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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-377

JUNE TERM, 2008

Kimberly VoganSchneider	}	APPEALED FROM:
	}	
	}	
v.	}	Caledonia Family Court
	}	
	}	
Earle Chaffee, III	}	DOCKET NOS. 7-1-95 Cadm/ 90-6-06 Cafa

Trial Judge: M. Kathleen Manley

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

Mother appeals the family court's decision transferring sole legal and physical parental rights and responsibilities from her to father with respect to the parties' youngest child. We affirm.

The parties, who were divorced in 1995 following an eight-year marriage, have three children, two of whom have reached the age of majority. The third child, born in June 1993, is the subject of this litigation. The parties' divorce order awarded mother sole legal and physical parental rights and responsibilities and gave father parent-child contact. In 1998, following her divorce from father, mother remarried and had four more children, including triplets. Mother and her second husband separated in June 2005, and their divorce was pending at the time of the instant proceedings. Mother was also pregnant with her eighth child at the time of the family court proceedings. Father remarried in 2001, but he and his wife have no children together.

In 2004, father filed a motion to enforce parent-child contact. Following a contested hearing, the family court found that mother had engaged in a pattern of interference with father's right to parent-child contact. In May 2006, father filed a petition for relief from abuse on behalf of their oldest child following a physical altercation between mother and the child. One month later, the parties stipulated to a transfer of custody of that child to father. Shortly thereafter, in June 2006, father filed a petition for relief from abuse on behalf of the parties' youngest child and sought transfer of parental rights from mother to him. His petition and motion were based primarily on an incident in which mother's boyfriend provided alcohol and marijuana to the parties' then-thirteen-year-old daughter and her friend and then sexually assaulted the friend while mother was away at a music festival.

Following four days of hearings, the family court transferred sole legal and physical parental rights and responsibilities for the parties' youngest child from mother to father. After finding changed circumstances and reviewing each of the statutory factors, the court concluded that mother's tumultuous lifestyle had exposed the parties' daughter to a myriad of unhealthy behaviors and, at times, had endangered her. The court determined that the best interests of the child would be served by awarding sole parental rights and responsibilities to father, who was more able to provide a stable home environment. The court also awarded mother extensive parent-child contact after acknowledging her love for the child and her long-time role as the child's primary caregiver. On appeal, mother argues that the family court erred: (1) by making clearly erroneous findings and failing to articulate how it exercised its fact-finding discretion; (2) by concluding that there had been a substantial, unanticipated change of circumstances; (3) by not disqualifying the guardian ad litem for prejudging the case and not giving the parties an opportunity to preview her written report recommending that father be awarded sole legal and physical rights and responsibilities; and (4) by denying her motion to allow the testimony of the parties' two youngest children, including the child who is the subject of the instant litigation.

In her first argument, mother challenges multiple family court findings, arguing that they are not supported by the record and that the court failed to articulate how it exercised its discretion. Upon review of the record, we find no merit to this argument. For the most part, mother's argument asks this Court to consider her witnesses' contravening testimony and reweigh the evidence to find in her favor. This we will not do. It is exclusively the province of the trial court to assess the credibility of the witnesses and weigh the persuasiveness of the evidence. Chase v. Bowen, 2008 VT 12, ¶¶ 15, 36; see also Bonanno v. Bonanno, 148 Vt. 248, 250 (1987) ("We have consistently given due regard to the unique position of the trial court to assess the credibility of witnesses and the weight of all of the evidence presented."). Moreover, upon evaluating the credibility of the witnesses and persuasive value of the evidence, the family court has broad discretion to determine the children's best interests based on the relevant statutory factors. Chase, 2008 VT 12, ¶ 34. We will not set aside individual findings "unless they are clearly erroneous," and we will not deem findings insufficient unless "we are left to speculate as to the basis of the trial court's decision." Bonanno, 148 Vt. at 250, 251. In determining whether findings are clearly erroneous, we consider the evidence in the light most favorable to the prevailing party and exclude the effects of any modifying or conflicting evidence. Cliche v. Cliche, 143 Vt. 301, 306 (1983).

Given this standard, mother's arguments are unavailing. With the exception of an erroneous, but harmless, finding that the parties' eldest child still resided with father, there is evidence in the record to support each of the court's challenged findings. Testimony from various witnesses supports the court's findings that mother: (1) had engaged in behavior that had negatively impact on father's relationship with the parties' children, (2) had disparaged father and his wife in front of the children, (3) had significant problems with controlling her anger, (4) had physically abused the parties' older daughter and called the children foul names, (5) had given her daughters excessive responsibility with respect to the younger children, and (6) had used very poor judgment on several occasions concerning the children—to the extent, on at least one occasion, that it threatened the safety of the parties' youngest daughter. Mother complains that there was no evidence that the parties' youngest child was harmed by any of her actions, but, in fact, the evidence revealed not only that mother's poor judgment had led to the child being given drugs by mother's boyfriend, who also sexually assaulted the child's friend, but also that

the child had been in trouble with the law and was recommended for counseling. Indeed, while mother claims in one sentence in her brief that there was no evidence of harm to her daughter, in the next sentence, she claims that she ceased certain behaviors when she realized what a toll it was taking on her family. Not only are the court's findings supported by the record, but they more than adequately provide a reasonable basis for the family court's decision. Mother's reliance on her contradictory testimony is insufficient to demonstrate error on the part of the court.

Equally unavailing is mother's argument that the family court abused its discretion by making a threshold finding of a real, substantial and unanticipated change of circumstances. See 15 V.S.A. § 668 (court may modify parental rights and responsibilities upon showing of real, substantial and unanticipated change of circumstances when modification is in children's best interests). Although the moving party has a heavy burden to demonstrate changed circumstances, "[t]he 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. There are no fixed standards for determining whether this threshold requirement has been met, but the family court must be guided by the general principle that the children's welfare is the primary concern. Id. ¶ 28. Here, the family court found a real, substantial, and unanticipated change of circumstances based on mother undermining father's relationship with the parties' children, physically and emotionally abusing her daughters, and engaging in a tumultuous lifestyle that had exposed the children to unhealthy behaviors and potential harm—culminating in an incident in which mother ignored obvious signs that her boyfriend was an inappropriate caregiver and left the parties' thirteen-year-old daughter with him for a number of days, during which time the boyfriend gave alcohol and drugs to the daughter and her friend and then sexually assaulted the friend. There was more than adequate evidence to support the court's finding of changed circumstances.

Next, mother argues that the family court erred by not disqualifying their daughter's guardian ad litem (GAL) for telling the daughter halfway through the evidentiary hearings what her recommendation would be and by not requiring the GAL to submit her written report to the parties before she presented it to the court. We find no reversible error, if any error at all. After father had finished presenting his evidence but before mother had done so, mother moved to disqualify the GAL based on her claim that the GAL had informed the parties' attorneys and the daughter that she was going to recommend that father be awarded custody. Father opposed mother's motion, stating that the GAL was giving the parties only a weather report and could change her mind after all of the evidence came in. The family court denied the motion after the GAL assured the court she understood that any recommendation she made must be based only on evidence heard at trial. Later, after nearly all of the evidence had been presented, the court asked the GAL for a recommendation. The GAL indicated that she was "really torn" over the matter and would prefer to submit her recommendation in writing after taking a couple of days to organize her thoughts. Neither party objected to that procedure.

With respect to mother's first argument, the family court did not abuse its discretion by refusing to disqualify the GAL based on mid-trial statements she allegedly made as to what her recommendation would be. As the family court noted, the GAL had not presented the court with a recommendation at that point and could change her mind, assuming she had a preliminary position, after all of the evidence was in. Indeed, the record suggests that the GAL was "torn"

over the matter at the end of the hearing. Nor is there any indication that the GAL based her recommendation on anything other than evidence presented at the hearing. Cf. Davis v. Hunt, 167 Vt. 263, 265-67 (1997) (holding that family court erred by allowing GAL to testify based on evidence outside the record). Under these circumstances, the court acted within its discretion in declining to disqualify the GAL.

As for her second argument concerning the GAL, mother did not object at trial to the GAL submitting a written report directly to the family court without first submitting it to the parties. See V.R.F.P. 7(d) (GAL shall state his or her position to court and shall submit any written report to parties and to court only by agreement of parties or under rules of evidence). By not objecting when the GAL indicated that she would be sending a written report directly to the court, mother essentially acquiesced to that procedure and thus has waived any argument that the GAL erred by sending the report directly to the court without first sending it to the parties. See Sundstrom, 2004 VT 106, ¶¶ 22-23 (by not objecting at family court hearing, mother waived her argument that court erred by allowing former GAL to express opinion regarding children's best interests). Mother claims plain error, but even assuming that plain error may be claimed in civil proceedings such as this one, there would be no plain error here, where the parties acquiesced to the GAL submitting her written report directly to the court, and where the mother has made no showing that the report would not otherwise have been available to the court or that it contained significant inaccuracies critical to the family court's decision.

Finally, mother argues that the family court erred by denying her motion to allow the testimony of the parties' two younger children. According to mother, both children could have offered critical testimony, unavailable from any other source, concerning past incidents of father's abusive conduct toward them. We find no abuse of discretion. A minor child who is the subject of a divorce proceeding:

> may only be called as a witness if the court finds after hearing that: (1) the child's testimony is necessary to assist the court in determining that issue before it; (2) the probative value of the child's testimony outweighs the potential detriment to the child; and (3) the evidence sought is not reasonably available by any other means.

15 V.S.A. § 594(b); see V.R.F.P. 7(e)(1) (same); Davis, 167 Vt. at 267 (holding that § 594(b) "does not apply broadly to any child witness, but only to those minors who are the subject of the custody dispute"). A court "may" also allow the testimony of a minor child who is not a subject of the proceeding—such as the parties' second youngest child in this case—"[i]f the court finds . . . that the testimony of the child is necessary to assist the court in determining the issue before it [and] that the evidence sought is not reasonably available by any other means and is otherwise admissible." V.R.F.P. 7(e)(2).

Here, the parties' youngest child, who was the subject of the custody proceeding, initially did not want to testify, but later indicated that she would testify if it could be done in a way that minimized any potential harm to her. The child's attorney supported this request, but the GAL opposed it, indicating her belief that it was not in the child's best interests to testify. Given that the children were caught between two parents whose acrimonious relationship had already had a

negative impact the children, and considering that mother had a history of interfering with the relationships between father and the parties' children, the family court did not abuse its discretion in denying mother's motion to have the parties' minor children testify. Nothing in mother's proffer demonstrated that the expected testimony was probative enough to overcome the potential for further harm to the children. As we noted in Davis, the Legislature intended § 594(a) "to protect children faced with the dilemma of testifying simultaneously for one parent and against the other." See Reporter's Notes, V.R.F.P. 7, (noting that § 594(a) "recognizes that the act of testifying for or against one parent, and requests by a parent for such testimony, are often harmful to children"). The parties' oldest child, who had reached the age of majority and eventually moved back with her mother, was able to testify about negative aspects of father's past parenting. The family court acted within its discretion in determining that, under the circumstances, it was not a good idea to involve the minor children in this acrimonious custody dispute.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice