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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-063

OCTOBER TERM, 2008

Zdenek Fatka	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Family Court
	}	
	}	
Lesley Evon	}	DOCKET NO. 56-2-07 Wndm
		Trial Judge: Thomas J. Devine

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

Mother appeals from a family court order denying her motion to modify parent-child contact by suspending father's supervised visits with the child. She contends that the court abused its discretion in: (1) denying the motion; and (2) limiting the testimony of father's probation officer on the basis of medical privilege. Father has cross-appealed, asserting that the court erred in failing to hold mother in contempt for interference with visitation. We affirm.

The parties have one child, who was seven years old at the time of these proceedings. Although the parties originally stipulated in 2001 to joint custody, their subsequent relations were turbulent and difficult, leading to a series of competing motions for enforcement, relief from abuse, and contempt and a March 2003 court order modifying the custodial arrangement. The court found that father had physically assaulted and emotionally abused mother on several occasions during child exchanges, and that the child was scared and withdrawn, dirty, and neglected after spending time with father. The court denied father's motion for contempt and found that a substantial change of circumstances warranted modifying the custody agreement to provide for sole legal and physical rights and responsibilities with mother. Father was awarded visitation with the child on alternate weekends. Exchanges were to be supervised through the Lamoille Family Center. The court also granted mother a final relief-from-abuse order for three years, prohibiting father from contacting mother except in case of emergency or regarding visitation.

About a year later, in April 2004, father was indicted on nine criminal counts in Chittenden District Court, including charges of assault and robbery, kidnapping, and extortion. Father was imprisoned in May 2004 for want of bail, but apparently was released some time between May and October. The court found, however, that father did not establish if or when he conveyed this information to mother, and visits with father, which had ceased in May, did not

resume until October 2004. Father ultimately entered a no-contest plea to unlawful restraint and simple assault in October 2005, and was incarcerated from November 2005 to July 2006, at which time he was conditionally released to the community. Father did not see the child during this time.

Thereafter, in early 2007, the court approved supervised parent-child contact with father at the Lamoille Family Center, which was later relocated to Washington County Family Center for the convenience of the parties. In October 2007, however, the coordinator for the Washington County center suspended further visits with father because of concerns about "re-attaching to [father]" followed by a termination of visitation and separation. At about this same time, mother moved with her husband and the child to Maine for employment opportunities, although she also testified that she felt safer being a distance from father.

During this period, the parties filed numerous court motions. The instant appeal concerns two motions to modify filed by mother in August and October 2007, the first seeking to take into account her move to Maine and the second seeking to eliminate parent-child contact with father altogether, as well as motions for contempt and enforcement filed by father in September 2007. As to mother's motions, the court found the distance and burden on the child of traveling from Maine to Vermont for visitation purposes to be significant (father's conditions of release did not allow him to leave the State); that father's recent contact with the child had been slight (supervised sessions of one to two hours each week); and that while it was not in the child's best interests to have anything more than periodic supervised visits given father's history of domestic violence, lack of sensitivity to the child's special emotional needs, and inexperience in providing extended child care, neither was it in the child's best interest to eliminate contact altogether. The court found in this regard that there was evidence that father loved the child and was able to interact with him, and that it was in the child's best interests to be afforded an opportunity to preserve and develop the relationship. Accordingly, the court ordered supervised contact every third weekend through the Washington County Family Center. As to father's motions, the court found no evidence to support a finding that mother had interfered with father's visitation during the period between April 2004 and October 2006, when he was either incarcerated or his whereabouts were not clear. Although troubled by mother's resistance to supervised visits with father beginning in 2007, the court found insufficient evidence to support a finding of contempt or other sanction. These appeals followed.

Mother contends the family court's refusal to eliminate parent-child contact with father was not supported by its findings and conclusions. We review the trial court's decision on a motion to modify visitation solely for abuse of discretion. See Gates v. Gates, 168 Vt. 64, 74 (1998) ("Granting, modifying, or denying visitation is within the discretion of the trial court and will not be reversed unless its discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." (Quotations omitted.)). It is not for this Court to reassess the persuasiveness of the evidence or the credibility of the parties. Mullin v. Phelps, 162 Vt. 250, 261 (1994) (stating that "our role in reviewing findings of fact is not to reweigh evidence or to make findings of credibility"). Furthermore, we have held that in divorce or custody proceedings "the family court may not terminate child-parent contact of either parent absent clear and convincing evidence that the best interests of the child require such action." Id. at 267.

Assessed in light of these standards, we find no basis to disturb the court's decision. Although not substantial, there was sufficient evidence to support the court's finding of affection and constructive interaction between father and the child, and the court properly recognized the public policy favoring the preservation of a parent-child relationship with father. See 15 V.S.A. § 650 (declaring "as public policy that after parents have separated or dissolved their marriage it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child . . . is likely to result from such contact"). Although, as mother notes, the court was fully cognizant of father's record of domestic abuse, its findings in this regard are not inconsistent with its conclusion that contact could continue in a structured, supervised setting where the child's safety and welfare could be monitored and assured. Nor do we find any merit to mother's claim that the court's ruling reflects a judicial double standard, more protective of children in the custody of DCF than in contests between the parents themselves. As noted, the record supports the court's finding that maintenance of the parent-child relationship though supervised visitation posed no threat to the child's safety, and was in the best interests of the child.

Mother also contends that the court erred in refusing to order father's probation officer to disclose the reason that he had recently been returned to the "highest" level of supervision, and subject to a number of conditions, including requirements that he abide by his conditions of release, remain clean and sober, maintain employment, report regularly to his probation officer, and obtain permission to leave the state. When asked about the change, the officer indicated that answering could impinge on father's patient privilege. Mother's counsel argued that the court could override the privilege under V.R.E. 503(d)(7), upon a finding that lack of disclosure could pose a risk of harm to the child, that the probative value outweighed the potential harm to father, and that the information was not otherwise available. The court declined to address the claim, explaining that it lacked sufficient information to do so and that mother's counsel should have raised the issue in a motion in limine.

Mother claims that the court abused its discretion in declining to address the issue under V.R.E. 503(d)(7), but we fail to discern how any error would have affected the result. The court was well aware of father's history of domestic violence and recent criminal past, but was satisfied that limited, supervised visits every three weeks would pose no harm to the child. Although mother asserts that the information sought to be elicited was relevant to the child's welfare, she has not claimed that the additional information would have tangibly altered the court's conclusion that limited, supervised visitation was a safe alternative and in the best interests of the child. See Dunning v. Meaney, 161 Vt. 287, 289 (1993) (alleged error will no form basis of reversal absent demonstration of prejudice). Accordingly, we find no basis on which to disturb the judgment.

In his pro se cross-appeal, father contends that the court abused its discretion in declining to hold mother in contempt for interference with visitation. He claims that in this regard the evidence did not support the court's finding that father failed to establish evidence as to when he was released pending trial, and what efforts he made to clarify his availability to resume visits. Father cites two subsequent court orders, but neither undermines the court's findings concerning father's failure of communication during this period nor shows that the court's findings were

clearly erroneous. Mullin, 162 Vt. at 260 (stating that "we examine the trial court's findings of fact only for clear error"). Accordingly, we find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice