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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)

MOORE, Judge.

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"), whose date of birth is October 12, 2010; denying her petition to hold the father in contempt for

failing to pay for certain private-school and extracurricular expenses of the child; and denying her petition 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, the trial court entered a judgment on March 24, 2016, denying both parties' petitions to modify 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. On April 26, 2016, the mother filed her notice of appeal. On April 27, 2016, the mother withdrew her postjudgment motion.[1]

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.

[1]Because the mother withdrew her postjudgment motion, we do not set out the contents of the motion or the affidavit filed in support of that motion.

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.[2] The mother testified that she was shocked by the child's statements. The mother testified that, after the child disclosed the

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

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 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 "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.

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, 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 supports 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. By withdrawing the motion, the mother retracted her argument that the judgment was not supported by sufficient evidence. See Black's Law Dictionary

1836 (10th ed. 2014) (defining "withdraw" as "[t]o retract" and "[t]o refrain from prosecuting or proceeding with (an action)"). As a result, the trial court did not rule on the question of the sufficiency of the evidence.

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 did not have that opportunity because the mother withdrew her postjudgment motion. In effect, the withdrawal amounted to a waiver of any objection based on the alleged insufficiency of the evidence. See generally Cody v. Louisville & Nashville R.R., 535 So. 2d 82, 84 (Ala. 1988) (party who withdrew objection to jury instruction waived any error relating to that instruction and merits of objection could not be considered on appeal). Furthermore, because the trial court never ruled on the question of the sufficiency of the evidence, there is no adverse ruling for this court to review and the mother cannot now raise that issue on appeal. Stewart, supra.

Judge Thomas argues in her special writing that this court should consider the issue of the sufficiency of the evidence to be properly preserved because of the unique procedural posture of this case. The mother moved the trial court to stay its judgment while her postjudgment motion was pending; the trial court denied the motion to stay on April 26, 2016. The mother filed a notice of appeal that same date and moved this court to stay the trial court's judgment in order to deny the father unsupervised visitation with the child that was scheduled for April 27, 2016. However, because the mother's postjudgment motion remained pending in the trial court, the notice of appeal was held in abeyance pending disposition of the postjudgment motion, see Rule 4(a)(5), Ala. R. App. P., depriving this court of appellate jurisdiction. See Kenco Signs & Awning Div., Inc. v. CDC of Dothan, L.L.C., 813 So. 2d 913, 915 (Ala. Civ. App. 2001) ("'"A notice [of appeal] filed ... after the filing of a [specified postjudgment motion] but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals."'" (quoting Woodard v.

Hardenfelder, 845 F.Supp. 960, 965 (E.D.N.Y. 1994), quoting in turn the Advisory Committee Notes to Rule 4, Fed. R. App. P.)). Thus, this court issued an order denying the motion to stay, specifically advising the parties that, due to the operation of Rule 4(a)(5), "[t]his court lacks appellate jurisdiction to consider the [motion to stay]."

In her special writing, Judge Thomas implies that this court erred in determining that it lacked jurisdiction to consider the stay motion. However, Rule 8(b), Ala. R. App. P., authorizes this court to stay judgments or orders of a trial court only "pending appeal." Likewise, Rule 62(g), Ala. R. Civ. P., provides that an appellate court may issue a stay only "during the pendency of an appeal." In this case, the appeal was not "pending" because the notice of appeal was being held in abeyance pending disposition of the mother's postjudgment motion. Hence, this court could not stay the judgment under either Rule 8(b), Ala. R. App. P., or Rule 62(g), Ala. R. Civ. P., and this court correctly ruled that it lacked appellate jurisdiction to stay the trial court's judgment. Judge Thomas has not cited any authority that would authorize this court to stay a judgment or order of a trial

court when a notice of appeal is held in abeyance and this court does not have appellate jurisdiction.

Following our ruling, the mother withdrew her postjudgment motion and renewed her motion to stay in this court. Judge Thomas contends that the mother withdrew her postjudgment motion only because she was forced into a "Hobson's choice." ___ So. 3d at ___ (Thomas, J., concurring in part and dissenting in part). We disagree. The mother did not have to withdraw her postjudgment motion in order to bring the stay issue properly before this court. Once the trial court denied her motion to stay, the mother could have filed a petition for a writ of mandamus to obtain review of that order. See Ex parte Rawls, 953 So. 2d 374, 387 (Ala. 2006) (reviewing order denying motion to stay divorce proceedings via a petition for a writ of mandamus). The filing of a petition for a writ of mandamus would have given this court jurisdiction over the stay issue while the trial court retained jurisdiction to consider the mother's postjudgment motion. See Regions Bank v. Reed, 60 So. 3d 868, 877 (Ala. 2010) (holding that the filing of a petition for a writ of mandamus does not divest the trial court of jurisdiction).

This court did not mislead the mother's attorney by failing to inform her of that option; "[t]he courts of this state have no duty or authority to instruct an attorney on the law or how to practice law." Wright v. City of Mobile, 192 So. 3d 7, 12 (Ala. Civ. App. 2015) (opinion on application for rehearing).

Judge Thomas also maintains that the mother is appealing from the adverse ruling allowing the father unsupervised visitation. ___ So. 3d at ___ n.3 (Thomas, J., concurring in part and dissenting in part). In Stewart, supra, our supreme court clearly held that, in a nonjury case, a party challenging the sufficiency of the evidence to support a judgment containing no specific findings of fact must raise that issue before the trial court after the judgment has been entered and that the party must receive an adverse ruling on that point in order to preserve the issue for appeal. Under Stewart, the underlying judgment itself does not constitute the adverse ruling that preserves the issue of the sufficiency of the evidence for appellate review.

In this case, because the mother withdrew her postjudgment motion, the trial court never ruled on whether

the evidence was sufficient to sustain its judgment awarding the father unsupervised visitation with the child.

> "Generally, a party may appeal only an adverse ruling. CSX Transp., Inc. v. Day, 613 So. 2d 883, 884 (Ala. 1993) ('[I]t is familiar law that an adverse ruling below is a prerequisite to appellate review.'); Figures v. Figures, 658 So. 2d 502, 504 (Ala. Civ. App. 1994) ('The only matter for [the appellate court's] consideration is an adverse ruling of the trial court. Davis v. Hartford Accident & Indemnity Co., 335 So. 2d 688 (Ala. Civ. App. 1976).'); and Rountree v. Sanders, 413 So. 2d 1159, 1159-60 (Ala. Civ. App. 1982) ('Upon an appeal, only adverse rulings of the trial court will be reviewed.'); see also Public Serv. Comm'n of Missouri v. Brashear Freight Lines, Inc., 306 U.S. 204, 206-07, 59 S.Ct. 480, 83 L.Ed. 608 (1939) (stating that the successful party below lacked the right to appeal from a decree denying an injunction)."

Olson v. State, 975 So. 2d 357, 359 (Ala. Civ. App. 2007). An appellate court reviews rulings of trial courts only for correctness, and when no adverse ruling is made, the appellate court has nothing to review. See Davis v. Hartford Acc. & Indem. Co., 335 So. 2d 688, 690 (Ala. Civ. App. 1976) ("The Committee Comments to Rule 4, [Ala. R. App. P.], state that matters, i.e., 'issues presented for review' as provided in Rule 28, [Ala. R. App. P.], raised on appeal must have been presented to the trial court at some stage of the proceedings therein and once ruled on by the trial court are preserved for

review." (emphasis added)). Without a ruling on the mother's postjudgment motion, the issue of the sufficiency of the evidence has not been properly preserved.

Out of an abundance of caution, we nevertheless 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 leveled an unproven allegation of sexual abuse 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 may 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 extra-curricular 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.

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

Donaldson, J., concurs.

Pittman, J., concurs in the result, without writing.

Thomas, J., concurs in part and dissents in part, with writing, which Thompson, P.J., joins.

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 mother has failed to properly preserve the issue of the father's visitation for appellate review. Because I believe that the main opinion has disregarded relevant proceedings of this court that compel a contrary conclusion, I dissent as to that issue.

The trial court entered its judgment on March 24, 2016. On March 31, 2016, the mother filed a postjudgment motion pursuant to Rule 59, Ala. R. Civ. P., in which she argued that the trial court's judgment was not supported by the evidence presented at trial. That same day, the mother also filed in the trial court a motion in which she asserted, among other things, that the trial court had abused its discretion by entering its judgment in light of the evidence presented at trial and, therefore, requested that the trial court stay its judgment pending its decision regarding her postjudgment motion.

At 8:24 a.m., on April 26, 2016, the mother filed a notice of appeal to this court, and, at 8:28 a.m., she filed

a verified emergency motion in this court in which she averred that the father's unsupervised visitation was scheduled to begin the next day and therefore requested that we stay the trial court's judgment and reinstate the terms of an earlier order requiring that the father's visitation be supervised. In her verified motion for an emergency stay, the mother also averred that, although her stay motion was still pending before the trial court, her request that this court grant an emergency stay was nevertheless appropriate under Rule 8(b), Ala. R. App. P., because, she said, it was "not practicable to further await a ruling of the trial court ... as more than 30 days ha[d] passed since entry of the trial court's [judgment]" and the father's visitation was scheduled to begin the next day. That same day, at 3:54 p.m., the trial court denied the mother's stay motion, and she notified this court of the trial court's decision at 7:23 p.m.

On April 27, 2016, this court issued an order stating:

> "Pursuant to Rule 4(a)(5), Ala. R. App. P., the appellant's notice of appeal is held in abeyance until such time that the appellant's postjudgment motion is ruled upon by the trial court or denied by operation of law. This court lacks appellate jurisdiction to consider the appellant's Verified Motion for Emergency Stay and Reinstatement of

> Visitation Restrictions Pending Appeal. Accordingly, the appellant's motion is denied."

(Emphasis added.)

That same day, at 10:38 a.m., the mother withdrew her postjudgment motion in the trial court, and, at 10:53 a.m., she filed a motion in this court requesting that we reconsider our denial of her verified motion for an emergency stay and assume jurisdiction over her appeal. Later that day, we entered an order temporarily staying the trial court's judgment, requiring that the father's visitation be supervised until further order from this court, and requiring the father to submit a response to the mother's motion "no later than Noon on Monday, May 2, 2016."

On May 4, 2016, which was 2 days after receiving the father's response to the mother's motion for an emergency stay, but more than 30 days after the entry of the trial court's judgment, this court entered an order denying the mother's verified motion for an emergency stay. On May 5, 2016, the mother filed a petition for the writ of mandamus in our supreme court, and the supreme court denied her petition the next day. After receiving the parties' appellate briefs,

the appeal was submitted to this court on November 7, 2016, for consideration of the issues raised therein.

Relying primarily on our supreme court's holding in New Properties, L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004), the main opinion concludes that the mother's withdrawal of her postjudgment motion "amounted to a waiver of any objection based on the alleged insufficiency of the evidence. ... [T]he mother cannot now raise that issue on appeal." ____ So. 3d at ____. Because no fair evaluation of the record and the proceedings summarized above yields the conclusion that the mother has, at any stage in this case, failed to contest the trial court's determination that the father should be permitted unsupervised visitation with the child, I disagree with the main opinion's resolution of that issue.

As the main opinion notes, our supreme court held in Stewart that,

> "in 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."

905 So. 2d at 801-02 (emphasis added). As the main opinion also notes, the rule enunciated in Stewart allows "'the trial

judge an opportunity to carefully review the evidence and to perfect the issues for review on appeal.'" Id. at 801 (quoting Ex parte Vaughn, 495 So. 2d 83, 87 (Ala. 1986)). In this case, the mother contemporaneously filed both a postjudgment motion and a motion for a stay in the trial court arguing that its judgment was not supported by the evidence presented. Several weeks later, the trial court denied the mother's motion for a stay. Although the mother subsequently withdrew her postjudgment motion, the record indicates that she did so only to secure the appellate jurisdiction of this court.

Thus, this court's initial April 27, 2016, order denying the mother's motion for an emergency stay based on its conclusion that we lacked appellate jurisdiction effectively communicated to the mother that the only manner by which she could obtain an emergency stay of the father's visitation that was scheduled to begin that same day was to withdraw her postjudgment motion. Therefore, this court's order presented the mother's attorney with two options: (1) withdraw the mother's postjudgment motion in an effort to obtain an emergency stay of the father's visitation that was scheduled

to occur that same day or (2) delay seeking a stay of the trial court's judgment until the trial court ruled on her postjudgment motion or it was denied by operation of law, pursuant to Rule 59.1, Ala. R. Civ. P., which would not have occurred until approximately two months later.

Furthermore, because this court entered its May 4, 2016, order denying the mother's verified motion for an emergency stay more than 30 days after the trial court entered its judgment, the mother could not have refiled her postjudgment motion at that time. See Rule 59(e), Ala. R. Civ. P. Nor could she, of course, have refiled her postjudgment motion during the pendency of her verified motion for an emergency stay because we had already indicated in our initial April 27, 2016, order that doing so would have deprived this court of appellate jurisdiction. In light of the mother's sincere belief that the father posed a serious risk to the safety of the child, the task set before the mother's attorney amounted to a Hobson's choice, and she chose to act quickly to secure this court's appellate jurisdiction by withdrawing the mother's postjudgment motion in the trial court. Her decision cannot realistically be viewed as an indication that the

mother no longer contested the evidentiary foundation for the trial court's judgment; rather, it should be considered an attempt to more quickly contest that foundation for the safety of the child.

The main opinion contends that, in order to secure a stay of the trial court's judgment, the mother should have petitioned this court for mandamus review of the trial court's order denying her stay motion rather than withdraw her postjudgment motion in order to allow us to consider her verified motion for an emergency stay that was pending before this court. The main opinion's foundational misstep is its failure to recognize that the mother withdrew her postjudgment motion only in reliance upon this court's April 27, 2016, order, wherein we cited Rule 4(a)(5), Ala. R. App. P., and declined to consider the mother's verified motion for an emergency stay.

Rule 4(a)(5) provides, in relevant part:

> "A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions ... shall be held in abeyance until all post-judgment motions ... are ruled upon."

(Emphasis added). Rule 4(a)(5) makes no mention of this court's jurisdiction to consider a party's motion requesting

a stay pending appeal. Rule 62(g), Ala. R. Civ. P., which addresses the judicial power of appellate courts to consider stay motions, provides:

> "Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

In other words, although the pendency of the mother's postjudgment motion had not deprived this court of jurisdiction to consider her verified motion for an emergency stay, this court's citation to Rule 4(a)(5), Ala. R. App. P., in our April 27, 2016, order effectively communicated to the mother that we lacked jurisdiction to do so and that she should withdraw her postjudgment motion to remedy the jurisdictional defect. Furthermore, the main opinion ignores that the mother complied with Rule 62(g), Ala. R. Civ. P., and Rule 8(b), Ala. R. App. P., because she moved the trial court for a stay of its judgment, waited for a ruling from the trial court for as long as was practicable, thereafter submitted her verified motion for an emergency stay to this court, and

promptly notified us when the trial court ruled on her motion later that same day. See Rule 8(b), Ala. R. App. P. ("In a civil action, application for a stay of the judgment or order of a trial court pending appeal ... must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court in which the appeal is pending, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action."). See also Field v. Field, 382 So. 2d 1132, 1134 (Ala. Civ. App. 1980)("In child custody cases the proper procedure for superseding the trial court judgment is to file a motion for stay with the trial court and, if it is denied there, file a motion for stay of judgment with the proper appellate court. Piccolo v. Piccolo, [251 Ala. 483, 38 So. 2d 12 (Ala. 1948)]; A[la.] R[.] C[iv.] P[.,] Rule 62(g); A[la.] R[.] A[pp.] P[.,] Rule 8(b).").

