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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-212

NOVEMBER TERM, 2002

Aaron Diamondstone	}	APPEALED FROM:
	}	Windham Family Court
v.	}	DOCKET NO. 80-4-01 Wmdm
Anita Diamondstone	}	Trial Judge: David Suntag

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

Father appeals the parties' final divorce order, in which the family court awarded mother primary physical and legal rights and responsibilities over the parties' two children. We affirm.

The parties married in October 1987 and separated in April 2001. Two children were born of the marriage, the first in December 1989 and the second in May 1991. Following an incident in April 2001 in which father slapped the parties' older child, mother moved with the children from the marital home in Newfane, Vermont to Leeds, Massachusetts, where she had grown up and where her family still lived. Father filed for divorce, and mother petitioned for relief from abuse. The proceedings were consolidated, and mother was awarded temporary physical and legal rights and responsibilities over the children. Pending further order, the children were to continue to attend school in Newfane, where father resided. For the next year, until the family court issued its final divorce order in April 2002, the parties shared parental rights and responsibilities. Following three days of a contested hearing, the court awarded mother primary physical and legal rights and responsibilities over the children, except that father was awarded responsibility for medical decisions concerning the younger child, who has a diabetic condition.

One of father' s principal arguments in support of his request that the family court award him primary physical and legal rights and responsibilities was that the children, who both had a form of dyslexia, should continue to attend the Newfane school system, where they had been receiving excellent individual attention to address their special needs. On appeal, father argues that the family court' s decision to award mother parental rights and responsibilities must be reversed because the children' s court-appointed guardian ad litem made a statement that referred to matters outside the evidence, in violation of V.R.F.P. 7(d) and Vermont case law. According to father, the guardian ad litem' s reference to extrajudicial contacts she had made prejudiced him by undercutting his position concerning the children' s educational needs. We find no merit to this argument.

In relevant part, Rule 7(d) provides that

> [E]ach guardian ad litem shall meet with the child, the child' s attorney, and others necessary for an understanding of the issues in the proceedings. . . .
>
> The guardian ad litem shall state to the court a position and the reasons therefor, which reasons shall be based upon the evidence in the record, but shall not testify as a witness. Either the lawyer or the

> guardian ad litem should state the child' s position, if the child has a position.

Here, at the close of evidence, the court asked the guardian ad litem if she was prepared to state a position based on the evidence. When the guardian ad litem responded by first stating that she had spent time with the children and their parents, father' s counsel objected, arguing that Rule 7(d) required her to comment only upon the evidence presented at the hearing. The court denied the objection, pointing out that Rule 7(d) also allowed the guardian ad litem to state the position of the children and to provide a background as to how she knew what the children wanted. The guardian then proceeded to state, in relevant part, as follows:

> I' ve spoken with the therapist. I' ve spoken with the teachers, I' ve heard their testimony here. I' ve spoken with the guidance counsellor who was not here. I' ve spoken with JFK Middle School in Leeds and Leeds Elementary School.
>
> Okay, there' s, there are certain things that are clear to me . . . and that is that these kids are wonderful. . . . Very clear the parents want to do very well by their children. It was very clear to me by the testimony that Newfane School is proud of itself and has done well by the kids. It' s very clear from the testimony that the Diamondstone family is strong and very supportive of their son. It' s also very clear from almost everybody that the present arrangement [of the children commuting from Massachusetts to Vermont for school] is not a good arrangement for anybody.
>
> Where my concerns are during the testimony is the relationship to discipline. I noted that [father] had said that hitting [the parties' daughter], he doesn' t want to do that, but it did put an end to the solution. It did put an end to the problem. He didn' t think he left any physical markings and then he agreed that he did. That alcohol is in the picture, it' s not quite clear how much it is or how little it is, but it has caused disturbance and that he is willing to not drink with the children present.
>
> As far as [mother] is working forty hours plus commuting and that she has said she puts her children first and I think her sacrifices of time and energy to her children show that. And also the testimony of various people that [mother] seems to be the primary parent.
>
> Therefore, in the best interests of the children, what I would recommend is full physical and legal custody with [mother]. Shared medical involvement and decisions because this is a special needs with [the son' s] diabetes.

Upon further inquiry from the court, the guardian ad litem then indicated that her position was what the children wanted as well.

Father argues that, by mentioning that she had had contact with the Massachusetts school, the guardian ad litem was implicitly telling the court that, although mother had failed to present any evidence as to the ability of the Massachusetts school to provide for the children' s special needs, the school would in fact be able to meet the children' s needs. Father reads too much into the guardian ad litem' s comments. In responding to the court' s ruling that she could provide some background information to explain how she knew what the children wanted, the guardian ad litem began by naming the people with whom she had spoken. In doing so, she indicated that she had spoken to school officials in both Vermont and Massachusetts, but she made no further comment comparing the services available in the respective schools. She then explained in some detail, based on the testimony presented at the hearing, why she believed that it would be better for the court to award mother primary physical and legal rights and responsibilities over the children.

We find no violation of Rule 7(d) or Vermont case law. As noted, Rule 7(d) provides that the guardian ad litem shall meet with persons " necessary for an understanding of the issues in the proceedings" and shall state a position to the court based upon evidence in the record. In Johnson v. Johnson, 163 Vt. 491, 497 (1995), we reversed a custody decision based upon a Rule 7(d) violation in a closely contested case in which the family court declined to award parental rights and responsibilities to the children' s primary care giver, even though there was little evidence concerning the parties' respective abilities to meet the children' s physical and emotional needs. In that case, the guardian ad litem stated that (1) she had met with school officials who spoke highly of the father; (2) she had observed how well the father interacted with the parties' daughter both in and out of the school; and (3) she had had trouble reaching the mother

because of the mother' s unwillingness to be contacted at her work. We reversed because of the danger that the guardian ad litem' s statement, which was based on matters outside the record, influenced the court' s decision in a close case lacking evidence on more relevant matters. See id. Here, in contrast, the court awarded custody to the primary care giver after hearing extensive testimony from many witnesses, including expert witnesses, concerning the parties' respective abilities to meet the children' s needs. More importantly, in this case, the reasons that the guardian ad litem gave in support of her position were based on testimony from the divorce proceeding, not from evidence outside the record.

Moreover, even if we were to construe the guardian ad litem' s comments as somehow in violation of Rule 7(d), we would not find reversible error. The family court carefully reflected on its decision regarding parental rights and responsibilities, and in particular, the children' s educational needs, which was the focus of father' s concerns. The court ordered that the children remain in the Newfane school system for another two and one-half months until the end of the 2001 school year, at which point the parties' older child would be moving on to the middle school and the younger child would have only one more year left in the elementary school. The court acknowledged that the children had flourished under the guidance of the Newfane elementary school' s special education program, and that little evidence had been presented concerning the Massachusetts school, but pointed out that there was also little evidence concerning the Newfane middle school, and that it was understood that special services would be available at the Massachusetts school. In the end, the court determined that the factors favoring awarding mother primary physical and legal rights and responsibilities over the children were much more compelling than father' s speculative argument that the children would not fare as well in a larger school system. The court' s discretionary decision is amply supported by the extensive evidence, apart from the guardian ad litem' s comments.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice