

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-442

APRIL TERM, 2003

Nancy E. Eastman	}	APPEALED FROM:
	}	
	}	Windsor Family Court
	}	
v.	}	
	}	DOCKET NO. 94-5-02 Wrfa
Lynn F. Fisher	}	
	}	Trial Judge: Paul F. Hudson
	}	
	}	

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

Plaintiff Nancy Eastman appeals from the family court's dismissal of her petition for relief from abuse. She argues that the court erred by: (1) preventing the alleged minor victim from testifying; (2) refusing to grant a continuance to allow her to obtain counsel and a guardian ad litem to enable the child to testify; (3) allowing testimony about defendant's polygraph examination; and (4) denying her request to set aside the judgment or alternatively, to hold a new hearing. We vacate and remand for a new hearing.

In May 2002, plaintiff filed a complaint for relief from abuse against defendant. Defendant is plaintiff's boyfriend and the father of two of her children, Tanner and Ben. Plaintiff has two other sons from a previous relationship, Justin, twelve, and Graham, eleven. Plaintiff's grandson Logan was also present during the alleged incident. Plaintiff did not witness the events that gave rise to her petition. Justin told her that he saw defendant grab Logan by the arm and pull him across the carpet. Justin told plaintiff that defendant had become upset when Logan, twenty-one months, pushed Tanner, twenty-two months, during a fight over a toy. Justin stated that it looked like defendant was going to pull Logan's arm out of the socket and he yelled at defendant to stop. Defendant allegedly became upset and punched Justin in the arm. Based on these allegations, the court issued a temporary relief-from-abuse order.

Before a hearing could be completed, the court granted two continuances at defendant's request. At the hearing, defendant sought to admit testimony about the results of a polygraph test that his attorney had arranged for him to take. Over plaintiff's objection, the court admitted the testimony but reserved the right to strike it from the record "on further study and deliberation." After lengthy testimony by the polygraph administrator, plaintiff's counsel inquired when he would be able to call Justin and his brother to testify. The court expressed surprise that plaintiff intended to call the children and asked where the children's attorney was. Plaintiff asserted that, unlike a proceeding under Rule 4 involving divorce, annulment, and legal separation, the family court rules did not require an attorney for a V.R.F.P. 9 abuse prevention proceeding. Plaintiff explained that Justin was the alleged abuse victim. The court rejected plaintiff's argument and concluded that Justin could not testify without an attorney and the participation of a guardian ad litem. Plaintiff then moved for a continuance to allow her to comply with the court's ruling. The court denied her request, explaining that the case had already "been extended for a number of times." The court also stated that plaintiff and her family would be adequately protected because defendant was on probation with the Vermont Department of Probation and Parole. Plaintiff pointed out that defendant was on probation in New Hampshire, not Vermont.

The court later issued a written entry order dismissing plaintiff's petition without prejudice. In its order, the court stated that plaintiff had withdrawn her petition and the court must "concur in that decision." Additionally, the court indicated that plaintiff had not demonstrated by a preponderance of the evidence that Justin and his brother Graham were "household members" within the meaning of 15 V.S.A. § 1101(2). Plaintiff then moved for a new hearing or

alternatively, relief from judgment. Plaintiff asserted she had a right to call her son to testify without the presence of an attorney or guardian ad litem or, alternatively, she should have been granted a continuance to comply with the court's ruling. She also argued that the court erroneously stated that she had withdrawn her petition and erroneously concluded that defendant was not a "household member."

The court denied plaintiff's motion for a new hearing, explaining that "jeopardy had attached" and plaintiff's failure to prosecute resulted in the complaint's dismissal. The court stated that "[t]he disparity between V.R.F.P. 4 and 9(m) (abuse prevention) hardly trumps the Court's ability to prevent minors from becoming embroiled in a dispute such as this." The court reiterated that the dismissal of plaintiff's complaint was without prejudice. The court also denied plaintiff's motion for relief from judgment but amended its entry order to reflect that plaintiff had not withdrawn her complaint. This appeal followed.

We first address plaintiff's claim that the court erred in denying her request for a continuance after the court ruled that Justin would not be allowed to testify without the presence of an attorney and guardian ad litem. We find resolution of this issue dispositive. Although the court has substantial discretion to grant or deny a continuance, we will reverse its decision if the court exercises its discretion on clearly untenable or unreasonable grounds. Perrott v. Johnston, 151 Vt. 464, 468 (1989). We conclude that the court abused its discretion here.

First, we note that it is difficult to ascertain from the record the exact basis for the court's refusal to allow Justin to testify. To the extent the court based its decision on V.R.F.P. 7(e), its conclusion was erroneous. By its terms, Rule 7 applies to proceedings under V.R.F.P. 4, which concerns divorce, annulment and legal separation. See V.R.F.P. 7(a). This proceeding was conducted under V.R.F.P. 9, and thus the strictures of Rule 7(e) do not appear to apply. See Reporter's Notes, V.R.F.P. 7 (Rule 9 abuse proceedings are "excluded from the operation of the present rule"). This conclusion is consistent with purpose underlying the abuse prevention statute. See Rapp v. Dimino, 162 Vt. 1, 4 (1993) (abuse prevention law designed to provide "inexpensive and uncomplicated proceedings that allow an abused family member to obtain immediate relief"); see also 15 V.S.A. §§ 1101-1109. Although the court later indicated, in response to plaintiff's post-judgment motion, that it could prohibit Justin from testifying to protect him from being "embroiled" in this dispute, regardless of the applicability of Rule 7(e) to Rule 9 cases, it did not make this clear at the hearing. At the hearing, the sole basis identified by the court for its refusal to allow Justin to testify was the absence of an attorney and guardian ad litem. Thus, even assuming that the court could have acted within its discretion to prevent Justin from testifying on another basis, there is no indication from the record that it did so here.

We conclude that the court abused its discretion by refusing to grant a continuance that would have allowed plaintiff to comply with its ruling requiring the presence of an attorney and a guardian ad litem. On the day of the hearing, Justin and his brother were present and available to testify. The court's ruling that the children could not testify without an attorney and a guardian ad litem surprised plaintiff. As discussed above, plaintiff could not have reasonably anticipated this ruling. Despite plaintiff's assertion that she could not proceed without Justin's testimony, the court denied her motion to continue because the case had already been continued twice. This is an unreasonable basis on which to deny plaintiff's request, particularly given the dispositive nature of the court's ruling. It is worth noting that the two prior continuances in this case were granted at defendant's request. The court's assertion that plaintiff would be adequately protected by the Vermont Probation and Parole department similarly does not provide a reasonable basis for denying plaintiff's request. Aside from the questionable relevance of this statement, it appears that defendant is on probation in New Hampshire, not Vermont. We therefore conclude that the court abused its discretion by refusing to grant plaintiff a continuance on clearly untenable or unreasonable grounds. See Perrott, 151 Vt. at 468.

In light of our conclusion, we do not address plaintiff's remaining claims.

Vacated and remanded for a new hearing consistent with this opinion.

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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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned