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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-548

SEPTEMBER TERM, 2005

Kathleen Lovell	}	APPEALED FROM:
	}	
v.	}	Lamoille Family Court
	}	
Richard Gargiulo	}	
	}	DOCKET NO. 57-3-03 Ledm
		Trial Judge: Edward J. Cashman

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

Mother appeals pro se from the family court=s October 2004 order, which awarded her primary custody of the parties= minor child and ordered each party to bear their own attorney=s fees.[1] Mother asserts that the court erred in failing to award her attorney=s fees. We affirm.

Mother and father, who never married, are the parents of Lucy, who was born in 1994. Pursuant to a Massachusetts court order, parents shared legal custody of Lucy and mother had physical custody. Both parents married others. Mother eventually settled in Vermont in 1998; father resides in Massachusetts. Sometime prior to March 2003, father became concerned about Lucy=s well-being. In March 2003, he did not return Lucy to mother at the conclusion of a scheduled visit. At that time, with the assistance of counsel, father filed an ex parte emergency motion in Massachusetts seeking emergency temporary legal and physical custody of Lucy. Father provided a four-page affidavit outlining his concerns about Lucy=s safety and well-being. The Massachusetts court granted father=s request but eventually relinquished jurisdiction to Vermont.

The Vermont family court issued a temporary order in May 2003 indicating that mother would maintain sole and primary parental rights and responsibilities. In June 2004, the family court held a hearing on parents= conflicting requests to modify the current provisions for parent-child contact between father and Lucy.[2] Mother=s counsel indicated at the hearing that she would be requesting attorney=s fees based on her assertion that father had acted in bad faith. After the hearing, mother=s attorney moved for attorney=s fees, asserting that father had acted in bad faith by Awilfully and vexatiously@ refusing to return Lucy to mother=s custody in March 2003, filing an emergency motion for custody in Massachusetts, and lying to the court about his concerns regarding Lucy=s well-being. Mother asserted that she had incurred in excess of $15,000 in attorney=s fees, which caused her financial hardship. According to mother, although father purported to have suffered financially as well, he had shown an ability to pay when he chose to do so, by initiating the Massachusetts litigation, for example, hiring an attorney, and paying for the court-ordered forensic evaluation.

Father opposed mother=s motion, arguing that each party should pay their own attorney=s fees. Through counsel, father asserted that he had been willing to settle the matter for the prior ten months pursuant to the recommendations of the forensic evaluation but mother had refused to do so. Father noted that mother had not been trying to enforce the prior order, as she stated, but rather she had been seeking to modify it. Father also maintained that his actions in commencing his modification action in Massachusetts had been motivated solely by his concern for Lucy. Father maintained that there was no legal basis to award attorney=s feesCmother had not demonstrated bad faith, nor had she

demonstrated financial need (she had been able to afford counsel throughout the proceedings while father had not, and she had already paid over $17,000 in attorney=s fees), or father=s ability to pay her attorney=s fees.

In a written order, the family court denied father=s request to modify parent-child contact and it ordered each party to pay their own attorney=s fees. As relevant to the issue raised on appeal, the court found that father=s initial concerns for the child=s safety had proved unfounded and his actions created considerable confusion and concern to mother and child that could have been avoided through a better ability to communicate with one another. It stated that father=s decision to withhold the child from mother showed poor judgment and a fundamental distrust of mother. This same conduct also increased mother=s distrust of father. The court found, however, that this did not appear sufficient to trigger a reexamination of the parent-child contact provision. The court explained that father had used proper legal channels to address his concerns. He had abided by court process throughout these proceedings. It stated that, while father=s actions may have reflected poor judgment, the methods did not reflect vengeful conduct as mother suggested. Based on numerous findings, the court concluded that neither parent proved facts of sufficient gravity relative to the issue of parent-child contact to support a finding of real, substantial, and unanticipated change of circumstances. Mother filed a motion for reconsideration, asserting in part that the court erred in denying her request for attorney=s fees. The court denied the motion, stating that it had addressed the issues raised by mother in its previous order. Mother appealed.

Mother argues that the family court erred by failing to award her attorney=s fees. More specifically, she asserts that: (1) the court failed to make sufficient findings to assess her financial needs and determine father=s ability to pay; (2) it abused its discretion by denying her request without first determining the parties= financial obligations and resources; (3) it is in the interests of justice that she be awarded attorney=s fees to relieve her of the onerous financial burden that can befall a person seeking to promote a child=s best interest; and (4) father should pay her attorney=s fees because he engaged in bad faith litigation by knowingly and purposefully making false statements to the court at hearings and in his pleadings.

Vermont adheres to the AAmerican Rule@ regarding attorney=s fees, thus, Aparties must bear their own attorneys= fees absent a statutory or contractual exception.@ DJ Painting, Inc. v. Baraw Enters., Inc., 172 Vt. 239, 246 (2001). Trial courts also possess the authority to Aaward fees as the needs of justice dictate.@ Id. (quoting In re Gadhue, 149 Vt. 322, 327 (1987)). This power, however, Amay be invoked only in exceptional cases and for dominating reasons of justice.@ Id. (quotation omitted). The type of bad faith conduct that would justify an award of attorney=s fees has been found where Aone party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons where the litigant=s conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action.@ Id. (quotation omitted).

Mother fails to demonstrate that the family court erred by ordering each party to bear their own attorney=s fees. Mother asserted below, and here, that she was entitled to attorney=s fees because father had acted in bad faith but the family court rejected this assertion and found, instead, that while father may have exhibited poor judgment in keeping Lucy after a visit and instituting legal proceedings in Massachusetts, the methods that he employed did not reflect vengeful conduct on his part. It is for the family court, not this Court, to assess father=s credibility and weigh the evidence of bad faith. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (trial court=s findings entitled to wide deference on review because it is in unique position to assess the credibility of witnesses and weigh the evidence presented). We find no error in the family court=s refusal to award mother attorney=s fees based on her assertion and examples that father acted in bad faith.

Mother also complains that the family court erred by failing to make findings regarding the parties= respective financial situations. Unlike the divorce cases on which mother relies, however, there is not a specific statute that supports an award of attorney=s fees in proceedings on a motion to modify parental rights and responsibilities or a request to modify parent-child contact. See, e.g., 15 V.S.A. " 606, 607 (discussing the recovery of Asuit money@ in divorce proceedings); Turner v. Turner, 2004 VT 5, & 9, 176 Vt. 588 (mem.) (AAttorney=s fees are recoverable in divorce actions generally as >suit money.=@) and compare T. Malia, Annotation, Right to Attorneys= Fees in Proceeding, After Absolute Divorce, for Modification of Child Custody or Support Order, 57 A.L.R. 4th 710 (2005). Moreover, the family court=s consideration of a motion to modify does not involve the same financial considerations

present in a divorce proceeding. As we explained in Turner, 2004 VT 5, & 9,

> the peculiar nature of divorce and similar actions, involving almost always the financial circumstances and abilities of the parties as matters in controversy, and being matters of common occurrence in the trial courts, obviates the necessity for a separate hearing, or the taking of particular evidence, on the question of awarding of attorney fees or suit money. In the usual, and vast majority of, cases such allowance borders on judicial routine, and is supported by evidence bearing on the circumstances of the parties generally.

Mother=s assertion that the court had evidence of the parties= financial situation before it does not thereby transform this case into one substantively similar to a divorce proceeding.

Nonetheless, this Court had stated, relying on divorce cases, that the trial court has discretion to award attorney=s fees in proceedings dealing with motions to modify parental rights and responsibilities. Mullin v. Phelps, 162 Vt. 250, 268 (1994) (citing Cleverly v. Cleverly, 151 Vt. 351, 358 (1989). We stated in Mullin that A[t]he power to allocate expenses among the parties mitigates the potentially onerous financial burden that can befall one who seeks to promote a child=s best interests. In fashioning an award, the court=s primary consideration is the financial resources of the parties.@ Id. at 368-69 (citing Ely v. Ely, 139 Vt. 238, 241 (1981)).

In this case, the record supports the family court=s discretionary decision not to award mother attorney=s fees. Mother has not demonstrated that she suffered an Aonerous financial burden@ in seeking to promote Lucy=s best interests. Indeed, father similarly sought to promote Lucy=s best interests and he bore a similar financial burden in the process. The record shows that father proceeded pro se at the final hearing because he could no longer afford to hire counsel; father also paid for the court-ordered forensic family evaluation, in addition to hiring a doctor and dentist to evaluate Lucy. Mother, on the other hand, was able to retain counsel throughout the proceedings. Given this, and in light of the family court=s finding that father did not act in bad faith, we find no abuse of discretion in the court=s decision that each party should bear their own attorney=s fees. Finally, we reject mother=s assertion that this Court should impose sanctions against father under V.R.C.P. 11(c). Mother did not request such relief below, and this Court is not the proper forum to address such a request in the first instance.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] Mother was represented by counsel throughout the proceedings below; father was represented by counsel during some of the proceedings below but appeared pro se at the final hearing.

[2] Although father had initially sought an award of custody, the parties agreed at the hearing that awarding

custody to mother would be in the child=s best interests.