

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-389

MAY TERM, 2007

George Eisenhardt	}	APPEALED FROM:
	}	
v.	}	Washington Family Court
	}	
Linda Anderson	}	DOCKET NO. 489-12-02 Wmdm
	}	

Trial Judge: Christina C. Reiss

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

Father appeals the family court's order declining to transfer to him physical parental rights and responsibilities with respect to the parties' daughter. We affirm.

The parties' daughter was born in January 1997, and the parties were divorced in 2003. The final divorce order awarded mother sole legal and physical rights and responsibilities, while granting father parent-child contact. In September 2000, before the divorce, the family court issued a final relief-from-abuse order prohibiting father from abusing mother. In July 2001, the court issued a temporary order governing father's parent-child contact. Mother filed another relief-from-abuse petition against father in June 2002, this time on behalf of herself and the parties' daughter. Following a hearing, the court dismissed the petition. Over the ensuing four years, the court repeatedly addressed issues concerning the enforcement of the parent-child contact schedule. Based on her ongoing belief that father was emotionally abusing the parties' child, mother filed another relief-from-abuse petition against father in August 2005. Later that year, mother filed a motion to modify parent-child contact, asserting that father was threatening her and the parties' child.

In May 2006, father filed a motion to modify parental rights and responsibilities and a motion for enforcement and contempt based on mother's interference with his right to parent-child contact. Following an evidentiary hearing, the family court found mother in contempt and granted father sole legal parental rights and responsibilities and increased parent-child contact, but retained physical parental rights and responsibilities with mother. Father appeals, arguing that there is no support in the evidence for the court's finding that mother's behavior alienated the parties' child from him to such an extent that it would be difficult for him to take physical custody of the child without causing the child substantial emotional distress.

Essentially, father argues that the family court abused its discretion by maintaining physical rights and responsibilities with mother, given the evidence and findings establishing mother's

contempt, parental alienation, unsubstantiated claims of abuse by father, and psychological abuse of the parties' daughter. According to father, the only way to address the child's adjustment disorder and to prevent the financial and emotional toll resulting from mother's pattern of baseless accusations of abuse is to transfer both legal and physical parental rights and responsibilities to him. In making this argument, father focuses on the court's statement that mother's repeated reference to father as an abuser "has also alienated [the child] from her father to such an extent that it would be difficult to transition her to his physical custody without causing her substantial emotional distress." In father's view, this statement demonstrates that the court elected not to award him physical parental rights and responsibilities based on its unsupported assumption that the transition would be harmful to the parties' daughter. The court made the challenged statement in addressing the negative effect that mother's conduct had on the relationship between father and the parties' child—a factor that the court explicitly weighed heavily in favor of father.

We recognize, as father points out, that several witnesses testified that the child did not appear to be distraught following stays with father, and that no witness explicitly testified that transferring physical rights and responsibilities to father would cause the child substantial emotional distress. Nevertheless, as the court found, the child's therapist testified that although the child did not exhibit undue anxiety about visits with her father when discussing them, "she verbally makes claims of being frightened and not wanting to attend visitation." There was also undisputed testimony that mother had been the child's primary care giver for many years, and that the child was closely bonded to mother and reliant upon her. Although the family court ultimately determined that her role as primary custodian should not weigh in her favor under the circumstances of this case, even the guardian ad litem who recommended that physical parental rights and responsibilities be transferred to father acknowledged that such a transition would be difficult in light of the extent to which the child was bonded to mother. Moreover, the court noted that the child had had limited contact with father's home, and concluded that she would benefit from the stability of remaining in the same school district and community where she had received support.

The real issue in this case is not whether the evidence supports the court's statement that mother's conduct had alienated the child from father, but rather whether the court abused its discretion by maintaining physical parental rights and responsibilities with mother in light of mother's alienating conduct. We have stated that although "a sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent," evidence of alienation of affection does not "automatically preclude[] the offending parent from obtaining [or retaining] custody." Renaud v. Renaud, 168 Vt. 306, 309-10 (1998). The paramount consideration is the best interests of the child. Id. at 310. That does not mean that a court should turn a blind eye to conduct of parental alienation simply because a child has an emotional attachment to the offending parent or because stability and continuity would be furthered by maintaining the relationship with the offending parent. Id. Even in such situations, "a change of custody may well be in the child's long-term best interests," particularly when "the evidence discloses a continual and unmitigated course of conduct by a parent designed to poison a child's relationship with the other parent." Id.

In this case, the family court found by a preponderance of the evidence that father had not abused the parties' child. The court also found that mother's continued claims of abuse, often made

in front of the child, were extremely harmful to the child’s physical and emotional well-being. Indeed, throughout its twenty-page decision, the court expressed concern about mother’s pattern of conduct with respect to her accusations of abuse against father, and the negative effect of such conduct upon the child. The court did not find, however, that mother concocted knowingly baseless accusations of abuse for the purpose of undermining the child’s relationship with father. Cf. *id.* at 311-12 (concluding that the record mitigated in favor of the mother where it showed that she did not act precipitously in making abuse accusations ultimately found to be baseless and that her purpose was not to alienate the child from the father).

In considering the parties’ motions to modify, the court carefully reviewed each of the statutory factors set forth in 15 V.S.A. § 665. Although the court found several of those factors to favor father—particularly the factor concerning evidence of abuse—the court’s discretion is not dependent on a numerical assignment of those factors to each party on a scorecard. In the end, the court granted father increased parent-child contact and legal parental rights and responsibilities to restore his missed visitation resulting from mother’s interference and to give the parties’ child sufficient exposure to her father so that if a change of physical parental rights and responsibilities is required in the future, the child will be more familiar with father and his home. Not wanting to traumatically disrupt the mother-child bond and the support that the child was receiving through her school and community, the court allowed mother to retain physical parental rights and responsibilities, but unequivocally warned her that any continued conduct alienating the parties’ child from her father would result in a transfer of physical parental rights and responsibilities to father. See *id.* at 313 (underscoring the trial court’s “specific admonishment to mother to encourage a warm and loving relationship between father and child”).

Because of the value of stability in a child’s life, the party seeking to modify parental rights and responsibilities has a heavy burden of demonstrating that a transfer of custody is in the child’s best interests. *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 37, 177 Vt. 577. Here, the family court called this a very close case, but declined to transfer physical custody of the child for the reasons stated above. Upon review of the record, we conclude that the court acted within its discretion in increasing father’s parent-child contact and transferring legal, but not physical, rights and responsibilities to father. See *id.* (“The family court has broad discretion in determining a child’s best interests.”).

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice