

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-280

JUNE TERM, 2007

Gyna Poulin Hutchins	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Benjamin T. Doran	}	DOCKET NO. 54-1-03 Cndm
	}	
		Trial Judge: Thomas J. Devine

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

Father appeals the family court’s decision denying his motions to modify parental rights and responsibilities and to enforce the existing parent-child contact order. We reverse and remand based on our determination that the court abused its discretion by concluding that mother’s remarriage to a convicted sex offender was not a substantial change of circumstances sufficient for the court to consider modifying the existing parental-rights-and-responsibilities order.

The parties have one minor child, a girl born in September 2000. In the parties’ September 2003 final divorce order, the family court granted mother sole legal and physical rights and responsibilities over the child. Father—who has a history of substance abuse, domestic violence, and sexual abuse—was granted supervised parent-child contact and weekly telephone calls. Father moved to Florida shortly before the final divorce order issued and did not see his daughter again until two years later in September 2005, the same month that he filed his motions to enforce and to modify parent-child contact. About one month later, he filed a motion to modify parental rights and responsibilities, basing the motion, among other things, on mother’s marriage to a man previously convicted of sexually molesting young children. The family court issued a decision denying each of father’s motions following hearings. Regarding father’s motion to modify parental rights and responsibilities, the court concluded that father had failed to meet the threshold requirement of showing a real, substantial, and unanticipated change of circumstances. See 15 V.S.A. § 668 (“[U]pon a showing of real, substantial and unanticipated change of circumstances, the court may . . . modify an order made under this subchapter if it is in the best interests of the child.”).

In his pro se brief on appeal, father does not set forth a statement of the issues presented for review, as required by V.R.A.P. 28(a)(1), but rather presents a detailed rendition of his version of what happened at trial, interspersed with accusations, arguments, and factual allegations. Nevertheless, he does plainly argue that the family court erred by not allowing him sufficient time

to present evidence on his motions and by determining that he failed to meet his burden of satisfying the threshold requirement of demonstrating changed circumstances. Upon review of the record, we conclude that the family court abused its discretion in determining that mother's marriage to a man convicted of sexually molesting young children was not changed circumstances sufficient to warrant an examination of the best interests of the parties' child.

While acknowledging the subtle distinction between evidence of changed circumstances and evidence concerning a child's best interests, we have repeatedly stated that the family court, in considering whether to modify parental rights and responsibilities, must engage in a two-step inquiry in which the court first considers whether the moving party has shown changed circumstances, and if so, only then addresses the best interests of the child. See Gates v. Gates, 168 Vt. 64, 69-70 (1998); deBeaumont v. Goodrich, 162 Vt. 91, 95 (1994). In this case, in examining whether mother's remarriage to a convicted sex offender was changed circumstances, the family court found that (1) mother's husband, whom she met and married in 2004 after her divorce with father, had been convicted approximately eight years earlier of independent offenses involving sexual abuse against at least three different child victims; (2) with respect to those charges, the husband violated his probation in 1998 by staying at the home where his ten-year-old niece resided; (3) in 2001, he completed sex-offender treatment programs to the satisfaction of his probation officer; and (4) mother admitted that she left the parties' child alone in her husband's care from time to time. The court acknowledged that mother's marriage to a convicted sex offender presented father's strongest argument in support of his claim that changed circumstances existed, but nonetheless concluded that mother's marriage to the man, standing alone, did not create "a jurisdictional basis to even consider removing [the parties' child] from her mother's care, especially given the continuing risk factors surrounding [father], his limited involvement in the child's life since the divorce and his overwhelming anger level towards the mother." While expressing concern about the husband's history of sexual abuse against multiple child victims and recognizing that some sex offenders continue their abuse even after completing sex-offender treatment, the court noted that in this case the evidence indicated that the parties' child did not appear to be anxious or uncomfortable in the presence of the husband, who had successfully completed a comprehensive sex-offender program and had been awarded custody of an older male child.

We recognize that the moving party has a heavy burden to prove changed circumstances, and that the "family court has discretion in determining if the moving party has established a change of circumstances." Sundstrom v. Sundstrom, 2004 VT 106, ¶ 29, 177 Vt. 577 (mem.). "Thus, we will not disturb the court's determination unless its exercise of discretion was on grounds or for reasons clearly untenable, or the exercise of discretion was to a clearly unreasonable extent." Meyer v. Meyer, 173 Vt. 195, 197 (2001). Nevertheless, we conclude that the court exercised its discretion on untenable grounds in determining that father failed to demonstrate changed circumstances based on mother's marriage to a man who had been convicted of molesting multiple child victims similar in age to the parties' children. In concluding that mother's marriage to this man was not changed circumstances, the court relied primarily on its assessment of father's shortcomings, which are certainly relevant to a best-interests inquiry, but not to the question of whether father has demonstrated changed circumstances. Mother's marriage to a man convicted of molesting multiple child victims raised legitimate concerns about the safety of the parties' daughter, thereby establishing a real, substantial, and unanticipated change of circumstance requiring the court to examine the best

interests of the child in considering whether to modify parental rights and responsibilities. Cf. McConnell v. McConnell, 566 S.E.2d 801, 806 (N.C. Ct. App. 2002) (upholding trial court’s finding of changed circumstances where mother married man who had been convicted of molesting a fourteen-year-old girl and who admitted to continued sexual urges for young girls). Further, because of the passage of time since the last hearing and the family court’s focus at that hearing on whether father had met the threshold inquiry, we remand the matter for the court to hold an additional evidentiary hearing on the best interests of the child.

With respect to other issues, we find no error in the family court’s denial of father’s motion to enforce the current parent-child order and to find mother in contempt. Father also argues on appeal that the family court abused its discretion in denying his motion to appoint a guardian ad litem for the parties’ child. Insofar as the record does not reveal the reasons for the court’s denial of that motion, the court should revisit that request anew on remand and indicate the basis for its resolution of the motion.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice