

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-373

MARCH TERM, 2007

Lynn Burton	}	APPEALED FROM:
	}	
	}	
v.	}	Rutland Family Court
	}	
Craig Burton	}	
	}	DOCKET NO. 181-4-01 Rddm
	}	
		Trial Judge: David A. Howard

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

Father appeals the family court's order denying his motion and granting mother's motion to modify parental rights and responsibilities with respect to their daughter. We affirm.

The parties married in 1996 and were divorced in 2002. Their daughter, Alison, was born in October 1999. Pursuant to the parties' divorce order, mother had primary legal and physical rights and responsibilities and father had parent-child contact from Tuesday afternoons until Thursday mornings and on alternate weekends. That schedule was in place when, in late 2004, father filed a relief-from-abuse petition alleging that mother was sexually abusing their daughter. The family court denied the petition, finding that the child's reports of sexual contact with mother were due to pressure and undue influence from father and his fiancé and were not reliable. Father also reported the alleged abuse to the Department for Children and Families (DCF), but none of the claims were substantiated. Despite the findings of the court and DCF, father continued to file complaints based on the child's renewed reports of sexual contact with mother. DCF and law enforcement agencies investigated the various complaints, but none were substantiated and no criminal charges were ever brought against mother. The parties also filed multiple motions for contempt and to modify parental rights and responsibilities in the family court. Father asked the court to award him parental rights and responsibilities based on mother's alleged abuse of the child, and mother asked the court to reduce the contact between father and the child.

In April 2005, the family court issued an order for a family forensic evaluation to be performed by Dr. Jan Tyler, a psychiatrist who had expertise in the field of child abuse. Dr. Tyler submitted her evaluation to the court in September 2005. In October 2005, based on Dr. Tyler's recommendation, the parties agreed to have DCF take voluntary custody of Alison. The idea was to place the child in a neutral setting away from the undue influence or coercion of either parent while the investigation was continuing. Alison remained in foster care under DCF supervision from

October 2005 until February 2006. The family court held hearings on the parties' motions over six days between March and June 2006.

Following those hearings, in an August 2006 decision, the court denied father's and granted mother's motion to modify parental rights and responsibilities. The court prohibited contact between the child and father's fiancé and reduced father's parent-child contact to two hours on Tuesday evening and from Saturday morning until Sunday evening on alternate weekends. In making this decision, the court found credible Dr. Tyler's opinion that the majority of factors supported a conclusion that no inappropriate sexual conduct had occurred between Alison and her mother. Consequently, the court found that father had failed to demonstrate that mother was sexually abusing the child. The court further concluded that it was in Alison's best interest to reduce contact between her and father and prohibit contact with father's fiancé because the couple's continuing belief that mother was abusing the child had seriously affected the child's relationship with her mother and had created an atmosphere in which the child felt pressure from them to continue to report allegations of abuse against mother.

Father's arguments on appeal are melded together, but he appears to challenge the family court's findings that (1) father and his fiancé were the source of the child's persistent allegations of abuse; (2) father's dogged pursuit of the allegations had undermined the relationship between the child and mother; and (3) contact between father's fiancé and the child should be prohibited because of the major role that the fiancé played in encouraging the child to repeat the allegations. Upon review of the record, we conclude that there is evidence to support these findings and conclusions. The child's therapist testified that father's fiancé had pressed the child to talk about mother's "bad touch" and to tell the therapist that mother "does do bad touch." The therapist also testified that the child indicated she was afraid not to comply with the fiancé's request. According to the therapist, the child stated that father and his fiancé had told the child that they would never come to see her if they were restricted to supervised visitation. There was also testimony that father and the fiancé had indicated to the child that, if she had been lying about mother's sexual abuse, there must be something mentally wrong with her. The chief investigator for DCF, who had interviewed Alison and attended therapy sessions, found the child to be fearful of father's fiancé and, to a lesser extent, father. The therapist opined that the child was under great emotional distress because of the pressure she felt from father and her fiancé to confirm her allegations of abuse against mother, and that continued exposure to this pressurized atmosphere could cause serious developmental harm to the child. This and other evidence supported the court's conclusion that father and his fiancé's initial good-faith concern over the child's abuse allegations had been transformed, perhaps unwittingly, into their advocating that the abuse had happened and pressuring the child to verify their position regarding the alleged abuse.

The family court has wide discretion in determining custody matters. Begin v. Begin, 168 Vt. 298, 301 (1998). "Given its unique position to assess the credibility of witnesses and weigh the evidence, we will not set aside the court's findings if supported by the evidence, nor its conclusions if supported by the findings." Id. In this case, evidence supported the family court's findings, which, in turn, supported the court's conclusions and decision to reduce father's parent-child contact. The court's decision correctly focused on the best interests of the child rather than on whether father's conduct was right or wrong. See Renaud v. Renaud, 168 Vt. 306, 309 (1998) ("The paramount

consideration in any custody decision . . . is the best interests of the child.”). Based on the evidence presented, the court concluded that it was necessary to reduce father’s contact and prohibit his fiancé’s contact with the child to protect her from being harmed by the current circumstances. We find no abuse of discretion.

Father argues, however, that the family court erred by relying on hearsay statements made in Dr. Tyler’s report and by allowing certain testimony from the child’s therapist. Both arguments are unavailing. With respect to Dr. Tyler’s report, 15 V.S.A. § 667(b) provides:

Reports prepared by a person qualified as an expert under the Vermont Rules of Evidence, evaluating the best interests of the child shall be admissible for the purposes of determining parental rights and responsibilities provided that the expert is available for cross-examination.

In this case, Dr. Tyler prepared an evaluation report pursuant to a court order (1) finding that a family evaluation would provide information necessary to determining the best interests of the child, and (2) stating that the purpose of the evaluation is to assess each party’s parenting skills and relationship with the child, assess possible abuse by either parent, and recommend an appropriate allocation of parental rights and responsibilities. Dr. Tyler testified extensively and was available for cross-examination. Moreover, V.R.E. 703 allows experts to rely on otherwise inadmissible facts or data as long as the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Dr. Tyler indicated that the statements she relied on in writing the evaluation were of the type normally relied on by experts in the field.

As for the therapist’s testimony, father makes no coherent claim of error, but rather simply repeats the objections made at trial. At one point during direct examination, the therapist was asked whether she believed that someone had encouraged the child to continue to make allegations of abuse against her mother. Father’s attorney objected to the response as speculative, but the court allowed the question because it was within the realm of what had already been asked. Father fails to explain on appeal how the court abused its discretion in so ruling. Father’s attorney also objected to questions asking the therapist about her concerns with the child residing with father and his fiancé, arguing that providing an opinion on parent-child contact between the child and father or his fiancé was outside the therapist’s expertise. The court allowed the testimony, noting that such evidence derived from the therapist’s relationship with the child. Again, father fails to demonstrate, or even argue, on appeal that the court abused its discretion in allowing the testimony.

Finally, father argues that the family court erred by concluding that mother failed to meet the threshold requirement of showing a real, substantial, and unanticipated change of circumstances sufficient to modify parental rights and responsibilities. He contends that the court found changed circumstances with respect to mother’s motion, but found that the same circumstances were not sufficient to support his motion. We find no merit in this argument. We have held that “[t]he burden of showing changed circumstances with respect to a motion to alter parent-child contact is ‘not as high’ as the heavy burden of showing changed circumstances with respect to a motion seeking a change of custody.” Hawkes v. Spence, 2005 VT 57, ¶ 20, 178 Vt. 161 (quoting Gates v. Gates, 168

Vt. 64, 68 (1998)). In any event, the family court found no changed circumstances with respect to father's motion because he failed to make a sufficient showing that mother had abused the child. On the other hand, the court found changed circumstances with respect to mother's motion based on the fact that the conflict concerning the alleged abuse had reached the point where the child had been placed in voluntary foster care and her well-being was threatened. Plainly, there were changed circumstances sufficient for the court to alter parent-child contact.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice