THE SUPREME COURT OF MISSOURI

M. A.

Appellant

vs.

M. S.

Respondent

No. SC 86006

Appeal from the St. Louis County Circuit Court
The Honorable Joseph A. Goeke III, Judge
Transferred by the Missouri Court of Appeals, Eastern District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

Statutes

STATEMENT OF JURISDICTION

The Missouri Court of Appeals, Eastern District, transferred this case pursuant to Mo.R.Civ.P. 83.02. This is an appeal from the final judgment in an action to modify the custody provisions of a decree of dissolution. The St. Louis County Circuit Court entered the original decree during 1995. M. S. filed a motion requesting that the requirement of supervision when he visited with his children be eliminated and that he be awarded joint legal custody of the children. M. A., who is M. S.'s former wife, filed motions seeking the dismissal of M. S.'s request for unsupervised visitation and the termination of all visitation pursuant to § 452.400.1, Mo.Rev.Stat. The Circuit Court entered judgment on October 5, 2002, granting M. S.'s request for the elimination of supervised visitation with one child but continuing supervision with respect to the other child. The court also granted M. S.'s request for joint legal custody and made additional orders. M. A. filed her notice of appeal on November 1, 2002. The Court of Appeals reversed the judgment of the Circuit Court. *M. A. v. M. S.,* No. ED82018, 2004 Mo. App. LEXIS 679 (May 11, 2004).

The Court of Appeals transferred the case to this Court in its opinion. *Id.* at *21. This Court thus has jurisdiction of the appeal pursuant to Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

M. S. and M. A. were married in 1986. Tr. at 15, 478.[1] Their adopted daughter R. S. was born in Peru on July 6, 1990. Tr. at 15. Their adopted son J. S. was born in Peru on July 13, 1990. Tr. at 15. M. S. and M. A. first saw the children when they traveled to Peru during October, 1990. Tr. at 15. They remained in Peru for several months and adopted both infants. Tr. at 15, 480-81.

M. S. sexually molested R. S. when he first met her in Peru and on "six or eight" occasions during the ensuing one and one-half years. Tr. at 58-61, 67-68. He acknowledged that he had decided to use his adopted daughter "as an instrument to satisfy [his] sexual desires" as soon as he met her. Tr. at 59. M. S. testified: "I became turned on by something else besides my daughter, and then after I was aroused then I used my daughter to manipulate my penis." Tr. at 79. M. S. testified that J. S. had been in the house each time that he molested R. S. but that he could not recall whether J. S. had been in the room with them: "He could have been. I don't know where he was at." Tr. at 80. M. S. previously had

[1] M. A. married S. A. during 1998. Tr. at 465-66, 618. M. A. has a background in science, including a doctoral degree in ecology from the University of California, and is the director of e-business and market research for the Johnson & Johnson Strategic Customer Alliances Group. Tr. at 467, 618. He was a colonel in the United States Marine Corps Reserve until his retirement from the military. Tr. at 467.

molested his cousin when he was a teenager and she was two or three years old. Tr. at 65-67, 207-08, 480.[2]

During 1992 M. S. confessed to his clergyman that he had been sexually abusing R. S. Tr. at 18, 486. M. S. and the pastor then informed M. A. of the molestation. Tr. at 486. M. S. molested R. S. twice after having told the clergyman and M. A. of his conduct. Tr. at 487. M. S. eventually pled guilty to two counts of sodomy. Tr. at 20. M. A. sought a divorce because of M. S.'s molestation of R. S. Tr. at 488.

The St. Louis County Circuit Court suspended the imposition of sentence in M. S.'s criminal case and placed him on probation for five years. Tr. at 20.[3] In its decree of dissolution the Circuit Court awarded legal and physical custody of

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[2] MA. testified that Mr. Swinn was physically abusive in other ways during their marriage. Tr. at 484-85. He had pursued her with a knife once, slapped her "on a couple of occasions," and on another occasion refused to allow her to leave their home and "knocked the phone out of [her] hand." Tr. at 484. According to M.A., M.S. also struck both children when they were approximately one year old: "[H]e slapped them both on the stomach while he was—in both cases he was changing diapers." Tr. at 485.

[3] Marie Clark, the therapist who oversaw the several years of M.S.'s court-ordered sex offender treatment, testified that J.S. was in the room whenever M.S. molested R.S.. Ex. 6 at 86.

R.S. and J. S. to M. A. and granted M. S. supervised visitation with both children. Legal File at 29-31. The court noted M S.'s sexual abuse of R. S. and his "psychological illness" and concluded that "unsupervised visitation with Husband could endanger the children's physical health or impair their emotional development." Legal File at 29.

The decree of dissolution was modified in 1999 and 2001. Legal File at 83, 103. The 1999 judgment noted that M. S. had completed counseling with Behavioral Science Institute. Legal File at 85. The judgment recognized the children's continuing need for supervised visitation and transferred authority to designate supervisors from the Missouri Division of Family Services to Ms Clark "or any psychologist designated by [her] who is employed by Behavioral Science Institute." Legal File at 84. The 2001 judgment was entered by consent. Legal File at 103. It authorized M. A. to move to New Jersey with the children and provided that M. S. would have supervised visitation with the children in Missouri at least once each quarter. Legal File at 103-05.

In the present action M. S. sought further modifications awarding him joint legal custody of R. S. and J. S. and removing the requirement that his visitation with the children be supervised at all. Legal File at 108-12. M. A. filed an answer and a separate motion seeking the termination of M. S.'s visitation pursuant to the 1995 amendment of § 452.400, Mo. Rev. Stat. Legal File at 135, 154.

Mark Robinson was one of two mental health experts called to testify by M. A. Mr. Robinson is a "doctor of ministry and pastoral counseling." Tr. at 193.

He is not licensed as a psychiatrist, psychologist, or professional counselor. Tr. at 209-10, 217. Mr. Robinson testified that he works with individuals who have been involved in some form of physical abuse and that his counseling does not focus especially on child molesters. Tr. at 210, 215. M. S. participated in a 12-week group therapy program administered by Mr. Robinson. Tr. at 215-16.

Mr. Robinson stated his opinion that it is "really pretty unlikely" that M. S. would sexually abuse R. S. and J. S. Tr. at 204. He explained that he disagrees with the "popular notion" that child molesters have a high rate of recidivism. Tr. at 204. He did not refer to any authority or data in support of his position. Mr. Robinson acknowledged that there is no such thing as "zero likelihood" that a child molester will offend again. Tr. at 205. He said he had recommended to M. S. that he continue in therapy and that M. S. had not complied with that recommendation. Tr. at 206, 223, 238-39, 262-63.

Mr. Robinson relied upon M. S.'s 1992 confession in forming his opinion about the likelihood that he would harm a child again: "The fact that the offense was even known of because of his own volunteering that information suggests . . . that there's a part of him that is very concerned about that behavior and working very hard to contain it." Tr. at 205, 216. Mr. Robinson also found the passage of ten years without any report of further abusive behavior toward R. S. or J. S. important in his assessment of the possibility that M. S. would reoffend. Tr. at 205, Mr. Robinson allowed: "Well, it certainly would have been very risky to

him to engage in any kind of criminally abusive behavior knowing he was being watched." Tr. at 214.[4]

M. S. introduced Mr. Robinson's written report into evidence. Tr. at 208-09; Ex. K. Mr. Robinson noted in the report that Terrence Rohen, Ph.D., a psychologist previously involved in the case, had found that "the children . . . did not have the ego strength to challenge their father." Ex. K at 2. Mr. Robinson stated his own assumption that R. S. and J. S. had acquired that capacity by the time of trial. Ex. K at 2. He added: "If they [have] not, I see that as a cause for alarm." Ex. K at 2. Mr. Robinson pointed out that he never had interviewed or evaluated R .S. and J. S. Ex. K at 2.

[4] Mr. Robinson also suggested that his opinion regarding the likelihood that M. S. would harm either of his children again was supported by M. S.'s completion of the Behavioral Science Institute program administered by Ms Clark. Tr. at 217. When Mr. Robinson was asked for his opinion about the therapy that Ms Clark and her staff had been conducting with M. S., he declined to answer for want of "enough information." Tr. at 198-99. With respect to the methodology employed by Ms Clark's program, Mr. Robinson testified: "Some people hold it in very high esteem. Some people I think are fairly critical of it." Tr. at 198. Mr. Robinson placed M. S. in the beginning phase of his own counseling program when M. S. was referred to him. Tr. at 195-96.

The second behavioral expert relied upon by M. S. was Dean L. Rosen, Ph.D. Dr. Rosen is a clinical psychologist. Tr. at 101. He stated his opinion that "the children would be safe [with M. S.] and that their father is not likely to act out sexually against them as 12 year olds." Tr. at 141-42. Dr. Rosen also stated his opinion that M S. could control any impulse that he might experience "with respect to sexual abuse." Tr. at 139. Regarding the possibility that M. S. might be sexually attracted to either of his children, Dr. Rosen testified: "He's been in multiple treatment programs that are constantly assessing that with him, and no one else has been concerned or worried about it and I'm not concerned or worried." Tr. at 140-41.

Dr. Rosen said that the Rorschach inkblot test was one of several psychological tests that he had administered to M. S. Tr. at 125-27. He explained that the Rorschach test reveals the manner in which subjects "perceive something ambiguous" and is "a very good measure . . . of personality functioning." Tr. at 125. One aspect of M. S.'s response "suggested that he could become too easily swept up by his own needs, conflicts, and emotions," and that "at times he may not be able to always use his strong value system to control [his] impulses." Tr. at 127.[5] Dr. Rosen said that "overall" he had found "a certain immaturity in [M.

[5] Dr. Rosen offered the following specific example of a failure to control impulse: "He could become angry and say thing[s] that he didn't want to say even though that's against his own values to say such things." Tr. at 127.

S.'s] responses that was consistent with his general level of emotional neediness and self-focusing." Tr. at 128.

Dr. Rosen also administered the Minnesota Multiphasic Personality Inventory. Tr. at 116. When Dr. Rosen was asked to state the purpose of administering the MMPI to M. S., he responded: "It's useful . . . just to assess how open someone is to the assessment process." Tr. at 117. Dr. Rosen testified that he had been most concerned about M. S.'s performance on the "lie scale." Tr. at 117. He explained that M. S. had been in the "normal range" on that aspect of the test, suggesting "that he could admit to some common moral failings, that he didn't have to present himself as perfect." Tr. at 117-19. Dr. Rosen also found it significant that M S. had a very low score on "scale zero," meaning that "he does not have a lot of social anxiety." Tr. at 119. He found significance as well in M. S.'s very low score on the "A scale," indicating "a need to deny situational distress." Tr. at 120.

Dr. Rosen had reviewed the MMPI assessment previously completed by Dr. Rohen and acknowledged that he had been "struck by some of the differences" between Dr. Rohen's findings and his own. Tr. at 120. Dr. Rosen explained that the "chief difference" was on the "psychopathic deviant scale," which assesses "the tendency to act out, to have authority problems, to act impulsively." Tr. at 121. He testified that Dr. Rohen "certainly interpreted that [aspect of the test] as showing authority problems and impulsiveness" and stated that he had not gotten "that same elevation" on his own testing of M. S. Tr. at 121. When Dr. Rosen

was asked whether it was possible to tell which interpretation was most accurate, he answered:

> Well, the whole point of test scores is to predict behavior, and so if . . . Dr. Rohen's predictions came out to be true then his would be more accurate. If the predictions on mine came out to be more true, then mine would. But I can't tell you ahead of time.

Tr. at 124.[6]

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[6] In his written report, which was introduced into evidence by M. S, Dr. Rosen stated:

> While M. S. does have some personality traits which would be consistent with turning to an infant child for sexual stimulation, nothing in his current life situation would suggest that he currently presents a danger to his own children or the two sons of his current wife.

Ex. G at 8. Dr. Rosen noted that M. S. "may continue to have problems with conflict and anger" and that he may "experience relationships as filled with conflict which he finds hard to accept." Ex. G at 8. In the report Dr. Rosen concluded that M. S.'s "positive outcome" in treatment had left him at "little risk" for reoffending. Ex. G at 8. Dr. Rosen noted M. S.'s admission of window-peeping "years ago." Ex. G at 4. It is apparent from Dr. Rosen's report that M. S. had not told him about his sexual abuse of another child while he was a teenager:

M. S. testified in support of his own motion. He stated his opinion that R. S. and J. S. would be safe alone with him because "[t]hey're old enough to report." Tr. at 38, 88. M. S. also said that unsupervised visitation would present no danger to the children because he had completed "an extensive amount of treatment and counseling." Tr. at 38-39, 88. He explained: "And, you know, I've been made aware of the devastation . . . that it causes to the . . . victim herself, and family and friends. I mean, it's just a snowball effect." Tr. at 39. M. S. testified that he did not consider himself cured of his pedophilia. Tr. at 96-97.

When he was asked why unsupervised visitation was in R. S.'s and J. S.'s best interest, M. S. responded: "[S]o that I can have a more normal relationship with my children." Tr. at 42. He explained:

> [Having] someone else there that the kids can go to versus having . . . them coming to me with their wants and needs. That . . . takes away my opportunity to be with the kids to develop a relationship with them, to impose my values and ideas on them when they're getting it from someone else.

Tr. at 42. M. S. later explained: "[S]ituations come up where there could be situational training of the children on ethics and values, and with another person

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"He admits to no other sexual deviance other than the incidents with his daughter for which he confessed and was convicted." Ex. G at 2, 4.

there they interject or they interfere in such a way." Tr. at 241-42. He did not identify any value or idea that he had been unable to impose upon his children or that a supervisor had imposed or interjected. M. S. was asked whether the children had reached "the age when they can learn what happened with R. S. a decade ago," and he responded: "Yeah, I believe that it's an appropriate age for them to learn what happened, yes." Tr. at 43.[7]

Dr. Rohen testified as an expert witness for M. A. He said that he is a licensed psychologist in Missouri and Illinois, has taught psychology in post-graduate programs for 15 years, is a staff member at several hospitals, and has extensive experience and current involvement in psychological "testing and measurement." Tr. at 282-86. Dr. Rohen testified that he had been involved in the present case for several years, by agreement of the parties and with the approval of the Circuit Court. Tr. at 290-91.

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[7] M. A.'s counsel asked M. S. whether he had testified in a recent custody proceeding that his present wife's 11- and 13-year-old children were too young to be told about his molestation of R. S. Tr. at 265. M. S.'s attorney objected that the matter was irrelevant and the Circuit Court sustained that objection. Tr. at 265-66. M. A.'s counsel was allowed to make an offer of proof suggesting that M. S. would answer the question affirmatively. Tr. at 266. The trial court then sustained a relevancy objection to the offer. Tr. at 266.

Dr. Rohen stated that he had administered psychological tests to M. S. and evaluated the test results. Tr. at 292-94. Those tests included the MMPI, the Multiphasic Sex Inventory, and the Millon Clinical Multiaxial Inventory. Tr. at 294. Dr. Rohen said that he also interviewed M. S. "to validate the findings." Tr. at 294-95. At the conclusion of his testimony about the tests administered to M. S. and his interviewing of M. S., Dr. Rohen stated the following opinion: "My opinion is that he is not rehabilitated as a sexual offender." Tr. at 308.

When he was asked how firmly he held that opinion, Dr. Rohen replied: "You know, on a scale of 1 to 10, I'm likely at a 10. I mean, those tests are . . . very consistent. They're consistent with the records. They're consistent with his treatment. They're consistent with his interview." Tr. at 309. He summarized his findings with respect to M S. as follows:

> [H]e's above average in minimizing his problems. He lacks insight. He resents the rules and the regulations. He's impulsive. He has poor judgment. He has difficulty benefiting from experience. Tries to control and exploit others more than most. And does not take responsibility for problems he's created . . . He has fewer emotional resources than most. Has a low tolerance for frustration. And is at risk for having poor impulse control. And finally, he does not know the pattern of his deviant sexual behavior . . . He over-simplifies that situations are and he fails to recognize what's required of him more

than most. And he is at risk for behaving in ways that are inappropriate.

Tr. at 332-33.

Dr. Rohen described the MMPI as "an objective assessment . . . of the psychological stresses that an individual has" and said that it is helpful in determining whether an individual is suffering from psychological or psychiatric disturbances. Tr. at 295. He testified that he had obtained the results of an MMPI evaluation that had been performed by Ms Clark when M. S. began his treatment program at Behavioral Sciences Institute. Tr. at 294-95. He explained: "I wanted to . . . look at the . . . progress or the changes, if any, that he had from the 1993 version of the same test [and] any findings within that test that would suggest that he had or had not made progress in his treatment." Tr. at 295-96. Dr. Rohen identified the types of information that may be gleaned from such review:

> First of all, it . . . takes a look at . . . is the individual very defensive or not. And, are they willing or are they unwilling to admit what they've done. Do they have insight into what they've done. Do they understand what they've done. It also looks . . . at how impulsive are they and do they . . . have a history of alcohol abuse . . . . It lets us take a look at, in some cases . . . what's their prognosis given certain character and logical findings.

Tr. at 296.

Dr. Rohen testified that in both administrations of the MMPI, M. S. revealed a tendency to minimize and disregard psychological problems. Tr. at 297. Both instances reflect a lack of "self-insight" and "self-understanding." Tr. at 297. M. S. had a high score on the "disconstraint scale," which "looks at [an] individual's impulsivity." Dr. Rohen explained that M. S.'s testing "indicates that he's more risk-taking and more impulsive." Tr. at 297.

Dr. Rohen testified that another aspect of M. S.'s performance on both administrations of the MMPI was "what's called a spike 4 code type." Tr. at 298. He explained:

> These individuals . . . usually . . . have marital problems. They have problems with substance abuse. They have sexual acting out. They have delinquent behaviors and they have a lot of legal difficulties. And that certainly was consistent with what I found . . . on reviewing this case.

Tr. at 298. Dr. Rohen testified that an individual with a spike 4 code type "usually . . . ha[s] a very good show of their self-concept." Tr. at 298. He explained: "[O]n the outside they look like they're just fine. But that's usually a façade for some underlying feelings of being insecure . . . and feeling inadequate." Tr. at 298. Dr. Rohen testified about the implication of his finding: "The treatment prognosis is guarded. Unless that treatment starts very early in their life." Tr. at 298-99. He stated that his finding was consistent with the records that he had received from Behavioral Science Institute. Tr. at 298.

Dr. Rohen testified that on both administrations of the MMPI M. S. "was elevated in . . . scales that look at is he angry—he's angry on both, he's belligerent on both, he's rebellious on both, he's resentful of rules on both, he's hostile toward authority figures on both." Tr. at 299. He noted that M. S.'s scores were lower on the 2002 administration of MMPI but remained "above normal." Tr. at 299. Dr. Rohen stated that "[i]ndividuals who score as [M. S.] did . . . show poor judgment. They have difficulty planning ahead. They have difficulty benefiting from previous experiences." Tr. at 299. Dr. Rohen concluded that the persistence of M. S.'s above-normal scores "would suggest that the therapy didn't have a . . . substantial impact" and that most of M. S.'s MMPI results suggest "that he did not make any real changes as a consequence of therapy." Tr. at 299-301.

Dr. Rohen testified that the Multiphasic Sex Inventory is "a battery of scales that evaluates sexual offenders, and then what progress they have made as a result of being in treatment." Tr. at 303. He described this test as the "best and most accurate assessment of how individuals have done in treatment." Tr. at 303. Dr. Rohen explained that the test goes "[r]ight to the heart of the question" by assessing whether sex offenders "still minimize . . . their obsession," "still have excuses," "understand what they've done," and "take accountability." Tr. at 303.

The MSI results showed "some positive things" about M. S. Tr. at 304. Dr. Rohen explained: "[H]e was honest about having acted out molesting assault behaviors . . . He disclosed that he exposed himself to a child [and] that he . . . had acted out on peeping behaviors." Tr. At 304. Dr. Rohen added: "[H]e understood

adult sexual matters and he had accurate knowledge about sexual anatomy and physiology." Tr. at 304.

Dr. Rohen also identified negative MSI results: "[E]ven though M. S. admitted to molesting the girls, the child molest scale says . . . he seriously minimizes ever having any deviant fantasies about molesting a child." Tr. at 305. Dr. Rohen added: "[A]nother finding . . . is that according to the MSI-II he doesn't know the pattern of his deviant sexual activity and doesn't take full accountability for it." Tr. at 307. He explained: "So even though [M. S. has] been through the therapy . . . he doesn't have insight into how did that happen, what's the pattern . . . Including the . . . denial of the fantasies, the setting up of the situation and the acting out." Tr. at 307.

Dr. Rohen noted that he had found a correlation of negative results, particularly with respect to "minimization," on the MMPI and the MSI. Tr. at 307-08. He also found both the tendency to minimize and the inability to perceive the pattern of his molesting behavior in his interview with M. S.: "[H]e said that he was sexually inappropriate with R. S. on two to three times, and then once more after he confessed to it . . . . I looked at the police report and he said, well, he'd done this with R. S. six to eight times." Tr. at 307-08. Dr. Rohen testified:

> [T]hat is consistent with the MSI finding that he doesn't know his pattern of sexual deviancy, and with the MMPI-2 finding that he doesn't have insight into himself and that he doesn't take full accountability for his sexual deviant behavior.

Tr. at 308.

Dr. Rohen described the Millon Clinical Multiaxial Inventory as a test that measures issues similar to those assessed by the MMPI but focuses on whether "there is a chronic personality disorder that . . . may be amenable to treatment." Tr. at 309. He explained that the MCMI "looks at . . . personality features at a structural level," making its measurements "more plainly, at a deeper level" than the MMPI. Tr. at 309. When Dr. Rohen was asked why he had administered the MCMI he answered: "[I]n something . . . very serious like this . . . it is critical to have different lenses looking at the same behaviors from different theoretical and research bases . . . . So I gave the MCMI-III .. . to cross-check or to triangulate the findings of the MMPI and the MSI." Tr. at 310.

Dr. Rohen summarized his findings on the MCMI:

• The MCMI results suggested that Mr. Swinn is "likely to act in a way to intimidate and exploit others." Tr. at 311-12. Dr. Rohen explained that this was consistent with the "Spike 4" and the MMPI. Tr. at 312.

• The MCMI "also suggests that he's not willing to take responsibility for the problems that he might have created." Tr. at 312. Dr. Rohen explained: "That's consistent with the MMPI-2 findings regarding being defensive and lacking insight, and with the MSI-II findings about minimizing problems and not taking responsibility." Tr. at 312.

• M. S.'s MCMI results also indicated that M. S. "can be social and ingratiating." Tr. at 312. Dr. Rohen testified that the correlative MMPI scores

indicated that M. S. is able to "say what sells" and "get along well" in social settings. Tr. at 312. He explained: "[T]he better you are at this . . . the more insincere and manipulative you can become." Tr. at 312-13. Dr. Rohen stated his opinion that the coalescence of "very good social skills" and "spike 4 elevation" factors in a child molester "is a dangerous combination." (Tr. at 313.)[8]

Dr. Rohen stated his opinion that R. S. was at risk of being sexually abused by M. S. on the basis of her own psychological evaluation. Tr. at 334. He noted that R. S. is very intelligent but remained especially vulnerable to M. S. in an unsupervised setting because she has inadequate emotional resources. Tr. at 440. R. S.'s therapist had provided Dr. Rohen with her assessment that R. S. is emotionally immature. Tr. at 325, 438. Dr. Rohen stated: "Bright folks can also have emotional problems, and she's one of them." Tr. at 438-39. Dr. Rohen

[8] Dr. Rohen also administered the Rorschach inkblot test to M. S. Tr. at 294. The results indicated that M. S. tends "to narrow the situation, to miss the nuances and [fail] to recognize the behaviors that are required of him." Tr. at 319-20. Dr. Rohen said that this trait was manifested in. M. S.'s slow response to a visitation supervisor's reminder "during the last couple of years" that he should not "pick up R. S. and carry her." Tr. at 319-20, 390-91. Dr. Rohen explained: "He was carrying her. And [the supervisor] had to remind him not to keep his arm around R. S. when he was reading to her. That was beyond the . . . guidelines." Tr. at 320.

testified that R. S. "is very vulnerable at this time" and that if M. S. wanted to sexually molest her "she would be easily misled and . . . persuaded to make poor judgments." Tr. at 334. He explained:

> She falls apart under that kind of pressure. If she was in a sexually inappropriate situation, my findings are that she would be unable to understand what's . . . going on and would not be able to stop behavior that was inappropriate. That's consistent across the testing that I've done and consistent with what her therapist has told me.

Tr. at 334. Dr. Rohen stated his opinion that R. S. has "some substantial psychological problems" and that "she has a long way to go in therapy." Tr. at 336.

Dr. Rohen testified that J. S. "certainly is in need of therapy for some of the same reasons." Tr. at 336. He did not believe that J. S. was at risk of being molested by M. S. Tr. at 359, 362, 384, 436. From his testing and interviewing Dr. Rohen found: "J. S. doesn't perceive things well. And more importantly, he doesn't . . . think logically and clearly." Tr. at 337, 425. J. S.'s test results indicated that "he's below average in giving assistance to others," that "[h]e doesn't know or follow limits very well," and that he "looks for the easy or magical solution to problems that he sees." Tr. at 326-27. Dr. Rohen found that J. S. is vulnerable to manipulation especially in "emotionally charged" circumstances: "[H]e doesn't perceive accurately what's going on. He doesn't

think clearly. He's dependent on approval. He could easily be persuaded that something he saw didn't happen." Tr. at 331, 361-62.

Dr. Rohen stated his opinion that the children were incapable of having "an enhanced relationship with their father without supervision" because of their own psychological problems. Tr. at 405. He stated:

> These children have some significant psychological problems . . . I don't think that taking supervision away from them, given the way that they are vulnerable, the way they can be overwhelmed, the way that they can misinterpret data, the inability they have to report, the way they can be manipulated, is going to make their relationship better with their father.

Tr. at 403-04.

Dr. Rohen recommended that supervised visitation be continued for both children. Tr. at 432. He stated his opinion that granting M. S. unsupervised visitation with J. S. while continuing his supervised visitation with R. S. would not be in J. S.'s best interest: "[T]hese children have been together throughout this entire process. To pull them apart . . . especially given J. S.'s makeup, would be problematic for him as well." Tr. at 436-37. Dr. Rohen testified: "[W]e can't have a crystal ball. If we take [supervision] away too soon . . . [t]hey will be afraid of him. They will misinterpret that. They will be overwhelmed by him . . . Any chance of that relationship being normal . . . is diminished substantially." Tr. at 421.

M. A. also introduced the deposition testimony of Marie Clark. Tr. at 665; Ex. 6. The deposition had been taken on behalf of M. S. on April 13, 1999. Ex. 6 at 1. Ms Clark identified herself as the owner and operator of Behavioral Science Institute. Ex. 6 at 7. She testified that she had been working with sex offenders since 1982 and had testified as an expert witness "[t]housands of times." Ex. 6 at 8.

Ms Clark said that M. S. had been ordered to participate in treatment at Behavioral Science Institute as a condition of his probation during 1993. Ex. 6 at 9-10. She testified that M. S. had completed the therapy program at BSI in March, 1999. Ex. 6 at 16-19. Ms Clark noted that M. S. was "the longest client" that her organization had had in treatment since its inception: "No other client has been here almost six years. No one. And I've seen more than 7,000 sex offenders. None. He is the longest." Ex. 6 at 19-20.

Ms Clark said that a test administered during November, 1998, had indicated that M. S. still had "deviant sexual tendencies." Ex. 6 at 59-60. She testified that he was at "low risk" for re-offending. Ex. 6 at 11-12. Ms Clark explained that "low risk" means that an individual "understands what he needs to do" and has made "what we consider some significant changes in his life." Ex. 6 at 22. When M. S.'s counsel asked Ms Clark whether she believed that M. S. "still should be supervised with his children," she replied: "Yes, I do." Ex. 6 at 22, 97.

Ms Clark recalled that M. S. "has described in detail . . . one occasion when he fondled his daughter [while] they were watching television under a blanket."

Ex. 6 at 84. She testified that M. S.'s risk of reoffending would increase if he was watching television under a blanket again with his child, or "if he went to the movie theater, because the lights are going to go out," or "if he went to Six Flags in the horror show." Ex. 6 at 85. Ms Clark also testified that certain characteristics of a potential child victim, such as being "clingy" or "overly affectionate," would increase the risk of sexual molestation by M. S. Ex. 6 at 90. When she testified that M. S. was at low risk to molest his own children, Ms Clark noted that she did not know the children. Ex. 6 at 97.

Marilyn Milligan testified regarding her experience as a supervisor of visits between M. S. and his children. Tr. at 581-82. She was trained and approved for that assignment by the Missouri Division of Family Services. Tr. at 582. Ms Milligan recalled two incidents that had occurred during sessions that she was supervising:

• Ms Milligan reported an occasion during 2001 when M. S. confronted R. S. and asked her if she was fearful of him. Tr. at 588. R. S. grew "really kind of quiet." Tr. at 588. Then M. S. told R. S. "that as long as she continued to be afraid of him [a supervisor] would continually have to be there." Tr. at 588. Ms Milligan testified that M. S. then asked R. S.: "[W]ouldn't it be nice if you and I just did a visit together and like daddy and his daughter on a date." Ms Milligan added: "And that time I turned to him and said, '[S]top.'" Tr. at 588-89. She testified that both R. S. and J. S. appeared to be afraid and uncomfortable. Tr. at 589.

• Ms Milligan also related an incident that had occurred between 1999 and 2002, while she was with M. S. and his mother and the children were playing in another area. Tr. at 590-91. Ms Milligan stated: "[T]here was a conversation between M. S., his mother, and myself, and M. S. made the comment that he could not say that this would never happen again." Tr. at 590-91. She recalled that M. S.'s mother had sought approval as a visitation supervisor and had been rejected. Tr. at 591. Ms Milligan told the elder Mrs. S: "[Y]ou don't have to worry about ever having to turn your son in." Tr. at 591.

Dudley Dunlop served as guardian ad litem for R. S. and J. S. by court appointment. Legal File at 133. Mr. Dunlop made his recommendation to the Circuit Court after the parties had completed their presentation of evidence. Tr. at 688-96. He characterized M. S. as a pedophile who had been rehabilitated by the completion of treatment in the BSI program. Tr. at 688-91. Mr. Dunlop explained:

> I don't know a total definition of rehabilitation and I really couldn't find something that totally suited this case. But I can't imagine that [M. S.'s] progress in the Behavioral Institute's program wouldn't constitute rehabilitation. The testimony supports that.

Tr. at 689.

Mr. Dunlop characterized R. S. and J. S. as "fragile children." Tr. at 690. He stated: "The children are the problem now, not M. S." Tr. at 691. Mr. Dunlop suggested that R. S. and J. S. should "be counseled as soon as possible, preparing them to be self-reporters [and] acquainting them with the reason for this long

period of supervised visitation." Tr. at 690. He told the court: "[I]t's apparent that nobody up 'til now has actually laid out for the children the nature of their father's pedophilia and how best to protect themselves for the remote possibility that he might re-offend." Tr. at 690-91.

The court asked Mr. Dunlop if he was suggesting that "somebody who has . . . a high risk . . . can't be in a dark place, can't go to the movie, can't take swimming, can't have them sit on the lap," and that "different limitations . . . would be necessary for somebody who has a low risk." Tr. at 692. The guardian ad litem responded: "That's what I am suggesting." Tr. at 692. He advised the court that he "would like to see . . . no supervision in this case" once R. S. and J. S. "have been counseled and . . . brought to a point where they can deal with the fact that their dad was a pedophile." Tr. at 692.

The Circuit Court denied M. A.'s motions to dismiss M. S.'s request for unsupervised visitation with R. S. and J. S. and her request that the visitation be terminated pursuant to § 452.400.1. Legal File at 195-208. The court reasoned that it could not "ex post facto take away a right [M. S.] has." Tr. at 7. The court also stated: "Section 452.400.1 deals with how you grant visitation. Section 452.400.2 deals with how you modify visitation. And it specifically deals with how you modify a supervised visitation." Tr. at 9; Legal File at 200. It concluded: "I don't think [M. S.'s guilty plea] is dispositive of this case because it pertains to subparagraph 1 of § 452.400, and we are not dealing with subparagraph 1." Tr. at 8-9; Legal File at 200.

The Circuit Court found that "the BSI program is one of the most difficult programs of its type in the St. Louis area to successfully complete and that someone who successfully completes their sexual abuse program as Father has done is rehabilitated." Legal File at 200-01. It concluded that it was in the best interest of each child that M. S.'s visitation with him or her no longer be supervised. Legal File at 201-02. The court granted M. S.'s motion for unsupervised visitation with J. S. Legal File at 201. It ordered the parties to inform R. S. and J. S. of the reason that their visitation with M. S. had been subject to supervision. Legal File at 203. The court continued M. S.'s supervised visitation with R. S. but noted its intention to eliminate that supervision after the child had been told about her molestation. Legal File at 202. And the court ordered that M. S.'s current wife, D. S., could supervise his visitation with R. S. Legal File at 203. D. S. had not testified in the case.

M. A. appealed from that judgment. Legal File at 209. The Court of Appeals reversed the denial of M. A.'s motions seeking termination of M. S.'s visitation with R. S., the award of joint legal custody for both children, and the designation of M. S.'s current wife as a supervisor for visitation. The Court reversed the elimination of supervision for M. S.'s visits with J. S. and remanded that issue to the Circuit Court for further proceedings. The Court of Appeals transferred the appeal to this Court pursuant to Mo. R. Civ. P. 83.02 for a definitive determination of whether § 452.400.1, Mo. Rev. Stat., applies in modification proceedings.

The Court of Appeals concluded that § 452.400.1 does apply in modification proceedings. *M. A. v. M. S.* at *8-12. It relied on *Hoskins v. Box*, 54 S.W.3d 736 (Mo. App. W.D. 2001), which had so held. The Court of Appeals concluded that "the version of section 452.400.1 that was in effect when the motion to modify was filed prohibits the award of visitation" to a parent who has pled guilty to a felonious molestation crime in which the child was the victim. *Id.* at *10-11.

The Court of Appeals concluded that the Circuit Court's finding that immediate unsupervised visitation would serve J. S.'s best interest was erroneous. *Id*. at *14-15. The Court cited expert testimony that "son should be given counseling to prepare him for being told about father's abuse of daughter." *Id.* at *14. It also noted that "[t]he Guardian ad Litem urged the court not to remove supervision until son was counseled and brought to the point where he could deal with the information." *Id.* The Court of Appeals concluded:

> It was impossible for the trial court to know . . . what son's best interests would be with respect to unsupervised visitation after he was told of the abuse. The trial court erred in ordering immediate elimination of supervised visitation without first requiring the parties to come back before the court for a reevaluation of the situation after the son was told of the abuse. *Id*. at *14-15.

The Court of Appeals found that the order granting joint legal custody of the children was not supported by substantial evidence. The Court explained:

"There was no evidence that father and mother have a commonality of beliefs concerning parental decisions, and a willingness, as well as an ability, to function as a unit in making those decisions." *Id*. at *18-19.

The Court of Appeals concluded that the Circuit Court had erred in authorizing M. S.'s present wife to supervise his visitation. The Court explained that "no evidence was adduced regarding [her] training, capability, character, or beliefs," and noted that M. S. had not requested in his pleading that his wife be appointed as a supervisor. *Id*. at *19-21. The Court stated that "[t]he record on appeal contains no evidence that D. S. was evaluated as a supervisor or what the result of that evaluation was." *Id.* at *20. It also held that "[a] judgment is void to the extent that it grants relief beyond what was requested in the pleadings." *Id.*

POINTS RELIED ON

I.

The Circuit Court erred in denying M. A.'s motion to dismiss M. S.'s request for enhanced visitation rights with respect to R. S. and J. S., and in continuing M. S.'s supervised visitation with R. S. and granting him unsupervised visitation with J. S., because § 452.400.1, Mo. Rev.Stat., required the entry of an order terminating M. S.'s visitation rights and the Circuit Court was without jurisdiction to do otherwise, in that (1) M. S. previously had pled guilty to two felony charges involving the sexual molestation of R. S. and (2) the 1995 amendment of § 452.400.1 provides without exception that a court "shall not grant visitation" to a parent who has been convicted of or pled guilty to such abuse of his child.

§ 452.400, Mo. Rev. Stat.

Hagan v. Director of Revenue, 968 S.W.2d 704 (Mo. 1998)

Racherbaumer v. Racherbaumer, 844 S.W.2d 502 (Mo.App.E.D. 1992)

Robinson v. Health Midwest Development Group, 58 S.W.3d 519 (Mo. 2001)

II.

The Circuit Court erred in finding that unsupervised visitation with M. S. was in the best interest of R. S. and J. S., and in granting M. S. unsupervised visitation with J. S. and declaring its intention to grant him unsupervised visitation with R. S. after the occurrence of a specified event, because that finding was against the weight of the evidence and granting M. S. unsupervised visitation thus violates of § 452.400.2, in that (1) M. S. previously had molested R. S. and another infant on numerous occasions, (2) the legislature has made it the public policy of the state to recognize the likelihood of recidivism by individuals who have sexually molested their children and to protect children once molested from the risk of further sexual abuse, (3) M. S.'s performance on numerous psychological tests administered by one of his mental health experts and by M. A.'s expert revealed traits and disorders incompatible with confidence that the children would be safe alone in his presence, (4) Dr. Rohen and Ms Clark testified that supervision of M. S.'s visitation was required at least for R. S.'s safety, (5) Ms Clark testified that child molesters do not limit their victims to a single gender, and (6) even M. S.'s mental health experts acknowledged that he is at some risk of reoffending.

§ 452.400, Mo. Rev. Stat.

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976)

T. C. H. v. K. M. H., 784 S.W.2d 281 (Mo.App.E.D. 1989)

III.

The Circuit Court erred in awarding joint legal custody of R. S. and J. S. to M. S. because § 452.375.3, Mo. Rev. Stat., precludes any award of custody to M. S. and the Circuit Court thus was without jurisdiction to make such an award, in that (1) M. S. previously had pled guilty to two felony charges involving the sexual abuse of R. S. and (2) § 452.375.3 provides without exception that a court "shall not award custody" to a parent who has been convicted of or pled guilty to such a crime.

§ 452.375, Mo. Rev. Stat.

Hagan v. Director of Revenue, 968 S.W.2d 704 (Mo. 1998)

IV.

The Circuit Court erred in finding that the exercise of joint legal custody by M. S. and M. A. was in the best interest of R. S. and J. S. and granting M. S. joint legal custody, because that finding was against the weight of the evidence and the award thus violates § 452.410, in that (1) M. S. previously molested R. S. and another child on numerous occasions, (2) M. S.'s performance on numerous psychological tests administered by one of his mental health experts and by M. A.'s expert revealed traits and disorders incompatible with confidence that he possesses the judgment and other personal traits and skills necessary for the responsible exercise of joint legal custody, (3) the legislature has made it the public policy of the state to recognize the likelihood of recidivism by and impaired judgment and decision-making abilities of individuals who have sexually molested their children, and to protect children from the consequences thereof by prohibiting any award of custody to such a parent, (4) M. A. has exercised sole legal custody since the entry of the first custody order in this case, and (5) no evidence suggested that M. S. and M. A. are able to cooperate and make shared decisions regarding the welfare of the children.

§ 452.410, Mo. Rev. Stat.

T. C. H. v. K. M. H., 784 S.W.2d 281 (Mo.App.E.D. 1989)

V.

The Circuit Court erred in ordering that D. S. may serve as supervisor of M. S.'s visitation with R. S. because the court's implicit finding that D. S. was willing and adequately trained to assure to safety of the children during visitation with M. S., and that she was otherwise capable of discharging that responsibility, was not supported by substantial evidence, in that no evidence was adduced regarding D. S.'s training, capability, character, or beliefs.

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976)

Vangundy v. Vangundy, 937 S.W.2d 228 (Mo.App.W.D. 1996)

Devor v. Blue Cross & Blue Shield, 943 S.W.2d 662 (Mo.App.W.D. 1997)

ARGUMENT

I.

The Circuit Court erred in denying M. A.'s motion to dismiss M. S.'s request for enhanced visitation rights with respect to R. S. and J. S., and in continuing M. S.'s supervised visitation with R. S. and granting him unsupervised visitation with J. S., because § 452.400.1, Mo. Rev. Stat., required the entry of an order terminating M. S.'s visitation rights and the Circuit Court was without jurisdiction to do otherwise, in that (1) M. S. previously had pled guilty to two felony charges involving the sexual molestation of R. S. and (2) the 1995 amendment of § 452.400.1 provides without exception that a court "shall not grant visitation" to a parent who has been convicted of or pled guilty to such abuse of his child.

> **Standard of Review:** The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The construction of a statute is a matter of law. *State v. Reproductive Health Services of Planned Parenthood of the St. Louis Region,* 97 S.W.3d 54, 56 (Mo.App.E.D. 2003). A trial court's construction of a statute is a declaration of law that is reviewed de novo on appeal. *Id.*

M. S. acknowledged that he had decided to use his adopted daughter "as an instrument to satisfy [his] sexual desires" as soon as he met her. Tr. at 59. R. S.

was less than six months old at that time. Tr. at 59. M. S. proceeded to molest his daughter over a period of one and one-half years after her adoption. Tr. at 15-16. He eventually pled guilty to two counts of sodomy. Tr. at 20.

Section 452.400.1, as amended in 1995, mandates that a court "shall not grant visitation to the parent not granted custody if such parent has . . . pled guilty to a felony violation of chapter 566 . . . when the child was the victim." The sodomy offenses to which M. S. pled guilty were defined and governed by § 566.060, Mo. Rev. Stat. Despite M. A.'s motion to dismiss M. S.'s request for enhanced and ongoing visitation with R. S. and M. A.'s own request for the termination of his visitation rights altogether, the Circuit Court granted virtually all of M. S.'s wishes: it made findings "that the risk that Father will abuse R. S. in the future is low" and "that it is in the best interest of R. S. that her visitation with Father no longer be supervised," made clear its conclusion "that R. S.'s supervised visitation with Father should be eliminated after the parties have had the opportunity to explain what happened to R. S. in the past," ordered that supervised visitation continue in the interim with D. S. as the supervisor of those visits, and immediately removed the requirement that visitation with J. S. be supervised. Legal File at 201. That ruling was impermissible under § 452.400.1, and the Court of Appeals reversed for that reason. *M. A. v. M. A.,* No. ED 82018, 2004 Mo.App. LEXIS 679 (Mo.App.E.D. May 11, 2004).

The primary role of a court called upon to construe legislation is to ascertain the intent of the legislature from language used and to give effect to that

intent. *Racherbaumer v. Racherbaumer,* 844 S.W.2d 502, 504 (Mo.App.E.D. 1992). Courts must consider words used in the statute in accordance with their plain and ordinary meaning. *Ports Petroleum Company, Inc., of Ohio v. Nixon,* 37 S.W.3d 237, 240 (Mo. 2001). A court should not look beyond the plain language of a statute to find its meaning unless that language is ambiguous or the employment of ordinary definitions would lead to an illogical result. *The Mary Riethmann Trust v. Director of Revenue,* 62 S.W.3d 46, 48 (Mo. 2001). The language of § 452.400.1 is not ambiguous and the mandate of the statute is clear: no trial court should award a parent who has pled guilty to the sexual molestation of his child the right of visitation with that child.

If the statute does require construction, surely there is no basis for a narrow or constrained interpretation. The obvious purpose of § 452.400.1 is to protect children from further abuse at the hands of parents who have molested them in the past. Remedial statutes such as § 452.400.1, "enacted for the protection of life . . . and in the interest of public welfare" are to be interpreted liberally "in order to accomplish the greatest public good." *Hagan v. Director of Revenue,* 968 S.W.2d 704, 706 (Mo. 1998). The Circuit Court's interpretation and application § 452.400.1 was out of sync with the intent of the statute and the rules that ought to govern its construction.

A narrow construction of § 452.400.1 might limit its protection to R. S., the child whose molestation led to M. S.'s guilty plea, and leave J. S. without the statutory benefit. The obvious remedial intent of this measure—protecting the

children of sexually abusive parents from the likelihood that the parent will offend again—augurs against such an interpretation. In the context of statutes governing the termination of parental rights, Missouri courts have recognized "that prior abuse of another child is a prima facie case of imminent danger to a sibling in the same circumstances" and have approved "before-the-fact protective measures" in the interest of such children. *See, e.g., In re A. A.*, 533 S.W.2d 681, 684 (Mo.App.W.D. 1978); *see also In re J.C.G.,* 743 S.W.2d 449, 451-52 (Mo.App.W.D. 1987) (concluding that a father's prior molestation of some of his children represented a threat to all of his children and that "to require his children to be subjected to the potential of further sexual abuse 'would be a tragic misapplication of the law'") .

The Circuit Court explained that it could not "ex post facto take away a right [M. S.] has." Tr. at 7. The court also stated: "Section 452.400.1 deals with how you grant visitation. Section 452.400.2 deals with how you modify visitation. And it specifically deals with how you modify a supervised visitation." Tr. at 9. It concluded: "I don't think the conviction is dispositive of this case because it pertains to subparagraph 1 of § 452.400, and we are not dealing with subparagraph 1." Tr. at 8-9. The court reiterated the latter reasoning in its judgment. Legal File at 199. Neither the Circuit Court's ex post facto rationale nor its reference to § 452.400.2 could justify the judgment entered As the Court of Appeals noted, the version of § 452.400.1 in effect when the parties' dissolution decree was entered in February, 1995, allowed the Circuit Court to grant visitation to an abusive

parent if visitation was in best interest of the child. *M. A. v. M. S.,* No. ED82018, 2004 Mo. App. LEXIS , at *8-9 (May 11, 2004).The 1995 amendment of § 452.400.1 prohibited courts from granting visitation to the non-custodial parent if that parent had been found guilty or pleaded guilty to a Chapter 566 felony and his child was the victim. *Id.* at *8-9. The Court of Appeals duly noted that M. S. has pled guilty to such an offense against R. S. and concluded that § 452.400.1 as amended compelled the termination of his visitation with R. S. *Id.* at *13.

The Court of Appeals relied upon *Hoskins v. Box*, 54 S.W.3d 736 (Mo.App.W.D. 2001), in concluding that M. S.'s visitation with the R. S. must be terminated. *M. A. v. M. S at *8-12*. The father in *Hoskins* had pled guilty to felony child abuse in 1993, and the marriage had been dissolved in 1994. The decree of dissolution precluded the father from having contact with his children. He did not seek modification until after the Legislature had amended § 452.400.1 to prohibit visitation awards with respect to children whose parents had been convicted of molesting them. The trial court granted the mother's motion to dismiss the father's request for visitation. The Court of Appeals affirmed, holding that the version of § 452.400.1 in effect at the time the father filed his motion to modify governed his motion. 54 S.W.3d at 738-41.

In this case the Court of Appeals stated: "If *Hoskins* is correct, section 452.400.1 R.S.Mo (2000) applies in modification proceedings, whether the modification sought is to increase visitation rights or decrease visitation rights." *M. A. v. M. S.* at *12. Under the *Hoskins* analysis adopted by the Court of Appeals

in this case, M. S.'s invocation of the Circuit Court's jurisdiction subjected him to the law as it existed when his motion was filed. *Id.* The Circuit Court's insistence that it could not apply the amended version of § 452.400.1 because it could not "ex post facto" take away right that M. S. already enjoyed missed the point: M. S. brought the issue of visitation back before the court and was entitled to nothing more or less than that the law be applied as it existed at the time he requested a change.

The notion that terminating M. S.'s visitation with R. S. and J. S. would amount to prohibited ex post facto punishment is refuted by the United States Supreme Court's recent decision in *Smith v. Doe,* 123 S.Ct. 1140 (2003). *Smith* upheld the Alaska Sex Offender Registration Act against a claim that it was an ex post facto law. The Court explained the inquiry required by such a challenge:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it "civil."

Id. at 1146. The Court noted that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.*

To determine legislative intent the Court considers a statute's text and its structure. *Id.* Section 452.400 is structured as a part of the civil procedure

established by the legislature for adjudicating child custody issues in domestic relations cases. The readily apparent non-punitive purpose of the statute is to protect children from the risk of sexual molestation by a parent who has harmed his or her child already and been prosecuted successfully for that conduct. No evidence of a punitive purpose was adduced in this case. As the Supreme Court found in *Smith,* "nothing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Id.* at 1147.

The present terms of § 452.400.2 do not begin to suggest a legislative intention to deprive some children of the unqualified protective measure written into § 452.400.1 in 1995 and 1998 merely because the parents who molested them previously obtained visitation orders. Another fundamental rule of statutory interpretation is that courts "must presume that the legislature did not intend to enact an absurd law [and] must favor a construction that avoids unjust or unreasonable results." *Racherbaumer v. Racherbaumer, supra,* 844 S.W.2d at 504. All of those conditions—absurdity, injustice, and unreasonableness—would be realized in a law that excluded some molested children from protection from further abuse solely because their parents had gotten divorced prior to enactment of the statute. *See Racherbaumer* at 504-05 (construing § 452.340.4, Mo. Rev. Stat., which authorizes child support awards for disabled adult children, and concluding, *inter alia,* that it would be unreasonable to find that the legislature had intended "to provide the security of the child support laws to one adult mentally

incapacitated child but not another simply because of the period of time their parents were divorced").

At least since the 1995 amendment of § 452.400.1, § 452.400.2 has no readily apparent—let alone explicit—application to the visitation request of a parent who has molested his or her child. Section 452.400.1 addresses that situation directly. Section 452.400.2, on the other hand, provides that "when a court orders supervised visitation because of allegations of abuse or domestic violence, a showing of proof of treatment and rehabilitation shall be made to the court before unsupervised visitation may be ordered." § 452.400.2. In view of the explicit application of § 452.400.1 to the issue of visitation for a parent who has pled guilty to or been convicted of specific sexual and assaultive crimes against his or her child, and the unequivocal prohibition of visitation in that circumstance, it seems clear enough that § 452.400.2 applies to other forms of abuse and perhaps to other victims.

"Each word, clause, sentence and section of a statute should be given meaning if possible" and "the statute should be construed in a manner to harmonize any potential conflict between . . . two subsections." *Hovis v. Daves,* 14 S.W.3d 593, 595-96 (Mo. 2000). Even "where the same subject matter is addressed in general terms in one statute and in specific terms in another," it is well established that "the more specific statute controls over the more general." *Robinson v. Health Midwest Development Group,* 58 S.W.3d 519, 522 (Mo. 2001). Again, the Circuit Court did not adhere to those principles in this case.

The termination of M. S.'s visitation with R. S. would be required even if the issue was governed by § 452.400.2 The latter subsection requires that visitation rulings in modification proceedings be made in accordance with the best interests of the child. *Id.* No rationale exists for ignoring the legislative declaration in § 452.400.1 that the best interests of a child who has been subjected to felonious molestation by her parent always require the denial of any visitation between the child and that parent. There is ample precedent for looking to other legislative provisions for specific guidance in determining the best interests of children in modification proceedings:

> In making a best-interest determination for a change of custody, § 452.410 does not set forth what factors are to be considered. However, our appellate courts have determined that the best interests factors of § 452.375.2 are to be considered in modification proceedings, as well as in initial custody proceedings.

Heslop v. Sanderson, 123 S.W.3d 214, 222 (Mo.App.W.D. 2003) (citing *Wood v. Wood,* 94 S.W.3d 397, 405 (Mo.App.W.D. 2003)).

It should be noted that the Legislature amended § 452.400 during its most recent session. H.B.1453, 92nd General Assembly §452.400 (2004). The bill had not been signed by the Governor at the time that this brief was prepared. If it becomes law, the new measure will expand the limitation upon visitation awards for parents who have pled guilty or been found guilty of the felonious molestation of their children. *Id.,* § 452.400.1. Under the existing statute, the prohibition is

limited to visitation with the child who was victimized; under the new legislation, a parent guilty of molesting any child cannot be awarded visitation with that child or any other. *Id.* The new statute also precludes any award of unsupervised visitation in a modification proceeding for a parent who has pled guilty or been found guilty of felony child molestation. *Id.,* §452.400.2.

By and large, "[a]n appellate court must decide a case on the basis of the law in effect at the time of the appellate decision." *Sturgess v. Guerrant,* 583 S.W.2d 258, 262 (Mo.App.W.D. 1979). That rule gives way when adherence "'would result in manifest injustice.'" *State ex rel. Pfitzinger v. Wasson,* 676 S.W.2d 533, 535 (Mo.App.W.D. 1984) (quoting *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974)). An application of the new legislation that deprived R. S. or J. S. of protection that the current law affords either or both of them against the risk of harm from visitation with M. S. would be harsh indeed and would amount to manifest injustice. In any event, the bill passed this year makes perfectly clear the Legislature's intent to protect all of the children of a sexually abusive parent.

The United States Supreme Court recently recognized that "[s]ex offenders are a serious threat in this Nation," that "[t]he victims of sex assault are most often juveniles," and that prior sex offenders "are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Connecticut Department of Public Safety v. Doe,* 123 S.Ct. 1160, 1163 (2003). The Court previously has held that states have "a compelling interest in protecting children

from sexual abuse." *Globe Newspaper Company v. Superior Court,* 457 U.S. 596, 617 (1982). The Missouri Legislature addressed those problems when it amended § 452.400.1 in 1995, and again in 1998, and declared the policy of the state with respect to visitation between sexually abusive parents and their child victims. The Circuit Court misinterpreted § 452.400 and rendered a judgment that is singularly inconsistent with that policy. Especially in view of the profundity of the issue, the Court of Appeals was correct in reversing that judgment.

II.

The Circuit Court erred in finding that unsupervised visitation with M. S. was in the best interest of R. S. and J. S., and in granting M. S. unsupervised visitation with Jacob and declaring its intention to grant him unsupervised visitation with R. S. after the occurrence of a specified event, because that finding was against the weight of the evidence and granting M. S. unsupervised visitation thus violates § 452.400.2, in that (1) M. S. previously had molested R. S. and another infant on numerous occasions, (2) the legislature has made it the public policy of the state to recognize the likelihood of recidivism by individuals who have sexually molested their children and to protect children once molested from the risk of further sexual abuse, (3) M. S.'s performance on numerous psychological tests administered by one of his mental health experts and by M. A.'s expert revealed traits and disorders incompatible with confidence that the children would be safe alone in his presence, (4) Dr. Rohen and Ms Clark testified that supervision of M. S.'s visitation was required at least for R. S.'s safety, (5) Ms Clark testified that child molesters do not limit their victims to a single gender, and (6) even M. S.'s mental health experts acknowledged that he is at some risk of reoffending.

Standard of Review: The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). Trial courts

are vested with broad discretion in the determination of child custody matters. *T. C. H. v. K. M. H.,* 784 S.W.2d 281, 283 (Mo.App.E.D. 1989). A child custody decision should be reversed when the appellate court "is firmly convinced that the welfare of the child requires some other disposition." *Id.*

The Circuit Court decided this case pursuant to § 452.400.2 rather than § 452.400.1. Section 452.400.2 provides that a parent limited to supervised visitation on account of "allegations of abuse or domestic violence" may obtain unsupervised visitation only by establishing that he has been rehabilitated through treatment and that the requested modification would serve the best interests of the child. It is impossible to harmonize the Circuit Court's determination that eliminating supervision was in the best interest of R. S. and J. S. with the evidence in this case. The judgment and the premises of this case comprise a clear risk of harm to those children. Even if the court was correct in applying § 452.400.2, its pivotal finding is grossly opposed to the weight of the evidence and the need for reversal is patent.[9]

[9] The court refrained from awarding M. S. unsupervised visitation with R.S. in the present judgment. Legal File at 202. But its decree memorializes findings that "the risk that Father will abuse R. S. in the future is low" and that "it is in the best interest of R. S. that her visitation with Father no longer be supervised." Legal File at 202. And the court stated its intention to terminate supervision with respect

The Court of Appeals concluded that the Circuit Court had no basis for determining what would be in J. S.'s best interest after the court-ordered disclosure of M. S.'s molestation crimes had been made. The Court of Appeals cited expert testimony that J. S. would require counseling "to prepare him for being told about father's abuse of daughter." *M. A. v. M. S.* at *14. It also noted that "[t]he Guardian ad Litem urged the court not to remove supervision until son was counseled and brought to the point where he could deal with the information." *Id.* The Court concluded:

> The trial court erred in ordering elimination of supervision of father's visitation with son without ordering the recommended counseling or ordering an evaluation of son's best interests after counseling and after being informed of father's abuse of daughter.

Id. at *15. The Court of Appeals reversed the order eliminating supervision for M. S.'s visitation with J. S., and remanded the case for further proceedings on that issue. Id. at *21.

Much of the evidence at the Circuit Court was comprised of the trial and deposition testimony and the written reports of the parties' mental health experts. Each of those witnesses recognized that M. S. as a confessed child molester was at some risk to reoffend if he enjoyed unsupervised visitation. Their various

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to R. S. "after the parties have had the opportunity to explain what happened to R. S. in the past." Legal File at 202. M. A. seeks the reversal of those findings.

psychological test results and assessments painted a singularly disturbing image of danger and insecurity. The interplay of their analyses and assessments renders the Circuit Court's finding utterly wrong:

• Marie Clark, the director of Behavioral Science Institute, testified that M. S. was at "low risk" of harming his children, *provided that his time with them was supervised.* Ex. 6 at 22, 97. She specified the sort of visitation that BSI demands: "[W]e want face-to-face, one-on-one supervision at all times." Ex. 6 at 28.

• Dr. Rohen stated his opinion that M. S. "is not rehabilitated as a sexual offender." Tr. at 308. He testified that his opinion was based on extensive psychological testing of M. S., review of M. S.'s treatment and records, and his interviews with M. S. Tr. 309. Asked how sure he was about his opinion, Dr. Rohen answered: "[O]n a scale of 1 to 10, I'm likely at a 10." Tr. at 309.

• Mr. Robinson offered his opinion that it is "pretty unlikely" that M. S. would sexually abuse R. S. and J. S. Tr. at 204. He had recommended that M. S. continue in therapy and M. S. ignored that recommendation. Tr. at 206, 223, 238-39, 262-63. Mr. Robinson noted his disagreement with the "popular notion" that child molesters have a high rate of recidivism. Tr. at 204. The "notion" spurned by Mr. Robinson is the very rationale of the public policy declared by the legislature in §452.375.3 and §452.400.1. The United States Supreme Court also has taken an affirmative position on the matter: "The risk of recidivism posed by

sex offenders is 'frightening and high.'" *Smith v. Doe, supra,* 123 S. Ct. at 1153 (quoting *McKune v. Lile,* 536 U.S. 24, 34 (2002) (internal quotes omitted)).

• Dr. Rosen stated his opinion that "the children would be safe [with M. S.] and that their father is not likely to act out sexually against them." Tr. at 141-42. Regarding the possibility that M. S. might be sexually attracted to either of his children, Dr. Rosen testified: "He's been in multiple treatment programs that are constantly assessing that with him, and no one else has been concerned or worried about it and I'm not concerned or worried." Tr. at 140-41. That reliance upon M. S.'s therapists was misplaced.

In fact, Ms Clark, who ran one of the two treatment programs in which M. S. had participated, found M. S. to be at low risk for harming his children *only* if his visitation was closely supervised. Ex. 6 at 22, 97. Mr. Robinson, who conducted M. S.'s other treatment program, testified that he had not met R. S. and J. S. and that it would be "a cause for alarm" if the children had not developed "the ego strength to challenge their father." Ex. K at 2.

Well, Mr. Robinson ought to be worried sick. Dr. Rohen, the one expert witness who actually had met and evaluated the children, testified that R. S. "falls apart under [emotional] pressure [and] in a sexually inappropriate situation . . . would be unable to understand what's . . . going on [or] stop behavior that was inappropriate." Tr. at 334. Dr. Rohen found that J. S. is vulnerable to manipulation especially in "emotionally charged" circumstances: "[H]e doesn't perceive accurately what's going on. He doesn't think clearly. He's dependent on

approval. He could easily be persuaded that something he saw didn't happen." Tr. at 331, 361-62.

The combined testimony and reports of the mental health experts in this case leave no room for doubt about the need for ongoing supervision of any visits between M. S. and the children. And there was no reasonable basis for differentiation between R. S.'s and J. S.'s circumstances or for allowing unsupervised visitation with J. S. alone. Ms Clark, who had "seen over 7,000 sex offenders," stated that child molesters do not limit their abuse to a single gender. Tr. at 19-20, 90. M. S. had not minded that J. S. was in the room when he molested R. S. Ex. 6 at 86. Dr. Rohen testified that separating the children in that way would create problems for J. S. because of his "makeup" and would exacerbate R. S.'s psychological and adjustment difficulties as well. Tr. at 436-37.

Dr. Rohen's analysis of M. S.'s psychological test results is testament in its own right for continued supervision of any visitation that M. S. may enjoy with R. S. and J. S.. Dr. Rohen found that M. S. lacks insight, does not recognize the pattern of his deviant sexual behavior, has poor judgment, is impulsive and at risk for inappropriate behavior, does not take responsibility for problems that he has created, has difficulty learning from his experiences, is more likely than most to try to control and exploit others, has a low tolerance for frustration, and enjoys fewer emotional resources than most. Tr. at 332-33. Dr. Rosen did note some differences between the MMPI results that he had obtained from M. S. and those

obtained by Dr. Rohen. Tr. at 123-24. But he did not come close to controverting the range of personality and character problems found by Dr. Rohen and he was disturbingly cavalier about the meaning of interpretations about which they did differ:

> Well, the whole point of test scores is to predict behavior, and so if . . . Dr. Rohen's predictions came out to be true then his would be more accurate. If the predictions on mine came out to be more true, then mine would.

Tr. at 124. At the very least, the evidence of M. S.'s testing provides no foundation for the judgment that was entered.

M. S.'s own testimony also mandated a different conclusion about the best interests of his children. He said that he did not consider himself cured of his pedophilia. Tr. at 96-97. He acknowledged that Ms Clark never told him that he was "at zero risk" of re-offending. Tr. at 91. Ms Milligan's testimony recalled M. S.'s comment to her and to his mother that he "could not say that this would never happen again." Tr. at 590-91. And M. S.'s claim of insight into the devastation that his molestation had caused R. S. was belied by his behavior in blaming R. S. at age eleven for the necessity of supervised visitation and

suggesting to her on another occasion that "it [would] be nice if you and I just did a visit together . . . like a daddy and his daughter on a date." Tr. at 588-89.[10]

The Circuit Court's rationale for finding that M. S. had been rehabilitated as a child molester is the most striking illustration of its faulty evidence-weighing and of the consequences of that flawed analysis. The court stated:

> Court finds from the credible evidence that the BSI program is one of the most difficult programs of its type in the St. Louis area to successfully complete and that someone who successfully completes their sexual abuse program as Father has done has been rehabilitated.

Legal File at 200-01. The court proceeded to find that "the risk that Father will abuse R. S. in the future is low" and that "J. S. is not at risk from Father," to order

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[10] M. S. also made much of the fact that he does not appear to have abused a child from the time of his prosecution until the time of the present trial. Tr. at 40; Legal File at 109. But when a father has had "no opportunity to be alone" with his previously molested child, the risk of abuse represented by his past conduct is "not substantially affected by the lapse of time between the abuse and the [current] proceedings." *In re M.C.,* 762 S.W.2d 476, 477 (Mo.App.S.D. 1988). M. S.'s own mental health expert acknowledged: "Well, it certainly would have been very risky to him to engage in any kind of criminally abusive behavior knowing he was being watched." Tr. at 214.

that M. S.'s visitation with J. S. no longer would be supervised, and to declare the unsupervised visitation with R. S. was a foregone conclusion. Legal File at 201-02. In fact Ms Clark, who operates BSI and oversaw M. S.'s court-ordered treatment there for six years, testified that M. S. was at low risk to reoffend *only if his visitation with both children was supervised.* Ex. 6 at 22, 97.

The scope of review in a bench-tried case is limited: a trial court's decree should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron, supra,* 536 S.W.2d at 32. An appellate court should set aside a judgment because it is against the weight of the evidence cautiously and only when it is left with a firm belief that the judgment is wrong. *Lewis v. Gibbons,* 80 S.W.3d 461, 466 (Mo. 2002). When a case involves the custody of children the discretion of the trial court is especially broad. *T. C. H. v. K. M. H., supra,* 784 S.W.2d at 283. But the judgment in such a case nonetheless must be reversed when an appellate court "is firmly convinced that the welfare of the child requires some other disposition." *Id.*

The welfare of the children in this case is crying out for some other disposition. M. S. is a confessed serial child molester who sexually abused his infant daughter on at least several occasions and who previously had molested his young cousin. His molestation crimes against infants spanned many years. He considers himself a pedophile and does not consider himself cured of that condition. The woman who oversaw his court-ordered, six-year-long sex offender

treatment program testified that any visitation with his children must continue to be actively supervised. His profile from a comprehensive battery of psychological assessments, combined with his history of sexually deviant behavior with children, is flat-out frightening. Although he demonstrated an ability to recite the hallmarks of insight into his own abusive behavior and its consequences for his daughter, in the real world he told her that her emotions were the cause of their limited access to one another and suggested that it would be nice if they could go on a date alone.

It is the public policy of Missouri that parents who molest their children *do* reoffend and that the state will protect children who have suffered such abuse from its recurrence. § 452.400.1. The paramount concern in all proceedings involving the custody of a minor child is the welfare of that child. *In re B. M. P.,* 612 S.W.2d 843, 846 (Mo.App.E.D. 1981). In short and if necessary, R. S.'s best interests and Jacob's best interests trump M. S.'s desire for a "more normal relationship" with his children.

The judgment of the Circuit Court awarding M. S. unsupervised visitation with J. S.—and finding that unsupervised visitation would serve R. S.'s best interest—is wrong. The Court of Appeals concluded that § 452.400.1 required the termination of M. S.'s visitation with R. S. *M. A. v. M. S.* at *9-13. With respect to J. S., based upon reasoning fully referable to R. S., the Court of Appeals held that no substantial evidence supported the trial court's finding that the best interest of the child would be served by allowing unsupervised visitation. *Id.* at *14. The

reasoning and analysis of the Court of Appeals were sound and the results it reached were correct.

III.

The Circuit Court erred in awarding joint legal custody of R. S. and J. S. to M. S. because § 452.375.3, Mo. Rev. Stat., precludes any award of custody to M. S. and the Circuit Court thus was without jurisdiction to make such an award, in that (1) M. S. previously had pled guilty to two felony charges involving the sexual abuse of R. S. and (2) § 452.375.3 provides without exception that a court "shall not award custody" to a parent who has been convicted of or pled guilty to such a crime.

> **Standard of Review:** The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The construction of a statute is a matter of law. *State v. Reproductive Health Services of Planned Parenthood of the St. Louis Region,* 97 S.W.3d 54, 56 (Mo.App.E.D. 2003). A trial court's construction of a statute is a declaration of law that is reviewed de novo on appeal. *Id.* Where the pertinent facts are undisputed, the existence of subject matter jurisdiction is a matter of law that is reviewed de novo. *Meyer v. Meyer,* 77 S.W.3d 40, 42 (Mo.App.E.D. 2002).

Again: M. S. sexually molested R. S. on a number of occasions during her infancy and eventually pled guilty to two counts of sodomy arising from that conduct. Tr. at 15-16, 20. His crimes were proscribed by § 566.060. Section

452.375.3 prohibits a court from awarding custody to a parent who has pled guilty to felonious sexual molestation of his child in violation of any section of chapter 566. The Circuit Court awarded M. S. joint legal custody of R. S. and J. S. despite his disqualifying criminal history. That ruling transcended the court's jurisdiction and should be reversed.

Again: it would be wrong to give a narrow interpretation to the governing statute. Remedial statutes such as § 452.375.3 are "enacted for the protection of life . . . and in the interest of public welfare" are to be interpreted liberally in order to achieve their salutary purposes. *Hagan v. Director of Revenue, supra,* 968 S.W.2d at 706. The effect of awarding a parent joint legal custody is to invest him or her with authority to share decision-making responsibility with respect to the health, education, and welfare of his or her children. § 452.375.1(2).[11] The obvious purpose of § 452.375.3 is to avoid handing that power to a parent who has demonstrated the poor judgment, lack of self-control, and capacity for engaging in intentional harmful conduct inherent in the sexual molestation of his own children,

[11] In fact the Circuit Court in this case explicitly gave M. S. the power to veto M. A.'s parenting decisions regarding religious upbringing, any sort of psychological care or counseling, the selection of other health care providers, schools the children might attend and school curricula, extracurricular and summer activities, and sex education and contraception. Legal File at 207-08.

and whom the state recognizes is likely to be a recidivist. Construing the prohibition of § 452.375.3 narrowly inevitably would frustrate that purpose.

The Circuit Court's order in this case can never be reconciled with the letter or the intent of § 452.375.3. The statute prohibited the court from awarding M. S. joint legal custody of R. S. and J. S. and the judgment should be reversed for that reason.[12]

[12] The new bill passed by the legislature also would amend § 452.375. H.B.1453, *supra,* § 452.375. The prohibition of custody awards to parents guilty of felonious child molestation would be broadened by that amendment so that a parent who has pled or been found guilty of such an offense against any child, or who resides with a person guilty of such an offense, could not be granted custody of that child or any other. *Id.*

IV.

The Circuit Court erred in finding that the exercise of joint legal custody by M. S. and M. A. was in the best interest of R. S. and J. S. and granting M. S. joint legal custody, because that finding was against the weight of the evidence and the award thus violates § 452.410, Mo. Rev. Stat., in that (1) M. S. previously molested R. S. and child on numerous occasions, (2) M. S.'s performance on numerous psychological tests administered by one of his mental health experts and by M. A.'s expert revealed traits and disorders incompatible with confidence that he possesses the judgment and other personal traits and skills necessary for the responsible exercise of joint legal custody, (3) the legislature has made it the public policy of the state to recognize the likelihood of recidivism by and impaired judgment and decision-making abilities of individuals who have sexually molested their children, and to protect children from the consequences thereof by prohibiting any award of custody to such a parent, (4) M. A. has exercised sole legal custody since the entry of the first custody order in this case, and (5) no evidence suggested that M. S. and M. A. are able to cooperate and make shared decisions regarding the welfare of the children.

Standard of Review: The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). Trial courts are vested with broad discretion in the determination of child

custody matters. *T. C. H. v. K. M. H.,* 784 S.W.2d 281, 283 (Mo.App.E.D. 1989). A child custody decision should be reversed when the appellate court "is firmly convinced that the welfare of the child requires some other disposition." *Id.*

A trial court may not modify a custody decree unless it finds, on the basis of facts that have arisen since the prior decree or were not known to the court at that time, that the modification is necessary to serve the best interests of the children whom it would affect. § 452.410.1. The only explanation offered by the trial court for its modification of the present custody decree was that M. A. "has failed to confer with [M. S.] on major issues, including medical decisions, as set forth in the Parenting Plan." Legal File at 203. That finding is dubious in light of M. S.'s own testimony on the issue. Tr. at 47. More to the point, any evidence of inadequate communication between M. S. and M. A. was vastly outweighed by evidence that was utterly inconsonant with granting M. S. the power over his children's lives that is inherent in joint legal custody.

M. S. filed his motion during December, 2001, approximately six months after the most recent custody decree had been entered. Legal File at 110. He testified in this proceeding during June, 2002, approximately six months after having filed his motion. Tr. at 2, 13. During his direct examination M. S. acknowledged that M. A. had been conferring with him "about decision-making regarding the kids" since he filed his motion. Tr. at 47. Although M. S. complained that M. A. did not solicit his opinion during those conferences, he did

not testify that he had offered any opinions or that M. A. had been unreceptive to his input.

"[A] change in circumstance of the child or custodian warranting custody modification must be 'substantial' or 'significant.'" *In re McIntire,* 33 S.W.2d 565, 569 (Mo.App.W.D. 2000). And the rationale for modification must derive from the circumstances of the child rather than the interests or desires of the complaining parent: "[t]he change must be of such a nature that the child will substantially benefit from the [modification] and the welfare of the child requires it." *Reeves-Weible v. Reeves,* 995 S.W.2d 50, 57 (Mo.App.W.D. 1999). With due respect for the importance of communication between custodial and non-custodial parents regarding the major issues affecting their children, and with an acknowledgment that one might find room for improved communication from the record in this case, M. S. did not describe a problem that presently had the substance to warrant a fundamental restructuring of R. S.'s and J. S.'s longstanding custody arrangement.

On the other hand the record is replete with evidence that M. S. ought not to have the authority to "to impose [his] values and ideas" upon—indeed to veto—every educational, medical, psychological, and religious choice that may have to be made with respect to the R. S. and J. S. Again: M. S. molested his own infant daughter on a number of occasions, molested another child years before that, and somewhere along the way engaged in some window-peeping. Despite his claims of insight into the harm caused by his behavior, M. S. pressured his daughter at

age eleven to stop demonstrating fear of him and suggested that her feelings were responsible for the necessity of having a supervisor present for his visitation with both children. Even as she was reacting to his remarks, he told her that it would be nice if they could go on a date. A thorough battery of psychological tests showed him to be susceptible to impulsive behavior, exploitative and manipulative of others, lacking in insight into his own psychological and character problems and into the harmful effects of his impulsiveness and self-indulgence upon others. M. S. classifies himself as a pedophile and denies that he has been cured of that condition, and no mental health expert called by either party was prepared to say otherwise. The record establishes in short that M. S.is a walking catalogue of traits that should militate against affording anyone the decision-making power over children that is inherent in being their legal custodian.

The record is incapable of satisfying one prerequisite for the granting of joint legal custody in particular. Any award of joint custody must be supported by substantial evidence of parental "willingness and ability to share the rights and responsibilities of child-rearing" after divorce. *Burkhart v. Burkhart,* 876 S.W.2d 675, 680 (Mo.App.W.D. 1994). In the absence of such a showing a different arrangement must be ordered:

> Where the record is devoid of substantial evidence that the parties have a commonality of belief concerning parental decisions and the willingness and ability to function as a unit in making those decisions, it is error for the trial court to award joint legal custody.

Id.

In § 452.375.3 the legislature mandated that no court award custody to a parent who has pled guilty to felonious sexual molestation of his child. Even if that prohibition does not preclude an award of legal custody to such a parent, the public policy declared by § 452.375.3—that the state will not place the control of children's lives in the hands of a parent who has demonstrated the poor judgment, lack of self-control, and capacity for engaging in intentional harmful conduct inherent in the sexual molestation of his own children, and whom the state recognizes is likely to be a recidivist—ought to preclude any finding that the present custody modification is necessary for the welfare of R. S. and J. S.

The Court of Appeals held that the Circuit Court had erred in awarding joint legal custody of the children to M. S. *M. A. v. M. S.* at *17-19. The court noted:

> An order granting legal joint custody must be based on substantial evidence that fairly supports the conclusion that the parents have a commonality of beliefs concerning parental decisions, as well as the willingness and ability to function as a unit in making those decisions.

Id. at *18. And it found that the record in this case does not support such a conclusion. *Id.* at *19.

"Not every change in the life of a child or his or her custodian is enough to trigger a modification of custody." *Reeves-Weible v. Reeves, supra,* 995 S.W.2d at

57. "The change must be of a nature that the child will substantially benefit from the [custody modification] and [that] the welfare of the child requires it." *Id.* The record in this case cannot begin to support a finding that R. S.'s and J. S.'s welfare required that M. S. be made their joint legal custodian. M. S. bore the burden of proving that requirement. *V. L. P. v. J. M. T.,* 891 S.W.2d 577, 579-80 (Mo.App.E.D. 1995). He did not carry that burden. The Court of Appeals was correct in reversing the judgment of the Circuit Court on this issue.

V.

The Circuit Court erred in ordering that D. S. may serve as supervisor of M. S.'s visitation with R. S. because the court's implicit findings that D. S. was willing and adequately trained to assure to safety of the children during visitation with M. S., and that she was otherwise capable of discharging that responsibility, was not supported by substantial evidence, in that no evidence was adduced regarding D. S.'s training, capability, character, or beliefs.

> **Standard of Review:** The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976).
>
> "Substantial evidence is evidence which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Devor v. Blue Cross & Blue Shield,* 943 S.W.2d 662 (Mo.App.W.D. 1997).

Marie Clark of Behavioral Science Institute testified about the rigor of supervision required when child molesters spend time with their children: "[W]e want face-to-face, one-on-one supervision at all times." Ex. 6 at 28. Each of the prior custody decrees designated at least one agency, organization, or mental health professional to qualify and approve supervisors for M. S.'s visitation with R. S. and J. S. Legal File at 31, 84, 105. In the present judgment the Circuit Court eliminated those safeguards and approved M. S.'s current wife as a supervisor,

despite the fact that she did not testify and the remarkable dearth of evidence regarding her training, qualification, and general fitness to protect R. S. while M. S. visits with her. That ruling should be reversed.

When a child is before any court and his or her welfare is at issue, "the welfare of the child is the primary concern of the court." *Vangundy v. Vangundy,* 937 S.W.2d 228, 231 (Mo.App.W.D. 1996). That concern is so weighty that the judge in a custody proceeding does not serve in the first instance as a "neutral arbitrator," but rather "has an affirmative duty to determine the best interests of the child" that eclipses even its responsibility to accord the parties a fair trial. *Id.* Nothing in the evidence or the judgment suggests that the approval of D. S. as a visitation supervisor was consistent with the discharge of that judicial duty.

In fact the record reflects precious little about D. S. There is no evidence that she has received formal training in the supervision of visits between children and a parent with a history of having sexually molested his offspring. There is no evidence of her character or intelligence or capacity for responsible behavior. The judgment on the other hand announces the Circuit Court's determination that M. S. was rehabilitated, that he poses no threat to R. S., and that there should and soon will be no supervision of their time together. Legal File at 202. The approval of D. S. to oversee their visitation may be consistent with the latter determination. It is wholly inconsistent with the provision of the vigilant and meaningful protection for R. S. from danger attendant to being alone with M. S..

The judgment in a court-tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron, supra*, 536 S.W.2d at 32. "Substantial evidence is evidence which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Devor v. Blue Cross & Blue Shield, supra,* 943 S.W.2d at 665.

The Court of Appeals correctly found the record devoid of evidence that might support or justify the designation of D. S. as a visitation supervisor. *M. A. v. M. S.* at *20-21. It noted that there have been no factual findings at the trial level with respect to M. S.'s current wife. *Id.* at 20. The Court of Appeals also found reversal in order because M. S. had not requested that his wife be authorized to supervise his visitation in any pleading. *Id.* at 21. This Court should reverse the judgment of the Circuit Court for both of the reasons articulated by the Court of Appeals.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in this brief. This Court should remand the case to the Circuit Court with instructions to terminate visitation between M. S. and R. S. and J. S. pursuant to § 452.400.1, Mo.Rev.Stat. Alternatively, the case should be remanded with instructions to enter a judgment allowing nothing more than supervised visitation with either child. Upon remand the Circuit Court should be instructed to enter a judgment restoring the legal custody of R. S. and J. S. to M.A., and to refrain from authorizing M. S.'s current wife to supervise visitation between M. S. and either child.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Mo.R.Civ.P. 84.04, 84.05, and 84.06. The brief contains 16,249 words as determined by the software application Microsoft Word for Macintosh version X. The CD-ROM filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

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