

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 06-310

APRIL TERM, 2007

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|---------------|---|---------------------------|
| Donarae Cook | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | Washington Family Court |
| | } | |
| Bradford Cook | } | |
| | } | DOCKET NO. 325-9-04 Wndmd |

Trial Judge: Christina Reiss

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

Father appeals from a decision of the family court denying his motion to stay a hearing on parental rights and responsibilities to await the outcome of father’s pending criminal matter. We affirm.

Mother filed for divorce in September 2004. Under the terms of the final order, mother and father were to share parental rights and responsibilities regarding the couple’s two children, Trevor (age fourteen at the time) and Sean (age ten at the time). Mother was to remain in the marital home with the children. The family court issued its final divorce order on September 1, 2005. Father was apparently upset with aspects of the order. On September 5, 2005, father arrived at the marital home in a distraught state. Although father was there to visit the children, mother and father ended up in a confrontation. While the parties’ accounts of the events that followed differ, it is undisputed that at some point, mother’s arm was “caught in the door” of the truck father had driven to the residence, and mother was injured as a result. Mother called the police after father left, and the police went to father’s home. When they confronted father in his garage, he was running the car to fill the garage with exhaust and was also holding a knife to his own throat. Police overpowered father and arrested him. He was admitted to the psychiatric unit at Central Vermont Medical Center for five days. Based on these events, father was charged with first degree aggravated domestic assault with a weapon, to which he pled not guilty. While father was awaiting trial, the district court imposed conditions of release including a prohibition against contact with his former wife and children. In addition, mother sought and was granted a temporary relief from abuse order prohibiting contact.

In the aftermath of this episode, mother moved to modify the final divorce order to obtain sole legal rights and responsibilities for the children and establish limited, supervised visitation for the children with father. Father moved to stay the proceedings, arguing that he would not be able to testify on his own behalf without waiving his right against self-incrimination, protected by the Fifth Amendment to the United States Constitution. Waiving his Fifth Amendment rights, father argued, would prejudice his criminal proceedings, where a motion to suppress evidence related to the September 5, 2005 incident was pending. By the same token, refusing to testify at the family court hearing would prejudice his interests there.¹

In support of his motion, father cited Hicks v. City of New York, 268 F. Supp. 2d 238 (E.D.N.Y. 2003), for the factors a court should consider in deciding whether to stay civil proceedings in light of a party's assertion of the Fifth Amendment privilege:

- (1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the criminal case . . . ;
- (3) the private interests of the plaintiff in proceeding expeditiously weighed against the prejudice to the plaintiff caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.

Id. at 241 (citation omitted).

Father argued that the stay should be granted because (1) the issues in the criminal and family court proceedings were the same (namely, the events of September 5, 2005); (2) mother would not suffer prejudice from the stay because the conditions of release and relief from abuse order were in place; and (3) father would be severely prejudiced because he would not be able to testify "about the date in question or any of the surrounding circumstances without making statements that could be used against him in his upcoming trial and revealing his theory of the defense."

In denying the motion for stay, the family court noted that the matter had been pending since September 2005 (the hearing was held on June 6, 2006), and that there had been numerous previous delays. The court further noted that it was primarily the best interests of the children at stake, not just father's interests. In addition, the court emphasized that it would be impracticable to delay providing relief in divorce proceedings every time there was a related criminal proceeding, as it was not uncommon for a contentious divorce to result in charges of assault.

On appeal, father contends that by denying the motion for stay, the family court forced him

¹ On its face, father's motion requesting a stay was directed solely at the relief from abuse (RFA) aspect of the family court proceedings and not the hearing on parental rights and responsibilities (PRR). On this basis, mother argues that the appeal is moot because the family court did, in fact, defer its decision on the final RFA order. It is clear from the transcript of the proceedings, however, that the parties discussed the motion for stay and the Fifth Amendment privilege with respect to both the RFA and PRR issues, and that the court actually ruled on the motion for stay in the context of the PRR issues.

to choose between his Fifth Amendment right against self-incrimination and his interest in maintaining a relationship with his children. A ruling on a motion for stay is discretionary and we will not reverse it unless the family court abused or withheld its discretion. Gilbert v. Gilbert, 163 Vt. 549, 560 (1995). We conclude that the family court did not abuse its discretion.

Invocation of the Fifth Amendment privilege does not trump all other concerns, particularly where the best interests of children are implicated. We have previously weighed a parent's rights under the Fifth Amendment against determination of a child's best interests in a slightly different context. In In re M.C.P., 153 Vt. 275 (1989), the juvenile court required the parents to admit they had abused their child to regain custody. The parents claimed that it would violate their right against self-incrimination. We noted that, while parents "may not be compelled to incriminate themselves in order to regain custody of their child," the court nonetheless "has a strong interest in protecting the best interests of the child under its jurisdiction." Id. at 299. The court's protective responsibility includes not "return[ing] an abused child to the custody of abusive parents unless and until it can be assured that there will be no repetition of the abusive actions." Id. Thus, the burden was on the parents to determine what evidence would "show that they have become good parents, without admitting to any misconduct, and that a restoration of custody of the juvenile to them is in the best interest of the child and is safe." Id. at 300-01. Ultimately, the parents' "difficulty in discharging this burden without admitting their own inadequacies is a consequence of their actions, and the difficulty is not removed by the Fifth Amendment." Id. at 300. The same principle applies in the instant case.

Here, father has not demonstrated that his concerns for self-incrimination precluded all testimony regarding the children's best interests. It is not self-evident that the contested facts of September 5, 2005 confrontation—as opposed to the uncontested fact of the existing conditions of release and relief from abuse order—overlapped with the determination of the children's best interests, which is the primary concern in determining the proper allocation of parental rights and responsibilities. See Mauer v. Mauer, 2005 VT 26, ¶ 7, 178 Vt. 489 (mem.). As the family court pointed out, father could have taken the stand and asserted the Fifth Amendment privilege with respect to the events of September 5, 2005, and still testified regarding the best interests of the children without opening the door to other issues. Father chose not to. Ultimately, father does not identify specific evidentiary issues that he would have testified to, but was prevented from addressing due to his assertion of the Fifth Amendment privilege.

In addition, contrary to father's assertion, the family court did not deny the motion for stay primarily in the interest of resolving pending cases; rather, the court also focused on the interest of the children in having parental rights and responsibilities settled. Further, the parental rights and responsibilities hearing established a visitation schedule for father with his children—a development that was presumably in father's interests as well as the children's. Finally, any prejudice against father's interests in the family court hearing would potentially be temporary, as father could later seek to have the allocation of parental rights and responsibilities modified if there were substantial changed circumstances. See 15 V.S.A. § 668.

While father was faced with a difficult decision, the burden was ultimately on him to present non-incriminating evidence that went to the issue of the children's best interests. The family court considered the relevant factors and did not abuse its discretion in denying the request for stay.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice