

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned On Briefs September 3, 2014

**IN RE: MADISON M., ET AL.**

**Direct Appeal from the Circuit Court for Overton County  
No. 2013-CV-18 Amy V. Hollars, Judge**

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**No. M2013-02561-COA-R3-JV - Filed September 25, 2014**

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This is a dependency and neglect case. The juvenile court adjudicated the children at issue dependent and neglected and found that one of the children, Madison, had been subjected to severe child abuse at the hands of her stepfather. The stepfather appealed to circuit court. After a *de novo* hearing, the circuit court also adjudicated the children dependent and neglected and found that Madison had been subjected to severe child abuse by her stepfather. Stepfather appeals, arguing that the circuit court judge abused her discretion in admitting certain evidence during the *de novo* trial in circuit court. Discerning no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded**

BRANDON O. GIBSON, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY W. ARMSTRONG, J., joined.

Joshua V. Hoepfner, Livingston, Tennessee, for the appellant, Aaron H.

Robert E. Cooper, Jr., Attorney General and Reporter and Kathryn A. Baker, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

**OPINION**

**I. FACTS & PROCEDURAL HISTORY**

Madison M.<sup>1</sup> was born in January 2007. Her father is unknown. Madison's mother ("Mother") gave birth to a son in 2008. Thereafter, Mother began a relationship with Aaron

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<sup>1</sup>We have used initials rather than last names in this opinion in order to protect the identity of the children.

H. (“Stepfather”), and she and Stepfather were married at some point. Stepfather began residing with Mother and the children in 2009. In 2011, Mother gave birth to another son.

These proceedings began in August 2012, when the Tennessee Department of Children’s Services (“DCS”) filed a petition in juvenile court to adjudicate the three children dependent and neglected. The petition named as defendants Mother, the unknown and putative fathers of the two oldest children, and Stepfather, as the putative father of the youngest child. The petition alleged that DCS had received a referral that five-year-old Madison was the victim of sexual abuse at the hands of Stepfather. As such, the petition alleged that all of the children were at risk of abuse. The petition also asked the trial court to determine whether the children had been subjected to severe child abuse.<sup>2</sup> DCS sought a restraining order against Stepfather and requested that the court order a protective supervision plan for the children.

The juvenile court entered an ex parte emergency restraining order, finding probable cause to believe that the children were dependent and neglected. The order brought the children into the protective custody of the court and provided that Stepfather would have absolutely no contact with the children pending further orders. The juvenile court also appointed a guardian ad litem for the children and appointed counsel for Stepfather. After a hearing, the juvenile court ruled that Stepfather could have limited supervised visitation with Mother’s sons, but he could not have any contact with Madison. The court ruled that the three children could remain in the home with Mother, as “a less drastic alternative to foster care,” due to the protective supervision plan that was implemented to limit Stepfather’s contact with the children pending an adjudicatory hearing. Stepfather moved out of the home.

The adjudicatory hearing was held on February 25, 2013. The juvenile court entered an “Adjudicatory and Dispositional Hearing Order” on April 22, 2013.<sup>3</sup> The juvenile court

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<sup>2</sup>This finding was requested in accordance with Tennessee Code Annotated section 37-1-129(a)(2), which provides, in pertinent part, “If the petition alleged the child was dependent and neglected as defined in § 37-1-102(b)(12)(G), or if the court so finds regardless of the grounds alleged in the petition, the court shall determine whether the parents or either of them or another person who had custody of the child committed severe child abuse.”

<sup>3</sup>There are two phases to a dependency and neglect proceeding: “the adjudicatory phase in which the court determines whether a child is dependent and neglected” pursuant to Tennessee Code Annotated section 37-1-129(a)(1), and “the dispositional phase where the court ‘proceed[s] immediately or at a postponed hearing to make a proper disposition of the case’ under Tennessee Code Annotated section 37-1-129(c).” *In re Alysia M.S.*, No. M2011-02008-COA-R3-JV, 2013 WL 1501710, at \*5 (Tenn. Ct. App. Apr. 11, 2013) (quoting Tenn. Code Ann. § 37-1-129(c)). “Making a ‘proper disposition’ requires the court to make a  
(continued...)

found that DCS proved by clear and convincing evidence that Mother's children were dependent and neglected within the meaning of the law. Specifically, the court found that Madison was dependent and neglected "based on the sex abuse she endured at the hands of her [Stepfather]," and it found that the other children were dependent and neglected "based on those children being at substantial risk of harm in the care of [Stepfather]." The juvenile court also found that Madison was the victim of severe child abuse, as that term is defined by Tennessee Code Annotated section 37-1-102(b)(21)(C),<sup>4</sup> based upon Stepfather's commission of aggravated sexual battery against her, as defined by Tennessee Code Annotated section 39-13-504. The juvenile court's order recounted the testimony of various witnesses who testified at the hearing, and it specifically credited a videotaped forensic interview of Madison as "reliable." The juvenile court ruled that the children would remain in the custody of Mother "so long as she enforces the restraining order" against Stepfather, whereby he was allowed only supervised visitation with Mother's sons. The court extended its ruling to encompass an infant son born to Mother and Stepfather while the petition was pending.

Stepfather timely filed a notice of appeal to circuit court.<sup>5</sup> In his pre-trial brief, Stepfather argued that the statements Madison made during her recorded forensic interview should be excluded at trial due to a lack of trustworthiness, in accordance with Tennessee Rule of Evidence 803(25), which is the hearsay exception applicable to certain statements of children who are alleged to be victims of child abuse.

Also prior to trial, DCS filed a motion to admit the transcript of the juvenile court testimony of two witnesses who had become unavailable since the juvenile court proceedings. The first witness was a clinical psychologist, Dr. Janie Berryman, who had performed an extended assessment of Madison. DCS noted in its motion that Dr. Berryman was exempt from subpoena to trial pursuant to Tennessee Code Annotated section 24-9-101(a)(6), which provides that certain professionals, including psychologists, are

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<sup>3</sup>(...continued)  
custody determination 'best suited to the protection and physical, mental and moral welfare of the child.'" *Id.* (citing Tenn. Code Ann. § 37-1-130(a)).

<sup>4</sup>The cited definition provides that "severe child abuse" means "[t]he commission of any act towards the child prohibited by §§ 39-13-502--39-13-504, 39-13-515, 39-13-522, 39-15-302, 39-15-402, and 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child[.]" Tenn. Code Ann. § 37-1-102(b)(21)(C)(2014).

<sup>5</sup>Appeals from a juvenile court's final order or judgment in a dependency and neglect proceeding are to be made to circuit court, pursuant to Tennessee Code Annotated section 37-1-159(a), which provides that the circuit court "shall hear the testimony of witnesses and try the case de novo." *See also In re D.Y.H.*, 226 S.W.3d 327, 329 (Tenn. 2007).

subject to subpoena to a deposition but exempt from subpoena to trial. According to counsel for DCS, Dr. Berryman agreed to testify at the juvenile court hearing, but she was unwilling to testify again in circuit court. DCS also noted in its motion that counsel for Stepfather was in agreement with the transcript of Dr. Berryman's testimony being admitted in lieu of live testimony. The second witness at issue was Madison's former preschool teacher, Ms. Perry. DCS claimed that it had been unable to locate Ms. Perry to serve a subpoena on her or to notify her of the court date for voluntary attendance. DCS explained in its motion that Ms. Perry was no longer employed by the local school system, and counsel for DCS claimed that the school system would not provide any information about Ms. Perry's whereabouts. Although a DCS employee believed that she may have located Ms. Perry on the Internet via Facebook, her messages were not returned. DCS claimed that it had not otherwise been able to locate Ms. Perry. DCS pointed out that counsel for Stepfather had an opportunity to cross-examine both witnesses at the juvenile court hearing (and did, in fact, cross-examine Dr. Berryman), and neither witness had seen Madison since then. For all these reasons, DCS asked the court to declare these two witnesses unavailable and to admit the transcript of their former testimony at trial.

At the outset of the trial in circuit court, on August 26, 2013, the trial judge heard oral argument from both attorneys regarding these evidentiary issues. Counsel for Stepfather acknowledged that he previously agreed for the transcript of Dr. Berryman's testimony to be entered in lieu of her live testimony. However, he said he did not agree to the admission of the transcript of Ms. Perry's testimony, and he asked the trial court to exclude the prior testimony of both witnesses on the basis that the circuit court is required, by statute, to "hear the testimony of witnesses and try the case de novo." Tenn. Code Ann. § 37-1-159(a). Ultimately, the circuit court ruled that both Dr. Berryman and Ms. Perry were unavailable, and it admitted the transcripts of their juvenile court testimony as exhibits. Dr. Berryman's testimony spanned fifty pages, and Ms. Perry's testimony covered about twenty pages. The judge also overruled Stepfather's objection to the admission of the recorded forensic interview of Madison, and the DVD of the interview was made an exhibit at trial. The trial proceeded with the circuit court hearing live testimony from eight witnesses and receiving numerous additional exhibits.

At the conclusion of the testimony and after a short recess, the court issued a verbal ruling, followed by a written order entered on November 5, *nunc pro tunc* to the date of the August 26 hearing. The circuit court found that all of the children were dependent and neglected within the meaning of the law,<sup>6</sup> that Madison was the victim of severe child abuse

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<sup>6</sup>Specifically, the circuit court found the following definitions of "dependent and neglected child," found at Tennessee Code Annotated section 37-1-102(b)(12), to be applicable to the children:

(continued...)

perpetrated by Stepfather,<sup>7</sup> that it was contrary to the best interests of the children to remain in Stepfather’s custody, and that there was no less drastic alternative to restraining Stepfather from coming about the children. The circuit court ruled that the children could remain in the custody of Mother “so long as she enforces the restraining order” against Stepfather.

Stepfather timely filed a notice of appeal to this Court.

## II. ISSUES PRESENTED

Stepfather presents two issues for review on appeal, both of which we have slightly restated:

1. Did the circuit court err in admitting transcripts of prior testimony from two witnesses in lieu of live testimony in light of Tennessee Code Annotated section 37-1-159(c), which requires the circuit court in a dependency and neglect appeal to try the case *de novo* by hearing witnesses and rendering an independent decision based on the evidence received in circuit court; and
2. Did the circuit court err in admitting hearsay testimony of a child alleged to be the victim of sexual abuse when Tennessee Rule of Evidence 803(25) makes clear that a condition precedent to admissibility of such testimony is that the circumstances indicate trustworthiness of the statement.

For the following reasons, we affirm the decision of the circuit court and remand for further proceedings.

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<sup>6</sup>(...continued)

(12) “Dependent and neglected child” means a child:

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(B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;

....

(F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others; [and]

(G) Who is suffering from abuse or neglect[.]

<sup>7</sup>The court found that Madison was the victim of severe child abuse as defined by Tennessee Code Annotated section 37-1-102(b)(21), as Stepfather’s conduct fell within the definition of aggravated sexual battery as defined by Tennessee Code Annotated section 39-13-504(a).

### III. STANDARD OF REVIEW

“Trial courts are accorded a wide degree of latitude in their determination of whether to admit or exclude evidence[.]” *Tenn. Dep’t of Children’s Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at \*17 (Tenn. Ct. App. Mar. 8, 2005), *perm. app. denied* (Tenn. Aug. 29, 2005) (citing *Rothstein v. Orange Grove Ctr. Inc.*, 60 S.W.3d 807, 811 (Tenn. 2001); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992)). Accordingly, we review a trial court’s decision to admit or exclude evidence using an abuse of discretion standard. *In re Spencer E.*, No. M2009-02572-COA-R3-JV, 2011 WL 295896, at \*3 (Tenn. Ct. App. Jan. 20, 2011) (citing *Brown v. Crown Equip., Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005); *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004)). The abuse of discretion standard

does not permit an appellate court to substitute its judgment for that of the trial court, but “reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives, and thus envisions a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal.”

*Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (quoting *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010) (quoting *Lee Med., Inc. v. Beecher*, 312, S.W.3d 515, 524 (Tenn. 2010)). Consequently, when reviewing a discretionary decision by the trial court, “the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision.” *Id.* at 105-06 (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson*, 318 S.W.3d at 335). Still, “[d]iscretionary choices are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000)). An abuse of discretion will be found “when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.” *Id.*

### IV. DISCUSSION

#### A. Former Testimony

We begin with Stepfather’s contention that the circuit court erred in admitting the transcript of the juvenile court testimony of Dr. Berryman and Ms. Perry in lieu of their live testimony. The trial court admitted the testimony of both witnesses upon concluding that

they were unavailable at trial.

Generally, former testimony may be allowed as evidence at trial as an exception to the hearsay rule if the witness is unavailable at the time of trial and certain other requirements are met. *Smith v. Tri-County Elec. Membership Corp.*, 689 S.W.2d 181, 186 (Tenn. Ct. App. 1985). Tennessee Rule of Evidence 804(b)(1) provides, in part:

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

The rule covers deposition testimony as well as trial transcripts. Tenn. R. Evid. 804(b)(1), Adv. Comm'n Cmt. "Accordingly, if a witness previously testified in another proceeding and the party whom the testimony is offered against had an opportunity to examine the witness and a similar motive to develop that witness' testimony, then that testimony may be admitted in a subsequent proceeding if the witness is unavailable."<sup>8</sup> *Tenn. Dep't of Children's Servs. v. Hood*, 338 S.W.3d 917, 923 (Tenn. Ct. App. 2009).

"Rule 804(a) describes the situations in which a witness will be considered unavailable for purposes of the hearsay exceptions provided in Rule 804(b)." *Carter v. Quality Outdoor Prods., Inc.*, 303 S.W.3d 265, 268 (Tenn. 2010). "Unavailability" is defined to include, among other things, "situations in which the declarant . . . is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process[.]" Tenn. R. Evid. 804(a)(5). For example, a party's inability to procure a professional's attendance by process, due to his or her invocation of the exemption

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<sup>8</sup>*Tennessee Law of Evidence* says of the former testimony exception:

It may be the most reliable hearsay exception, for it is allowed only when the party against whom it is offered had an opportunity – and similar motive – to examine the declarant under oath at the former hearing. Furthermore, there is a substantial need for the exception, since by definition the declarant is now unavailable to testify. Finally, by definition the former testimony was given under oath, traditionally a strong indicia of truthfulness.

Neil P. Cohen, et al., *Tennessee Law of Evidence*, § 8.34[2][a] (5th ed. 2005). Former testimony has also been described as "extraordinarily trustworthy" and "hearsay of high caliber," rendering this "a valuable exception to the hearsay rule." David F. Binder, *Hearsay Handbook* § 26.05 (2d ed. 1983).

provided by Tennessee Code Annotated section 24-9-101, renders the witness unavailable pursuant to Rule 804(a)(5). See *Cullum v. Baptist Hosp. Sys., Inc.*, No. M2012-02640-COA-R3-CV, 2014 WL 576012, at \*3 (Tenn. Ct. App. Feb. 12, 2014), *perm. app. denied* (Tenn. June 20, 2014). “The language of Rule 804 is quite clear that when a witness is not available at a hearing because his attendance cannot be procured by process, former testimony or a deposition may be used under proper circumstances.” *Id.*

Stepfather does not challenge the trial court’s findings that Dr. Berryman and Ms. Perry were “unavailable” within the meaning of the rule, nor does he dispute that he had an opportunity and similar motive to cross-examine Dr. Berryman and Ms. Perry during the juvenile court hearing. In fact, Stepfather does not present any argument to suggest that the testimony of these witnesses was not admissible under Rule 804(b)(1). Rather, Stepfather argues on appeal that the circuit court erred in admitting the former testimony of these two witnesses because Tennessee Code Annotated section 37-1-159(a) states that, on appeal from a final order or judgment in a dependency and neglect proceeding, the circuit court “shall hear the testimony of witnesses and try the case *de novo*.” Stepfather cites one case in support of his argument, *Kissick v. Kallaher*, No. W2004-02983-COA-R3-CV, 2006 WL 1350999, at \*3 (Tenn. Ct. App. May 18, 2006), which states that “[a] *de novo* trial is ‘[a] new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.’” *Id.* (citing *Black’s Law Dictionary* 1544 (8th ed. 2004)). Stepfather interprets this language to mean that “the allowance of transcripts in lieu of live testimony is reversible error on the part of the Circuit Court.” We disagree.

We acknowledge that several cases have used broad language basically stating that the circuit court is to proceed “as if there had been no trial in the first instance” in juvenile court. See, e.g., *In re Caleb L.C.*, 362 S.W.3d 581, 592 (Tenn. Ct. App. 2011); *Cornelius v. Tenn. Dep’t of Children’s Servs.*, 314 S.W.3d 902, 906 (Tenn. Ct. App. 2009). However, this statement should be read in context. In *Cornelius*, for example, this Court described the nature of an appeal in a dependency and neglect case as follows:

In dependency and neglect cases, the General Assembly has directed that any appeal from the juvenile court is to be heard by the circuit court. . . . The appeal from juvenile court to circuit court in a dependency and neglect case is not the same as this Court’s review of trial court decisions, as set out in the Tennessee Rules of Appellate Procedure. That is because, by statute, the circuit court is to “hear the testimony of witnesses and try the case *de novo*.” Tenn. Code Ann. § 37-1-159(a).

While the record of the juvenile court proceedings is required to be provided to the circuit court on appeal, Tenn. Code Ann. § 37-1-159(c), the



circuit court is not limited to that record. On the contrary, the circuit court in a dependency and neglect proceeding may not rely solely on the record made before the juvenile court, but under Tenn. Code Ann. § 37-1-159(c) must try the case *de novo* by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding. *Tenn. Dep't. of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006). A *de novo* trial is “[a] new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance.” *Kissick v. Kallagher*, No. W2004-02983-COA-R3-CV, 2006 WL 1350999, at \*3 (Tenn. Ct. App. May 18, 2006) (no Tenn. R. App. P. 11 application filed). Consequently, the circuit court is not “reviewing” the juvenile court’s decision; instead, it is conducting a new proceeding as though the petition was originally filed in circuit court.

*Cornelius*, 314 S.W.3d at 906 (footnote omitted); *see also In re Caleb L.C.*, 362 S.W.3d at 592. These cases hold that the circuit court is to try the appeal *de novo*, as opposed to reviewing the juvenile court record and decision in the usual appellate posture. In the *Kissick* case cited by Stepfather, for example, the circuit court considered an appeal of a finding of dependency and neglect but did not hear any sworn testimony of witnesses or conduct a trial. 2006 WL 1350999, at \*2. The circuit court “heard” only unsworn statements of the parties’ attorneys and the guardian ad litem in chambers. *Id.* The Court of Appeals held that this type of procedure did not constitute a *de novo* trial as required by the statute. *Id.* at \*3.

*Kissick*’s instruction to proceed “as if there had been no trial” does not mean that an appeal actually erases any record of the juvenile court proceeding, or the testimony given therein, and it does not require the circuit court to literally proceed as if the juvenile court case never happened. In fact, the same statute that requires the circuit court to “hear the testimony of witnesses and try the case *de novo*” also provides, in subsection (b):

An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of that person, institution or agency to whose care the child has been committed. Pending the hearing, the criminal court or circuit court may make the same temporary disposition of the child as is vested in juvenile courts; provided, that until the criminal court or circuit court has entered an order for temporary disposition, the order of the juvenile court shall remain in effect.

Tenn. Code Ann. § 37-1-159(b). It goes on to say, in subsection (c):

When an appeal has been perfected, the juvenile court shall cause the entire record in the case, including the juvenile court's findings and written reports from probation officers, professional court employees or professional consultants, to be taken forthwith to the criminal court or circuit court whose duty it is, either in term or in vacation, to set the case for an early hearing.

Tenn. Code Ann. § 37-1-159(c).

This Court considered an argument somewhat analogous to Stepfather's position in *In re Isaiah L.*, 340 S.W.3d 692 (Tenn. Ct. App. 2010), which also involved a dependency and neglect proceeding appealed to circuit court. In the circuit court, the juvenile court order being appealed was introduced as an exhibit at trial. *Id.* at 702. Counsel for the mother objected, arguing that the trial in circuit court was to be conducted *de novo*, without deference to the decision of the juvenile court. *Id.* The circuit court overruled the objection and directed that the juvenile court order be marked and admitted into evidence, noting that Rule 36(e) of the Tennessee Rules of Juvenile Procedure provides that the entire juvenile court record must be sent to the circuit court when an appeal is perfected. *Id.* The circuit court held that it could consider the findings and recommendations of the juvenile court judge. *Id.* at 702-03. On appeal to this Court, the mother again argued that the circuit court erred by entering the juvenile court order into evidence in light of the fact that the circuit court trial is to be *de novo*. *Id.* at 704. She claimed that such a practice "undermined the statutory scheme providing for a *de novo* review by the Circuit Court." *Id.* at 707. We rejected the mother's argument with the following explanation:

As we have noted, Tennessee Code Annotated § 37-1-159(c) requires the juvenile court to "cause the entire record in the case, including the juvenile court's findings" to be "taken forthwith to the . . . circuit court whose duty it is . . . to set the case for an early hearing." T.C.A. § 37-1-159(c). The circuit court is to "hear the testimony of witnesses and try the case *de novo*." T.C.A. § 37-1-159(a). On appeal, the record of the juvenile court must be provided to the circuit court. T.C.A. § 37-1-159(c). However, the circuit court is not limited to that record. "On the contrary, the circuit court in a dependency and neglect proceeding may not rely solely on the record made before the juvenile court, but under Tenn. Code Ann. § 37-1-159(c) must try the case *de novo* by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding." *Cornelius*, 314 S.W.3d [902, 906 (Tenn. Ct. App. 2009)] (citing *DCS v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006)). A *de novo* trial is "[a] new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance." *Id.* (citing *Kissick v. Kallaher*, No. W2004-

02983-COA-R3-CV, 2006 WL 1350999, at \*3 (Tenn.Ct.App. May 18, 2006)).

In the case at bar, it was appropriate for the Circuit Court to consider the entire Juvenile Court record, including the Juvenile Court's order disposing of the case, in addition to the evidence submitted in the *de novo* trial before the Circuit Court. *See id.* In light of the fact that the Juvenile Court's order was a part of the record before the Circuit Court, entering the order as an exhibit at trial simply made the order available to the Circuit Court in two alternative ways. Mother has cited to this Court no authority to the contrary. Furthermore, the record shows clearly that the Circuit Court gave careful consideration to all of the testimony presented in its *de novo* trial on the DCS petition. Therefore, we reject Mother's argument that the Circuit Court committed reversible error in this regard.

*Id.* at 707-708 (footnote omitted).

In *In re K.A.P.*, No. W2012-00281-COA-R3-JV, 2013 WL 6665012, at \*5 (Tenn. Ct. App. Dec. 17, 2013) (*no perm. app. filed*), this Court again discussed the extent to which a circuit court may consider the juvenile court record in an appeal from a juvenile court finding of dependency and neglect. The mother in that case argued that the circuit court erred in relying on the juvenile court record during the *de novo* appeal. *Id.* We pointed out that the statutory scheme contemplates that the juvenile court record will be before the circuit court. *Id.* at \*6. Citing the relevant statute and *In re Isaiah L.*, we explained that "Tennessee Code Annotated § 37-1-159 directs the circuit court to conduct its own *de novo* trial, but also permits it to consider the juvenile court record." *Id.*

For these same reasons, we conclude that the circuit court did not err in admitting and considering the transcript of the former testimony of Dr. Berryman and Ms. Perry from juvenile court. First, the transcripts of the former testimony were allowable under Rule 804(b)(1). A requirement for a *de novo* hearing does not require the circuit court to disregard the rules of evidence and former testimony of undisputably unavailable witnesses. Second, the circuit court did not impermissibly rely solely on the juvenile court record. Rather, it considered the live testimony of eight witnesses in addition to the testimony of these two witnesses by transcript of former testimony and numerous exhibits, and the court reached an independent decision. In sum, the circuit court conducted a procedurally sound *de novo* hearing. Stepfather's argument is without merit.

### ***B. The Forensic Interview***

Stepfather also argues that the DVD recording of Madison's forensic interview should

have been excluded.

“Rule 803(25) of the Tennessee Rules of Evidence is the hearsay exception applicable to statements of children who are alleged victims of child abuse” in certain civil proceedings. *In re Malichi C.*, No. E2009-00055-COA-R3-PT, 2009 WL 3270178, at \*10 (Tenn. Ct. App. Oct. 13, 2009), *perm. app. denied* (Tenn. Jan. 19, 2010). “An alleged child victim’s statements are exempt from the general hearsay rule.” *Id.* Rule 803(25) provides:

The following are not excluded by the hearsay rule:

.....

(25) **Children’s Statements.** Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

The Advisory Commission Comment to the Rule reiterates that “[d]eclarations under this hearsay exception are inadmissible if ‘circumstances indicate lack of trustworthiness.’” Tenn. R. Evid. 803(25) Adv. Comm’n Cmt. Thus, the Advisory Commission Comment instructs courts to “carefully consider the motivation of particular minor declarants and also the motivation of some adults to influence children,” in addition to “the presence or absence of evidence corroborating the hearsay statement.” Other factors for consideration in assessing trustworthiness may include the circumstances surrounding the statement, such as the child’s demeanor and appearance; the time between the statement and the event described; and whether the environment where the statement was made was coercive or suggestive. Cohen, *Tennessee Law of Evidence* at § 8.30[4][a] (5th ed. 2005). “Whether to admit a child’s statement of sexual abuse as a hearsay exception is within the discretion of the trial court.” *Tenn. Dep’t of Children’s Servs. v. M.S.*, 2005 WL 549141, at \*17 (citing *State v. Purcell*, 955 S.W.2d 697, 609 (Tenn. Ct. App. 1997)); *see also Shofner v. Shofner*, No. M2004-02619-COA-R3-CV, 2006 WL 1501266, at \*7 (Tenn. Ct. App. May 31, 2006) (describing Rule 803(25) as a “narrow exception” that is “carefully constructed, and its

application to a given case is largely in the discretion of the trial court.”).

We note at the outset that this case is of the type mentioned in the rule, namely, “a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), [and] issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21).” Tenn. R. Evid. 803(25). Also, Madison is under the age of thirteen, as required by the rule. Therefore, “the admissibility of the extrajudicial statements depends upon the trustworthiness of the statements.” *Tenn. Dep’t of Human Servs. v. Purcell*, 955 S.W.2d 607, 609 (Tenn. Ct. App. 1997). “[T]he determination of trustworthiness is a matter for the trial court to decide and his decision will not be disturbed on appeal unless there is a showing of abuse of discretion.” *Id.*

In order to review the circuit court’s determination of trustworthiness, we must examine the material facts in this case that bear on the issue of trustworthiness. Madison’s first reported statement about Stepfather touching her came during “circle time” in her kindergarten special education class. Madison had been placed in the special education class due to behavioral issues, including defiance and hitting other children. During circle time, the children were asked about the best and worst parts of their weekend. Madison raised her hand and said that the worst part of her day was when her “daddy” touched her, and she proceeded to touch her private area.<sup>9</sup> Madison’s teacher took her aside and asked her to tell a teacher’s aide about the best and worst parts of her weekend, and Madison again said that her daddy had touched her and that she did not like it.

Madison’s kindergarten teacher (who testified live before the circuit court) testified that Madison regularly touched her private parts at school. She described this as a daily occurrence. Madison’s kindergarten teacher described Madison as a truthful child, explaining that if she wanted to do something, she would “just blatantly” do it and would not lie about it. Madison’s teacher expressed her belief that Madison knew right from wrong and truth versus “non-truth.” Madison’s teacher testified that Madison never said anything to her to suggest that she would have a motive to lie about Stepfather.

Madison’s statements of abuse were immediately reported to DCS. A child protective services worker, Christin Walker, met with Mother and Stepfather, and he agreed to leave the home pending an investigation. Ms. Walker testified that Mother had consistently, “from day one,” conveyed her belief that the alleged abuse never occurred. Accordingly, Ms. Walker said she had no evidence to suggest that Mother would have coached Madison to make these allegations against Stepfather.

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<sup>9</sup>It is undisputed that Madison refers to Stepfather as “daddy.”

Ms. Walker arranged for a forensic interview of Madison at a local children's center within a few days of the initial disclosure. Madison met with a forensic interviewer in private, while Ms. Walker watched via closed circuit television. As we have noted, the DVD recording of this interview was made an exhibit during the circuit court trial, and it is included in the record on appeal. When Madison was shown anatomical drawings during the forensic interview, she identified a female's genital area as her "thing." The examiner later asked if Madison "ever got a touch that hurt you," and Madison said, "Daddy touched me." Madison said this happened "at home" in "my room" at "wake up time." The examiner asked where on her body that her daddy touched her, and Madison said, "my thing." She also said, "It very hurts." The examiner asked Madison what her daddy used to touch her, and she named two different objects. Madison then made specific statements describing the abuse, but we do not find it necessary to describe them in detail here. When asked what happened next, Madison raised her arm in the air and said, "I say, 'Stop Daddy.'" She said her daddy did stop, but then he was "mean" and "mad." Madison pushed her eyebrows downward with her hand and said, "like this." She said her daddy told her to go to bed and slammed her door.

Madison's school counselor testified that she had contact with Madison on several occasions over the course of about a month<sup>10</sup> due to Madison complaining to her teacher about her private area hurting. The counselor testified:

We asked her several different ways to explain to me why it was hurting, what was going on, and she just kept saying, "My daddy hurt me." That was her answer every time. Every different way we, or I would ask the question she would say, "My daddy hurt me there."

The counselor said that she sometimes had difficulty understanding what Madison was saying because Madison mumbles and "[h]er language development is slower." Nevertheless, the counselor testified that she was able to understand when Madison said that her daddy hurt her. She said "[Madison] made that very clear." The counselor also expressed her belief that Madison was a truthful child.

Ms. Perry, Madison's former preschool teacher, testified via previous trial testimony that Madison was placed in her preschool special education classroom for behavioral issues, and Madison also received speech and language therapy for difficulty with communication. Ms. Perry testified that she did not have any problems with Madison lying. She said, "Madison would often even come to you, you didn't even have to witness it, and say I've

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<sup>10</sup>Madison's mother removed her from the elementary school after the statements of abuse were reported, and she began home schooling Madison thereafter.

done this. She was very black and white; things were very factual to her[.]” Ms. Perry also experienced problems with Madison touching herself. She said Madison would often cry when she went to the bathroom, and during one of these episodes, Madison described being touched with an object in her private area. Madison was asked who did this, and she said the name of her three-year-old brother.<sup>11</sup>

Madison’s preschool teacher testified that Mother had contacted her prior to this litigation and asked her to write a letter basically stating that Madison was very close with Stepfather, that she behaved better when he was around, and that Madison did not understand questions and would always answer “yes” to questions. Ms. Perry testified that she “wasn’t comfortable doing that because [she] did not feel any of those were valid.” She added, “Madison definitely answers questions significant to whatever the question is and will be very explicit with that answer.” She further clarified that Madison does not always answer “yes” to questions. She said if you ask Madison something that is not true, “She will let you know that[.]” An employee of an entity called “Health Connect” testified that she had been providing in-home counseling to Madison for the past two months based upon a referral that Madison had engaged in lying behavior and “sometimes acted out.” However, she said it was Mother who reported that Madison was lying.

Finally, we note the testimony of Dr. Janie Berryman, a licensed clinical psychologist who performed an extended assessment of Madison about three months after the initial disclosure of abuse. Dr. Berryman had extensive experience in evaluating and counseling children who are alleged to be victims of sexual abuse. Dr. Berryman testified that she initially met with Madison, at the request of DCS, in order to assess Madison’s ability to tell the truth. Dr. Berryman explained that articulating the difference between the truth and a lie is “more of an abstract concept,” and it is generally more difficult for younger children. She said younger children are generally able “to tell you what happened more so than to explain it.” Dr. Berryman met with Madison for one intake meeting and three interview sessions. Dr. Berryman said when she asked Madison if anyone ever touched her in a way she did not like, Madison clearly identified that her daddy touched her inside her clothes and that she did not like it. After Madison’s verbal description of the incident, Dr. Berryman showed her drawings of figures, and Madison “was able to draw a line from his hand to her private parts and identify her private parts as her ‘thing’ that he touched.” Dr. Berryman then asked Madison to show her how her daddy got his hands inside her clothes, and Madison stood up and demonstrated. She said Madison consistently described the physical touching in other sessions. Dr. Berryman testified that, in her opinion, Madison was able to give age

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<sup>11</sup>Madison’s younger brother was named Sean, and so was Sean’s father, but Sean’s father had not lived with Madison since she was two years old. By our calculation, Madison made this statement when she was either four or five years old, and Sean was three years old.

appropriate details regarding the sexual abuse. She said she generally considers whether a younger child is able to identify “who did it, where it happened, and what happened,” and Madison was able to give details about each of those. Dr. Berryman also explained that Madison’s emotional state while discussing the abuse was consistent with what she would expect from a child of her age in this situation: “She would be a generally chatty child until I started getting into the uncomfortable things, and then she would respond in an avoidant, distracted manner” and “kind of avoid the conversation.” Dr. Berryman opined that Madison’s emotions were congruent with the allegations of sexual abuse. Finally, Dr. Berryman noted Madison’s history of touching herself at school and “talking about her privates hurting,” which, Dr. Berryman said, would have been “a red flag for me right off the bat to look at some additional services for her.”

Dr. Berryman also met with Mother. She said Mother was adamant in stating that she had never heard Madison complain about her genitals hurting, nor had she witnessed Madison doing “anything sexual whatsoever.” Dr. Berryman was asked whether she found any indication that Mother would have encouraged Madison to lie, to which she responded, “Not at all.” She acknowledged that mothers are often suspected of instigating disclosures of abuse, for instance, when parents are in the context of a divorce. However, she said, “that’s not the case at all here.”

According to Dr. Berryman’s written report, Madison “is developmentally delayed with language impairment.” She concluded in her report that Madison “had trouble distinguishing in a verbal sense of what a truth and lie was.” Dr. Berryman explained during her testimony that Madison struggled with some of the questions she posed to her in order to determine whether Madison knew the difference between the truth and a lie. She said,

[Madison] didn’t have a verbal, conceptual manner to explain herself. I mean, she would get it right about half the time, whatever color we were using, whatever stuffed animal I was using, whether I would say “Are you wearing jeans or a skirt?” She would get it right some of the time and not some of the time. Part of the time she wasn’t paying attention, part of the time she was.

Despite this difficulty, Dr. Berryman opined that Madison’s statements were credible. She testified that Madison “continuously” described the abuse in the same manner over the course of three sessions, “and that never changed.” She noted that in addition to Madison’s verbal description of the touching, “she also used a format of drawing” and physically demonstrated how the incident occurred. Dr. Berryman described Madison’s reenactment of the abuse and said, “it was pretty compelling.” In conclusion, Dr. Berryman was asked, again, whether she considered Madison’s statements to be credible, and she responded affirmatively, stating, “The look on her face when she was demonstrating things did it for me.”



In its final order, the circuit court gave a detailed explanation for its decision to admit the recorded forensic interview:

The court admitted the out of court statement of Madison M[.] under Tennessee Rules of Evidence Section 803 (25), finding that statement of abuse to be trustworthy. The court finds that statement not only to be trustworthy, but to be credible, and to be entitled to significant weight in the evaluation of the proof of this case. There are a number of reasons for this.

The forensic interview began with questions that were intended to establish whether or not Madison M[.] could communicate based upon reality. For instance, she was requested to identify the people in her family, and to identify the parts of the body, and she could adequately do that. These things as preliminary questions are for the very purpose of showing that a child can communicate based upon reality.

The details of Madison's account of sexual abuse are significant. She indicated to the forensic interviewer where the abuse occurred - in the new home; when it occurred - at wake-up time; by whom - daddy. She consistently identifies Aaron H[.] as daddy.

The original disclosure to [her kindergarten teacher] Ms. Sullivan in the classroom was a spontaneous disclosure. It was not elicited, or solicited by the teacher, other than she was just asking the children what the best thing and worst thing was about their weekend. Then the child essentially blurts out that her daddy had touched her . . . .

The child's demeanor in the forensic interview was also significant. Dr. Berryman commented on this both from the forensic interview and in her own sessions with Madison. She said that Madison's demeanor was congruent with the allegations she was making - that her emotions as she was making the disclosures were congruent with the allegations she was making. She would be happy and smiling and chatty, and then become avoidant and distractive when she was talking about the uncomfortable subject of the abuse.

This is a very young child. There is no reason to believe that she should be a good or an accomplished liar. That's something that Dr. Berryman noted as well. The teachers noted that she was not a child who lied, but rather would even tell on herself even when the teacher had not witnessed personally the misdeed, and that she would come forward and tell on herself.

We have multiple disclosures here to professional persons outside the home, who have no motivation to lie, and indeed the child herself has no motivation to lie.

We have a disclosure of some sort of abuse in the 2011-2012 school year to her [preschool] teacher, [Ms.] Perry. In this disclosure Madison

identified the perpetrator as [her brother] . . . . Significantly this is during the time period in which [Stepfather] was in the home, from July 2009 to the time of the Restraining Order coming into place.

Further of significance is the fact that Ms. Perry testified that [Mother] was very insistent that she write a letter indicating that Madison's behavior was better when [Stepfather] was in the home, and that she would always answer 'yes' to a question.

There was a disclosure to Angela Sullivan during the circle time in the special education kindergarten classroom at [the elementary school]. There was a disclosure to [school counselor] Shirley McDonald when there was a time when Madison was complaining of hurting in her vaginal area, and she indicated 'my daddy hurt me there.'

Another thing, in making the disclosure in the forensic interview that Madison did, which certainly had an impact on the court in viewing that DVD was that the child lifted her hand up, indicating where she knew the camera was above her, and demonstrated what she did when this occurred, "Stop daddy." Then she also described her daddy's reaction. She turned to her side and made her eyebrows contract to make an angry face with a furrowed brow[ ].

The drawings that she did during the forensic interview also indicate that she is continually saying that daddy touched me in the vaginal area, which she identified as her thing.

Then when she goes to see Dr. Berryman in November and December, some months later, this time she indicates the touching . . . by her daddy. She even demonstrates how that would occur if her clothes were on.

This child has difficulty articulating a lot of things, but she has been remarkably clear in communicating consistently touching by her daddy in the vaginal area.

On appeal, Stepfather argues that the circumstances do not indicate the trustworthiness of Madison's out of court statement regarding abuse. He points to the fact that Madison has difficulty verbally distinguishing between the truth and a lie. He also asks this Court to consider the fact that when Madison was in preschool, she made a statement suggesting that her younger brother had inappropriately touched her. We are not unmindful of these issues. We have carefully considered Madison's previous statement, and the undisputed fact that Madison struggled to clearly differentiate between true and false statements. Still, in our view, the overall circumstances present in this case indicate trustworthiness of Madison's statements and indicate that the circuit court considered all the evidence in determining trustworthiness. Dr. Berryman acknowledged that there were some slight variances in Madison's statements to various people, such as whether she was touched with a particular

object, and whether her brother was involved at some point. Dr. Berryman said “those are some things that can be detailed a little bit later when she is in therapy and try to assess where that came from.” She added, “Other than that though, [Madison] was very clear” in describing the touching by Stepfather. We likewise find that Madison was unmistakably clear in communicating the details of the abuse to several people, despite her language impairment. Madison continued to make these consistent statements despite the fact that Mother did not believe her. The settings in which these statements were made were not coercive or suggestive. Madison initially volunteered the information to her teacher in a rather spontaneous manner. Madison made similar statements to a teacher’s aide, a school guidance counselor, a forensic interviewer, and a licensed clinical psychologist. The teacher, guidance counselor, and psychologist testified that they were of the opinion that Madison was truthful. These were unbiased parties. Madison was able to give specific details about the abuse, and her description of the event was not inconsistent with any other circumstances. She said it happened at her home, in her bedroom, at “wake up” time. Stepfather was living in the home at that time. Madison was able to demonstrate how it happened and the manner in which she told Stepfather to stop, and she described how Stepfather reacted. Madison regularly touched her private area, which, Dr. Berryman said, can sometimes be a “red flag.” There is no suggestion from anyone that Madison has any motivation to be untruthful or invent stories of abuse or that she has been coached or encouraged to fabricate her statements.

Madison’s statements are not rendered untrustworthy simply because there was no eyewitness to the abuse, and no physical evidence to confirm that it occurred. As *Tennessee Law of Evidence* aptly notes, “In cases involving child abuse or child neglect, the child victim is often the primary source of information about the event at issue. Frequently the critical occurrence involved only an adult and the child-victim. There were no other direct witnesses.” Cohen, § 8.30[2]. Thus, Rule 803(25) “provides a hearsay exception that will ease the ability to prove child abuse or neglect in some situations.” *Id.*

Again, the determination of trustworthiness is a matter for the trial judge to decide, and his or her decision will not be disturbed on appeal unless there is a showing of abuse of discretion. We certainly cannot say, in this case, that the circuit court judge abused her discretion in deeming Madison’s statements trustworthy, credible, and entitled to significant weight, and therefore admissible pursuant to Rule 803(25).

## V. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is hereby affirmed and remanded for further proceedings. Costs of this appeal are taxed to the appellant, Aaron

H. Because Aaron H. is proceeding *in forma pauperis* in this appeal, execution may issue for costs if necessary.

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BRANDON O. GIBSON, JUDGE