' testimony relating Daisy's

allegations of sex abuse are "inaccurate," and has prayed that Daisy would have amnesia.

Defendant-Father called Lieutenant Kelly Guthrie with the Morehead City Police Department. Guthrie first met Daisy during the child medical exam ("CME") where she observed the interview between Sarah Kirk with Safe Child and Daisy. Guthrie heard Daisy's statements during the CME. Following that interview, Guthrie talked with Daisy's family including Plaintiff-Mother, Defendant-Father, Daisy's grandmother, Daisy's stepdad and DSS.

When Guthrie interviewed Defendant-Father, his attorney was present. According to Guthrie:

> Of course, he denied everything. That he hadn't touched his daughters or his daughter, I should say in any way. I asked him about him sticking his finger in her anal area and he told me that there was sometimes that she would get rashes and that he would put medication on her - - her bottom.

Following her interview with Defendant-Father, Guthrie asked Defendant-Father to take a polygraph. Defendant-Father agreed. Defendant-Father had already taken one polygraph at that point, and provided the results of the initial polygraph to Guthrie.

In March 2015, Plaintiff-Mother contacted Guthrie and stated Daisy had made some more allegations. Guthrie asked Plaintiff-Mother to please document the allegations and send them to her, but Guthrie never received them.

Guthrie presented her case to an Assistant District Attorney, but he informed her there was insufficient evidence to prosecute. Plaintiff-Mother's counsel objected to whatever the D.A. said, and moved to strike. The Court sustained Plaintiff-Mother's objection, and stated "Stricken."

Defendant-Father also called Dr. H.D. Kirkpatrick, a forensic psychologist. Dr. Kirkpatrick reviewed the digital recordings of Daisy's Child Forensic Exam ("CFE") and Child Medical Exam ("CME"). He also reviewed Dr. Meisburger's session notes. Dr. Kirkpatrick stated there was "data to support the hypothesis that Daisy has not been sexually victimized." Dr. Kirkpatrick also believed there is a compelling argument "at some point during a visitation [Defendant-Father] touched his daughter in her private areas perhaps while providing hygienic care in a manner that both hurted her and upset her."

Following trial, on 2 October 2015, the trial court verbally rendered its findings. The trial court found:

> [B]ut at the end of the day, the Court still finds that - - that - - that the father has, at a minimum, had some inappropriate sexual contact with the child and most likely has sexually abused the child.
>
> . . . .
>
> [T]he Court finds that he has sexually abused this child. The Court recognizes that this might mean that he may never see his kids, because I believe what his testimony was is I'm not going to take any more lie detector tests. I'm not going to take anymore therapy. I'm not going to admit

> and if - - and if going into sex offender therapy means I have to admit, I'm not going to do it. That is his choice. And I'm not going to make any - - I'm just not going to make any findings as to that.

The trial court also concluded "Mom has legal and physical custody of the children."

The trial court filed its written order on 4 March 2016.[4] After entering 95 findings of fact, the trial court concluded:

> 3. The custody provisions set forth below in the ordering clause are in the minor children's best interest.
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> 4. Defendant is an unfit person to have custody of, or visit, the minor children.
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> 5. It would jeopardize the minor children's welfare and be detrimental to the best interests of the minor children to have contact with the Defendant.
>
> 6. It would jeopardize the minor children's welfare and be detrimental to the best interests of the minor children to have contact with members of Defendant's family.
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> 7. Plaintiff is a fit and proper person to have sole legal custody of the minor children.
>
> 8. Plaintiff is a fit and proper person to have sole physical custody of the minor children.

On 31 March 2016, Defendant-Father timely filed his notice of appeal.

On 18 October 2016, Defendant-Father served Plaintiff-Mother the proposed

[4] Plaintiff-Mother's counsel drafted the order.

record on appeal. On 15 November 2016, Plaintiff-Mother filed a motion to dismiss appeal because Defendant-Father failed to deliver a copy of the transcript along with the proposed record on appeal. Defendant-Father responded to Plaintiff-Mother's motion and contended under Appellate Rules 7 and 9 Defendant-Father was only required to "designate" the verbatim transcript of the proceedings. Defendant-Father also contended he was only required to pay for the original transcript, and not pay for a copy for Plaintiff-Mother. The trial court heard Plaintiff-Mother's motion on 15 December 2016. On 21 December 2016, the trial court entered an order requiring Defendant-Father to pay for a copy of the transcript to be delivered to Plaintiff-Mother's counsel. The trial court also denied Plaintiff-Mother's motion to dismiss the appeal.

II. Standard of Review

In a child custody case, the standard of review is "whether there was competent evidence to support the trial court's findings of fact[.]" *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). "Whether [the trial court's] findings of fact

support [its] conclusions of law is reviewable *de novo*. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

"'If the trial court's uncontested findings of fact support its conclusions of law, [this Court] must affirm the trial court's order.'" *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (quoting *Mussa v. Palmer-Mussa*, 336 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)).

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[.]" *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

This Court reviews *de novo* the trial court's determination of whether "an out-of-court statement is admissible pursuant to N.C.R. Evid. Rule 803." *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009).

III. Analysis

A. Permanent Custody Order

The overriding question presented for review is whether the trial court correctly determined Defendant-Father abused his daughter, Daisy. Defendant-Father first generally contends in his brief there was insufficient evidence to support the trial court's findings of fact Defendant-Father sexually abused Daisy. Defendant-

Father then argues the trial court erroneously admitted specific evidence at trial. For the reasons stated below, we conclude Defendant-Father's disputed evidence was properly admitted and considered by the trial court.

1. Specific Findings of Fact

Defendant-Father first argues the trial court's "[f]indings of fact 16, 18, 19, 22, 23, 24, 26, 28, 33, 34, 35, 38, 39, and 40 concerned Daisy's hearsay statements to others which were contaminated by negative bias, coaching, and failure to follow protocol." Those findings are as follows:

> 16. Plaintiff presented ample credible testimony from multiple credible witnesses who recounted disclosures made by Daisy regarding her father's sexual abuse of her. Daisy has disclosed that she was sexually abused by Defendant to Blake Fricks, Debbie Simpson, Dr. Laura Kelly, Dr. Heather Kane, Dr. Jean Spaulding, and Dr. Diana Meisburger.
>
> . . . .
>
> 18. Daisy disclosed to Dr. Laura Kelly, M.D., the minor child's pediatrician at Oberlin Road Pediatrics on or about July 11, 2014 details of sexual abuse by Defendant consistent with those disclosed to Debbie Simpson.
>
> 19. Daisy made additional unsolicited disclosures to Blake Fricks, her maternal aunt, on or about July 15, 2014, which Ms. Fricks recorded. Daisy told her "My daddy putted his finger up my bottom," and "He touched it all the way up where my poop comes out," and that he did it "a thousand times a day." Daisy asked Ms. Fricks, "Can you call a doctor . . . to look after him when I'm in Morehead so he doesn't do it again?"

. . . .

22. On July 29, 2014 and August 25, 2014, Daisy made multiple consistent disclosures in her CME interviews. She disclosed that Defendant took her clothing off, that he had his clothes off, and that they were in his bedroom. She reported seeing Defendant's "pee pee" when he went to the bathroom.

23. CPS contacted Dr. Heather Kane and asked her to conduct a CFE in this case. Dr. Kane interviewed Daisy on five occasions and in the course of these interviews Daisy disclosed multiple instances of sexual abuse by Defendant. The CFE documents some of these disclosures as follows:

> A. "My dad lets me sleep in his bed . . . it's our secret hideout." The evaluator asked Daisy what her father wears to bed. Daisy answered, "He shows his privates, he sleeps naked without underwear."
>
> B. The evaluator asked Daisy if she had ever seen someone's "pee pee" before. She identified "my dad." When asked which dad, Daisy replied, "My dad that hurted me . . . Daddy Jay." The evaluator asked Daisy what was happening when she saw her father's "pee pee." Daisy reported that they were taking showers. When asked if this was true or a lie, Daisy said it was true. The evaluator asked Daisy if she liked taking a shower with her father. Daisy answered in the affirmative. Daisy then stated, "Then we sitted together naked." When asked where, Daisy replied, "On dad's bed."
>
> C. The evaluator asked Daisy what "rules" her father broke. Daisy answered, "He hurted me on purpose." When asked to tell more about that, Daisy stated, "He sticked his fingers up my bottom." The evaluator asked Daisy what that felt like. Daisy responded, "And he put Desitin on his finger so it can slip far." The evaluator asked Daisy to show on the

> anatomically correct female doll how her father did this. Daisy said, "He woke me up . . . this is the Desitin . . . he putted it in here (as she pointed to the vaginal opening on the doll) and then I walked away naked to Ya Ya's house." . . . The evaluator asked Daisy if that happened just one time. Daisy answered in the negative and said, "Five times, no actually 10 times a day." The evaluator asked Daisy where this would happen. Daisy identified her father's bedroom.
>
> D. The evaluator asked Daisy to point on the drawing of the female figure where her father had hurt her. Daisy pointed to and labeled the "back bottom". When asked what he did to that part, Daisy said, "He sticked his fingers all the way up to here" (as she drew a line on the figure indicating insertion). When asked what that felt like, Daisy wrote the word and stated, "Hurt." The evaluator asked Daisy which finger her father used. Daisy identified his "pointer" finger. The evaluator asked Daisy if her father said anything when he did that. Daisy answered in the negative. When asked what his breathing sounded like, Daisy made heavy breathing sounds.

24. Daisy also made additional disclosures to Dr. Kane during the CFE, including that her father had touched her "boobies" and she had seen his "pee-pee" sticking out of his pants.

. . . .

26. The Court reviewed the recordings of Dr. Heather Kane's five interviews with Daisy for the CFE. During the video-taped interviews, Daisy made credible statements describing sex abuse by Defendant. These statements are consistent with the written CFE.

. . . .

28. Daisy met with Dr. Jean Spaulding on three occasions. During her sessions with Dr. Spaulding, Daisy again made consistent and credible disclosures of sexual abuse by Defendant.

. . . .

33. Daisy made numerous consistent disclosures to Dr. Meisburger about Defendant's sexual abuse of her. She told Dr. Meisburger how Defendant penetrated her with his finger. She indicated on multiple occasions to Dr. Meisburger that her father asked her to touch his "peepee." Daisy also said she had told her grandma Ya-Ya about what had happened and that she wanted Ya-Ya to "Keep me safe. Keep me away from dad."

34. Dr. Meisburger's file recounts when Daisy disclosed to her in a session on March 5, 2015 that her father had raped her and had shown her pornography:

> A. I asked Daisy if something different had happened. Daisy said, "I'm kind of scared. The police came over to my house because my dad broke a very big rule. Can you put that in my worry box?" I asked Daisy if the police scared her and she answered, "No." I asked what scared her and she said, "Kind of scary to tell. It's a scary thing to tell other people." I asked what might help her feel less scared and she said, "I know that I need to tell now." I asked which dad she was talking about that broke a big rule and she stated her dad, Jay, the one that lived in Morehead. Daisy said she thought she could just tell me and that she was safe here. She said, "He did stick his pee-pee up my front hole and back hole. That's the part that was hard to tell." I asked Daisy if she told Dr. Kane this and she said, "No." I asked her, "What's the reason you didn't tell Dr. Kane?" Daisy responded, "It was too hard to tell her." I asked if she told her mom, and she said,

> "Yes." I asked how she felt after she told her mom, and she said, "Better. Dad knows the rules and he broke them." Daisy got her worry box and I asked her what I should write to put in the box and she said, "The part where he sticked his pee-pee in my front hole and back hole." I asked what it felt like to her body when daddy sticked his pee-pee in her front hole, and she responded "Not good. It feeled really bad." I asked about her back hole, and she said "Really bad also." Daisy said her father wasn't as nice to her after he broke the big rule.
>
> B. I asked Daisy if she had remembered another rule being broken, and she said, "Naked girls and boys hugging each other-like their underwear was off too. My dad showed me that." I asked what she thought when she saw that, and she responded, "It was gross." I asked where she saw that and she said, "On the computer." I asked if all this was hard to tell me and she said, "Kind of, "cause it was scary." I asked how she felt now, and she said "Much better, because I don't have to tell you again. If I was too scared to tell you today have to do it again another day."

35. Daisy's disclosures of sexual abuse to Dr. Meisburger are consistent and credible.

. . . .

38. Daisy has been consistent in her disclosures that she was sexually abused by her father, Defendant, and the Court finds that Defendant repeatedly sexually abused Daisy on multiple occasions.

39. Daisy is clear that she has two fathers: "Daddy Jay" who is the Defendant and her biological father; and "Daddy John" who is Plaintiff's current husband and her step-father. Daisy has consistently indicated that it was "Daddy Jay" who sexually abused her.

> 40. Daisy's disclosures of sexual abuse by Defendant are clear and credible.

Additionally, Defendant-Father argues the evidence fails to support findings of fact 29, 36, 41, 42 and 46. Those findings are as follows:

> 29. Dr. Spaulding expressed concerns that any contact between Defendant and Daisy, even supervised contact, could be detrimental to Daisy, given her diagnosis and the results of the evaluations. The Court finds Dr. Spaulding's concerns to be valid, appropriate, and in the best interest of the children.
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> . . . .
>
> 36. Dr. Meisburger expressed concerns from a therapeutic standpoint about Defendant having any contact with Daisy at this time because he has refused to follow CPS recommendations, and because it is not a developmentally-appropriate time for Daisy to have contact with him. The Court finds Dr. Meisburger's concerns appropriate, valid, and in the best interest of the minor children.
>
> . . . .
>
> 41. The minor child, Daisy, was sexually abused by her father, Defendant.
>
> 42. Defendant is not a fit and proper person to have any contact with the minor children.
>
> . . . .
>
> 46. After having been sexually abused by Defendant, Daisy exhibited concerning behavior, including spending excessive time in the bathroom at school, masturbating at school, boundary issues, sharing information about the

> abuse with students at school, choking a friend at school, wetting Plaintiff's couch while fully awake, going to bathroom beside the toilet, and being overly apologetic.

The evidence supporting these findings of fact originate from Dr. Spaulding's, Dr. Meisburger's, Dr. Kane's, and Dr. Kelly's testimony. For the reasons stated below, we conclude their testimony is reliable and admissible under Rule 803(4) of the North Carolina Rules of Evidence.

2. Doctors' Testimony

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2016). "Hearsay is not admissible except as provided by statute" or the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2016). Rule 803(4) creates an exception for the hearsay rule for statements made for purposes of medical diagnoses and treatment. Our State Supreme Court stated "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnoses or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000).

The rationale for this rule is "statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient's strong motivation to be truthful." *Id.* at 284, 523 S.E.2d at 668. Therefore,

the "proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. In determining whether a child's statements are admissible, "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether [the child] possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670.

