

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-490

MAY TERM, 2005

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| Christopher D. Kellner | } | APPEALED FROM: |
| | } | |
| v. | } | Lamoille Family Court |
| | } | |
| Kimberly J. Bourdeau | } | DOCKET NO. 170-10-00 Ledm |
| | } | Trial Judge: Edward J. Cashman |

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

This is an appeal in a parentage action in which the Lamoille Family Court modified an order on parental rights and responsibilities relating to the parties' minor daughter Cassey. The order on appeal may be characterized as the latest in a long series of family court orders seeking to prevent mother from denying Cassey a relationship with her father. The family court transferred primary authority for Cassey's upbringing from mother to father after concluding that it was in the child's best interests because of mother's inability to let go of false allegations of abuse. We affirm the court's decision on father's motion to modify, but remand the order directing mother to pay father's legal fees for fact findings.

The record, viewed in the light most favorable to the prevailing party, Osmanagic v. Osmanagic, 2005 VT 37, ¶ 5, 16 Vt. L. Wk. 122, establishes that father filed this paternity action so he could legally participate in Cassey's life. Before father sought judicial intervention, mother barred father from seeing Cassey. Since the child's birth in August 2000, mother has rebuffed father's efforts to be something more than only a financial resource for Cassey. Mother has filed numerous relief-from-abuse petitions against father, and she has accused him—repeatedly and without any grounds—of sexually abusing the child. [1] The sexual abuse allegations began in early 2001 when Cassey was only a little older than five-months.

Some of mother's accusations found their way to the Department for Children and Families (DCF), but not a single allegation has been substantiated by DCF or the family court. In 2002, the court found that father poses no risk of harm to Cassey. It also found that mother fabricated the sexual abuse allegations. In 2003, Cassey began making allegations of abuse to her therapist. The therapist reported the three-year-old child's statements to DCF. Again DCF entered a finding of "unsubstantiated." Contact between father and Cassey became sporadic because of mother's persistent allegations of abuse.

To address mother's noncompliance with court-ordered visitation and her false accusations against Cassey's father, the court has held mother in contempt, ordered her to pay fines and father's legal fees, and it has modified the terms of visitation. In January 2003, it entered an order on father's motion to modify custody, a motion the court explained that father filed "in desperation to see his child." It made findings on the criteria set forth in § 665(b) on parental rights and responsibilities. It found that mother "frustrated the child's needs for positive emotional contact with the father." It concluded that Cassey's best interests rested with "having frequent and healthy contact with each parent," but it reserved judgment for ninety days on whether modifying custody was best for Cassey. The court explained that mother "cannot maintain the current refusal to permit visitations and remain the primary custodian of this child." It modified the visitation schedule slightly to accommodate the parties' requests.

The court held more hearings and issued additional orders on the visitation matter during the late summer and fall of 2003. The question of modifying custody arose again in late 2003 and early 2004, and hearings were held in January, April, and July 2004. In the family court's decision resulting from those hearings (the decision on appeal) the court found that mother's "enunciated adamancy in an unreasonable standard of conduct has hardened to become a way of life for her. The Court does not believe that any amount of contempt fines for frustrated visitation will change that." The court incorporated the factual findings of its January 2003 order on the motion to modify into its decision. After considering the best interest factors enumerated in 15 V.S.A. § 665(b), the court concluded that Cassey should live with father. It set a schedule for parent-child contact between mother and Cassey, and stayed the judgment pending mother's appeal.

Mother raises several arguments on appeal: (1) the court erred by not assigning an attorney to represent Cassey; (2) the court misapplied the change-of-circumstances standard when modifying custody; (3) the decision was based on evidence outside the record; (4) the court clearly erred by finding that mother had emotionally abused Cassey; (5) a finding that mother refused visitation to father is not supported by the evidence; (6) the court should not have incorporated two-year-old findings into its analysis on the child's best interests; (7) the parent-child contact schedule for mother failed to include blocks of time over school holidays and vacations; and (8) the court erred by not considering the parties' financial circumstances when it ordered

mother to pay father's legal fees.

We do not address the first argument because mother did not raise it before the trial court and therefore did not preserve it. Sundstrom v. Sundstrom, 2004 VT 106, ¶ 21, 865 A.2d 358. As to the issue of legal fees, we remand the matter to the family court for findings on mother's ability to pay and father's financial needs. See Davis v. Hunt, 167 Vt. 263, 269 (1997) (holding that awarding legal fees in parentage actions requires family court to make findings on the parties' respective financial needs). We address the remaining arguments in turn.

Mother challenges the court's change-of-circumstances analysis because she believes the court erroneously applied the "stagnation" standard used in termination-of-parental-rights proceedings. Mother argues that if the court is allowed to apply the stagnation standard in a dispute like this one, it should first offer mother social services to prevent a change in custody because those services are made available to parents before their rights are terminated.

Section 668 of Title 15 allows the family court to modify a prior order on parental rights and responsibilities if it first finds that a "real, substantial and unanticipated change of circumstances" has occurred and modification meets the child's best interests. 15 V.S.A. § 668; Sundstrom, 2004 VT 106, ¶ 28. The heavy burden to show a change of circumstances rests with the moving party, and we review the court's determination on the change-of-circumstances question for an abuse of discretion. Sundstrom, 2004 VT 106, ¶ 29. We explained in Sundstrom that repeated and wilful interference by one parent in the visitation rights of the other parent may qualify as the change of circumstances required by § 668 before the family court may consider modifying a prior order. [2] Id. Changing custody does not necessarily follow from a finding that the custodial parent has interfered with the other parent's contact with the child—even if that finding qualifies as the requisite change of circumstances under § 668. Neither is the finding, or subsequent modification decision, intended to punish the uncooperative parent. Whether the court should modify an existing parental rights and responsibilities order depends upon the particular child and the circumstances presented to the family court, with the guiding principle always being the child's best interests. The court may use its own experience and common sense when analyzing the evidence in light of the statutory best interest factors. Osmanagic, 2005 VT, ¶ 6. But the change of circumstances issue must be decided as a threshold matter, Habecker v. Giard, 175 Vt. 489, 490 (2002) (mem.), and here the court applied the proper standard.

In its order, the family court observed that mother's persistent efforts to prevent father from seeing Cassey could be considered "a continuation of prior conduct and thus raise the argument that there is no change." It analogized the situation in this case to cases involving a parent whose inability to reform his or her unfit parenting leads to the termination of the parent's rights in the child. See, e.g., In re D.B., 161 Vt. 217, 219 (1993) (explaining that parental stagnation can lead to a modification of disposition for a child in need of care and supervision, including termination of the parent's rights). The court found that mother is so emotionally invested in the allegations of sexual abuse that she cannot let them go, and that "she may not have the ability to recognize the damage that she is doing to the child and to father." It noted that father "presented evidence that he could not continue to remain in his role as putative sexual abuser of the child. He raised this not in relation to his own reputation but to the child's self image as a sexually abused child." Notwithstanding the family court's repeated admonitions to mother to stop interfering with father's court-ordered contact with Cassey, mother continued to fabricate abuse allegations and prevent father and Cassey from having a positive father-daughter relationship. The findings, and the record upon which they are based, reflect that the court used the standard established by § 668 and that it exercised its discretionary authority properly.

Mother also argues that the court should have referred her for social services before it addressed the custody modification issue. We find no error here. Mother never asked the court for assistance in the form of a social service referral and cannot now claim that it erred by not giving her one. Moreover, mother fails to explain what kinds of services would have caused her to cease her obstreperous behavior. Mother testified that she sought assistance and guidance on the issues with Cassey from Lamoille County Mental Health, Copley Hospital, and the Head Start program. Notwithstanding those services, and DCF intervention, the record shows that mother tried to frustrate father's contact with Cassey at nearly every turn. No fine, no modified parent-child contact order, no payment of legal fees, and no admonishments by the family court could prompt a sustained change in mother's conduct or her attitude about Cassey's father. Mother has not demonstrated that ordering a referral for social services would have made any difference in the outcome of this case.

Next, mother argues that the court entered findings that are not supported by the evidence. In particular, mother contends that the court erroneously found that she presented a "transcript" at trial of a conversation she had with Cassey on the morning that the child purportedly told her that father forced her to perform fellatio on him. Mother misreads the court's order. The finding used the term "transcript" to refer to mother's testimony about the conversation, which she recounted in question and answer format at the hearing. The court's finding is not clearly erroneous because it accurately portrays mother's sworn testimony.

Mother also claims that the court clearly erred by finding that mother claimed to have studied techniques used to interview child sexual abuse victims. Mother told the court that she had taken psychology classes and did research on therapy, implying that her studies related to child sexual abuse. There is no evidence in the record that mother studied techniques for interviewing victims of sexual abuse, however. Although the challenged finding is clearly erroneous, it does not provide grounds to reverse because it is harmless. V.R.C.P. 61.

The next finding mother challenges relates to Cassey's emotional health. When analyzing § 665(b)(9)—evidence of abuse and its impact on the child and the child's relationship with the abusing parent—the court found that mother's persistent

abuse allegations were “prima facie evidence of emotional abuse to the child” such that it impaired her psychological growth and development. See 33 V.S.A. § 4912(7) (defining “emotional maltreatment” as a pattern of malicious behavior resulting in impaired psychological growth and development); 15 V.S.A. § 1101(1)(c) (making 33 V.S.A. § 4912(7) applicable in relief-from-abuse proceedings in family court). The court found that “mother would cause the most terrible social stigma be placed on the child and the father in order to insure her position as the sole and only caretaker.” Mother argues that the record lacks evidence of Cassey’s emotional health or that mother’s behavior has harmed her in any way. Although there was evidence that Cassey has a happy and well-adjusted disposition, we disagree that the record lacks evidence that she has suffered as a result of the conflict between her parents.

Mother testified that Cassey was demonstrating behavioral problems that she felt would benefit from therapy. She presented expert testimony from Cassey’s therapist. The therapist testified that Cassey acted out her anxiety and anger during play therapy, throwing a male doll representing father across the room. She also testified that Cassey refers to her father as “Bad Daddy” when the child raises abuse accusations during therapy. The therapist opined that Cassey would benefit from further therapy so she can resolve her issues surrounding the alleged sex abuse.

None of the abuse allegations have been substantiated. Yet this now nearly five-year-old child has been claimed to be a victim of sexual abuse for almost her whole life, the alleged perpetrator being her father. The court was concerned that mother was raising Cassey to bear the social stigma of an incest victim because of repeated false or unfounded accusations. The court did not err by concluding that mother’s four-year campaign of fabricated abuse claims against father have negatively influenced Cassey’s psychological growth and development.

Mother also argues that the court erred by finding that she “terminated visitation in December 2003.” She argues that the record shows that visitation could not occur because Cassey underwent surgery and was ordered to remain at home by her doctor. The finding appears in the court’s recitation of this case’s four-year procedural history. In context the finding states as follows:

The father moved for enforcement of visitation on December 31, 2003 and then for change of custody on January 15, 2004. The mother had terminated visitation. She had made another sexual abuse report to the Department of Social and Rehabilitation Services.

(Emphasis added.). Given the context in which the court made the finding, we understand it to refer to the grounds father cited in his December 2003 and January 2004 motions to enforce and to modify custody. The record supports that interpretation. Paragraph 22 of father’s January 2004 motion asserted that mother was in contempt for not allowing visitation in December 2003 as scheduled. At the January 21, 2004 hearing on the motions, the court found mother acted reasonably by keeping Cassey at home while she recovered from surgery. In light of the record, therefore, the finding is not clearly erroneous.

Mother complains that the court erred by incorporating its stale January 2003 findings in its order on father’s motion to modify. We find this argument without merit. The court took notice of its prior orders without objection from mother, and the January 2003 order’s express terms reserved judgment on the issue of custody modification, again without objection. Moreover, mother does not explain what findings in that order are so stale that they render the court’s order unworkable. Mother has not demonstrated reversible error.

Mother’s last issue relates to the terms of her contact with Cassey. Mother complains that the family court’s order does not contain large blocks of time for her to be with Cassey so they can take vacations together. The terms of parent-child contact for the noncustodial parent are a matter for the family court’s discretion. Cleverly v. Cleverly, 151 Vt. 351, 355-56 (1989). To reverse the family court’s decision on parent-child contact, therefore, we must find that the court’s decision is based on clearly unreasonable or untenable grounds. Id. at 356. Other than her generalized complaint that she cannot take Cassey on vacation, mother offers no grounds to reverse the family court’s discretionary decision. Given the history of this case, Cassey’s young age, and the court’s findings on mother’s inability to foster a positive relationship between Cassey and her father, we find no abuse of discretion.

The order modifying parental rights and responsibilities is affirmed. The issue of attorney’s fees is remanded for findings on the parties’ financial needs and defendant’s ability to satisfy the award.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

[\[1\]](#) In each year since the child's birth, mother has filed at least one petition seeking to end Cassey's contact with father on grounds that he engaged in heinous conduct with her. After the petition mother filed in 2001, she filed two petitions in 2002, one in March 2003, and another in June 2004.

[\[2\]](#) This case does not represent just an interference in the noncustodial parent's visitation. Rather, this case involves a parent who has, from the day of the child's birth, tried to prevent the child from establishing a relationship with the other parent.