

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2020-CA-00490-COA**

**DENA MYERS**

**APPELLANT**

**v.**

**CHRISTOPHER MYERS**

**APPELLEE**

DATE OF JUDGMENT: 05/01/2020  
TRIAL JUDGE: HON. SUSAN RHEA SHELDON  
COURT FROM WHICH APPEALED: LAMAR COUNTY CHANCERY COURT  
ATTORNEY FOR APPELLANT: ABBY GALE ROBINSON  
ATTORNEY FOR APPELLEE: MICHAEL ADELMAN  
NATURE OF THE CASE: CIVIL - CUSTODY  
DISPOSITION: AFFIRMED - 07/20/2021  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE WILSON, P.J., GREENLEE AND WESTBROOKS, JJ.**

**GREENLEE, J., FOR THE COURT:**

¶1. Dena Myers (“Dena”) appeals the Lamar County Chancery Court’s judgment ordering her ex-husband, Christopher Myers (“Chris”), to attend counseling sessions with their son (“NM”) and reinstating visitation with their twin daughters (“ALM” and “AUM”).<sup>1</sup> Finding no reversible error, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2. Chris and Dena were granted a divorce in February 2016. Dena was awarded physical custody of their son, NM, and twin daughters, ALM and AUM, and Chris was granted

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<sup>1</sup> We use initials to protect the identities of the minor children. NM was born in 2006, and ALM and AUM were born in 2012.

visitation. The parties shared legal custody.

¶3. Prior to Chris and Dena's divorce, NM began seeing Josh Hamm, a licensed professional counselor with Connections Hattiesburg Clinic. During a counseling session, NM told Hamm that Chris had shaken and slapped him when he had become frightened of wasps while hunting. In November 2015, Hamm filed a report with the Mississippi Department of Child Protection Services (CPS), alleging that Chris had emotionally abused/neglected and physically abused NM. Chris admitted to shaking NM but explained that he was trying to prevent NM from jumping out of a deer stand, presumably to get away from the wasps. Ultimately, CPS determined that the abuse allegations were unsubstantiated.

¶4. After Chris and Dena's divorce, in August 2016, Dena and NM reported to law enforcement that Chris had bruised NM while disciplining him. This resulted in another CPS report being filed against Chris alleging that he had physically abused NM. These allegations were unsubstantiated as well.

¶5. That same month, Chris filed a CPS report against Dena alleging physical neglect of the children, emotional abuse/neglect of the children, and exploitation of NM. Chris asserted, among other things, that Dena had violated the child-custody agreement and that Dena was hindering his relationship with NM. Ultimately, the allegations were unsubstantiated.

¶6. In September 2016, Dena filed a "Petition for Emergency Modification of Visitation." Attached to the petition was a letter from Hamm (NM's counselor). The letter referenced the alleged abuse that Hamm had previously reported to CPS. Hamm stated that NM was

“extremely fearful” of Chris, and “due to the safety concerns for [NM], [he] believe[d] it would be in [NM’s] best interest to cease all physical contact with [Chris] until he [could] seek help.” As a result, the court temporarily suspended visitation between Chris and NM.

¶7. Around that time, Chris filed a CPS report alleging that Dena had physically neglected and emotionally abused/neglected NM. According to Chris, Dena had misplaced a gun in her house, and he was concerned that NM would find the gun. Ultimately, the allegations were unsubstantiated.

¶8. In October 2016, the court temporarily ordered Chris’s visitation to be supervised and appointed a guardian ad litem (GAL).

¶9. Several months later in May 2017, Dena reported to law enforcement that she suspected that Chris had sexually abused ALM. Dena stated that she had noticed ALM positioning Barbie dolls on top of each other and rubbing stuffed animals between her legs. Additionally, Dena reported that ALM said that she did not want to visit Chris anymore and suggested that he had hurt her vagina.

¶10. As a result, the children were referred to Kids Hub Child Advocacy Center for forensic interviews. During eleven-year-old NM’s interview, he stated that Chris had slapped him, punched him, and grabbed him by the throat and shoved him into a wall, and that Chris “did something to his sister too.” According to NM, Chris had taken ALM into a room and locked the door. NM stated that he knew that the door was locked because he tried to open it. According to NM, when ALM came out of the room, she was crying, holding her vagina, and saying Chris had hurt her. NM stated that this happened at least five

times. NM told the interviewer that Chris was probably molesting ALM and that his mother thought something was going on. NM further stated that he thought that Chris was “messaging with” or “playing around with [ALM’s vagina].”

¶11. With respect to four-year-old ALM, the interviewer noted that her cognitive abilities seemed slightly below her age, and she was unable to understand many questions including questions about touches. ALM was asked “if anyone ha[d] ever touched her in a way [that was] not okay,” and she mentioned Dena. Then she said that Chris had touched her with his hand and pointed to every part of the body on the diagram. When asked what Chris did with his hand, ALM responded, “I don’t know.” When asked if anyone had touched her in a place she did not like or that they were not supposed to touch, ALM responded, “No.” The interviewer then asked ALM how it felt when Chris touched her vagina, and ALM said it felt warm. Ultimately, Kids Hub found that the results of ALM’s statement were inconclusive and that ALM did not disclose any abuse. In addition to reporting the alleged incident to the police, Dena also filed a CPS report regarding the sexual-abuse allegations. The allegations were ultimately unsubstantiated.

¶12. Around that time, Chris filed a “Petition for Modification of Final Judgment of Divorce and Dissolution of Order on Petition for Emergency Modification of Visitation,” suggesting that Dena was mentally unfit to parent. Chris asserted that this constituted a material change in circumstances adverse to the children’s best interests, and he requested physical custody of the children. Alternatively, Chris requested joint physical custody. Finally, Chris requested that the court change visitation from supervised to unsupervised.

¶13. In July 2017, a CPS report was filed against Chris and his father, Dale Myers, alleging that they had sexually abused ALM. The CPS report indicated that ALM began seeing Matthew and Ramona Wicht with The Cornerstone Group and that ALM had allegedly disclosed that Chris had touched her vagina and that Dale had touched her too. Ultimately, the allegations were unsubstantiated.

¶14. Several months later, in September 2017, the court entered another temporary order allowing Chris to have supervised visitation.

¶15. Less than two months after the court's order, Dena asserted in a responsive pleading that the abuse allegations against Chris constituted a material change in circumstances and requested physical and legal custody of the children. She further requested that Chris's visitation be restricted to supervised visitation only. A few months later, Dena filed a "Motion for Emergency Temporary Relief," alleging that NM had attempted to cause himself bodily harm in order to refrain from having to go to visitation. Attached to Dena's motion was another letter from Hamm, NM's counselor. The letter stated that NM was experiencing "extreme distress" and that it would be in NM's best interest to cease all physical contact with Chris at that time. In response, Chris asserted that Dena was in contempt for denying him visitation and intentionally alienating him from the children. The court temporarily suspended Chris's visitation but allowed him to communicate with the children through telephone and FaceTime.

¶16. In June 2018, Dr. Beverly Smallwood, a licensed psychologist with The Hope Center, conducted court-ordered psychological evaluations of Chris and Dena. Dr. Smallwood noted

that Chris was somewhat defensive. She also noted that he had experienced significant distress over ongoing conflicts with Dena and the family situation. However, Dr. Smallwood concluded that Chris did not display any evidence of significant psychological difficulties.<sup>2</sup> During Dena's evaluation, Dena admitted that she did not want the children to have anything to do with Chris. She also admitted that she struggled with anxiety and experienced stress over matters that she could not control. She stated that she feared losing control or going crazy, and she admitted that she had "always been a little paranoid" and "prefer[red] the kids to be at home with [her]." Dr. Smallwood noted that Dena appeared to be "a bit obsessive in personality" and had some depression and anxiety that was exacerbated by the family situation but did not appear to affect her direct ability to parent. However, Dr. Smallwood noted that Dena experienced a great deal of underlying anger and resentment and that her "struggles may affect her perceptions and actions in this difficult family situation." Afterwards, the court entered another temporary order allowing Chris to have supervised visitation with ALM and AUM but suspended his visitation with NM. Additionally, the court appointed Amanda Heitmuller as the family counselor.

¶17. In August 2018, after the court's order allowing supervised visitation with ALM and AUM, another CPS report was filed alleging that Chris had sexually abused ALM. The report stated that ALM had complained about her butt hurting and that Dena stated that Chris had previously sexually abused ALM. However, ALM gave various reasons for her pain, such as she hurt herself on the slide, on the stairs, on the seesaw, and at the beach, and that

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<sup>2</sup> At trial, Chris testified that he experienced post-traumatic stress disorder but had not experienced any symptoms since 2013.

a catfish stung her. Chris denied the allegations and stated that Dena was making his life “a living hell.” The CPS caseworker noted that there were no signs of sexual abuse and that ALM did not admit to any sexual abuse. Ultimately, the allegations were unsubstantiated.

¶18. A few months later, in November 2018, Dena took ALM to Merit Health alleging that Chris had sexually abused ALM again. The CPS report noted that ALM was hesitant when she was asked if someone had touched her inappropriately, but she responded, “No.” The CPS report did not indicate whether the reporter was Dena, but ALM allegedly informed the reporter after the doctor left the exam room that Chris touched her “in the front of her private area” while she was clothed. ALM allegedly demonstrated this by rubbing her hands back and forth three times; however, she mentioned that she and Chris were wrestling. Ultimately, ALM was prescribed medication for a possible yeast infection. When interviewed by a CPS caseworker, Chris denied the allegations. The CPS caseworker also interviewed NM and ALM. NM told the caseworker that he had seen Chris touch ALM’s “private area” while “peeping inside the room door.” ALM pointed to the vagina on a diagram when asked to point where someone had touched her. When asked if Chris had touched her vagina, ALM indicated that he had touched her once. The allegations were ultimately unsubstantiated.

¶19. Alyssa Chandlee, a special victims investigator with the Forrest County Sheriff’s Office, investigated and created an investigation report. In her report, Investigator Chandlee noted that she had watched a video recording of the Kids Hub interviews and described the inconsistencies between NM’s Kids Hub interview and his interview with her. For example, NM stated during the Kids Hub interview that he assumed Chris was touching ALM

inappropriately because Chris had taken ALM into the bedroom and closed the door. However, after the Kids Hub interview, NM apparently told Dena that he disclosed that he saw Chris touch ALM between the legs through a cracked door. When Dena spoke with law enforcement, she was told that NM did not make any such disclosure. Dena then confronted NM, and he admitted to lying. However, Investigator Chandlee noted that when she interviewed NM, he “was adamant that he disclosed witnessing the abuse against his sister [during the] Kids Hub interview.” According to Investigator Chandlee, “[t]he fact that he lied about something he’d previously been caught lying about discredit[ed] him.”

¶20. Investigator Chandlee also suggested that Dena had been untruthful. According to Investigator Chandlee, Dena told her that ALM had disclosed “what her father ha[d] done to her” to a teacher, medical professionals, therapists, and CPS workers. However, Investigator Chandlee noted that was not the information that she obtained from those sources. Additionally, Dena told Investigator Chandlee that Kids Hub required her to drop off the children for their forensic interviews. Investigator Chandlee knew that this was inconsistent with Kids Hub’s usual procedures, so she contacted Kids Hub. Kids Hub told her that they had never asked a parent to drop off their children. When Investigator Chandlee inquired further from Dena, Dena denied that Kids Hub made her drop off the children. But then Dena provided a written statement, which stated that she did in fact drop them off. Investigator Chandlee noted that ALM and AUM had been to doctors numerous times for vaginal issues, but Dena never attributed AUM’s issues to sexual abuse even though AUM had been to the doctor more times than ALM. Finally, Investigator Chandlee noted that

when Dena learned that the GAL and the family counselor thought it would be appropriate to expand visitation, Dena took ALM to the doctor and claimed that she had been molested. Investigator Chandlee wrote in her report, “This seems a brazen attempt at putting a stop to the visitations.”

¶21. With respect to ALM, Investigator Chandlee noted that ALM did not say anything during the Kids Hub interview to indicate that she had been sexually abused by Chris. She also noted that during ALM’s interview with her, ALM stated that Chris touched her vagina while she and AUM were wrestling with him but that it was an accident.

¶22. Investigator Chandlee concluded her report by stating, “It is believed by several professionals involved that Dena is coaching [NM] and [ALM] . . . .” She also noted that “the majority of professionals involved in this and previous cases are concerned about Dena’s mental health and are concerned about the children[’s] well-being in her care.” Investigator Chandlee stated that there was not any information to establish that ALM had been sexually abused.<sup>3</sup>

¶23. Around this time, Dena filed a “Motion for Emergency Ex Parte Temporary Relief.” Dena mentioned the recent sexual-abuse allegations and requested that the court suspend Chris’s visitation. Then Chris filed a “Petition for Citation for Contempt and for Modification of Temporary Order.” Chris asserted that the allegations against him were false and that Dena was alienating him from the children. He requested, among other things,

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<sup>3</sup> Chris was interviewed by another investigator about the allegations. The investigator noted that “[n]othing disclosed in the interview was evidentiary that [Chris] was guilty of sexually assaulting [ALM].”

unsupervised visitation with the children.

¶24. Then the GAL emailed the chancellor and stated that she had spoken with Heitmuller, the family counselor, and detailed their conversation. ALM apparently told Heitmuller that she and AUM were wrestling with Chris on the bed and that he accidentally bumped her vagina with his hand. ALM stated that she missed Chris, but Dena would not let her talk to him. In contrast, NM apparently told Heitmuller that Dena told him what Chris had done to ALM, and he did not want a relationship with Chris. The GAL also emailed the chancellor regarding Investigator Chandlee's findings. Subsequently, the court entered an order temporarily granting Chris supervised visitation.

¶25. In February 2019, Dena filed a motion to amend and an amended response. In her motion to amend, Dena mentioned the sexual-abuse allegations against Chris and seemingly requested that the court suspend visitation in the event that Chris was indicted. Similarly, in her amended response, Dena asked the court to deny Chris's petition. In the alternative, Dena asked the court to revoke Chris's parental rights if he was indicted for the sexual-abuse allegations.

¶26. Subsequently, Chris filed a "Motion for Modification, For Citation for Contempt, and For Other Relief." Chris asserted that Dena was in contempt because she had, among other things, prohibited NM from attending counseling sessions with him. Chris also requested unsupervised visitation.

¶27. In September 2019, the sexual-abuse allegations stemming from the wrestling incident were presented to a grand jury, and the grand jury returned a no bill.

¶28. Two months later, in November 2019, Dena filed a “Necessary (Second) Motion for Leave to File [an] Amended Response . . . .” In her motion for leave, Dena requested that the court “grant her exclusive custody of [NM] by terminating [Chris’s] parental rights” and “consider [ALM and AUM’s] safety . . . [and] remov[e] the twins [ALM and AUM] from the custody of Chris Myers.” Alternatively, Dena requested that the court “remove [ALM and AUM] until they are of a majority age of at least 13, so that they can depict any wrongful touching . . . to the authorities.” The court granted Dena’s motion for leave to amend her response.

¶29. In January 2020, a trial was conducted. At trial, Chris acknowledged that his relationship with NM had been “fractured” from the beginning but denied intentionally hurting him. Chris testified that counseling sessions with NM had been productive, and he thought his relationship with NM could be repaired with more counseling. Chris testified that his relationship with ALM and AUM was great and denied sexually abusing any of his children.

¶30. Chris’s mother, Ethel Myers, testified that she supervised Chris’s visitation with the children. Ethel testified that the relationship between Chris and NM had been strained, but she believed that it was repairable. Ethel testified that she never saw anything inappropriate or felt that ALM or AUM were in danger. And according to Ethel, she would have known if something had happened.

¶31. Lieutenant Latashia Myers (no relation to the parties) with the Hattiesburg Police Department testified that she investigated the sexual-abuse allegations in May 2017.

According to Lieutenant Myers, she watched ALM's Kids Hub interview via closed circuit, and there was no disclosure of sexual abuse. However, Lieutenant Myers testified that Dena called her a couple of weeks later to tell her that ALM had made a disclosure to Ramona Wicht with The Cornerstone Group. When Lieutenant Myers contacted Ramona, Ramona told her that she used her husband's cell phone to record the disclosure but did not have the recording anymore. When Lieutenant Myers asked why the recording was on her husband's cell phone, Ramona explained that she was not licensed in Mississippi but her husband was licensed. Then Ramona stated that she could provide a report. According to Lieutenant Myers, Ramona never provided a report even though she requested it more than once. Lieutenant Myers testified that she believed that she would not have to force a therapist to give her information if there had in fact been a serious allegation. Lieutenant Myers testified that despite the lack of evidence she still sent the case to the district attorney's office, and to her knowledge, there had been no further action.

¶32. Investigator Chandlee testified that she investigated the sexual-abuse allegations in November 2018. During her interview with ALM, ALM stated that she and her father were wrestling and did not indicate that the incident was sexual in nature. Then Investigator Chandlee testified about the discrepancies in NM's interviews. According to Investigator Chandlee, everyone was concerned about NM's story constantly changing. Investigator Chandlee testified that she was not sure if Dena had specifically coached NM, but she did not believe that NM actually witnessed what he claimed to have witnessed. Investigator Chandlee testified that NM said things like "[ALM is] not going to remember anything,"

“[M]om and I think [Chris is] doing this,” or “[Chris is] probably doing this.” Finally, Investigator Chandlee noted that ALM and AUM had been to the doctor for vaginal issues eleven and twelve times, respectively. And she suggested that a multi-disciplinary team had discussed the possibility that Dena suffered from Munchausen syndrome by proxy.

¶33. Heitmuller testified that she began counseling sessions with Chris, NM, and ALM in 2018. Heitmuller testified that NM was “very rigid” at the beginning of the initial session with Chris, but towards the end of the session he said that he would unblock Chris from his phone and consider going to the shooting range with him. In another session, NM said that maybe he had been mistaken about what he saw between Chris and ALM. Finally, in another session, NM said he did not want a relationship with Chris, but by the end of the session he was tearful and open to a relationship. NM privately told Heitmuller that he felt conflicted and confused about his relationship with Chris. Ultimately, Heitmuller testified that she believed Chris and NM’s relationship could be repaired.

¶34. With respect to ALM, Heitmuller testified that she observed “a very healthy interaction” between ALM and Chris. Heitmuller asked ALM if she had ever received a bad touch from a family member, and she said no. After the sexual-abuse allegations (presumably in November 2018), Heitmuller met with ALM again. According to Heitmuller, ALM explained that she, AUM, and Chris were wrestling and that he accidentally brushed over her vagina. Heitmuller testified that ALM reenacted what happened. According to Heitmuller, ALM did not express anything negative about the event, and nothing led her to believe that it was anything but an accident. Heitmuller testified that she never felt that ALM

was in any form of danger with Chris and had no objections to unsupervised visitation.

¶35. Amber Burge testified on Dena’s behalf. Burge and Dena went to school together and had known each other for more than ten years. According to Burge, she witnessed Chris slap NM once, and she testified that she believed that Chris mentally and physically abused NM. However, Burge admitted that she had not seen Chris since he and Dena divorced. According to Burge, NM stated that he did not want anything to do with Chris and told her that he had seen things. Burge explained that NM had been withdrawn and had “progressively . . . worse[ned]” in the last three to four years. But Burge admitted that NM was primarily in Dena’s care for the last three years.

¶36. Kelly Ann Davis, Dena’s friend, testified that Dena was a great mother. According to Davis, a mother knows if her child is telling the truth, and she suggested that she would have pursued the matter in court if her daughter had told her that she had been sexually abused.

¶37. Finally, Dena testified that Chris and NM never had a relationship. According to Dena, NM hated Chris because of what Chris had allegedly done to him and ALM. Dena explained that NM witnessed two separate incidents involving Chris and ALM—once when the bedroom door was locked and once when he saw Chris touching ALM’s vagina through a cracked bedroom door. Dena testified that she had not coached NM or tried to turn him against Chris.

¶38. Dena expressed displeasure with the sheriff’s office, Kids Hub, Lieutenant Myers, Investigator Chandlee, and Heitmuller. She testified that she feared going crazy because

nobody would help her child, and everyone had taken Chris's side. Dena testified that she wanted Chris's parental rights to be terminated with respect to NM because Chris had hurt him and showed no remorse. Then she indicated that she did not want Chris to be involved in any of the children's lives.

¶39. After a *Jethrow*<sup>4</sup> hearing, NM testified without his parents in the courtroom. According to NM, he was a little afraid of Chris and worried about his sisters visiting him. When asked about the counseling sessions, NM recalled that he was nervous but said that the counselor helped calm him down. NM thought the sessions accomplished things little by little, and he indicated that he would feel comfortable continuing the sessions but perhaps with a different counselor.

¶40. After the GAL provided her recommendation, the chancellor rendered a final judgment. The chancellor held that there had not been a material change in circumstances adverse to NM's best interest. The chancellor found that Chris and NM did not have a close relationship prior to the divorce, which had not changed significantly. Additionally, the chancellor noted that Dena had requested that the court terminate visitation between Chris and NM. However, the chancellor indicated that Chris and NM's relationship could possibly be reestablished by a "reintegration process." The chancellor ordered Chris to complete a minimum of twelve counseling sessions with NM, and then Chris could petition the court to reconsider visitation.

¶41. With respect to ALM and AUM, the chancellor noted that Chris requested a

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<sup>4</sup> *Jethrow v. Jethrow*, 571 So. 2d 270 (Miss. 1990).

modification of custody. However, no material change in circumstances had occurred that was adverse to their best interests. Specifically, Chris failed to prove that Dena was mentally unfit to parent. Additionally, the chancellor held that Dena failed to prove that Chris was a danger to the twins and that his visitation should be restricted. The chancellor noted that Dena had been insistent that Chris hurt ALM despite the lack of medical evidence, unsubstantiated CPS investigations, and lack of prosecution. The chancellor noted that the temporary orders were entered out of an abundance of caution, but held that no credible evidence justified the continued restriction of visitation.

¶42. On appeal, Dena claims the court erred by (1) granting Chris visitation with ALM and AUM and ordering counseling with NM, (2) failing to consider a hospital report, (3) allowing “misplaced and wrongly marked” exhibits into evidence, (4) excluding Josh Hamm’s letter from evidence, and (5) excluding a recording of ALM from evidence.

### **STANDARD OF REVIEW**

¶43. The standard of review in child-custody cases is limited. *Moreland v. Spears*, 187 So. 3d 661, 663 (¶4) (Miss. Ct. App. 2016). “A chancellor must be manifestly wrong [or] clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse.” *Id.* (quoting *A.M.L. v. J.W.L.*, 98 So. 3d 1001, 1012 (¶23) (Miss. 2012)). A chancellor’s findings of fact “may not be set aside or disturbed upon appeal if they are supported by substantial, credible evidence.” *Id.*

### **DISCUSSION**

#### **I. Whether the court erred by granting Chris visitation with ALM and AUM and ordering counseling with NM.**

¶44. After the trial, the chancellor held that there was no credible evidence to justify the continued restriction of Chris’s visitation with ALM and AUM. However, the court ordered Chris to complete a minimum of twelve counseling sessions with NM before he could petition the court to revisit the visitation issue. On appeal, Dena seemingly claims the court abused its discretion in granting Chris visitation with ALM and AUM and ordering counseling with NM.

¶45. “To modify a visitation order, ‘it must be shown that the prior decree for reasonable visitation is not working and that a modification is in the best interest of the child.’” *Id.* at 666 (¶17) (quoting *H.L.S. v. R.S.R.*, 949 So. 2d 794, 798 (¶9) (Miss. Ct. App. 2006)).

¶46. The chancellor’s decision to allow visitation between Chris and ALM and AUM was supported by substantial, credible evidence. At trial, Lieutenant Myers testified that she investigated the sexual-abuse allegations in May 2017. According to Lieutenant Myers, there was no disclosure of sexual abuse during ALM’s Kids Hub interview. Although Dena told her that ALM had made a disclosure to Ramona Wicht, Ramona never provided documentation of the disclosure. Lieutenant Myers testified that despite the lack of evidence she still sent the case to the district attorney’s office, and to her knowledge there had been no further action.

¶47. Investigator Chandlee testified that she began investigating the sexual-abuse allegations in November 2018. During her interview with ALM, ALM stated that she and Chris were wrestling and did not indicate that the incident was sexual in nature. Investigator Chandlee testified that she was not sure if Dena had specifically coached NM, but she did

not believe that NM actually witnessed what he claimed to have witnessed. Finally, Investigator Chandlee suggested that a multi-disciplinary team had discussed the possibility that Dena suffered from Munchausen syndrome by proxy.<sup>5</sup>

¶48. Heitmuller, the family counselor, testified that she observed “a very healthy interaction” between Chris and ALM. Heitmuller testified that she asked ALM if she had ever received a bad touch from a family member, and she said no. After the sexual-abuse allegations (presumably in November 2018), Heitmuller met with ALM again. According to Heitmuller, ALM explained that she, AUM, and Chris were wrestling and that he accidentally brushed over her vagina. According to Heitmuller, ALM did not express anything negative about the event, and nothing led her to believe that it was anything but an accident. Furthermore, Heitmuller testified that NM said during a counseling session that maybe he had been mistaken about what he saw between Chris and ALM. Heitmuller testified that she never felt that ALM was in any form of danger with Chris and had no objections to unsupervised visitation.

¶49. Finally, Chris testified that his relationship with ALM and AUM was great and denied sexually abusing any of his children.

¶50. Likewise, the chancellor’s decision to order counseling between Chris and NM was supported by substantial, credible evidence. At trial, Chris acknowledged that his

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<sup>5</sup> Munchausen syndrome by proxy is “a form of child maltreatment or abuse inflicted by a caretaker (usually the mother) with fabrications of symptoms and/or induction of signs of disease, leading to unnecessary investigations and interventions, with occasional serious health consequences, including death of the child.” Stedman’s Medical Dictionary 1761 (27th ed. 2000).

relationship with NM had been fractured from the beginning. However, Chris testified that counseling sessions with NM had been productive, and he thought his relationship with NM could be repaired with more counseling. Similarly, NM testified that he believed the counseling sessions accomplished things little by little. And he indicated that he would feel comfortable continuing the sessions but perhaps with a different counselor. Finally, Heitmuller testified about her observations of Chris and NM during their counseling sessions. Ultimately, Heitmuller testified that she believed Chris and NM's relationship could be repaired.

¶51. A review of the record shows that the chancellor's findings of fact were supported by substantial, credible evidence, and the chancellor did not abuse her discretion by granting Chris visitation with ALM and AUM or ordering counseling sessions with NM.<sup>6</sup> This issue is without merit.

## **II. Whether the court failed to consider a hospital report.**

¶52. Dena claims the court erred by failing to consider a hospital report from Wesley Health. It seems as though the medical report that Dena is referencing is Exhibit 51. However, this exhibit was admitted into evidence without objection. After the exhibit was admitted into evidence, Dena's attorney questioned several witnesses about the document. Furthermore, the chancellor stated that she would review all of the exhibits, and as discussed, a review of the record shows that the chancellor's findings were supported by substantial,

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<sup>6</sup> Allegations as to what Chris may or may not have done since the court's order will not be considered as they are outside the record. *Ivy v. State*, 103 So. 3d 766, 770 (¶13) (Miss. Ct. App. 2012).

credible evidence. Dena has not shown that the court failed to consider the hospital report. Therefore, this issue is without merit.

**III. Whether the court erred by allowing “misplaced and wrongly marked” exhibits into evidence.**

¶53. Dena claims the court erred by allowing “misplaced and wrongly marked exhibits” into evidence. Although it is not exactly clear from her Appellant’s Brief, Dena seemingly takes issue with Exhibits 6, 17G, 24, 39, and 41 through 46.

¶54. Exhibit 6 was a timeline drafted by Investigator Chandlee that was submitted by Chris at trial. Exhibit 39 was a duplicate of Exhibit 6 that was submitted by Dena. Both exhibits were admitted into evidence by stipulation. Additionally, Exhibit 52 was a color copy of the timeline, and it was also admitted into evidence. Dena has not shown this Court how these exhibits were “misplaced [or] wrongly marked.”

¶55. During Chris’s direct examination, his attorney—Michael Adelman—noted that Exhibits 17A through 17H contained CPS’s findings. Then the following colloquy occurred with respect to Exhibit 17G:

COURT: Hold on. 17G was not listed on the exhibit list.

ADELMAN: It wasn’t?

COURT: It was not.

ADELMAN: It’s marked. I got it right here.

COURT: Well, let’s take a moment.

ROBINSON: Your Honor, we’re going to object. If it wasn’t on the list, we haven’t seen it.

COURT: . . . [I]t goes from 17F to 17H. 17G is not listed.

ADELMAN: It was marked as an exhibit.

CLERK: I probably just looked over it.

COURT: Okay. Well, let's go off the record.

(Off the record.)

COURT: Ms. Robinson has taken an opportunity to look at 17G. It is a CPS report dated 8-28-18. It appears that on our exhibit list that that was incorrectly marked as 17H. So, in fact, it should be 17G.

And there is no objection from Ms. Robinson to 17G being admitted. We also need to add to our exhibit list the appropriate date for 17H. That's also a CPS report, and what was the date?

(Exhibit 17G was marked and admitted into evidence.)

ADELMAN: 11-19-2018.

COURT: And is there any objection to that one? You had previously not listed an objection but since these two exhibits got mixed up, let's make sure.

ROBINSON: Which one is that?

COURT: 17H.

ROBINSON: I've seen G.

ADELMAN: That's H.

ROBINSON: No problem, Your Honor. No objection.

COURT: Wonderful. So just so the record is clear, 17G, CPS report dated 8-28-18 and 17H, CPS report dated 11-19-18 are all admitted by stipulation. Okay. Go ahead.

Although Exhibit 17G was not initially listed on the exhibit list, the court corrected the exhibit list. Additionally, the court clarified that Exhibit 17G was a CPS report from August 2018, and Exhibit 17H was a CPS report from November 2018. Both exhibits were admitted into evidence.

¶56. Exhibit 24 appears to be a page from NM’s medical records. The document, dated May 25, 2017, states in relevant part:

[NM] previously provided a history that was clear and detailed about previous maltreatment involving his father, [Chris]. His physical exam today was normal, which neither confirms nor denies previous maltreatment. It is important to remember that many forms of maltreatment do not leave physical evidence. In the rare cases where there is injury, the body is often able to heal injuries without scar. In comparing the physical findings to available history, no inconsistencies were noted.

Exhibit 24 was admitted into evidence by stipulation. Again, Dena has not shown this Court how this exhibit was “misplaced [or] wrongly marked.”

¶57. Exhibits 41 through 46 were admitted into evidence with the exception of Exhibit 44, which we will discuss in Issue V. Exhibits 41 through 43 were Kids Hub summaries, and Exhibits 45 and 46 were reports from the Forrest County Sheriff’s Office. These exhibits were admitted into evidence by stipulation. Dena has once again failed to show this Court how these exhibits were “misplaced [or] wrongly marked.”

¶58. In her Appellant’s Brief, Dena asserts that the chancellor may not have “reasonably adjudicated [her] opinion.” We find nothing to suggest that the chancellor was confused or did not consider certain exhibits. In fact, the chancellor stated that she would review all of the exhibits, and as discussed, a review of the record shows that the chancellor’s findings

were supported by substantial, credible evidence. For these reasons, this issue is without merit.

**IV. Whether the court erred by excluding Hamm’s letter from evidence.**

¶59. Dena claims the court erred by excluding a letter from NM’s counselor, Josh Hamm, from evidence. This Court has held that the exclusion of evidence is reviewed for an abuse of discretion. *Robinson v. State*, 248 So. 3d 892, 896 (¶15) (Miss. Ct. App. 2018).

¶60. Although the court excluded two letters, Dena seemingly takes issue with the exclusion of Exhibit 47B. In Exhibit 47B—a letter dated August 31, 2016—Hamm stated that NM had brought to his attention a recent event where Chris became verbally and physically abusive to him. NM stated that Chris had slapped him and pushed him, which was reported to the authorities. Hamm stated, “This type of event has unfortunately happened before and was . . . reported . . . .” According to Hamm, NM was extremely fearful of Chris, and Hamm stated that he thought it would be in NM’s best interest to cease all physical contact with Chris until he could seek help.

¶61. At a pretrial hearing, Chris objected to the admission of the letter arguing that it constituted inadmissible hearsay. However, the court reserved its ruling. At trial, when Dena attempted to admit the letter into evidence during her direct examination, Chris objected on the basis of hearsay again. Ultimately, the court sustained the objection and excluded the letter from evidence.

¶62. Hearsay is a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted. M.R.E.

801(c); *see also Parker v. State*, 273 So. 3d 695, 701 (¶21) (Miss. 2019). Dena wanted to offer Exhibit 47B—a letter from NM’s counselor, made out of court, to prove the truth of what the counselor had asserted—namely, that Chris had abused NM.<sup>7</sup> Dena admitted that she was not present during the counseling session and that she received the letter after the counseling session. Further, Dena did not call Hamm as a witness at trial. Therefore, the chancellor did not abuse her discretion by excluding the letter from evidence. This issue is without merit.

**V. Whether the court erred by excluding a recording of ALM from evidence.**

¶63. Finally, Dena claims the court erred by excluding Exhibit 44 from evidence. In late 2019, Dena used her phone to record ALM saying that she did not want to return to Chris’s house because he had hurt her. At trial, Chris objected to the admission of Exhibit 44 on the basis of hearsay. The court sustained the objection and excluded the evidence.

¶64. As stated, the exclusion of evidence is reviewed for an abuse of discretion. *Robinson*, 248 So. 3d at 896 (¶15). Hearsay is a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted. M.R.E. 801(c). Hearsay is not admissible unless it meets an exception. M.R.E. 802.

¶65. Dena argued that the recording met the following exceptions to hearsay: present sense

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<sup>7</sup> The Appellant’s Brief states in relevant part: “Appellant contend[s] that due to the [c]ourt not allowing the Josh Hamm letter . . . into evidence and ignoring the fact that [Chris] slapped, pushed, and shook N.M.[,] the court has erred in it’s [sic] conclusion that the children are safe with . . . [Chris].”

impression, excited utterance, and recorded recollection. A present sense impression is “[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” M.R.E. 803(1). An excited utterance is “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” M.R.E. 803(2). On the recording, ALM stated that the alleged incident occurred “when [she] was five.” ALM was born in October 2012, and Dena testified that the recording was created around November or December 2019. ALM’s statement clearly was not made while or immediately after she perceived the event. Furthermore, her statement was not made while under the stress of excitement caused by the event.

¶66. Additionally, under Mississippi Rule of Evidence 803(5), a recorded recollection is a record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and

(C) accurately reflects the witness’s knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

M.R.E. 803(5). We agree with the court’s ruling that the recording did not meet the recorded-recollection exception because it was not offered by an adverse party.

¶67. Because Exhibit 44 constituted inadmissible hearsay, the chancellor did not abuse her discretion by excluding it from evidence. This issue is without merit.

## CONCLUSION

¶68. Finding no reversible error, the chancellor's judgment is affirmed.

¶69. **AFFIRMED.**

**BARNES, C.J., CARLTON AND WILSON, P.JJ., WESTBROOKS,  
McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.**