Statements made by a child to a psychologist in the course of determining the child's psychological status and treatment needs may be admissible under Rule 803(4) as "statements made for purposes of medical diagnosis or treatment[.]" *State v. Bullock*, 320 N.C. 780, 782, 360 S.E.2d 689, 690 (1987) (quoting N.C.G.S. § 8C-1, Rule 803(4) (1986)). Therefore, the Rule 803(4) exception is not limited to only physical examinations by medical professionals.

a. Dr. Spaulding

During *voir dire*, Dr. Spaulding testified Plaintiff-Mother hired her because she was concerned about Daisy's behavior, but Plaintiff-Mother was also involved in a custody case. Dr. Spaulding was not aware Plaintiff-Mother testified in her deposition one reason Plaintiff-Mother hired Dr. Spaulding was Defendant-Father hired Dr. Kirkpatrick. Dr. Spaulding testified Plaintiff-Mother did not hire her to provide ongoing treatment for Daisy. Dr. Spaulding further testified during *voir dire*

that she was not retained to perform a forensic evaluation. Dr. Spaulding admitted to testifying pursuant to a subpoena and that her diagnoses were completed within the last ten days. The trial court overruled Defendant-Father's objections to Dr. Spaulding's testimony and report.

Dr. Spaulding met with Daisy for three sessions to perform a psychiatric evaluation. These meetings occurred at Dr. Spaulding's offices at Duke in the ambulatory surgery center building. Dr. Spaulding told Daisy she is a doctor. Daisy also referred to Dr. Spaulding as "Dr. Jean." Dr. Spaulding told Daisy at the beginning of their first meeting they were there "to work and play together." Dr. Spaulding also told Daisy "we can work and play on anything you want and we cannot tell lies, because that's a big rule." Dr. Spaulding did not question Daisy during their sessions together, so Dr. Spaulding did not prompt Daisy's verbalizations about Defendant-Father. Dr. Spaulding diagnosed Daisy with PTSD, Dissociative disorder, psychosocial problems, and serious impairment related to sexual abuse. Dr. Spaulding testified Daisy's behaviors were consistent with children who had experienced trauma.

We conclude Daisy's statements fall within the 803(4) hearsay exception because they were made in an environment and under circumstances that promote truthfulness and reliability. Daisy's statements were also pertinent to Dr. Spaulding's diagnosis of Daisy. Dr. Spaulding testified about her sessions with Daisy

as the basis for her expert opinion as to whether Daisy's actions were consistent with a child who had been sexually abused. We therefore conclude the trial court properly permitted Dr. Spaulding to testify about her sessions with Daisy as the basis for her expert opinion. We also conclude the trial court correctly used Dr. Spaulding's evidence to support its findings of fact that Daisy was sexually abused by her father.

b. Dr. Meisburger

Dr. Meisburger met with Daisy for the purposes of providing therapy and treatment. Dr. Meisburger identified herself to Daisy as a doctor and explained she would "help [Daisy] with any worries or things that scared her or things that she didn't like." Dr. Meisburger also talked to Daisy about "not guessing" answers and they discussed telling the truth on more than one occasion. Daisy's statements originated in the course of her sessions with Dr. Meisburger. There is no evidence Dr. Meisburger engaged in leading or suggestive questioning with Daisy. We conclude Daisy's statements to Dr. Meisburger were made under circumstances which promoted truth and reliability and were pertinent to Daisy's diagnosis and treatment. The trial court did not err allowing Dr. Meisburger's testimony about Daisy's statements to her.

c. Dr. Kane

Dr. Kane met with Daisy on five occasions. She performed her evaluations at the request of Wake County Child Protective Services. Dr. Kane videotaped these

evaluations, and Daisy knew the interviews were being recorded. These interviews occurred in a "non-descript . . . room with a table in it" at "DSS offices." Dr. Kane explained she was a doctor, and it was her job "to help make sure that children are safe[.]" Dr. Kane also talked to Daisy about the importance of telling the truth.

While Dr. Kane did not treat or diagnose Daisy, and Dr. Kane's role in this matter was to conduct the Child Forensic Exam as part of the CPS investigation, we determine Daisy was too young to understand Dr. Kane was not treating or diagnosing her. We conclude Daisy made her statements to Dr. Kane under circumstances that promoted truthfulness and reliability. Therefore, Daisy's statements to Dr. Kane fall within the 803(4) hearsay exception.

d. Dr. Kelly

Dr. Kelly is a pediatrician with Oberlin Road Pediatrics, where Daisy is a patient. Daisy received medical treatment from Oberlin Road Pediatrics in the past. Daisy met with Dr. Kelly, along with her maternal grandmother, in an examination room where Daisy made statements to Dr. Kelly suggesting Defendant-Father may have sexually abused Daisy. Dr. Kelly asked clarifying questions to understand what Daisy was saying, but Daisy initiated her statements. Daisy's statements were not the result of leading or suggestive questioning. Dr. Kelly decided not to perform a physical examination on Daisy at this time. Rather, Dr. Kelly contacted the authorities at SafeChild and Child Protective Services to report possible abuse.

We conclude Daisy's statements to Dr. Kelly were made under circumstances that promote truthfulness and reliability. Daisy's statements to Dr. Kelly were also pertinent to Daisy's diagnosis and treatment. Accordingly, the trial court did not err by admitting Dr. Kelly's testimony regarding Daisy's statements.

3. Findings Relating to Defendant-Father's Family

Defendant-Father also takes exception to findings of fact and conclusions of law prohibiting Defendant-Father's family from having contact with Daisy and Lulu. Defendant-Father especially challenges finding of fact number 73, which states "It is not in the best interest of the minor children to have contact with Defendant-Father's family." Because Defendant-Father's family were not parties to this action, and did not have any claims pending for visitation, we conclude the trial court lacked jurisdiction to award or prohibit visitation to Defendant-Father's family.[5] The portions of the trial court's order prohibiting the minor children from seeing their grandparents is therefore vacated.

4. Finding of Fact #17

Defendant-Father next contends the trial court erred in incorporating finding of fact 14A into finding of fact 17 of the permanent child custody order. This finding

[5] While we acknowledge this Court has held in custody proceedings the "judge is authorized to determine . . . whether and to what extent a noncustodial person shall be allowed visitation privileges . . . [.]" *Kanellos v. Kanellos*, ___ N.C. App. ___, ___, 795 S.E.2d 225, 231 (2016) (quoting *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986)). A Court in this particular instance is unable to adjudicate the rights of non-parties to an action who are unable to invoke their due process rights.

of fact states Daisy disclosed possible sexual abuse to her maternal grandmother, Debbie Simpson, on 8 July 2014 while Daisy was taking a bath. Defendant-Father contends this finding of fact is a hearsay statement, and the trial court erred in incorporating "this highly prejudicial finding into the permanent custody order when Simpson did not testify at the trial herein violates the exceptions to the hearsay rule."

Defendant-Father concedes this Court "has permitted a trial court to consider evidence from a previous record in making its custody determination[,]" and cites this Court's opinion in *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996). In *Raynor,* this Court stated "[n]o decisions in North Carolina specifically indicate that it is improper for a trial court to use orders from temporary hearings or contempt hearings in the same case to support permanent custody orders." *Id.* at 728, 478 S.E.2 at 657 (1996). "A trial court may take judicial notice of earlier proceedings in the same cause." *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). "When a trial judge is attempting to evaluate what is in the best interests of the child or whether a parent is unfit or has neglected the child, it is an undue restriction to prohibit the trial judge's consideration of the history of the case on record." *Raynor* at 728, 478 S.E.2d at 657.

Even disregarding this finding of fact, there is ample evidence in the record to support the trial court's findings and conclusions Daisy's father sexually abused her. Defendant-Father's argument is meritless.

5. School Records

Defendant-Father next contends the trial court erred in allowing Plaintiff-Mother to introduce, over Defendant-Father's objection, Daisy's school records. These records consisted of emails between Plaintiff-Mother and Daisy's kindergarten teacher, Hyams.

At trial, Plaintiff-Mother testified she told the school principal and Hyams about Daisy being sexually abused. Plaintiff-Mother also quoted, in her emails with Hyams, from a child trauma book. Defendant-Father contends this "one-sided" history resulted in Hyams sending Plaintiff-Mother weekly observations regarding Daisy. The trial court, over Defendant-Father's objection, allowed Plaintiff-Mother to read the teacher's observations without Hyams being present for questioning.

Rule 803(6) of the North Carolina Rules of Evidence concerns the hearsay exception for records of a regularly conducted activity. This rule provides "business records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is unavailable as a witness." *In re S.D.J.* 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008). A business record "is admissible when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records

and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *Id.* at 482, 665 S.E.2d at 821 (quoting *State v. Price*, 326 N.C. 56, 77, 388 S.E.2d 84, 95 (1990)) (internal quotation marks omitted). The foundational requirements of Rule 803(6) may be satisfied through the submission of:

> An affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded. . . .

Id. at 483, 665 S.E.2d 818 (quoting *In re S.W.,* 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006)). Plaintiff-Mother's counsel introduced into evidence a records custodian affidavit executed by Daisy's teacher that included Daisy's school records, an email between Plaintiff-Mother and Hyams, and weekly observations sent by Hyams to Plaintiff-Mother. Plaintiff-Mother included this information in Plaintiff-Mother's Exhibit 13.

Here, the record reflects Plaintiff-Mother gave advance notice to Defendant-Father of her intent to offer the evidence contained in Plaintiff-Mother's Exhibit 13 into evidence with authentication by affidavit. We conclude, under our *de novo* review, the trial court properly admitted Plaintiff-Mother's Exhibit 13 into evidence under Rule 803(6) of the Rules of Evidence as a data compilation by Daisy's teacher,

Hyams. The record shows Hyams kept Daisy's records in the course of her regularly conducted activity as a kindergarten teacher. The record also shows that it was Hyams's regular practice to make the data compilation. Therefore, the trial court properly admitted this evidence.

6. Audio Recording

Defendant-Father next contends the trial court should not have allowed Plaintiff-Mother to admit Plaintiff-Mother's Exhibit 28, the audio recording of Daisy made by Plaintiff-Mother's sister, Blake Fricks ("Fricks") into evidence. The trial court admitted the recording into evidence under Rule 803(3), the state of mind exception to the hearsay rule.

Rule 803(3) provides the following is not excluded as inadmissible hearsay, even though the declarant is available as a witness:

> **Then Existing Mental, Emotional, or Physical Condition.** – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed[.]

N.C. Gen. Stat. § 8C-1, Rule 803(3) (2016). The North Carolina Supreme Court "has defined the state of mind exception to include statements made by the victim which may indicate the victim's mental condition by showing the victim's fears, feelings,

impressions or experiences." *State v. Walker*, 332 N.C. 520, 535, 422 S.E.2d 716, 725 (1992).

Fricks was in the bathroom with Daisy when Daisy began talking about her father. Fricks authenticated the audio recording by testifying she made the recording, and stating the recording depicts her voice and Daisy's voice. Fricks also testified she made the recording so she would not forget Daisy's statements and would capture Daisy's exact words.

We conclude Daisy's statements to her aunt were admissible to show Daisy's mental condition at the time of her conversation with Fricks, and fall within the Rule 803(3) exception.

Under this assignment of error, Defendant-Father also contends Daisy's statements actually recount a past experience and the trial court should have excluded the recording as a statement of memory rather than as an indication of Daisy's state of mind at the time of the recording. However, this argument is meritless since this Court has held a victim's description of a prior assault may be admitted under Rule 803(3). *See Walker* at 534, 422 S.E.2d at 724.

Finally, Defendant-Father contends even if Daisy's statements fall within the Rule 803(3) exception, the trial court should have excluded the recording since it was more prejudicial than probative. This determination lies within the trial court's discretion. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). Here,

Defendant-Father fails to show any abuse of discretion by the trial court in admitting the recording.

B. The Trial Transcript Order

In Defendant-Father's final assignment of error, Defendant-Father contends the trial court erred in ordering Defendant-Father to pay for Plaintiff-Mother's copy of the trial transcript. Defendant-Father contends this issue involves the statutory interpretation of Rule 7 of the Rules of Appellate Procedure, and therefore is a question of law reviewable *de novo* by this Court.

