

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-070

AUGUST TERM, 2017

In re M.H. and K.H., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 142/143-12-15 Bnjv

Trial Judge: Cortland Corsones

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

In this matter involving children in need of care or supervision (CHINS), father appeals the superior court’s order modifying a prior disposition order to make sole custody with mother the disposition goal. We affirm.

Mother and father have three children together, a son born in September 2007 who is not a subject of these proceedings, and two daughters, M.H., who was born in July 2009, and K.H., who was born in May 2011. Mother and father divorced in 2014. Pursuant to the final divorce order, the parties shared legal parental rights and responsibilities and father was awarded primary physical rights and responsibilities, with mother having parent-child contact every weekend. During the divorce proceedings, father and his fiancée alleged that M.H. and K.H. had been sexually abused at mother’s house. DCF and law enforcement investigated the allegations and found them to be unsubstantiated.

In November 2015, following the parties’ divorce, father’s fiancée made more allegations of sexual abuse of the girls. She reported that the girls told her that they had been sexually abused by mother, mother’s brother, and their brother. DCF once again investigated the allegations. As part of the investigation, DCF received a report from the girls’ counselors expressing concerns that father’s fiancée may have a mental health disorder affecting her ability to parent and that the children could be at risk of emotional and physical harm by her. In December 2015, while the sexual abuse investigation was ongoing, DCF petitioned for emergency custody of the girls to ensure their safety, although it was still unclear as to what form of abuse they had been subjected to and by whom. The petition noted that there had been multiple investigations into alleged sexual abuse of the girls and that there were serious concerns as to whether father’s fiancée had influenced the allegations. The petition stated that DCF intended to place the girls in foster care, free of the influence of either parent, until an independent evaluation could be completed to determine the nature and extent of the abuse.

On December 4, 2015, the superior court issued an emergency care order placing the girls in DCF custody. Following a contested temporary care hearing on December 23, 2015, the court awarded DCF temporary custody. The girls were placed in foster care and contact with the parents was allowed as agreed to by DCF. Dr. Marilyn Gabriel was hired to complete an independent forensic family evaluation.

On January 15, 2016, the parties entered into a merits stipulation. On April 28, 2016, the parties stipulated to a disposition order that continued DCF custody and established a goal of reunification with either parent. At the disposition hearing, the superior court noted that Dr. Gabriel's evaluation had not yet been completed but that her report was expected within a week. Dr. Gabriel completed the report on May 23, 2016. At a June 30, 2016, post-disposition review hearing, DCF indicated that the State would be filing a motion to modify the disposition order based on Dr. Gabriel's report. On July 6, 2016, the State filed a motion to modify, seeking an order transferring custody of the girls to mother. Meanwhile, DCF placed the girls with mother based upon the recommendations made by Dr. Gabriel. Evidentiary hearings were held on September 1, 2016, and January 17, 2017. All parties, except for father, stipulated to granting the State's motion to modify.

The first day of the hearing consisted of Dr. Gabriel's testimony. Her testimony and report, which was admitted into evidence over father's hearsay objection, was based on her review of DCF files; her clinical interviews with father, mother, father's fiancée, the girls, and their brother and half-brother; her observations of parent-child contact; her home visit with mother; her interviews with collateral sources, including the girls' counselors; and the results of standardized psychological tests administered to mother, father, and father's fiancée. Based on this information, Dr. Gabriel found no evidence of sexual abuse between any of the children or adults. Dr. Gabriel found that father's fiancée appeared to experience a serious degree of distortion with her thinking that interfered with her perception of reality. Dr. Gabriel diagnosed her as suffering, among other things, from Factitious Disorder Imposed on Another, which involves presenting another individual to others as ill, impaired, or injured. Dr. Gabriel also found father to meet the criteria for the disorder and further concluded that he was completely attached and committed to his fiancée's allegations. Dr. Gabriel concluded that the unfounded allegations of sexual abuse had deeply traumatized the girls and that long-term therapy would be required for their emotional recovery.

On the second day of the hearing, the family's DCF caseworker recommended that mother be granted conditional custody of the girls because there had been no substantiation of the sexual abuse allegations following the forensic evaluation. After the State rested, father testified that the girls had told his fiancée about the sexual abuse and that she had reported it to DCF before he got home from work. He stated that he had no reason to disbelieve his daughters. Father's grandmother testified that when she transported the girls back from visits with mother they had spoken to her of sexual contact. Father's stepfather testified that the girls' brother stated to him on one occasion, after being asked whether he knew why everyone was so upset, that it was because he had touched his sisters.

On January 25, 2017, the superior court issued an order granting the State's motion to modify its prior disposition order by transferring custody of the girls to mother with conditions and changing the disposition goal to sole custody with mother. The court found, based on the evidence, that Dr. Gabriel's conclusions regarding the alleged sexual abuse were well-supported and credible. The court noted Dr. Gabriel's diagnoses and conclusions, which were based on her interviews; observations; and testing of mother, father, father's fiancée, and the girls. The court also noted that DCF had found the November 2015 sexual abuse allegations to be unsubstantiated. Based on its findings, the court determined that the results of Dr. Gabriel's independent family forensic evaluation constituted a significant change in material circumstances and that transferring custody to mother was in the girls' best interests because mother had been meeting their emotional and material needs since September 2016 and the girls would be traumatized again if they were moved back with father because of father's and his fiancée's continuing belief that mother and others in her home had sexually abused them. See 33 V.S.A. § 5113(b) (providing that court may modify order on grounds that changed circumstances require such action to serve children's best interests).

On appeal, father first argues that the issue of whether the girls were sexually abused should have been determined in a merits proceeding rather than a disposition proceeding. According to father, because "merits findings must precede a disposition hearing," the court had no authority to address a merits issue—whether the girls had been sexually abused—at a disposition hearing. In re M.C.P., 153 Vt. 275, 291 (1989); 33 V.S.A. § 5315(g) (providing that disposition hearing shall be set if court at merits hearing "finds that the allegations made in the [CHINS] petition have been established based on the stipulation of the parties or on the evidence if the merits are contested"). Father further argues that the court's error was not harmless because the rules of evidence apply to merits proceedings but not to disposition proceedings and, in this case, the court relied on DCF's investigation and Dr. Gabriel's evaluation without the benefit of hearing the testimony of the DCF investigator himself or many of the people to whom the investigator and Dr. Gabriel spoke. Compare 33 V.S.A. § 5315(d) ("A merits hearing shall be conducted in accordance with the Vermont Rules of Evidence."), with 33 V.S.A. § 5317(b) ("Hearsay may be admitted and may be relied on to the extent of its probative value.").

We reject this claim of error insofar as the parties, including father, stipulated to a merits adjudication that the girls were CHINS and agreed to a disposition hearing that would hinge on the court's assessment of the results of Dr. Gabriel's pending evaluation. At a January 15, 2016, pretrial hearing, the State's attorney suggested scheduling a merits hearing if the allegation of CHINS was being contested. The court agreed, stating that it would set a half-day merits hearing, unless the juveniles and father decided "that admissions are appropriate." When the court later stated that "the next step would be to set it for a half-day merits hearing," father's attorney interjected that father would have no objection to entering an admission.¹ The court then noted that "[f]ather and the juveniles have entered admissions to the petition that the children were

¹ Although father's interjection is not entirely clear as transcribed, the response of the girls' attorney and the court demonstrate unequivocally that father's attorney was offering to enter an admission of CHINS on behalf of father.

