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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2015

2140015

S.M.M.

v.

J.D.K.

Appeal from Marshall Circuit Court
(DR-11-509.01)

PITTMAN, Judge.

This appeal is taken from an August 2014 judgment modifying the visitation provisions of a July 2011 consent judgment of divorce entered by the Marshall Circuit Court in a case involving the mother, S.M.M., and the father, J.D.K., of two minor daughters, L.J.K. (who is currently seven years

old) and S.R.K. (who is currently five years old).[1] The July 2011 divorce judgment awarded the mother sole physical and legal custody of the parties' children and provided the father "supervised visitation at [the mother]'s discretion to be supervised by [whomever] she chose at times and places that she saw fit." In contrast, the August 2014 modification judgment was entered after several proceedings at which testimonial and documentary evidence was admitted; that judgment awarded the father unsupervised visitation pursuant to the circuit court's standard-visitation order, including on alternating weekends and during academic-break periods. The mother's appeal challenges the correctness of the circuit court's allowance of unsupervised visitation.

This court has previously stated, in reviewing a judgment modifying a noncustodial parent's visitation privileges, that "[t]he matter of visitation rests soundly within the broad discretion of the trial court, and a trial court's determination regarding visitation must be affirmed absent a finding that the judgment is unsupported by any credible evidence and that the judgment, therefore, is plainly and

[1]This case involves a victim of a sex offense, whose anonymity this court is cautioned to preserve under Rule 52, Ala. R. App. P.; the case has thus been restyled so as to utilize the parties' initials.

palpably wrong." Watson v. Watson, 634 So. 2d 589, 590 (Ala. Civ. App. 1994); accord Flanagan v. Flanagan, 656 So. 2d 1228, 1230 (Ala. Civ. App. 1995) (applying analogous standard to judgment changing visitation from supervised to unsupervised). Although the mother insists that the presumption of correctness customarily indulged under the ore tenus rule in reviewing visitation judgments does not apply because the judge who rendered the August 2014 modification judgment did not preside at certain testimonial hearings in 2012, it is undisputed that that judge did receive testimony in open court over a three-day period in August 2014 before that judgment was rendered; thus, the mother's argument is not well taken, and we decline her invitation to apply a de novo standard of review. See First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415, 425 (Ala. 1982) (although documentary evidence was received and deposition testimony was read into transcript, presumption of correctness was applied; "where evidence has been presented orally, a presumption of correctness attends the trial court's conclusion[s] on issues of fact, if these conclusions were based totally or in part on oral testimony"), and Fluker v. Wolff, 46 So. 3d 942, 950 (Ala. 2010) (ore tenus rule applies to disputed issues of

fact, even when dispute is based on a combination of oral testimony and documentary evidence).

At the time the parties entered into their settlement agreement in contemplation of their divorce, whose terms (including the provision making the father's visitation rights as to the children subject to supervision and to the approval of the mother) were incorporated into the circuit court's July 2011 divorce judgment, the father had freely confessed to, had been charged with, had pleaded guilty to, and had been convicted of statutory rape stemming from certain incidents of sexual contact involving him and a 15-year-old member of a youth group at a church for which the father had served in a pastoral capacity. However, in its August 2014 modification judgment, the circuit court made the following pertinent determinations:

> "There was no credible and/or reliable evidence that the parties' minor children have been, nor are in future danger of being, sexually or physically abused by the [father]. The Court relied heavily upon the expert testimony of several witnesses, taken as a whole.
>
> "....
>
> "... There has been a material change in circumstances since the Judgment of Divorce that justifies a change in visitation and said change is in the best interest of said minor children. There was also no evidence presented that the previous

> illegal sexual relationship that [the father] had has had a detrimental effect on the children."

At the final hearing on the father's petition to modify, the circuit court heard evidence from a number of lay and expert witnesses, including Dr. Marilyn Elizabeth Lachman, a former forensic psychiatrist, who testified to having had an ongoing therapeutic relationship with the father since July 2011, when the consent divorce judgment was entered. Dr. Lachman testified that, although the father had a "reactive mood," he did not have any serious ongoing mental illness, and she opined, based upon her educational and professional experience and specific personal knowledge of the father, that he posed "no risk higher than any in the general population" to his children in the event that he was afforded unsupervised visitation. She additionally opined that the father had expressed remorse and appreciation of the gravity of his sexual misconduct so as to demonstrate that he did not have an antisocial personality. Further, Craig L.W. Boden, a licensed professional counselor who had counseled the father over 13 sessions in mid-2011 at the behest of the father's former employer, Grace Covenant Church, opined that the father was not a risk to abuse his own children. Finally, Carolyn Reyes, a fellow congregant at the father's current church, testified

that she had observed the father interact with her nieces and nephew, who had ranged in age between three and seven years, and had observed the father interacting positively and appropriately with them and expressing regret that he was missing a number of activities that his own children were engaging in.

The mother sought to counter the father's opinion testimony with the testimony of Dr. Deegan Mercer Malone, a nonmedical counselor who testified to having administered a computerized "Abel test" to the father in December 2013, which had entailed the father's viewing of and reacting to a number of images of minors and reporting on his own sexual behaviors. The report generated by Dr. Malone indicated that the father had sexual fantasies as to girls between the ages of 14 and 17 years, and Dr. Malone opined, based upon a third party's scoring of the Abel test administered to the father, that he posed a threat to repeat his conduct in the future. However, Dr. Lachman, the father's psychiatrist, testified that the Abel test is a subjective test that is "less reliable than the polygraph test" and is not to be used for reliable information regarding a particular subject. Further, on questioning by the guardian ad litem for the children, Dr. Malone admitted that she perceived no difference between a person's sexual

attraction to children in general and the arguably separate matter of potential attraction to children with whom a person has a biological relation.

The legislature of this state has expressed the view that "[i]t is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children," as well as to "to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage." Ala. Code 1975, § 30-3-150. Although not directly applicable to modification judgments, see Ala. Code 1975, § 30-3-157, that statute is consistent with the common-law principle that a noncustodial parent should generally be afforded "reasonable rights of visitation" with his or her children, Naylor v. Oden, 415 So. 2d 1118, 1120 (Ala. Civ. App. 1982). In this case, although the father agreed in the immediate aftermath of his revelation of his having engaged in a sexual relationship with a teenaged female to allow the mother to dictate the times and places of his visitation with the children and to the imposition of a supervision requirement, the father testified at trial that, despite his consistent written correspondence efforts directed toward the children, the

mother had cut off all contact with the children for several months and, during pendente lite visitation periods during the modification action, the children had consistently looked to the mother for permission to express affection to the father in a manner indicating that they were "in bondage" to the mother. Viewing the record through the lens of the applicable standard of review, we conclude that the circuit court could properly have determined from the evidence that the father's continuing psychiatric treatment, his remorse for his indiscreet behavior with a child significantly older than his own children, the absence of any ongoing risk to the children of sexual contact from the father, the mother's denial of visitation, and the children's inhibited relationship with the father, taken together, amounted to a material change in circumstances so as to warrant the removal of the supervised-visitation requirement and of the mother's exclusive right to dictate the father's visitation such that the judgment under review is not "unsupported by any credible evidence" so as to be "plainly and palpably wrong." See Watson and Flanagan, supra.[2]

[2]We note that the "material-promotion" custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), "does not govern ... visitation issues." Gallant v. Gallant, [Ms. 2130632, December 19, 2014] ___ So. 3d ___, ___ (Ala. Civ. App. 2014).

In reaching the foregoing conclusion, this court should not be perceived as somehow condoning the father's past conduct to the extent that that conduct amounted to violations of applicable laws governing sexual contact between minors and adults. The extent of the father's past conduct, presented in a light most adverse to the judgment under review, is aptly summarized by the dissenting opinion.[3] Our conclusion is instead based upon the proposition that the circuit court, and not this court, is in the best position to decide, based upon comparison of the weight and materiality of both favorable and unfavorable evidence adduced, whether the father demonstrated a material change in the pertinent circumstances warranting the alteration of the conditions initially imposed by the circuit court upon his visitation with his children. "'[B]ecause the trial court has the advantage of observing the witnesses' demeanor and has a superior opportunity to assess their credibility, [a reviewing court] cannot alter the trial court's judgment unless it is so unsupported by the evidence as to be clearly and palpably wrong.'" Ex parte Fann, 810 So.

[3]In actuality, this court must review the evidence in a light most favorable to the prevailing party. See, e.g., Boyd v. Ottman, 961 So. 2d 148, 151 (Ala. Civ. App. 2006).

2d 631, 636 (Ala. 2001) (quoting Ex parte D.W.W., 717 So. 2d 793, 795 (Ala. 1998); emphasis added in Fann).

Based upon the foregoing facts and authorities, the circuit court's judgment is affirmed.

AFFIRMED.

Donaldson, J., concurs.

Moore, J., concurs in the result, with writing.

Thompson, P.J., dissents, with writing, which Thomas, J., joins.

MOORE, Judge, concurring in the result.

J.D.K. ("the father") and S.M.M. ("the mother") executed an agreement settling their divorce action, which, among other things, provided that the mother would have sole physical and legal custody of the parties' daughters, L.J.K., born on December 27, 2007, and S.R.K., born on December 2, 2009, and that the father would have "[s]upervised visitation at the discretion of the [mother], supervised by the [mother] or person of her choice at places designated by the [mother]." The attorney who drafted the settlement agreement on behalf of the mother testified that he had included the "unusual" provision requiring supervised visitation at the discretion of the mother because, among other things, the father had recently been convicted of second-degree rape of a minor female and had registered with the state as a convicted adult sex offender.[4] The Marshall Circuit Court ("the circuit

[4]The attorney testified as follows:

> "[By counsel for the mother]: Well, knowing what you know about [the father] in this situation, do you believe there is a good basis for putting into that agreement that his visitation with his children be supervised?
>
> "A. Yeah. It was more than just the rape conviction that we did that. Can't go into great detail about that because it's confidential with my client, but yeah."

court") entered a consent judgment on July 26, 2011, incorporating the agreement without conducting an evidentiary hearing.

For three or four months following the entry of the divorce judgment, the mother allowed the father to visit with the children on multiple occasions, all without incident or complaint. The mother testified that she sometimes left the children with the father while she went running, although, she said, she could always observe their interactions. A few months after the divorce, however, the mother decided to end all visitation between the father and the children. That decision led the father, on January 5, 2012, to petition the circuit court to modify the visitation provisions of the divorce judgment.[5] At trial, the father requested any reasonable modification of the divorce judgment that the circuit court would allow him in order to spend parenting time with his daughters, including regular unsupervised visitation "because of the lack of evidence against him."

[5]In his petition, the father alleged that he "is not being allowed sufficient visitation with his minor children and [the father] believes it would be in the best interest of his minor children to have regular contact with their father."

On August 27, 2012, the circuit court awarded the father pendente lite supervised visitation with the children.[6] After a lengthy trial conducted over the course of three years, during which over a dozen fact and expert witnesses testified, the circuit court awarded the father regular, unsupervised visitation with the children. In its August 28, 2014, judgment, the circuit court found:

> "There was no credible and/or reliable evidence that the parties' minor children have been, nor are in future danger of being, sexually or physically abused by the [father]. The Court relied heavily upon the expert testimony of several witnesses, taken as a whole.
>
> "....
>
> "... There has been a material change in circumstances since the Judgment of Divorce that justifies a change in visitation and said change is in the best interest of said minor children. There was also no evidence presented that the previous illegal sexual relationship that [the father] had has had a detrimental effect on the children."

The mother appeals, arguing that the circuit court erred in modifying the visitation provisions of the divorce judgment.

In S.A.N. v. S.E.N., 995 So. 2d 175 (Ala. Civ. App. 2008), a father who had been awarded unsupervised-visitation

[6]The circuit court conducted an evidentiary hearing on the father's motion for pendente lite visitation on May 2, 2012, and denied that motion on May 7, 2012. However, on August 27, 2012, the circuit court awarded the father pendente lite supervised visitation and telephone contact with the children based on an agreement of the parties.

rights with his children pleaded guilty to first-degree sexual abuse following sexual acts with the mother's sister, who was a minor. After his conviction, the mother would not allow the father to visit with their children on the ground that the Alabama Community Notification Act ("the CNA"), Ala. Code 1975, former § 15-20-20 et seq., prohibited an adult criminal sex offender from "establish[ing] a residence or any other living accommodation where a minor resides." Ala. Code 1975, former § 15-20-26(c). The parties submitted that controversy to the trial court, agreeing that the father would be allowed to visit with the children at his home if the CNA did not prohibit such visitation. Upholding that agreement, the trial court, upon finding that § 15-20-26(c) did not preclude it, awarded the father unsupervised overnight visitation with the parties' children at the father's home, and the mother appealed. On appeal, this court agreed with the trial court that the CNA did not preclude an adult criminal sex offender from visiting with his children without supervision at the home of the criminal sex offender so long as the children did not reside there.[7] However, this court also held that, by

[7]Our legislature has since repealed the CNA and enacted the Alabama Sex Offender Registration and Community Notification Act, Ala. Code 1975, § 15-20A-1 et seq., which prohibits an adult sex offender from having overnight visits with a minor in enumerated circumstances. Ala. Code 1975, § 15-20A-11(d).

enacting the CNA, the legislature had intended that trial courts would continue to exercise their traditional duty to protect children by awarding unsupervised visitation with an adult criminal sex offender only upon a determination, based on sufficient evidence, that such visitation did not expose the children to an undue risk of sexual abuse and otherwise served the best interests of the children. This court reversed the judgment and remanded the case for the trial court to conduct an individualized assessment of the facts to assure the protection of the children's safety and other interests. In the present context, the principles from S.A.N. establish that a trial court can modify a judgment so as to allow an adult sex offender unsupervised visitation with his or her child if a probing inquiry of the particular circumstances of the case shows that visitation to be appropriate.

Before removing a supervision restriction, a trial court must determine that the circumstances existing at the time of the entry of the judgment imposing that restriction have materially changed so that removal of the restriction would serve the best interests of the child. Long v. Long, 781 So.

2d 225, 227 (Ala. Civ. App. 2000).[8] Generally speaking, a judgment establishing a particular form and mode of visitation, like a judgment establishing a particular custody arrangement, "is conclusive of the interest of the child and the rights of the parents, so long as the status at the time of the [judgment] remains without material change ...." Messick v. Messick, 261 Ala. 142, 144, 73 So. 2d 547, 549 (1954). Thus, again generally speaking, "[a]ny change to the trial court's supervised-visitation award would have to be based on new evidence of the suitability of unsupervised visitation." Barrett v. Barrett, [Ms. 2140041, May 22, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015). However, when a trial court enters a consent judgment based strictly on an agreement of the parties, that court, in deciding whether its judgment should be modified based on a material change of circumstances, may also consider facts that existed at the time of the entry of the earlier judgment but that were not disclosed in the earlier proceedings. See C.P. v. W.M., 806 So. 2d 395, 396-97 (Ala. Civ. App. 2001). Applying those

[8]I agree with the main opinion that the "'material-promotion' custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), 'does not govern ... visitation issues.'" ___ So. 3d at ___ n.2 (quoting Gallant v. Gallant, [Ms. 2130632, December 19, 2014] ___ So. 3d ___, ___ (Ala. Civ. App. 2014)).

general principles to this case, the circuit court, in inquiring into whether it was appropriate to lift the visitation restrictions imposed in the parties' divorce judgment and to allow the father, an adult sex offender, regular, unsupervised visitation with his children, could consider all the facts, including those existing, but not brought to light, at the time of the entry of the divorce judgment.

In this case, the circuit court determined from the evidence that there had been a material change in the circumstances and that regular, unsupervised visitation with the father would serve the best interests of the children without subjecting the children to the risk of sexual abuse. The question whether visitation restrictions should be modified is a question of fact for the trial court to decide "on a case-by-case basis, depending on the particular facts and personalities involved." Butler v. King, 437 So. 2d 1300, 1302 (Ala. Civ. App. 1983). When a trial court uses a combination of oral testimony, transcribed testimony, exhibits, and other documentary evidence to reach its determination, the ore tenus rule applies, and this court must presume that the trial court correctly determined the facts necessary to its judgment. Charles Israel Chevrolet, Inc. v.

Walter E. Heller & Co., 476 So. 2d 71 (Ala. 1985).[9] This court reviews the evidence solely to determine whether substantial evidence supports the trial court's judgment. See Ala. Code 1975, § 12-21-12(a) ("Proof by substantial evidence shall be required for purposes of testing the sufficiency of the evidence to support an issue of fact in rulings by the court ...."). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); see Ala. Code 1975, § 12-21-12(d).

The evidence was clear and undisputed that the father, while acting as a youth pastor, entered into a romantic and sexual relationship with a 14-year-old girl that culminated in two acts of sexual intercourse in February and March 2011. The father ultimately confessed to his criminal conduct and pleaded guilty to second-degree rape on April 26, 2011. In May 2011, he began counseling with Craig L.W. Boden, a pastor and a licensed professional counselor with training in male

[9]I note that, although the trial judge who entered the modification judgment did not preside over the 2012 evidentiary hearings in this case, the trial judge informed the parties that he had listened to the recordings of the testimony from those hearings.

sexual addiction. At that point, Boden was also counseling the mother separately because she was contemplating reconciling with the father. However, the mother terminated the counseling sessions after deciding to divorce the father at the end of July 2011.

Following the divorce, the father continued to seek counseling from Boden until September 2011 when, according to a letter written by Boden on May 29, 2013, the two mutually decided to conclude the counseling "as it was no longer necessary to continue the sessions." In a letter dated October 17, 2011, Boden stated regarding the father: "It is my opinion that he is not a danger to harm his, or anyone else's children." At trial, Boden testified that, during her counseling sessions, the mother had told Boden that the father had never sexually abused the children. The evidence shows that the mother had had both children examined by their pediatrician and a least one other doctor, both of whom had found no physical evidence indicating that the children had been sexually abused. Boden testified: "[I]n my opinion I found no evidence that was told to me that there had been abuse, and so I see nothing I can say definitively that I would think [the father] is at risk of abusing his children." Boden also testified:

> "THE COURT: You have had training, as I understand, in sexual addiction as it relates to men. But as part of that training, did you learn or have any workshops or any training, any reading or any experience relating to whether or not a person that was attracted toward adolescents and/or had a sexual relationship with an adolescent would be a danger to other children or other adolescents?
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> "BODEN: I've not found that to be true. I mean, as a judgment I have read things like -- well, my mind's slipping -- several books on sexual addiction. I've done seminars at the American Association of Christian Counselors world conference where we do several workshops. But specifically is it possible? Sure, it's possible that someone could venture out in other areas. But my opinion in this case it's not, but it's opinion."

The father also received psychiatric care from Dr. Marilyn Elizabeth Lachman, who first evaluated the father on July 16, 2011. Dr. Lachman drafted a report dated August 5, 2013, in which she stated:

> "There is no clinical evidence by any appropriately qualified professional, that has ever been brought to my attention, that shows that the [parties'] two minor daughters have ever been in any danger of abuse and/or neglect under the direct parenting of [the father]....
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> "....
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> "I have had the opportunity to evaluate [the father] for any risk of abuse or neglect, of any type, of his minor children.
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> "I have evaluated [the father] for his capacity to maintain himself safely and appropriately in the community as well as parenting his two minor children safely and appropriately. A summary of my findings is as follows:

> "....
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> "3. [The father] has the capacity to understand the ramifications of maintaining himself safely and appropriately in the community as well as parenting his two minor children safely and appropriately, in greater depth than merely reciting the ramifications back to me voluntarily and without coercion and lacks and rejects any kind of sexual deviant thought processes.
>
> "4. [The father] has the capacity to maintain himself safely and appropriately in the community as well as parenting his two minor children safely and appropriately with no symptoms of sexually deviant thought processes.
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> "In the life of this caring and gentle man, this experience is a one time peccadillo without any evidence to suggest a past recurring pattern of behavior or a future recurring pattern of behavior. In my professional opinion, it is imperative not to rob the children the experience of growing up with this caring and decent father as an important part of their lives.
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> "[The father] at this time and at any time in his longitudinal history, has no psychiatric obsessive preoccupations, and pathology that would lead to any propensity to have sexual deviant thought processes, that would limit his capacity to appropriately parent his two minor children without supervision and to maintain himself safely and appropriately in the community."

At trial, Dr. Lachman testified: "As far as being a threat, there is no risk higher than any in the general population of [the father's] participating unsupervised with his children and being a father to his children." Dr. Lachman also opined that the father will not engage in wrongful conduct in the future due to lack of a pattern of past misconduct and his

recognition of the wrongfulness of his sexual abuse of the minor.

The father eventually joined a new church that conducts a weekly program for men struggling with sexual issues. The father assumed an active leadership role in that group. He regularly takes educational material to the group's meetings that instruct the membership about methods of avoiding, and surrendering to, sexual temptation. Craig Johnson, a fellow church member, testified that he has never seen anyone as focused as the father on trying to make himself a better person and to make sure that "it never happens again." Ed Kleiman, a missionary and long-time friend of the parties, testified that father has changed for the better in the years since the parties' divorce:

> "I have seen the use of his time. I have seen use of his time in the study of the Bible, the study of materials involving the area of sexual purity. I've seen him help others at the church. I've seen them talk, heard them talk much. I've sat in the group that he was leading with these men and heard and saw the impact he was having and continued to see that every single time I was there and continued to hear that with all of the difficult conversations that I put him through on the telephone."

Kleiman also testified that the father had "resolved to take every action Biblically that's possible to prevent [his sexual misconduct from] ever happening again."

The mother introduced some evidence designed to show that the father had acted inappropriately in the past both with the parties' children and with other unrelated female children. That evidence, standing alone, may suggest that the father has deviant sexual compulsions, as Presiding Judge Thompson concludes in his dissent, ___ So. 3d at ___ (Thompson, P.J., dissenting), but that evidence was disputed at trial. See Ex parte H.H., 830 So. 2d 21, 25 (Ala. 2002) (holding that appellate court cannot reweigh disputed evidence on appeal). In resolving that dispute, the circuit court reasonably could have concluded that the mother and her witnesses were exaggerating or mischaracterizing the conduct of the father, especially considering that the mother had denied any sexual abuse of the children by the father to Boden. Likewise, the circuit court could have reasonably determined from the father's explanations that the acts showing his alleged pattern of sexual misconduct in the past either had not occurred[10] or did not amount to sexual misconduct and that he

[10]A Missouri child-protective agency apparently found one report of child sexual abuse asserted against the father and alleged to have occurred while the father was residing in Missouri and attending seminary school to be "substantiated" based on an interview with the alleged victim during the course of the underlying litigation. However, the father testified: "I'm sure you've read her accusations, and what she's accusing me of is actually totally impossible to have happened." The record indicates that the mother attempted to

was not "grooming" the children for future sexual abuse through his gifts. Finally, the mother relied on Deegan Mercer Malone, a clinical therapist and licensed professional counselor specializing in sexualized misbehavior, to provide expert-opinion testimony that the father has deviant sexual interest in teenage girls that generates a moderate risk of his committing sexual abuse in the future; however, Malone, who lacks any psychiatric training, relied heavily on an "Abel" test that she had administered to the father on one occasion on December 5, 2013, which test, she admitted, "a lot of the members of the scientific community" do not recognize as a valid analysis tool.[11] Dr. Lachman described that test as being only a "screening tool" that has no reliable diagnostic value when it is unsupported by clinical observations from a trained psychiatrist.

From Christmas and birthday cards that the mother had given the father during their marriage, it is clear that,

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depose the alleged victim, but the father objected on the ground that a Missouri probate court had adjudged the victim to be partially incapacitated due to psychological problems and drug abuse on September 17, 2013, and the deposition was not taken. No one attempted to introduce the report from the agency, which is not in the record.

[11]Malone also relied on the father's alleged self-report to her of sexually fantasizing about teenage girls, which report the father denied.

before the revelation of his crime, the mother had considered the father to be a good parent to their daughters. The mother testified that, based on her observations while supervising visitation, the children seemed to enjoy their visits with their father. Two church members testified that the father acts appropriately around their children. Other than the concerns regarding the father's alleged improper sexual predilections, which the circuit court rejected, no witness questioned the fitness of the father to parent the children.

Viewing the foregoing evidence in a light most favorable to the circuit court's judgment, see Summers v. Summers, 58 So. 3d 184, 187 (Ala. Civ. App. 2010) ("[W]hen a trial court hears conflicting testimony, we must review the evidence in a light that favors the prevailing party."), the circuit court could have reasonably reached the conclusion that a material change of circumstances had occurred and that allowing the father unsupervised visitation with the children served their best interests without exposing the children to the risk of sexual abuse. Although I agree that the mother presented substantial evidence that would have supported a judgment denying the father's modification petition, this court cannot reweigh the evidence and substitute its judgment for that of the circuit court. Ex parte H.H., supra. Because substantial

evidence supports its factual findings, the circuit court acted within its discretion in removing the restrictions on the father's visitation. Thus, I concur that the judgment is due to be affirmed.

THOMPSON, Presiding Judge, dissenting.

S.M.M. ("the mother") and J.D.K. ("the father") were divorced on approximately July 26, 2011. The divorce judgment incorporated an agreement that, in pertinent part, provided that the mother be awarded sole custody of the parties' two minor daughters (hereinafter "the daughters") and that the father receive "supervised visitation at the discretion of [the mother] supervised by the [mother] or a person of her choice."

It is undisputed that in April 2011, shortly before the parties entered into the agreement incorporated into the July 26, 2011, divorce judgment, the father pleaded guilty to a charge of second-degree rape for engaging in a sexual relationship with a 14- to 15-year-old girl.[12] The record indicates that the father attended but did not complete seminary. The girl he is convicted of raping had attended the youth ministry run by the father at a local church. The

[12]The father began what he characterized as an "emotional relationship" with the girl in the summer of 2010, when the girl was 14 years old. The father stated that he could not recall whether he engaged in a sexual relationship with the girl before her 15th birthday in late February 2011. Some evidence supports a conclusion that the father engaged in sexual activity with the girl as early as December 2010, when she was 14. Regardless, the father admitted that his relationship with the 14-year-old girl was inappropriate during the seven months before he claimed the sexual relationship began.

father was 33 years old when he began his relationship with the girl in the summer of 2010.

In January 2012, only six months after the entry of the divorce judgment that incorporated the parties' agreement, the father sought to modify the divorce judgment to increase his visitation with the parties' two minor daughters and to remove the requirement that his visitation with the daughters be supervised. Testimony was taken over two days in 2012 with regard to pendente lite relief, and then the father's request for a modification of visitation was heard over three days in August 2014. The record contains approximately 1,200 pages of testimony and numerous exhibits. On August 28, 2014, the trial court entered a judgment finding that there had been "a material change in circumstances" and awarding the father a standard schedule of unsupervised visitation.[13]

I agree, generally, with the main opinion that matters of visitation, particularly when the trial court has received ore tenus evidence, are within the discretion of the trial court.[14]

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[13]The father testified that he was no longer pursuing his claim seeking the modification of his child-support obligation, and, in its judgment in this matter, the trial court denied all requests for relief not specifically addressed in the judgment.

[14]I also agree with the conclusion in the main opinion that § 30-3-150, Ala. Code 1975, which addresses the state policy concerning an award of joint custody, is "not directly

I would add to that analysis, however, that our caselaw has stated that a party seeking to modify visitation must show both a material change in circumstances since the entry of the most recent judgment concerning visitation and that a modification of visitation would serve the best interests of the children at issue. Griffin v. Griffin, 159 So. 3d 67, 70 (Ala. Civ. App. 2014); Baird v. Hubbert, 98 So. 3d 1158, 1163 (Ala. Civ. App. 2012); and Flanagan v. Flanagan, 656 So. 2d 1228 (Ala. Civ. App. 1995). See also N.T. v. P.G., 54 So. 3d 918, 920 (Ala. Civ. App. 2010) ("On a petition to modify visitation, a court does not reexamine the evidence to determine if its original judgment was correct; rather, it

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applicable" to the facts of this case. ___ So. 3d at ___ . Section 30-3-157, Ala. Code 1975, provides that the article of which § 30-3-150 is a part "shall not be construed as grounds for modification of an existing order." I agree with the assertion, relied upon by the judges concurring in the main opinion, in reaching their holding, that § 30-3-150 "is consistent with the common-law principle that a noncustodial parent should generally be afforded 'reasonable rights of visitation.'" ___ So. 3d at ___ (emphasis added). However, this case does not involve an award of visitation in what could be considered a common divorce action. Rather, as is discussed in this writing, this case involves a request to modify an award of supervised visitation that was in place because of the father's criminal actions, and the father was required to demonstrate a material change in circumstances and that the change would promote the children's best interests. Griffin v. Griffin, 159 So. 3d 67, 70 (Ala. Civ. App. 2014); Baird v. Hubbert, 98 So. 3d 1158, 1163 (Ala. Civ. App. 2012); and Flanagan v. Flanagan, 656 So. 2d 1228 (Ala. Civ. App. 1995).

decides whether modification is warranted based on changed circumstances."); compare Watson v. Watson, 634 So. 2d 589 (Ala. Civ. App. 1994) (holding that because the parties were awarded joint custody in the original divorce judgment, the best-interests-of-the-child standard applied to the custody and visitation modifications at issue in that case).

The main opinion, in affirming the trial court's modification judgment, concludes that

> "the circuit court could properly have determined from the evidence that the father's continuing psychiatric treatment, his remorse for his indiscreet behavior with a child significantly older than his own children, the absence of any ongoing risk to the children of sexual contact from the father, the mother's denial of visitation, and the children's inhibited relationship with the father, taken together, amounted to a material change in circumstances so as to warrant the removal of the supervised-visitation requirement and of the mother's exclusive right to dictate the father's visitation ...."

___ So. 3d at ___.

My review of the record, however, indicates that the father was seeing a psychiatrist at the time of the entry of the divorce judgment and that the father testified at the August 2014 hearing that, at the time of the entry of the divorce judgment, he was remorseful for his sexual relationship with the teenaged girl. The father agreed that the divorce judgment contained a provision providing him

visitation at the mother's discretion and requiring that his visitation be supervised by the mother or someone the mother selected. Thus, the father agreed to the conditions that resulted in the alleged "inhibited" relationship with the children. ___ So. 3d at ___. I cannot agree that any of the factors discussed above demonstrate a material change in circumstances between the facts as they existed at the time of the entry of the divorce judgment and at the time of the entry of the modification judgment.[15] The record indicates that the only arguable change in circumstances that occurred was the mother's denial of the father's visitation after he filed his

[15]As Judge Moore notes in his writing, this court has held that, in considering a custody-modification petition, a trial court that did not receive ore tenus evidence before entering its previous judgment may consider evidence pertaining to periods occurring before the entry of that judgment. See C.P. v. W.M., 806 So. 2d 395, 396-97 (Ala. Civ. App. 2001). However, caution should be exercised to ensure that the evidence pertaining to the periods occurring before the entry of that most recent judgment is considered only to establish the facts that existed at the time the parties entered into the agreement upon which the most recent judgment was based; those facts should not be used to reexamine the most recent custody or visitation award, or as a basis for determining that the most recent award should have been different than the award to which the parties agreed. To do otherwise would discourage amicable settlement agreements between the parties and work to the disadvantage of the party who makes other concessions in negotiating the visitation or custody provision. For example, in this case, the mother might have forgone certain rights or claims in order to negotiate the visitation provision that the father sought to modify almost immediately following the entry of the divorce judgment.

modification petition and after she learned that an investigation in Missouri had substantiated accusations that the father had sexually abused a child in that state in 2006. I am not convinced, given the terms of the divorce judgment, that the mother's denial of visitation is outside the discretion afforded the mother by the divorce judgment. The trial court, in incorporating the parties' agreement into the divorce judgment, afforded the mother discretion in determining when and if the father was to visit the children, and the mother, after the entry of the divorce judgment, exercised that discretion, albeit not in a manner with which the father agreed. While this court would generally not affirm a judgment placing visitation at the discretion of the other parent, the father did not appeal the divorce judgment. Therefore, any error in the visitation provision of the divorce judgment "bec[a]me the law of the case, subject to modification only upon a showing of changed circumstances." N.T. v. P.G., 54 So. 3d at 920 (citing McQuinn v. McQuinn, 866 So. 2d 570, 575 (Ala. Civ. App. 2003)) (holding that any error in the original judgment that granted the former custodians visitation with the children became the law of the case after the mother failed to challenge that judgment and that the error could not be remedied in a modification action).

"On a petition to modify visitation, a court does not reexamine the evidence to determine if its original judgment was correct; rather, it decides whether modification is warranted based on changed circumstances." N.T. v. P.G., 54 So. 3d at 920. In this case, the father sought to modify the visitation awarded in the divorce judgment, and, therefore, he had the burden of proof. "The father, as the party seeking to remove the restriction on his visitation with the child[ren], had the burden of demonstrating that there had been a material change in circumstances since the entry of the divorce judgment and that the best interests and welfare of the child[ren] warrant the modification." H.H.J. v. K.T.J., 114 So. 3d 36, 41 (Ala. Civ. App. 2012). Given the particular facts of this case, I disagree with the conclusion in the main opinion that the father met his burden for a modification of visitation, and, therefore, I conclude that the trial court erred in modifying visitation in its August 28, 2015, judgment.

Even assuming, for the sake of argument, that the mother's denial of visitation to the father under the facts of this case could be said to constitute a material change of circumstances warranting a modification of the visitation provision of the parties' divorce judgment, I still dissent.