After Defendant-Father served Plaintiff-Mother with the proposed record on appeal, Plaintiff-Mother filed a motion to dismiss the appeal because Defendant-Father did not include a copy of the trial transcript. Here, Plaintiff-Mother argued the burden is on the appellant to ensure the record on appeal is complete and the transcript and record have been served on all parties to the action. Plaintiff-Mother also contended Defendant-Father's failure to serve Plaintiff-Mother's counsel with the transcript, which is part of the Record on Appeal, "deprives Plaintiff-Mother from engaging in the adversarial process and fairly litigating the appeal." Defendant-Father responded that Rule 9 of the North Carolina Rules of Appellate Procedure provides the appellant need only "designate" a verbatim transcript of the proceedings when submitting the proposed Record on Appeal. Defendant-Father also contended since there is no order establishing indigency on either party, Defendant-Father's

failure to pay for and provide a copy of the transcript to Plaintiff-Mother as part of the Record on Appeal does not deprive Plaintiff-Mother from engaging in the adversarial process.

The trial court found, *inter alia*:

> 8. Appellate Rule 7 addresses the delivery of the transcript. The parties argued their respective positions on the interpretation of Rule 7, its relation with other appellate and civil practice rules, and appellate case law.
>
> 9. The Court finds that Appellate Rule 7 is silent on the issue of who pays for the copy of the trial transcript in non-indigent cases. Neither of the parties in this case are indigent.
>
> 10. The Court finds that it is the appellant's responsibility to pay for and provide a copy of the trial transcript to the appellee in non-indigent cases. Therefore it is the responsibility of the Defendant to pay for the copy of the transcript.
>
> 11. The Court finds that this is a legal issue involving the interpretation of an appellate rule. It is therefore a non-sanctionable offense under Appellate Rules 25 and 34. Nor did the Defendant violate any of the Appellate Rules by taking the position that he was not responsible for paying for the Plaintiff-Appellee's copy of the trial transcript. Nor has his position prejudiced the Plaintiff-Appellee. Therefore the Motion to Dismiss Appeal should be denied.

Based on these findings, the trial court found:

> 1. The Court has jurisdiction over this motion pursuant to Appellate Rule 25.
>
> 2. Because Appellate Rule 7 is silent as to which party pays for the Appellee's copy of the transcript, this Court finds

> that it is the Appellant's responsibility to pay for the Appellee's copy of the trial transcript.
>
> 3. The Appellant's position that he is not responsible for paying for and providing a copy of the trial transcript to the Appellee with the proposed Record on Appeal is not a violation of the appellate rules and the Motion to Dismiss Appeal should be denied.

This is an issue of first impression. The Appellate Rules are silent as to which party pays for the printed copy of the transcript, but our laws and rules do speak as to allocating costs in other circumstances.

For example, as for attorneys' fees, "North Carolina follows the American Rule with regard to the award of attorneys' fees." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 94, 717 S.E.2d 9, 32 (2011). Our State Supreme Court concluded:

> The jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action. Certainly in the absence of any contractual agreement allocating the costs of future litigation, it is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879. Thus the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.

Id. at 94, 717 S.E.2d at 32 (quoting *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980)) (internal citations and quotation marks omitted). Therefore, each party is responsible for his own costs unless otherwise statutorily provided.

Additionally, Rule 35 of our Rules of Appellate Procedure also speak to costs:

> (a) *To whom allowed*. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

N.C. R. App. P. 35 (2017).

Looking at the spirit of these rules for guidance, we conclude each party to an appeal is responsible for payment of their own copy of the transcript. However, if an appellee loses an appeal, that party may recover the cost of the transcript from the appellant. The trial court's order regarding payment of the trial transcript is therefore reversed.

AFFIRMED IN PART; VACATED IN PART; AND REVERSED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).