In light of the guidance provided by this court regarding our ability to review the mother's verified motion for an

emergency stay and the urgency of the circumstances presented, I believe that the main opinion's retrospective assertion that the mother's attorney should have instead petitioned this court for the writ of mandamus is overly artful and penalizes the mother's attorney for her attempts to conform with our procedural rules and what at least appeared to be this court's express directives. See Ex parte Jefferson Smurfit Corp., 951 So. 2d 659, 669 (Ala. 2006)(citing with approval and quoting Kissic v. Liberty Nat'l Life Ins. Co., 641 So. 2d 250, 252 (Ala. 1994)) ("'Any construction of [a rule of procedure] on our part that could, under certain circumstances, create a trap for an unwary attorney would surely violate the spirit, if not the letter, of our rules of civil procedure.'"); Barnes v. Dale, 530 So. 2d 770, 777 (Ala. 1988) ("formality is subordinate to the substantive interests of the parties"); and Hand v. Thornburg, 425 So. 2d 467, 469 (Ala. Civ. App. 1982) ("Myriad changes have been made ... in an attempt to eliminate, or soften the effect of, ultra technical rules of civil trial and appellate procedures thereby striving for a

just, speedy and inexpensive determination of each civil action upon its merits.").[3]

Regarding whether the trial court had an opportunity to consider the mother's contention that its judgment was supported by insufficient evidence, I note that, in her March 31, 2016, motion for a stay that she filed in the trial court, the mother raised the issue of the insufficiency of the evidence supporting the trial court's award of unsupervised visitation to the father. For instance, in that motion, the mother noted that the evidence presented at trial had demonstrated that the Monroe County Department of Human Resources ("DHR") had not completed its investigation of her sexual-abuse allegations; that Dr. Bridget Smith, a licensed psychologist, had testified that the child had disclosed to her that she had been sexually abused by the father and recounted Dr. Smith's descriptions of those communications; and that Niki Whitaker, the executive director of a child-

[3]The main opinion also concludes that we cannot consider the sufficiency of the evidence supporting the trial court's judgment because the mother suffered no adverse ruling from the trial court regarding that issue. Clearly, the trial court's judgment awarding the father unsupervised visitation with the child is the adverse ruling from which the mother has appealed.

advocacy center, had testified that the child had made similar disclosures to her. In light of the evidence referenced, the mother asserted that her pending postjudgment motion was "meritorious and [that] she ha[d] a likelihood of success on appeal." After having several weeks to consider the mother's motion for a stay and her assertions that its judgment had not been supported by the evidence presented at trial, the trial court entered an order on April 26, 2016, denying her motion for a stay.

Under these unique circumstances, I therefore conclude that the mother has "otherwise properly raise[d] 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 Properties, 905 So. 2d at 802, and that "'the trial court [had] an opportunity to carefully review the evidence and to perfect the issues for review on appeal.'" Id. at 801 (quoting Ex parte Vaughn, 495 So. 2d at 87). Thus, I consider our review of the issue of the father's visitation with the child as a matter of judicial obligation, see § 12-3-10, Ala. Code 1975 ("The Court of Civil Appeals shall have exclusive appellate jurisdiction of ... all appeals in

domestic relations cases."(emphasis added)), rather than as something that is to be conducted simply "[o]ut of an abundance of caution," as the main opinion chooses to do. ____ So. 3d at ____.

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 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 Whitaker. 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. 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."

As mentioned above, 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.

Thompson, P.J., concurs.