I conclude that the trial court's award of unsupervised, alternating-weekend visitation to the father was plainly and palpably wrong. The mother opposed the modification of visitation on the basis that she believed that the father was grooming the daughters for future abuse, as she believed he had similarly groomed other children. The evidence in the record provides a clear basis for that concern, and the trial court's judgment provides no method for protecting the parties' young daughters. The primary consideration in establishing visitation for a noncustodial parent is the best interests of the children, and, when appropriate, the trial court must "set conditions on visitation that protect the child[ren]." Ex parte Thompson, 51 So. 3d 265, 272 (Ala. 2010). I do not believe that the trial court's award of unsupervised, alternating-weekend visitation between the father and the children adequately protects the welfare of the children or serves their best interests.

The main opinion contains only a brief recitation of some of the evidence, and this writing does not attempt to include a full statement of the facts. I recognize that the evidence the father presented tended to support a claim in support of visitation. However, this case does not involve an initial award of visitation but rather, a modification of visitation;

therefore, the father has a greater burden of proof. Further, as explained below, I conclude that the trial court's judgment is not supported by substantial evidence and is plainly and palpably wrong.

Although Dr. Marilyn Elizabeth Lachman, the psychiatrist who testified in support of the father, testified that she did not believe that the father posed a greater risk to the children than anyone else, Dr. Lachman also insisted that, at the time he was engaged in the relationship with the 15-year-old girl, the father did not recognize the wrongfulness or criminality of his conduct. The father admitted in his own testimony, however, that he understood the wrongfulness of his actions throughout the relationship with the girl from his youth ministry. Dr. Lachman stated that because, in her opinion, the father had not understood that his abuse of the 15-year-old girl was wrongful, the father had difficulty conforming his conduct to the law, i.e., not engaging in a sexual relationship with a young teenager. Based on those beliefs, Dr. Lachman concluded that the father was unlikely to engage in that "wrongful conduct," because, she said, there was no pattern in his conduct, stating in her report: "In the life of this caring and gentle man, this experience is a one-time peccadillo without any evidence to suggest a past

recurring pattern of behavior or a future recurring pattern of behavior."

My review of the record indicates that there is a pattern by the father of inappropriate conduct toward young girls. The father's conduct and failure to respect boundaries between him and young girls was questioned in Missouri in 2006 with respect to his conduct toward two fifth- or sixth-grade girls who attended an after-school program at which the father worked. The director of the after-school program spoke to the father about complaints by those girls. Although the father denied any inappropriate conduct with those girls, the director of the after-school program spoke with the father about maintaining appropriate boundaries with children. After the father pleaded guilty to second-degree rape in Alabama in 2011, an investigation into his actions in Missouri resulted in a determination by a Missouri state agency that the allegations of sexual abuse by the father toward one of the girls in Missouri was "substantiated." Other evidence in the record makes it clear that maintaining appropriate boundaries with children was also a part of the father's seminary training and his church training.

The evidence concerning the father's interactions with a Haitian orphan who lived with the parties for a period after

the 2006 Missouri incident and shortly before the parties' daughters were born indicates that the father failed to maintain appropriate boundaries with that girl as well. During the 2014 hearing, the father denied inappropriate contact with the Haitian girl, and he stated that the Haitian girl had made advances toward him on several occasions. However, during the 2012 pendente lite hearing in this matter, the father described an incident of "passionate hugging" and "rubbing" with the Haitian girl that he denied was sexual in nature. A friend of the parties testified to having observed the father lounging on the sofa with the Haitian girl while she lived in the parties' home; the father denied that incident. The mother testified that the father had refused the Haitian girl's request that she be allowed to lock her bedroom door during the time she lived in the parties' home. The father pointed out during his testimony that the Haitian orphan was 17 years old. However, a witness's description of the Haitian girl and photographs of her submitted into evidence support the mother's contention that the Haitian girl was small for her age and appeared much younger than 17 years of age.

Thereafter, the father again failed to maintain appropriate boundaries in his youth ministry in Alabama in his

relationship with the 14- to 15-year-old girl. The father testified that the then 14-year-old girl initiated the contact that started their "relationship," which the father consistently referred to as "adulterous," rather than as abusive. The record reveals that the father engaged in sexual touching of the girl in his youth ministry in a church van and again while sharing a blanket with the girl while watching a movie in the church pastor's home.[16] The father arranged a sexual liaison with that girl at approximately the time of her 15th birthday, at a time when he knew the girl's parents were not home. The father also admitted that he arranged a meeting with the girl and engaged in sex with her at the church after the other members of the youth ministry had left a church event.

The mother presented evidence indicating that, during his relationship with the 15-year-old girl, the father sent the girl flowers, t-shirts, underwear, and teddy bears, which were gifts identical to the types of gifts the father sent the mother during their courtship. The mother stated that she has objected to the father's lavish gifts to the daughters during visitation, and that he has repeatedly sent the daughters

[16]As is explained later in this writing, the church pastor confronted the father the following day about his relationship with the 15-year-old in his youth ministry.

flowers; the mother testified that she has refused any further deliveries of flowers for the daughters from the father. The father admitted that, in addition to the other gifts, in January 2015 he gave the girl from his youth ministry a ring engraved with Scripture from the Song of Solomon, which read: "I am my Beloved's, and my Beloved is mine." The father testified that that quote was meant to remind the girl of her relationship to Christ, as she was struggling in her faith at the time. Only after questioning on cross-examination did he admit that the quotation has another, more romantic meaning.

Thus, contrary to the testimony of the father's psychiatrist, I conclude that the evidence before the trial court demonstrates that there has been a pattern in the father's conduct toward young girls. The mother attempted to speak with the psychiatrist on two occasions, but the psychiatrist canceled both of those appointments because of emergencies. Thus, the psychiatrist based her opinion solely on the information the father related to her. In this case, that causes concern not only because the psychiatrist insisted that the father did not appreciate the wrongfulness of his conduct (a fact the father himself disputed), but because of the psychiatrist's opinion that the father felt "so much guilt that he shared [the nature of his relationship with the

girl in his youth ministry] with his pastor, his wife at the time, and then the District Attorney." The father admitted that, on the morning after he sexually touched the girl from his youth ministry while watching a movie at the pastor's home, the pastor confronted him and questioned him about the relationship, and, the father said, he denied the relationship. The record indicates that the father adamantly denied the relationship to the mother and that he confessed to the inappropriate relationship days or a week later. Thus, although it is clear that the father felt guilt over his relationship with the girl from his youth ministry, it is also clear that he confessed only after others became suspicious of the nature of that relationship and confronted the father about it. That behavior seems consistent with his conduct with regard to the Haitian orphan who briefly lived in the parties' home. The testimony of the father's friends from seminary indicates that the father had specific opportunities to seek advice and maintain accountability with other Christian leaders during his experiences with the Haitian girl and the 15-year-old girl in Alabama, yet the father failed to do so.[17] Further, the mother testified that the family's

[17]One of those friends testified that he had been tempted by a girl or woman and had sought the father's counsel and prayer in resisting that situation.

telephone bills indicate that, between the time of the father's confession to her about his inappropriate relationship with the girl and the date of the father's conviction for second-degree rape, the father continued to send and receive numerous texts to and from the 15-year-old girl who was his victim.

The father's evidence relied a great deal on his Christian faith and his assurances that, because of the tenants of his faith, he would not again sexually abuse a child. I appreciate the father's continued efforts to follow in his faith and to seek forgiveness for his actions. However, the fact remains that the father is and was not a youth who exercised bad judgment on one occasion. Rather, the father was 29 years old when, the record demonstrates, he was first reminded by a former employer of the necessity of maintaining appropriate boundaries with children in his care. He was older when the Haitian girl lived in his home and he engaged in inappropriate contact with her. The father was 33 years old when he began the inappropriate relationship with the 14-year-old girl from his youth group. Despite warnings from a former employer and training within the church, the father has either repeatedly failed or has been unable to

maintain appropriate boundaries with girls within his sphere of contact.

I fully understand and agree with the bases for the mother's concern about the safety of the daughters if they are left with the father during unsupervised visitation. Given the evidence of the father's past behavior and his continued lavishing of the daughters with gifts during visitation, the father's excuses that the Haitian orphan and the then-14-year-old girl in his youth ministry initiated the contact, and his insistence on referring to his sexual relationship with the young teenager from his youth ministry that resulted in his rape conviction as "adultery," I believe that the mother's concerns that the father could groom the daughters for future abuse are well-founded. The father has repeatedly demonstrated that he cannot or will not abide by appropriate boundaries with young teenaged girls. I do not believe that the fact that the girl with whom the father had a sexual relationship was, as the main opinion characterizes her, "significantly older than his own children," is an appropriate basis upon which to base, in part, the award of unsupervised visitation with the father. ___ So. 3d at ___. The daughters will continue to age and will soon be the age of the father's victims. As the main opinion points out, one of the experts

who testified stated that "she perceived no difference between a person's sexual attraction to children in general and the arguably separate matter of potential attraction to children with whom a person has a biological relation." ___ So. 3d at ___. Thus, the evidence indicates that the fact that the daughters are related to the father will not guarantee their safety from possible abuse.

The record in this matter contains 1,200 pages of transcript and a number of exhibits. I have considered the evidence, which is briefly set forth by the main opinion and more fully discussed in Judge Moore's writing, that arguably tends to support the trial court's visitation award. I recognize that a visitation award based on ore tenus evidence may be reversed only when it is plainly made in error. See H.H.J. v. K.T.J., 114 So. 3d at 40. In my opinion, the evidence, as discussed in this writing, amply demonstrates that this case is one in which there should be grave concern for the safety and well-being of the young children at issue. See Rasp v. Ballard, 651 So. 2d 39, 42 (Ala. Civ. App. 1994) ("The paramount consideration in awarding visitation is the best interests and welfare of the child."); Sullivan v. Sullivan, 631 So. 2d 1028, 1029 (Ala. Civ. App. 1993) ("Every case pertaining to a noncustodial parent's visitation rights

requires an examination of the facts and circumstances of the individual situation. ... The paramount consideration in visitation cases is the best interests and welfare of the child."). This court, too, is charged with guarding the best interests of the children. My review of the entire record leads me to conclude that, in this case, the trial court was plainly and palpably wrong in concluding that the father had met his burden of demonstrating a material change of circumstances warranting the modification of the original visitation award.

Even assuming that such a modification were warranted, however, I conclude that the trial court's award of a standard schedule of unsupervised visitation between the father and the daughters is plainly and palpably wrong. I believe that, under the facts of this case, such an award fails to protect the best interests and safety of the daughters, which must be the court's paramount concern in matters pertaining to visitation. Sullivan v. Sullivan, 631 So. 2d at 1029. "[A] trial court establishing visitation privileges for a noncustodial parent must consider the best interests of the child, and, when appropriate, it must set conditions on visitation that protect the child." Casey v. Casey, 85 So. 3d

435, 440 (Ala. Civ. App. 2011) (citing Ex parte Thompson, 51 So. 3d at 272).

The modification judgment at issue provides no method by which the parties' young children could be protected and no method by which the father can continue to attempt to safely establish his relationship with the daughters and prove his reliability and safety with them. Accordingly, I dissent.

Thomas, J., concurs.