

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-539

SEPTEMBER TERM, 2002

	}	APPEALED FROM:
	}	
Linda Thatcher	}	Franklin Family Court
	}	
v.	}	DOCKET NO. DOCKET NO. 56-2-97
	}	Frmd
Thomas H. Thatcher	}	
	}	Trial Judge: James Crucitti
	}	

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

Father appeals from orders of the Franklin Family Court restricting parent-child contact with the parties' two children. Father contends: (1) the court abused its discretion in failing to order immediate unsupervised visitation; (2) the court erred in failing to give sufficient weight to the opinion of the court-appointed expert; (3) the findings are unsupported by the evidence; and (4) the findings fail to support the ruling. We reverse and remand.

The parties were divorced in 1998. The divorce order awarded mother primary legal and physical responsibilities for the parties' two children and granted father visitation for one weekend per month and three weeks during the summer. The order immediately stayed the visitation provision until further order of the court, however, and provided during the interim for supervised visitation with the children " to demonstrate that [father] can be sensitive to the children' s needs above his own and show ability to insulate the children from his bitterness to [mother]." In July 2000, father moved for an order to set parent-child contact, claiming that he had not had contact with the children since November 1999 because of difficulties with the visitation supervisor. In December, the court approved an agreement between the parties to appoint Dr. Joseph Hasazi to supervise visitation and issue a report of his findings. Dr. Hasazi met with the parties and the children (who were then fifteen and thirteen years old), spoke with father' s psychotherapist, supervised several of father' s visits with the children, and issued his report in August 2001.

In his report, Dr. Hasazi noted mother' s continuing concerns that father had attempted to alienate the children from her in the past, as well as father' s explanation that the alienation had occurred years earlier in the period following the marital separation. Hasazi also noted that the children had reassured him that father had never treated them poorly, that they viewed father as " an unusually close and loving parent," and that they loved and missed him very much. Dr. Hasazi described the supervised visits as having gone " extraordinarily well." He observed that father had complied with the rule forbidding discussions of mother, and detected a " strong emotional bond" between the children and father. Dr. Hasazi thus felt comfortable allowing the last two visits to involve periods without supervision. In this regard, Dr. Hasazi stated that the children were exceptionally competent, self-confident, articulate and assertive, and he felt confident the children would have reported any derogatory comments about mother, had they occurred.

Thus, Dr. Hasazi stated that he " did not have any concerns ever that the children were in any danger from [father] and saw no evidence on his part that he was attempting to alienate the children from [mother] to whom the children also are strongly attached and loyal." While acknowledging that father continued to feel sad and depressed by the separation

from his children, Dr. Hasazi found " no indication to date that he is motivated to alienate the children from [mother]," and seemed " to understand that any attempt to do so on his part would be counter-productive and would adversely affect his relationship with his children." Indeed, Dr. Hasazi observed that any effort to alienate the children from mother would be unsuccessful in light of the children' s age, maturity, and affection for mother. He thus found no " reason to delay further movement toward implementation" of the parent-child contact order in the original divorce decree, although he recommended that the children continue to work with a counselor during the transition process, and that father continue in counseling.

In September 2001, the court held an evidentiary hearing on father' s motion to permit extensive unsupervised visitation. Dr. Hasazi and both parties testified. Dr. Hasazi' s testimony was largely consistent with his report. He noted that the children loved their father deeply, missed him, and had a strong bond which was reasserted immediately during the supervised visits. While noting mother' s concerns based on father' s actions in the past, Dr. Hasazi stated that he found no basis to believe that father was currently motivated to alienate the children from mother, and that any such effort would be unsuccessful in light of the children' s age, maturity, and attachment to mother. He also stated his belief that continuing to limit the children' s contact with father would be detrimental to their emotional well being, and could even backfire and engender resentment and anger toward mother. In response to questioning, Dr. Hasazi stated that he saw no reason to believe that increased unsupervised contact would detrimentally affect the children' s relationship with mother, and no reason to delay immediate day-long unsupervised visits, transitioning to overnights. He also recommended the involvement of professionals for a period of time to debrief the children after the initial visits.

Father testified that he had been wrong to attempt to involve the children in the parties' marital difficulties in the past, and that he was now able to put the children' s interests ahead of his own. Mother testified that she believed the children needed contact with father, but that any unsupervised contact should be phased in gradually.

In September 2001, the court issued a written decision, rejecting father' s request for unsupervised visits. While noting Dr. Hasazi' s report and findings, the court stated that it was not persuaded father had gained the ability to insulate the children from his own continued bitterness toward mother. Nevertheless, the court found that a sufficient change of circumstances had occurred to justify a plan A which will work toward more unsupervised contact between the children and their father." Accordingly, the court ordered that parent-child contact occur a minimum of one day per month during the school year, two days per month during any month in the school year when the children are on vacation for at least two days during any week, and a minimum of three days per week during June, July and August. The court directed that the contact be at first supervised, with the goal of working toward unsupervised contact, and that the parties choose professionals to set ground rules for the visits, with father to bear the costs of professional services or additional conferences with Dr. Hasazi. In addition, the court authorized telephone calls with father one time per week for each child, and modified an existing relief from abuse order to facilitate father' s attendance at the children' s extracurricular activities. The court made the provisions of the new visitation order contingent upon father continuing in private counseling. Finally, the court provided that the parties could submit any objections to the order or proposed details within fourteen days.

Two months later, the court issued an amended order, noting that father had filed objections to the initial order but no details for its implementation. In its amended order, the court reaffirmed its determination that parent-child contact would at first be supervised, that an intermediate step would be unsupervised visits followed by meetings with the children to ensure that defendant was not communicating his bitterness toward mother, with the ultimate goal of unsupervised visitation and overnight stays. Ground rules for the visits would be established by the Vermont Children' s Aid Society. In addition, the court appointed two parent coordinators to assist the parties in developing and implementing the mechanics of the parent-contact order, with costs for their services to be paid by the parties on a sliding scale basis. Father has appealed from these orders.

Father contends that the court abused its discretion in failing to order immediate unsupervised contact with the children. As we have observed, " [g]ranting, 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." Gates v. Gates, 168 Vt. 64, 74 (1998) (internal quotations and citations omitted). The court' s findings will not be disturbed unless they are clearly erroneous. Gabriel v. Pritchard, __ Vt. __, __, 788 A.2d 1, 4 (2001).

Father relies principally on the report and testimony of Dr. Hasazi, which " as noted " indicated that the children' s visits with father (including periods of unsupervised contact) had gone extremely well, that Hasazi had seen no evidence that father was still motivated to alienate the children from mother, and that such efforts would not be successful in any event. He opined that increased, unsupervised visitation with father was in the children' s best interests, and that continued restrictions on visitation could detrimentally affect the children' s relationship with mother.

Father asserts correctly that Dr. Hasazi' s testimony was largely uncontradicted, and argues with considerable force that the court' s decision essentially failed to take that testimony into account. We recognize, of course, that expert opinions are merely advisory, and that the trial court remains the final arbiter of the best interests of the children. See Gabriel, 788 A.2d at 6. Nevertheless, the court' s decision must rest on some factual basis in the record. Here, the court' s conclusion that immediate unsupervised visitation was inappropriate was based solely on its stated finding that father had not gained the ability to insulate the children from his own continued bitterness toward mother. All of the record evidence, however, was precisely to the contrary. Although Dr. Hasazi acknowledged that father was depressed and continued to feel persecuted and unfairly treated by the system, this does not support the court' s finding that father was unable to insulate his children from these feelings, and was not cited by the court as the basis for such a finding. Mother' s testimony that she remained concerned about unsupervised visits was based on father' s past conduct; she offered no testimony concerning his current state of mind or recent behavior.

All of the record evidence thus indicated that immediate unsupervised visitation was in the best interests of the children. Essentially what the court ordered " supervised visits moving gradually to unsupervised visits " had already occurred successfully through Dr. Hasazi, and Dr. Hasazi' s opinion is that unsupervised visits are now appropriate. The trial court does not reject Dr. Hasazi' s testimony and yet gives no record-based reason why the supervised visitation process should be repeated. We are compelled, therefore, to conclude that the record evidence fails to support the court' s finding that father had not demonstrated an ability to shield his children from his anger toward mother, and that its decision rejecting immediate unsupervised contact was clearly unreasonable on the facts presented, and must be reversed.

For similar reasons, we agree with father' s contention that the record evidence fails to support the court' s decision to reduce the amount of contact to one day per month. Again, the evidence all supports the conclusion that the father had satisfied the terms of the original decree that he demonstrate an ability to shield the children from his bitterness toward mother. Accordingly, we conclude that the order modifying the original visitation provision in this regard must also be reversed.

Finally, father contends the court erred in ordering him to pay for the continued services of Dr. Hasazi and the Children' s Aid Society, and to pay for the costs of the parent coordinators on a sliding scale, without taking evidence on his financial circumstances. Although we reverse the requirement of supervised visitation, the trial court on remand may continue to require such services for other purposes. The provisions requiring payment by father merely tracked the court' s earlier order appointing Dr. Hasazi, which had similarly provided that father would be responsible for the costs of his services. Moreover, father makes no claim that he is financially unable to pay for the services in question. Accordingly, we discern no error requiring reversal.

Reversed and remanded for further proceedings consistent with the views expressed herein.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice