REL: 04/28/2017

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150607

T.G.F.

v.

D.L.F.

Appeal from Monroe Circuit Court
(DR-10-900007.01)

On Application for Rehearing

MOORE, Judge.

This court's opinion of February 10, 2017, is withdrawn, and the following is substituted therefor.

T.G.F. ("the mother") appeals from a judgment entered by the Monroe Circuit Court ("the trial court") denying her

petition to modify the visitation of D.L.F. ("the father") with S.F. ("the child"), to hold the father in contempt for failing to pay for certain private-school and extracurricular expenses of the child, and to modify the parties' divorce judgment to require the father to pay a portion of the child's private-school and extracurricular expenses.

Procedural History

In September 2011, the trial court entered a judgment of divorce that incorporated an agreement of the parties, which provided, among other things, that the wife would exercise sole physical custody of the child subject to specified visitation rights of the father and that the father would pay child support and 50% of any of the child's noncovered medical, dental, orthodontic, pharmacy, or surgical expenses. The agreement incorporated into the divorce judgment also provided: "Any major decision ... that would require that the [father] pay additional money above child support ... must be agreed to by both parties in advance."

On November 25, 2014, the mother filed a petition seeking to terminate the father's visitation with the child; she also filed an ex parte motion to terminate the father's visitation

based on allegations that the father had sexually abused the child. That same day, the trial court entered an order suspending the father's visitation pending an investigation by the Monroe County Department of Human Resources ("DHR") and further orders of the trial court. Based on an agreement of the parties, the trial court later lifted that suspension and ordered that the father would have scheduled daytime supervised visitation. On December 8, 2014, the father filed an answer to the petition and a counterclaim seeking to gain sole legal and physical custody of the child, claiming that the mother had made false allegations against him to the detriment of the child. On June 16, 2015, the mother filed an amended petition seeking to hold the father in contempt of court for his failure to pay certain private-school and extracurricular expenses of the child. She also requested that the trial court clarify the divorce judgment incorporating the parties' agreement regarding the father's responsibility to pay amounts over and above his child-support obligation and/or to amend the divorce judgment to require the father to pay a portion of the child's private-school and extracurricular expenses.

After a trial that ended on October 1, 2015, the trial court's judicial assistant, on January 7, 2016, orally notified the parties that the trial court intended to deny the mother's petition to modify visitation. In response, on January 14, 2016, the mother filed an affidavit signed by the child's therapist indicating that, upon learning that visitation with the father would be resumed, the child had had a severe adverse reaction that had necessitated psychological intervention, reinforcing her opinion that the visitation should not be allowed. The trial court entered a judgment on March 24, 2016, denying the mother's petition and the father's counterclaim, reinstating the father's unsupervised visitation, and declining to hold the father in contempt for failure to pay private-school and extracurricular expenses because, the trial court concluded, the father had not agreed to pay those expenses. On March 31, 2016, the mother filed a postjudgment motion and a motion to stay the aspect of the final judgment allowing unsupervised visitation between the father and the child pending a ruling on the postjudgment motion and appeal.

On April 26, 2016, the mother filed a notice of appeal and moved this court to stay the final judgment pending appeal. However, the notice of appeal was held in abeyance pending disposition of the mother's postjudgment motion, see Rule 4(a)(5), Ala. R. App. P., depriving this court of jurisdiction to grant the motion to stay. See Rule 8(b), Ala. R. App. P. (authorizing this court to stay judgments or orders of a trial court only "pending appeal"). Later that same day, the trial court denied the motion to stay pending before that court. On April 27, 2016, the mother withdrew her postjudgment motion, making her notice of appeal effective to vest this court with jurisdiction, and the mother renewed her motion in this court to stay the final judgment. This court entered an order temporarily staying the judgment, which stay was lifted on May 4, 2016. The mother filed a petition for a writ of mandamus with the supreme court, along with a motion to stay, on May 6, 2016, requesting that the visitation order of the trial court be stayed pending appeal; the supreme court denied the petition and the motion to stay on May 9, 2016.

Facts

I.

The facts relevant to the visitation issue are as follows. The father testified that he and the mother had gotten along well until the child was born, after which, he said, their relationship had quickly deteriorated. The father testified as to a dispute between the parties about feeding the child on the day the child was born. The father moved out of the marital home only three days later, and the mother served him with a divorce complaint not long thereafter.

While the divorce action was pending, the maternal grandmother of the child alleged that she had observed the father sticking his tongue out in the direction of the child's vagina while changing the child's diaper. The father testified that the maternal grandmother had later accused him of performing oral sex on the child. Based on those allegations, the trial court had suspended visitation between the father and the child for three weeks, after which the visitation had been supervised for two or three months. The father testified that the mother had told him during that period that she would not comply with any court order

requiring unsupervised visitation between the father and the child. The father further testified that the mother had interfered with his supervised visitation. During the divorce proceedings, the trial court entered an order finding that the mother had violated its pendente lite order concerning supervised visitation. DHR investigated the sexual-abuse allegations and found that child abuse was not indicated. The trial court later reinstated unrestricted visitation.

When the child was six months old, the mother noticed bruising on the child's elbow when the father returned the child from visitation. The mother took the child to the emergency room, and, during the examination, the doctor found bruising on the child's groin area and reported his findings to DHR. DHR investigated and determined that child abuse was not indicated but that the child had been accidentally injured. The mother testified that the father had had nothing to do with the bruising.

The mother testified that, once the parties agreed to divorce in September 2011, they had resumed friendly relations. The mother testified that she had consulted with a psychologist and had read numerous articles on co-parenting,

which had led her to encourage the child to have a good relationship with the father following the divorce. After the child turned two years old, the child began having overnight unsupervised visitation with the father. The mother also invited the father to visit with the child beyond his regularly scheduled visitation times. The mother presented multiple photographs taken in 2014 of happy interactions between the mother, the father, and the child, including photographs taken on vacations and other occasions. The father stipulated that the parties had enjoyed a good co-parenting relationship before the mother filed her modification petition in November 2014. However, the father also testified that the mother had consistently caused problems for his visitation, often threatening to report him to DHR, and that the parties had experienced only brief, intermittent periods of cooperative parenting, when he would acquiesce to the mother's demands.

The mother testified that, in the time leading up to the child's scheduled Thanksgiving visitation with the father in 2014, the child began showing symptoms of distress such as becoming irritable, crying, wetting the bed and her pants,

clinging to the mother, not eating, having nightmares, and refusing to sleep alone. On the Sunday before Thanksgiving, the child expressed that she did not want to attend the visitation with the father, which was to commence on Wednesday. The mother questioned the child, who, according to the mother, disclosed information that convinced the mother that the father had sexually abused the child.[1] The mother testified that she was shocked by the child's statements. The mother testified that, after the child disclosed the information to her, the child had prayed, the mother had comforted the child, and she and the child had slept together with their hands clasped all night.

According to the mother, the next day she contacted DHR and also filed the modification petition and the motion to suspend the father's visitation. The mother testified that she had not wanted the allegations of sexual abuse to be true but that she had wanted to have those allegations fully investigated. Jane Agee, a social worker employed by DHR, instructed the mother to take the child for a physical examination and, afterwards, to see Niki Whitaker, the

[1]The mother was not allowed to testify as to the child's communications based on a sustained hearsay objection.

executive director of Baldwin County's Child Advocacy Center. The mother testified that the physician who had performed the physical examination on the child had found no physical evidence of abuse.

On December 2, 2014, Whitaker conducted a forensic interview of the child. The mother testified that she had instructed the child to tell the truth during the forensic interview, which both Agee and Whitaker testified would be a proper instruction. However, Agee also testified that, during the forensic interview, the child had said that the mother had told her what to say. Agee testified that she and a law-enforcement officer from Monroe County had observed the interview through a one-way window. Agee testified that the child had been talkative but that the child had not cried, urinated, or otherwise acted in an alarming or unusual manner. Whitaker testified that the child had demonstrated through a baby doll that the father had used his fifth finger to touch the child's vagina. Whitaker testified that she was concerned for the child, who, she said, had expressed a strong desire not to be with the father; however, Whitaker testified that, based solely upon the forensic interview, she "could not rule

in or rule out sexual abuse" and that she had informed Agee and the law-enforcement officer that a more extensive six-week forensic interview could be provided by a therapist on staff. Agee testified that, because the trial court had imposed a restriction requiring that any visitation between the child and the father be supervised, she had considered the child to be sufficiently protected and therefore had not recommended further forensic interviews. Whitaker testified that she had also suggested that DHR search through the father's cellular telephone to try to corroborate some of the things the child had stated that she had seen on his telephone. Agee testified, however, that DHR does not take custody of cellular telephones.

Agee interviewed the mother and the father as part of her investigation, both of whom, she said, had been cooperative. Agee testified that law-enforcement officers also had investigated the matter, but she was unaware of whether any action had been taken by the Monroe County District Attorney's office based on the allegations of sexual abuse. The father testified that he had fully cooperated with all investigations and that he had submitted to hours of interviews. The father

testified that he had even offered to grant law-enforcement officers access to his cellular telephone, although he had not given them his telephone. Agee testified that, after 90 days, she had filed a required disposition report stating that she was "unable to complete" the investigation. Agee testified that she had entered that finding because she had found a lack of creditable evidence to support whether sexual abuse had or had not occurred. The letter notifying the father of the disposition states, however, that a finding of "unable to complete" means that "sufficient evidence was unable to be obtained to complete the assessment." Whitaker and Willie Frye, a DHR caseworker, also defined "unable to complete" in the latter manner. Furthermore, Whitaker testified that DHR's policy suggests that the "minimal standard for investigation" of a sexual-abuse allegation requires DHR to conduct more than one interview with the child and a conversation with the parents in order to make a determination. Agee testified that she had no opinion regarding whether the child would be safe having unsupervised visitation with the father.

Whitaker testified that the mother could not arrange for the six-week forensic interview without a referral from DHR or

the multi-disciplinary team assigned to the case. The mother testified that, after she received the letter from DHR closing the investigation, she had consulted with Dr. Bridget Smith, a licensed psychologist in private practice. Dr. Smith testified that, since April 2015, she had spent approximately 10 clinical hours with the child, over 7 sessions, for the purpose of diagnosing and treating the child. Dr. Smith testified at trial for the mother at a rate of $250 per hour, and the mother testified that she had paid Dr. Smith $5,000 for treating the child. Dr. Smith testified that her "fee has nothing to do with my clinical opinion and my desire to advocate for children who I think are in unsafe environments."

Dr. Smith testified that the child had disclosed that the father had subjected her to inappropriate sexual touching. Specifically, she testified that the child had reported that the father had sexually touched her vaginal area; she testified that the child had spontaneously disclosed the touching on four separate occasions while playing, as well as on a "Kinetic family drawing," on an "incomplete sentence blank," and after reading a book called "My Body is Private." Dr. Smith testified that the incomplete sentence that the

child had completed was "I get mad when" and that the child had answered "Daddy." She testified that she had asked the child "why Daddy" and that the child had answered that he had told her to keep a secret. When asked what the secret was, the child put her finger in the vaginal area of a doll. Dr. Smith testified that, after she and the child had read the "My Body is Private" book, she had asked the child if anyone had made her feel uncomfortable and that the child had answered that her "Daddy" had; according to Dr. Smith, the child had then squatted and put her finger in her own vaginal area. Dr. Smith also testified that, when she drew a stick picture of a little girl, the child had wanted a red marker because she was upset and that the child had drawn an arrow to the vaginal area. Dr. Smith testified that the child had further disclosed that when the father had touched her it made her uncomfortable and scared.

Whitaker testified that Dr. Smith had informed Whitaker that the child had made spontaneous disclosures similar to those that had been made in Whitaker's forensic interview of the child and that, in her opinion, the consistency of the disclosures boosted the child's credibility. Whitaker

testified that, based on her interview, she had some concerns about the father's having unsupervised visitation with the child. Dr. Smith testified that her discussion with Whitaker had reinforced her opinion that the child had been sexually abused.

Dr. Smith testified that she has a strong opinion that the child's allegations of sexual abuse have not been fabricated. Dr. Smith testified that it would be unusual for a mother, who has taken a child on outings with the child's father and has taken photographs of the father and the child while on those outings, to make up an allegation of sexual abuse. Dr. Smith also testified that, generally, false allegations are made during a divorce or shortly thereafter. Dr. Smith testified that, in her opinion, the allegations made against the father in the past were not directly relevant to the child's most recent allegations because the parents had successfully co-parented for a long period between the complaints.

Dr. Smith testified that the child had shown "fairly common symptoms" of sexual abuse through her physical behavior in November 2014 as described by the mother's testimony. Dr.

Smith also testified that the child had been very consistent in her disclosures and that she had exhibited the emotions and affect expected in an abuse victim in her disclosures. Dr. Smith testified further that she had previously determined in cases involving other parties that a parent had been coaching his or her child to make false allegations of sexual abuse, but, she said, she had no concern that the child had been coached in this case. She testified that there was no way the mother could have known what she was going to ask the child because her questions are different with every child and, therefore, the mother could not have prepared the child for some of the things that she and the child had discussed. Dr. Smith also explained that the child had not used inappropriate language or sought approval from her or the mother for the disclosures, which, she said, are both common signs of coaching. Dr. Smith also noted the consistency in the detail of the child's disclosures. Dr. Smith testified further that the clinical data supports that the child has been sexually molested and that it is typical for sexual touching to leave no physical evidence.

On cross-examination, Dr. Smith acknowledged that a child can be manipulated by one parent to tell untruths against another parent. Dr. Smith admitted that it would "raise red flags" if the mother had told the child what to say in the forensic interview. However, Dr. Smith maintained that, in this case, she did not believe the mother had coached the child. Dr. Smith did not know that the trial court had previously denied a petition filed by the mother to modify the father's visitation based on the allegations made by the maternal grandmother, but, she said, she did not believe that that fact, or the fact that the maternal grandmother still resided with the mother, would alter her opinion. Dr. Smith also agreed that DHR did not find enough evidence to indicate that sexual abuse had or had not occurred. However, Dr. Smith testified on redirect examination that she had supplied the further evaluation that DHR was missing. Dr. Smith acknowledged that her clinical data and her opinion could be wrong.

When shown photographs of the child during recent visits with the father, Dr. Smith testified on cross-examination that the child did not appear to be scared. On direct examination,

Dr. Smith testified that it is not uncommon for an abused child to love his or her abuser and to want to see the abuser. The mother testified that the child loves her father. Also on redirect examination, Dr. Smith testified that the photographs did not negate her finding of sexual abuse. Dr. Smith recommended that the father's visitation should remain supervised at all times. The mother testified that the child had been doing well under the supervised-visitation arrangement and that she felt like the child was recovering.

The father denied having touched the child inappropriately. The father admitted that he and his girlfriend had exchanged erotic images of themselves over the telephone. The father also testified that he had viewed pornography up until a year before the trial, but had stopped without seeking any professional assistance in order to end any questions about his "sexual life." The father denied that he viewed pornography while the child was visiting with him or that the child had witnessed pornography on his telephone or computer. The father also denied that he had photographed the child while undressing or while the child was nude.

The father admitted that he had been discharged from the United States Navy due to his having a personality disorder, which he described as "shyness." He testified that a physician had prescribed medication for that disorder but that he did not take that medication because he did not feel like he needed it. The father testified that he had taken other people's medication, but had stopped when informed that the practice was illegal.

The father testified that the mother had filed her modification petition as a result of an ongoing dispute between the parties concerning his visitation. The father complained that the mother had sought to control the child's activities and environment while with the father, such as by demanding that he not expose the child to his cats, to his cigarette smoke, and to the dust at his house and that he follow a specific diet plan for the child; he acknowledged, however, that those restrictions had been medically indicated due to the child's allergies. The father characterized the mother's petition as the third in a series of false allegations made by the mother in an attempt to erase him from the child's life, although he admitted that the mother had

included the father in the child's life, as evidenced by the photographs that had been taken in 2014. The father testified that the mother was harming the child by raising false allegations of sexual abuse and thereby making the child distrustful of men. The mother denied that she would harm the child by raising false allegations of sexual abuse against the father.[2]

II.

The evidence relevant to the remaining issues on appeal is as follows. The father testified that he had agreed to the provision in the settlement agreement that called for him to pay costs for the child "above child support" if both parties agreed in advance to those costs. The father testified that the parties had made decisions regarding the child jointly and that, when those decisions had resulted in financial costs,

[2]We have not included in our recitation of the facts the information contained in the affidavit signed by Dr. Smith, which was filed by the mother on January 14, 2016. Nothing in the record indicates that the trial court reopened the evidence to accept the affidavit or that the trial court considered the affidavit in rendering its final judgment. See J.S.M. v. P.J., 902 So. 2d 89, 91 n.2 (Ala. Civ. App. 2004) (noting that this court had not considered evidence submitted in support of a postjudgment motion when the record did not indicate whether the trial court had considered that evidence).

the parties had equally shared the expenses. The father admitted that he had agreed in advance to pay one-half of the costs of the child's private-school tuition and one-half of the costs of the child's gymnastic and piano lessons.

The father testified that he had ceased all payments when he was served in the modification action because he had to use those funds to finance the litigation and could no longer afford the costs. The father testified that he had made $70,000 in 2015 and that he and his current wife paid $4,341 per month for living expenses, leaving them with $700 per month in disposable income. The father testified that he had paid for his April 2015 wedding and a cruise by selling a truck. The mother testified that she had paid $6,313 for tuition, $750 for gymnastic lessons, and $2,485 for music lessons, the majority of which had been for piano lessons. The mother requested that the father reimburse her one-half of those payments.

Discussion

I.

On appeal, the mother argues that the trial court erred in allowing the father to resume visitation with the child

without limiting the visitation to daytime supervised visitation. The mother essentially asserts that the evidence does not support the trial court's determination that the father should be allowed unsupervised visitation. The trial court did not make specific findings of fact to support its visitation determination.

> "[I]n a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review."

New Props., L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004). In this case, the mother filed a postjudgment motion in which she argued, at length, that the evidence did not support the trial court's visitation determination. However, the mother later withdrew the postjudgment motion without receiving a ruling on the motion. We nevertheless conclude that the mother properly raised the question of the sufficiency of the evidence to support the award of unsupervised visitation by filing a brief following the trial setting forth her position that the evidence would support only a denial of visitation. See Vines v. Vines, 195 So. 3d 985 (Ala. Civ. App. 2015) (considering issue of sufficiency of

evidence to have been properly preserved by the filing of a posttrial brief despite absence of postjudgment motion).

In Stewart, our supreme court explained that the purpose of filing a postjudgment motion is to afford "'the trial judge an opportunity to carefully review the evidence and to perfect the issues for review on appeal.'" 905 So. 2d at 801 (quoting Ex parte Vaughn, 495 So. 2d 83, 87 (Ala. 1986)). In this case, the trial court had that opportunity because the mother summarized the evidence in her posttrial brief and expounded on her legal arguments as to why visitation should be denied. Although the trial court did not rule on the postjudgment motion because it was withdrawn, under Vines we presume that the trial court, by awarding the father unsupervised visitation following its review of the posttrial brief, determined that the evidence was sufficient to justify its award.

We find that the trial court could reasonably have reached its factual determination that unsupervised visitation served the best interests of the child. The trial court received conflicting evidence regarding whether the visitation between the father and the child should be supervised. One

aspect of the evidence indicates that the mother had previously interfered with the father's visitation in violation of a court order, that the mother had indicated that she did not want the father to have unsupervised visitation, and that the mother had litigated an unproven allegation of sexual abuse lodged by the maternal grandmother against the father during the divorce proceedings in order to deny him that visitation. Given that context, the trial court could have viewed the latest charge of sexual abuse, which arose just before an extended unsupervised-visitation period between the father and the child, skeptically.

The mother testified that the child had acted extremely distressed when disclosing the alleged sexual abuse, but Agee testified that the child had not exhibited such unusual behavior during the forensic interview. Neither Whitaker nor Dr. Smith testified to observing such behavior. Whitaker could not definitively determine that the child had been sexually abused based on the forensic interview. Dr. Smith testified that she believed that the child had been sexually abused by the father, but Dr. Smith, who describes herself as an "advocate" for children she considers to be in unsafe

environments, admitted that her clinical data and her conclusion could be wrong. The trial court also heard evidence indicating that, while the action was pending, the child had been visiting with the father regularly without incident since at least January 2015, and the trial court observed photographs of the child interacting with the father without fear. The trial court also observed the demeanor of the father when he denied any inappropriate touching and the demeanor of the mother when questioned regarding whether she had fabricated the sexual-abuse allegation. From the totality of that evidence, the trial court could have determined that the mother did not prove that the father posed a sexual threat to the child.

We acknowledge that the mother presented a great deal of evidence supporting her claim that the visitation should be supervised to protect the child from sexual abuse by the father. However, the trial court ruled against the mother on that point, impliedly finding that the father had not sexually abused the child. See Espinoza v. Rudolph, 46 So. 3d 403, 405 n.2 (Ala. 2010) ("[W]here the record is silent as to the trial court's findings of fact on a disputed issue, we assume that

the trial court made those findings necessary to support the judgment."). In cases in which a trial court hears oral testimony, placing it in a superior position to evaluate the demeanor and credibility of the witnesses, this court must defer to the trial court's factual findings and its ruling based on those findings. Dunn v. Dunn, 972 So. 2d 810, 815 (Ala. Civ. App. 2007). This court may not substitute its judgment for that of the trial court or reverse a judgment because it might have found the facts differently than did the trial court. Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001). Thus, we affirm that aspect of the judgment denying the mother's petition to modify the father's visitation. See Alexander v. Alexander, 625 So. 2d 433, 435 (Ala. Civ. App. 1993) (holding that a trial court's decision on visitation will not be reversed unless the trial court has exceeded its discretion).

II.

The mother also argues that the trial court erred in declining to hold the father in contempt for failing to pay for one-half of the child's private-school tuition and one-half of the fees for the child's gymnastic and piano lessons.

The mother further complains that the trial court failed to clarify the father's ongoing obligations to pay those costs under the divorce judgment by interpreting or modifying that judgment.

The divorce judgment unambiguously requires the father to pay costs for the activities of the child to which the parties have jointly agreed in advance. In its judgment, the trial court found that the father had not "agree[d] to pay in advance" for the expenses at issue. However, the father admitted that he had agreed in advance to the child's attending private school and receiving gymnastic and piano lessons and that he had paid one-half of those expenses until the mother filed her petition in this case. When the material facts are established by undisputed evidence, a judgment based on a factual finding inconsistent with the undisputed evidence cannot stand on appeal. Salter v. Hamiter, 887 So. 2d 230, 233-34 (Ala. 2004). Accordingly, we reverse the trial court's judgment on this point and remand this cause for the trial court to reconsider, in light of this opinion, its rulings on the mother's contempt motion and the mother's motion to clarify or to modify the divorce judgment regarding the

father's obligation to pay for the child's private-school and extracurricular expenses.

Conclusion

Based on the foregoing, we affirm the trial court's judgment to the extent that it awarded the father unsupervised visitation with the child. We reverse the judgment insofar as it addresses the issue of private-school and extracurricular expenses and remand this case for the trial court to reconsider its rulings on the mother's contempt motion and motion to clarify or modify the divorce judgment in accordance with our instructions above.

APPLICATION GRANTED; OPINION OF FEBRUARY 10, 2017, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, J., concurs.

Donaldson, J., concurs specially.

Thompson, P.J., and Thomas, J., concur in part and dissent in part, with writings.

DONALDSON, Judge, concurring specially.

I concur. The judgment in this case was entered after a trial conducted in accordance with the requirements of law. From my review of the record and the briefs of the parties, I am unable to identify any procedural irregularities or substantive errors of law that occurred during the proceedings that would permit an appellate court to reverse the judgment as to the issue of visitation. Thus, the judgment, insofar as it addresses visitation, may not be reversed without overturning the trial judge's assessment of the credibility of the witnesses. The law does not permit this court to do so.

> "'It was within the province of the trial court to consider the credibility of the witnesses, to draw reasonable inferences from their testimony and from the documentary evidence introduced at trial, and to assign such weight to various aspects of the evidence as it reasonably may have deemed appropriate.... In order to reverse the trial court ..., we would have to make our own credibility determinations and we would have to reweigh the evidence, neither of which we are allowed to do.'"

Vestlake Cmtys. Prop. Owners' Ass'n, Inc. v. Moon, 86 So. 3d 359, 367 (Ala. Civ. App. 2011) (quoting Miller v. Associated Gulf Land Corp., 941 So. 2d 982, 990 (Ala. Civ. App. 2005)).

Reasonable judges might disagree as to whether the judgment, insofar as it addresses visitation, is in the "best

interest" of the child. These types of cases "are among the hardest to deal with and courts are seldom satisfied in all respects with the results reached." Mothershed v. Mothershed, 348 So. 2d 501, 502 (Ala. Civ. App. 1977). But only one judge actually saw and heard the parties and the witnesses, and that is the trial judge. Resolving disputed facts in highly emotional cases affecting lives, liberty, or property is part of the job placed squarely upon the trial judge's shoulders because that judge personally interacts with the people involved. Deferring to such decisions of the trial judge is not a matter of courtesy or protocol. It is a recognition that decisions based on assessments of the traits and character of people--e.g., where a child lives or with whom a child visits, whether a criminal defendant receives probation, the extent of pain felt by an injured employee, etc.--are best left to the judge who has actually seen and heard from the people involved and should not be made on cold records from distant offices.

> "This 'what is best for the child' rule prevails over presumptions and has probably caused judges more sleepless nights than any other one legal or equitable principle. It is an awesome responsibility, fraught with difficulty, to determine the best welfare of children. The trial judge observes attitudes, facial expressions, voice tones and all human traits in parties and witnesses

> testifying and appearing before him, weighs the evidence, wishes for the wisdom of Solomon, and hopefully reaches the correct decision in the case. This unique opportunity to observe and hear is the primary reason for the strong presumption favoring the trial court's findings in cases of this nature."

Ashley v. Ashley, 383 So. 2d 861, 863 (Ala. Civ. App. 1980)(citing Mothershed, supra).

Finally, the admission of testimony from a witness hired by a party and presented as an expert does not mean the fact-finder must assign any particular weight or assessment of credibility to the testimony. See, e.g., McCurry v. Gold Kist, Inc., 647 So. 2d 732, 734 (Ala. Civ. App. 1993)("A trial court is not bound by the testimony of expert witnesses, even if that testimony is uncontroverted."); Patrick v. FEMCO Se., Inc., 565 So. 2d 644, 645 (Ala. Civ. App. 1990) (noting that, in a nonjury case, "[t]he trial court is the trier of fact and weighs all of the evidence, including the expert's testimony, and then decides what to do"). As with all witnesses, such testimony must be carefully evaluated for bias, motive, and other matters that may affect factual findings. Experienced litigators and trial judges know that such testimony at times does not actually provide evidence grounded in scientific, technical, or other specialized knowledge as contemplated by

Alabama Rule of Evidence 702 but is, instead, virtually indistinguishable from advocacy.

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

I dissent from that part of the main opinion that affirms the award of unsupervised visitation to the father. I concur in the remainder of the opinion.

THOMAS, Judge, concurring in part and dissenting in part.

In November 2014, T.G.F. ("the mother") filed a petition requesting that the Monroe Circuit Court ("the trial court"), among other things, terminate the visitation of D.L.F. ("the father") with the parties' child, who was born on October 12, 2010, because, she alleged, the father had sexually abused the child. In June 2015, the mother filed an amended petition in which she also alleged, among other things, that the father was in contempt of an earlier judgment for failing to pay certain expenses for the child. In December 2014, the father filed an answer and a counterclaim in which he, among other things, requested that the trial court award him sole physical custody of the child.

The trial court thereafter conducted a trial and entered a judgment on March 24, 2016, denying, among other things, the mother's requests and permitting the father to have unsupervised visitation with the child. The mother timely appealed the trial court's judgment to this court, and the main opinion reverses the trial court's determination regarding the father's alleged contempt and remands this action for further proceedings on that point. I concur with

the main opinion's resolution of that issue for the reasons discussed therein. The main opinion also concludes, however, that the evidence presented at trial was sufficient to support the trial court's award of unsupervised visitation to the father. I dissent as to that issue.

On appeal, the mother argues that the trial court's judgment should be reversed, in part, because its award of unsupervised visitation to the father does not adequately protect the child's safety. I note that, although the mother's petition sought complete termination of the father's visitation and did not alternatively request supervised or restricted visitation, the following exchange took place at trial between the trial court and the mother's attorney after an evidentiary objection from the father's attorney regarding the relevance of certain testimony:

> "[The trial court]: Ultimately the issue in this case that you're asking me to decide is to terminate his visitation -- is that right?
>
> "[The mother's attorney]: Well, I'm asking [that] it be supervised, that it be limited -- that it be restricted.
>
> "[The trial court]: That it be permanently restricted pending further orders of the Court?

> "[The mother's attorney]: Yes, Your Honor. That's what we're asking.
>
> "[The trial court]: ... I will overrule, but let's don't go far afield of what the ultimate issue is in this case."

Furthermore, the mother later testified: "I'm asking for continued supervised visitation." The father's attorney did not thereafter object to the parties' trial of the issue of restricted or supervised visitation.

> "According to our rules of civil procedure, when an issue not raised in the pleadings is tried by the express or implied consent of the parties, the issue must be treated as if raised in the pleadings. See Rule 15(b), Ala. R. Civ. P. In this case, the father did not object to the testimony concerning the issue of [supervised or restricted visitation]; therefore, the issue was tried by the express consent of the parties and the judgment is not void."

McCaw v. Shoemaker, 101 So. 3d 787, 798 (Ala. Civ. App. 2012).

Relying on the ore tenus rule, the main opinion concludes that the trial court's award of unsupervised visitation to the father should be affirmed. "'Under the ore tenus rule, the trial court's findings of fact are presumed correct and will not be disturbed upon appeal unless these findings are "plainly or palpably wrong or against the preponderance of the evidence."'" Bittinger v. Byrom, 65 So. 3d 927, 930 (Ala.

Civ. App. 2010)(quoting Shealy v. Golden, 897 So. 2d 268, 271 (Ala. 2004), quoting in turn Ex parte Carter, 772 So. 2d 1117, 1119 (Ala. 2000))(emphasis added). Black's Law Dictionary defines "preponderance of the evidence" as:

> "The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Black's Law Dictionary 1373 (10th ed. 2014).

The mother testified that, before she filed her petition in November 2014, the child was four years old and that the child had begun resisting visitation with the father at that time. Specifically, the mother testified that the child had been crying, irritable, wetting the bed, and "clinging" to the mother. She recalled that the child had been exhibiting such behavior the night before the mother filed her petition and that she had asked the mother to sleep with her, which the mother said was unusual. She said that, before the events of that day, her relationship with the father and the child's relationship with the father had been positive for a time. She also stated, however:

> "This particular day when she disclosed information to me has changed -- everything changed. I was in a situation that we need to find out what was going on with her, I want her to be healthy. I want her to be protected."

The mother testified that she contacted the Monroe County Department of Human Resources ("DHR") the next morning and filed her petition that day. The mother testified that the child had told her that she had seen certain photographs while in the father's care that the mother was concerned were pornographic.

When the mother contacted DHR in November 2014, she was instructed by DHR to take the child for a physical examination and for an evaluation by Niki Whitaker, the executive director of Baldwin County's Child Advocacy Center. She stated that the physical examination had not uncovered physical evidence of sexual abuse. She testified that DHR had given her no additional instructions, but she had taken the child to Dr. Bridget Smith for further evaluation and treatment. The mother testified that she had taken the actions summarized above to protect the child.

Jane Agee, the caseworker who conducted DHR's investigation, testified that she had been unable to determine

whether the father had sexually abused the child. Agee stated that she had witnessed Whitaker's interview and could not recall specific information about what had transpired during the interview. She stated, however, that when asked if someone had told her what to say during the interview, the child responded that the mother had. Agee stated that, although she could have referred the child for an extended forensic interview, she had not done so because the father's visitation was supervised at that time and there were therefore no concerns for the child's safety. She testified that she had no opinion regarding whether the child would be safe if the father was awarded unsupervised visitation.

Whitaker testified that she had had concerns after her interview with the child: "My concerns were because she did indicate some things had happened, and she also strongly indicated she did not want to be [with the father], and she gave examples of things that made her not want to be [with the father]." She further stated that the child had brought with her to the interview a toy cat and a baby doll. When asked what the father had done, the child demonstrated with the toys

that the father had touched her inappropriately using his fifth finger.

Whitaker also stated that, if the mother had told the child to tell the truth during her interview, that would have been an appropriate instruction for the mother to give the child. Regarding her conclusions, Whitaker stated: "I felt like there was more to be done. I don't think I could rule in or rule out sexual abuse based upon the one interview that was conducted." She said that, based on her evaluation, she had informed Agee that she could provide an extended forensic interview of the child, but, she said, DHR had not referred the child for that service.

Whitaker testified that she had spoken with Dr. Smith after Dr. Smith had interviewed the child. She noted that many of the child's disclosures that Dr. Smith recounted were similar to those that the child had made to her. She stated that she believed that the similarities between those disclosures had increased the child's credibility. When asked whether she had any concerns with the father being awarded unsupervised visitation, Whitaker responded:

> "I don't know what happened from my interview to present, I don't know if there's other information

> that was obtained. But based upon my interview with the child, yes, there were concerns."

Dr. Smith testified that she was a licensed psychologist who had "been serving children and adults for over thirty years." She stated that she had testified as an expert witness "[p]robably close to a hundred" times. Dr. Smith had observed the child during several sessions, over the course of approximately "ten clinical hours," beginning in April 2015. Dr. Smith said that she was concerned for the child's safety based on the allegations that the child had made. Dr. Smith testified that the child had told her on multiple occasions that the father had "sexually touched her in the vaginal area."

Regarding the manner in which the child had made those allegations, Dr. Smith offered the following testimony upon direct examination by the mother's attorney:

> "A. On the incomplete sentence blank, she disclosed that she was being asked to keep a secret. When I asked her what the secret was, she took a doll and she put her finger in the vaginal area. On another occasion, after we read the book, and I asked her if anyone ever made her feel uncomfortable, she said her father made her feel uncomfortable -- she refers to him as Daddy -- and she squatted and put her finger on her own vaginal area.
>
> "Q. Did you ask her to do that?

"A. No.

"Q. You said that she was being told to keep a secret. I didn't hear you say who was telling her to keep a secret.

"A. I did ask her who told her to keep a secret, and she said her daddy.

"Q. You talked about she made a disclosure on the incomplete sentence blank. What is that?

"A. It's a series of questions -- well, they're sentence stems, and so the child is asked to just complete it with what they think or feel, so the stem might be, I would like to or my daddy is or boys are. They're very open ended. Children can answer them in pretty -- whichever way they feel like answer them. And I asked her the stems, and then I write down the responses.

"Q. And do you know what she said?

"A. Yes. There were several that were of concern. The specific concern was -- the stem was I get mad when, and I said -- she said, I get mad when Daddy. And I said, why Daddy? And she said, because Daddy told me to keep a secret. That's when I followed up on the question about secrecy.

"Q. Dr. Smith, is it typical for abused children to love the abuser?

"A. Absolutely.

"Q. Is it typical for abused children to have a desire to see the abuser?

"A. Yes.

> "Q. I'd like to ask you. Dr. Smith, if a mother told a child that were coming to see you, for example -- tell Dr. Smith the truth, tell Dr. Smith what you told me. Is that appropriate or inappropriate instruction for matters such as this?
>
> "A. Appropriate."

She also offered the following testimony regarding the child's behavior during their sessions:

> "A. She did several drawings that I think were highly significant clinically. For example, she refused to draw herself on the picture with her father and stepmother. She drew pictures which she identified herself as sad when she did draw a picture. When I asked her to draw a picture of her father, she drew her sad and him angry. Spontaneously, she drew another picture on her own of her father with a very angry-looking face. She said he was angry. And it is an unusual drawing that is actually quite phallic looking as far as the drawing. And then when she disclosed -- after several disclosures, I drew a stick person of a man and asked if she had ever seen a man's private parts, and she said, yeah, she had seen her father while he was going to the bathroom, but no other connotation. And when I drew a stick picture of the little girl, I asked if anybody had ever touched her or made her uncomfortable and I had the pink marker in my hand and she said she wanted the marker to be red because she was upset and hurt, and she drew a picture -- she touched the knee, and then she drew a circle around the hip, and then she drew an arrow to the vaginal area. When I asked her [for] more disclosure, she talked about where her father had touched her and how uncomfortable and scared it made her.
>
> "Q. Did she tell you how he touched her in her private area?

"A. With his hand.

"Q. Do you know if he put his hand inside of her vagina?

"A. I don't know.

"Q. Is it typical that children whose vagina has been touched by a parent would reflect no physical evidence?

"A. Yes, very typical."

She also specifically stated:

"A. When you're evaluating children for allegations of abuse, different types of responses have more salient value. So a spontaneous disclosure -- if the child makes that is considered to be highly significant. The second level would be indirect questioning, and the third would be direct questioning. As you become more direct in your interview style, then you have to be very careful to make sure you're not influencing the child. So spontaneous disclosures are considered the most important.

"Q. And in this case do you know how many spontaneous disclosures that you had?

"A. Four times.

"Q. And when you testified earlier about her squatting and on her own body putting her finger at her vagina, was that spontaneous?

"A. Yes.

"Q. How credible is that? In your mind?

"A. Highly significant, credible, yes."

Dr. Smith testified that she did not believe that the child had been coached by the mother and that she had observed no indication that the child's allegations had been fabricated. She stated that, in her professional opinion, the "clinical data support[ed]" the conclusion that the child had been sexually abused by the father and that she believed that the father's visitation should remain supervised.

The father denied that he had sexually abused the child. He testified that his relationship with the mother had been troubled at least since the child's birth and that they had separated only a few days after the child's birth. He opined that the mother had alleged his sexual abuse of the child in an effort to erase him from the child's life, but he conceded that there had been a period wherein their relationship had improved and that they had participated in joint activities with the child during that time.

After a declaration from the trial court that, because the father was seeking a custody modification, "everything [wa]s pretty much relevant with regard to his character and her character," the father testified that he had been discharged from the Navy because he had been diagnosed with a

personality disorder. He stated that he had been prescribed medication both for the personality disorder and for depression. He elaborated upon his conditions during cross-examination by the mother's attorney:

> "Q. Do you take any of your medications anymore?
>
> "A. No.
>
> "Q. Why not?
>
> "A. I don't need them.
>
> "Q. So you have been prescribed medications for your personality disorder and your depression, isn't that correct?
>
> "A. I have.
>
> "Q. And you have a long list of medications that you have been prescribed, right?
>
> "A. At one time, yes.
>
> "Q. And what were those?
>
> "A. Just mainly anti-depressants, Zoloft and Effexor and things like that.
>
> "Q. Wellbutrin?
>
> "A. Yeah.
>
> "Q. Lexapro?
>
> "A. I'm not sure about that one.
>
> "Q. Was there a list of about ten medications you've been prescribed?

"A. I guess.

"Q. And you just decided -- even though your doctor prescribed them -- prescribes them for you, you just decide on your own that you don't need them, right?

"A. Yes.

"Q. So you have suffered from depression since the eighties; is that true?

"A. That's true.

"Q. And you still maintain that you just -- you discontinued your medications even when the doctor thinks you should take them, right?

"A. Yes.

"Q. That's just a decision that you make on your own?

"A. If you don't have a headache, you don't take an aspirin.

"Q. So, in addition to -- let me ask you. Do you still take prescription medications like Lortab that you get from your father or other sources?

"A. No.

"Q. Can you pass a drug test?

"A. Yes.

"Q. So you have stopped taking other people's pain medication?

"A. Yes.

"Q. When did you stop that?

"A. When I realized it was wrong.

"Q. When was that?

"A. During your deposition.

"Q. So you haven't taken anymore illegal drugs since then?

"A. Never."

Regarding certain sexual activity and whether he had exposed the child to such activity, the father offered the following testimony during cross-examination by the mother's attorney:

"Q. Let's talk about pornography. Do you still engage in pornography; do you still view it?

"A. No.

"Q. Isn't it true that you sent pictures of your penis over the e-mail to your girlfriend?

"A. I did.

"Q. And isn't it true that she sent pictures of her pleasing herself, masturbating to you on your phone?

"A. Yes.

"Q. So did you give your phone to the police officers?

"A. I offered it.

"Q. That's a yes or no. Did you give it to them?

"A. No.

> "....
>
> "Q. The pornography -- did you -- the pornography that you were viewing -- you masturbated while you viewed the pornography; isn't that true?
>
> "A. I have in the past.
>
> "Q. And you don't do that anymore either?
>
> "A. No.
>
> "Q. When did you stop that?
>
> "A. I don't know. A year ago, year and a half.
>
> "Q. All right, so up until the time she was, say, three and a half -- up until [the child] was three and a half years old, you still engaged in pornography, and you would masturbate while you viewed the pornography?
>
> "A. Not when she was with me.
>
> "Q. You would only do that when she was gone?
>
> "A. Yes."

The father testified that he believed that Dr. Smith was "biased towards the mother" because, in his opinion, her testimony had been "ridiculous."

The main opinion "acknowledge[s] that the mother presented a <u>great deal</u> of evidence supporting her claim that the visitation should be supervised to protect the child from sexual abuse by the father" but nevertheless concludes that

the trial court's award of unsupervised visitation to the father should be affirmed. ____ So. 3d at ____ (emphasis added). I agree that the mother presented a "great deal" of evidence supporting her claim, and I therefore conclude that the mother met her burden of proving that the father's visitation should be restricted or supervised.

> "While a trial court has broad discretion in determining visitation rights it will award a noncustodial parent, each such case requires an examination of the facts and circumstances of that individual situation. Andrews v. Andrews, 520 So. 2d 512 (Ala. Civ. App. 1987). Additionally, the trial court's primary consideration in establishing visitation rights for the noncustodial parent must be the best interests and welfare of the child. Brothers v. Vickers, 406 So. 2d 955 (Ala. Civ. App. 1981)."

Y.A.M. v. M.R.M., 600 So. 2d 1035, 1036 (Ala. Civ. App. 1992)(emphasis added)(reversing a trial court's award of unsupervised visitation with the father when evidence was presented at trial indicating that the father had sexually abused the child). Furthermore,

> "'[a] noncustodial parent generally enjoys "reasonable rights of visitation" with his or her children. Naylor v. Oden, 415 So. 2d 1118, 1120 (Ala. Civ. App. 1982). However, those rights may be restricted in order to protect children from conduct, conditions, or circumstances surrounding their noncustodial parent that endanger the

> children's health, safety, or well-being. See Ex parte Thompson, 51 So. 3d 265, 272 (Ala. 2010).'"

B.F.G. v. C.N.L., 204 So. 3d 399, 404 (Ala. Civ. App. 2016)(quoting Pratt v. Pratt, 56 So. 3d 638, 641 (Ala. Civ. App. 2010))(emphasis added).

The mother presented evidence indicating that the child had, on multiple occasions, spontaneously disclosed that the father had sexually abused her. The father did not present any evidence indicating that the child had not, in fact, made those statements or providing an alternative explanation for the child's statements. Furthermore, in addition to Whitaker's testimony that she had been concerned for the child's safety, Dr. Smith testified that, in her expert opinion, the father had sexually abused the child. The only evidence offered by the father rebutting Dr. Smith's conclusion was his own testimony, wherein he denied having sexually abused the child and described Dr. Smith's opinion as "ridiculous." However, regarding the father's credibility, the undisputed evidence demonstrated that, despite having been diagnosed with two psychological conditions, the father had refused to take his prescribed medication based on his unilateral disagreement with the opinions of psychological

professionals that he do so, and his testimony was therefore offered without the benefit of treatment that he had been advised was necessary for him to achieve appropriate psychological or behavioral functioning. The trial court's conclusion that the father's testimony outweighed the undisputed disclosures made by the child and the professional observations of Whitaker and Dr. Smith is not supported by the record.

Thus, the mother met her burden of proving by a preponderance of the evidence that any award of visitation to the father should be restricted in such a way as to ensure that the child's safety is protected, and the father did not adequately rebut the evidence presented by the mother such that an award of unsupervised visitation was warranted. Because I believe that the trial court's conclusion that it was in the child's best interest to award the father unsupervised visitation was against the greater weight of the evidence and against the evidence that had the most convincing force, I believe that the trial court erred to reversal, and I disagree with the main opinion's conclusion to the contrary.

The trial court's mistake in this case was failing to primarily consider the child's safety. When faced with a demonstrated probability that a child has been sexually abused by a parent, any visitation award fashioned by the trial court in favor of that parent must reflect the priority that the law gives to the child's safety. Because the trial court's judgment failed to do so in this case, I would reverse the judgment insofar as it addresses visitation and remand this action with instructions for the trial court to order that the father's visitation be supervised or, alternatively, to craft a visitation award that adequately protects the child from the possibility of sexual abuse by the father -- an order to which the child is entitled and that our courts are obligated to provide.