CHINS B, based upon the affidavit in this case,” and “that the issues that are at issue will all be examined as part of the disposition recommendation.” The parties agreed that the children had been mistreated and that the only remaining question was whether the mistreatment was sexual abuse under mother’s care or manipulation of the girls by father’s fiancée resulting in false allegations of sexual abuse. Understanding this, father agreed to proceed in the manner that he now claims constituted error. We conclude that he has waived any such claim of error. See State v. Longe, 170 Vt. 35, 39 n.* (1999) (explaining that “invited error doctrine, which applies in both civil and criminal cases, is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside” (citation and quotation omitted)). As for father’s claim that the superior court lacked authority to address at the disposition hearing the nature of the abuse stipulated to, the court was not barred from considering at disposition issues relating to parental conduct to determine what custody order would serve the children’s best interests. Cf. In re J.T.S., 169 Vt. 620, 620-21 (1999) (mem.) (affirming trial court’s determination at disposition, after parties stipulated to CHINS, that transferring custody from father to state was supported by fact that father’s history of removing child from needed residential treatment threatened potential interruption of that treatment if custody remained with him).

Father also argues that the superior court’s finding that the girls were not sexually abused was not supported by competent evidence. In support of this argument, father points out that a substantiation decision is not required to meet a preponderance-of-the-evidence standard, see In re Selivonik, 164 Vt. 383, 388 (1995) (stating that “agencies investigating reports of suspected child abuse need not apply a preponderance of evidence standard to their determinations”); 33 V.S.A. § 5317(c) (providing that standard of proof regarding nontermination issues is preponderance of the evidence), and that the superior court is not obligated to defer to DCF’s substantiation determination. According to father, absent testimony from the person who conducted the DCF investigation into allegations of sexual abuse, DCF’s naked conclusion that the abuse could not be substantiated has no probative value. With regard to Dr. Gabriel’s forensic evaluation, father argues that the court erred in declaring the hearsay evidence within her report reliable based on psychological testing performed by Dr. Gabriel and her observations because parents “must be judged on their conduct, not on their test-taking skills or psychological traits,” In re B.M., 165 Vt. 331, 338 (1996), and an expert witness is not competent to opine that a person does not seem the type to engage in the alleged conduct.

We conclude that the court’s finding that no sexual abuse occurred was not clearly erroneous. See In re L.R.R., 143 Vt. 560, 563 (1983) (“Findings of fact must stand if supported by credible evidence, and are not clearly erroneous.” (citation omitted)). Regarding DCF’s substantiation determination, the superior court merely noted the determination in its findings and then cited it in addition to Dr. Gabriel’s completion of her forensic evaluation as evidence of changed circumstances, which father has not challenged. The court did not rest its conclusion that no sexual abuse occurred on the fact that the allegations had not been substantiated. In reaching that conclusion, the superior court relied primarily on Dr. Gabriel’s evaluation, which, as noted, was based not only on psychological testing but also clinical interviews with the family members, parent-child observations, and interviews with collateral sources. The court found Dr. Gabriel’s

testimony and conclusions to be credible. Juxtaposed against this evidence were alleged statements of sexual abuse made by the girls primarily to father’s fiancée, whom Dr. Gabriel concluded suffered from Factitious Disorder Imposed on Another—in part as the result of extreme, illogical, and bizarre comments she had made in her interview. As the court found, some of the girls’ allegations “were very strange,” such as the statement that mother put a stick-like object in their vaginas in the middle of the street.² The only other evidence supporting the sexual abuse allegations was the stepfather’s testimony that the girls’ brother acknowledged that people were upset because he touched the girls and the vague testimony of father’s mother that the girls had said things to her about sexual contact. Given this record, the court’s finding that the girls were not sexually abused was not clearly erroneous, and the modified disposition order was supported by a preponderance of the evidence. Cf. Clark v. Bellavance, 2016 VT 124, ¶ 15 (upholding trial court’s finding that there was no credible evidence to support mother’s allegation of sexual abuse of parties’ child by father).

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

² Two vaginal examinations of K.H. and one of M.H. were negative for physical findings of sexual abuse.