Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-266

APRIL TERM, 2005

Annette Weaver	}	APPEALED FROM:
	}	
v.	}	Franklin Family Court
	}	
Donald E. Weaver, II	}	
	}	DOCKET NO. 298-8-02 Frdm
		Trial Judge: Jane Dimotsis

In the above-entitled cause, the Clerk will enter:

Mother appeals from the family court's final divorce order, which awarded primary physical and legal rights and responsibilities over the parties' two children to father. She argues that the court improperly assessed the factors set forth in 15 V.S.A. § 665(b). We reverse and remand for a new evidentiary hearing.

Mother and father were married in April 1996. They are the parents of twin daughters, born in November 1997. Mother filed for divorce in August 2002. After a two-day hearing, the court issued an order awarding father sole legal and physical responsibility for the children until further order of the court. The court indicated that the case would be reviewed in mid-August to determine how the children were doing. Mother appealed.

While mother's appeal was pending, the family court issued an entry order in August 2004 declining to conduct a de novo review of the court's earlier custody order. The family court found that the June 2004 order contemplated an opportunity to set a long-term parent-child contact schedule rather than a reevaluation of its award of parental rights and responsibilities.

We cannot accept this construction of the family court's initial order, which plainly contemplated a de novo review of the court's custody award after two months. The divorce order stated:

> Mr. Weaver will have sole legal and physical responsibility for the twins beginning the day after school ends when he picks them up until further order of the court. . . . The case will be reviewed at mid August to determine how the children are doing. The idea is to have them remain in New York with parent child contact to be set with their mother for the rest of the year at the August hearing, after assurance that the children are doing well.

(Emphasis supplied). In essence, the family court was willing to award custody to father only on a trial basis, but an evaluation of the trial period never occurred.

We conclude that the family court exceeded its authority by issuing a conditional, time-limited, custody order, and we therefore do not address the merits of mother's arguments on appeal. The court awarded custody of the children to father for two months, essentially to "see how it goes." This type of order is not authorized by the statutes, and it is at odds with relevant case law.

We have confronted a similar situation in several juvenile cases. In In re B.B., 159 Vt. 584 (1993), for example, the family court issued an initial order reserving its decision on the State's request to terminate mother's parental rights, and holding open the record to see if mother would develop parenting skills. At a later hearing, the court terminated mother's rights. We reversed and remanded after finding that the family court had erred by continuing the disposition hearing for evidence of mother's future progress. Id. at 589. We reached a similar conclusion in In re A.A., 134 Vt. 41, 43 (1975). In that case, we held that the family court had erred by conditioning its final disposition order on a review hearing scheduled several months later. At the later hearing, the court granted the State's request to terminate parental rights. We found the court's procedure at

odds with the law governing juvenile proceedings. Id. We explained that the law sought, in the best interests of the child, to insure not only a speedy disposition of the proceedings, but also a final disposition, subject only to specifically enumerated time limitations, and modification procedures, which had not been followed in this case. Id.

Finally, in In re R.B., 152 Vt. 415, 422 (1989), we found a provision in a disposition order, which allowed the reopening of the case, to be invalid. The disposition order at issue in that case allowed the parties to reopen the court's order for any reason and at any time after thirty days, and to require a full disposition hearing as if the first hearing and order never existed. We found the order inconsistent with the court's duty to order a disposition "most suited to the protection and physical, mental and moral welfare of the child." Id. (quoting 33 V.S.A. § 656(a)). As we explained, "[t]he reopening provision meant that the disposition order was only temporary and subject to relitigation at any time. It placed [the juvenile] in a state of continuing limbo rather than creating a stable living arrangement, as the law requires." Id.

Like the statutes involved in the juvenile cases cited above, the family court's decision to award parental rights and responsibilities turns on the best interests of the child. 15 V.S.A. § 665(b). The statute contains no authorization for a provisional and time-limited award of parental rights and responsibilities to test whether the order will work properly. As in In re R.B., the court's order created a legal limbo for the children, as well as for their parents. Rather than finally deciding the matter before it, the family court sought to render its final decision at a later date. Moreover, the court attempts to allow for modification of the final order, if found appropriate, without meeting the changed circumstances requirement of our statutes. See 15 V.S.A. § 668. This decision exceeded the bounds of the court's authority.

We cannot determine what the court would have done if it had understood that it could not impose the time-limited order that it attempted to impose. Thus, the only possibly remedy is to reverse and remand for a new hearing and determination of parental rights and responsibilities.

Reversed and remanded.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

_____

Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned