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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-077

SEPTEMBER TERM, 2006

Melissa M. Dunk	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Family Court
	}	
David C. Dwyer	}	
	}	DOCKET NO. 47-2-96 Wndm

Trial Judge: Dennis R. Pearson

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

Father appeals the Lamoille Family Court=s orders denying his motion to modify parental rights and responsibilities with respect to the parties= two daughters and requiring the parties to engage in at least two mediation sessions before filing any additional motions concerning parental rights and responsibilities. We affirm the court=s orders in all respects, except that the matter is remanded to amend the court=s mediation provision in the manner described below.

Apart from a three-and-one-half-year period between May 2001 and November 2004, the parties have been embroiled in litigation regarding their three children since their divorce in 1996. The parties= final divorce order awarded mother parental rights and responsibilities with respect to their three children, with father having parent-child contact every other weekend. The most recent round of litigation began in November 2004, six months after the parties= teenage son left mother=s residence and moved in with father following a fight between son and mother. Mother filed a motion seeking to reduce father=s contact with the parties= two daughters. Approximately two weeks later, father followed with a motion seeking parental rights and responsibilities with respect to the parties= son. In June 2005, husband responded to mother=s motion to modify and amended his motion to modify by asking the court to award him parental rights and responsibilities with respect to the parties= two daughters.

At the conclusion of an August 2005 hearing at which mother and father testified, the family court denied mother=s motion to modify without prejudice to renewing the motion following the appointment of a guardian ad litem for the children and a hearing on whether to grant mother=s motion to allow the children to testify. Regarding father=s motion, the only issue that remained as to the parties= son was whether mother would share legal rights and responsibilities with father. As to the father=s motion concerning the parties= daughters, the court expressed doubt as to whether father had satisfied the threshold requirement of demonstrating a real, substantial, and unanticipated change of circumstances, but deferred judgment on that issue until after the hearing on whether the parties= children would be allowed to testify. In September 2005, mother withdrew her request to have the children testify and her objection to father retaining legal rights and responsibilities with respect to the parties= son.

Based on those withdrawals, on October 5, 2005, the court canceled the scheduled hearing on mother=s motion to have the children testify and granted father=s motion to award him parental rights and responsibilities with respect to the parties= son. The court also ordered the parties to engage in at least two mediation sessions before filing any further motions with the court regarding parental rights and responsibilities. On January 10, 2006, in response to father=s motion to clarify, the family court stated that no further hearing was necessary because mother had no objection to father being awarded parental rights and responsibilities with

respect to the parties= son, and because father had failed to raise grounds that were sufficient even to trigger a hearing on whether he had demonstrated a real, substantial, and unanticipated change of circumstances with respect to the parties= daughters. According to the court, father=s motion concerning the girls was based solely on his suspicion of what might happen in the future. The court also reminded the parties that they were required to attend at least two mediation sessions before filing further motions with the court regarding parental rights and responsibilities.

On appeal, father argues that the court erred: (1) by denying him a hearing on his amended motion to modify after the first judge had agreed to give him one, and (2) by ordering the parties to attend mediation sessions before filing further motions regarding parental rights and responsibilities. Regarding the first issue, father contends that the court erred in denying his motion to modify after acknowledging that he made a showing of changed circumstances. He also contends that his claim of parental alienation with respect to the girls was not based on what might happen in the future, but rather Asimply expressed my belief that the plaintiff[=]s mistreatment of [the parties= son] would be replayed with my daughters in the future.@

We find no merit to these contentions. In its January 2006 order, the family court acknowledged that father had shown changed circumstances with respect to the parties= son, but had not done so as a matter of law with respect to his daughters. As for the first judge=s decision to give father a hearing on his motion to modify regarding the parties= daughters, the court expressed skepticism at the August 2005 hearing that father had made the requisite showing of changed circumstances, but declined to rule on that point until it was determined whether the children would be allowed to testify and could add anything that would bolster father=s claims, which were inadequate in and of themselves. As it turned out, mother withdrew her request to have the children testify, and father had opposed the idea from the outset. Without any additional testimony from the children, the new judge concluded that father=s claim of changed circumstances was forward-looking and failed as a matter of law. Father=s response, quoted above, belies his contention that his claim of changed circumstances was not based on the future. We find no abuse of discretion in the family court=s determination that father failed to demonstrate changed circumstances with respect to the parties= daughters. See Gates v. Gates, 168 Vt. 64, 67-68 (1998) (stating that family court=s decision concerning whether there are changed

circumstances will be upheld unless court exercised its discretion on clearly untenable or unreasonable grounds).

Relying on Gates, father also argues that the family court erred by requiring the parties to attend at least two mediation sessions before filing further motions regarding parental rights and responsibilities. In Gates, the family court ordered the parties to attend mediation, and if that failed, binding arbitration, before resorting to the court for relief. Id. at 71. The primary reason that we reversed the family court=s order is that the order permitted the parties to return to court after mediation had failed, Abut only after submitting the matter to binding arbitration.@ Id. at 72. We concluded that A[a] court may not order the parties to submit their future disputes to arbitration without a voluntary agreement of the parties concerned, or a statute or rule authorizing such an order.@ Id. Here, in contrast, there was no requirement that the parties participate in binding arbitration if mediation failed; rather, the parties were permitted to return to court as long as they had participated in at least two mediation sessions. This was an entirely reasonable provision, given the parties= ten-year history of litigation, which the court had recognized as having a negative impact on the parties= children.

Secondarily, we also noted in Gates that the family court=s order in that case did not contain any Aflexibility to accommodate emergency situations where time may be of the essence.@ Id. at 73. That is true in the instant case as well. The court=s omission of an emergency exception is understandable, given the parties= proven propensity to claim emergency situations that turned out not to be true emergencies. Nevertheless, there must be some flexibility to accommodate actual emergencies that cannot be addressed through relief-from-abuse proceedings or by the Department for Children and Families through proceedings under Chapter 55 of Title 33. Accordingly, the matter is remanded for the family court to amend the mediation provision to make an exception for legitimate emergency situations in which the health or safety of the children is actually and immediately threatened. In all other respects, the family court=s order is affirmed.

Affirmed in all respects, except that the matter is remanded for the family court to amend its October 5, 2005 and January 10, 2006 orders to allow the parties to file motions in the family court without first attending mediation sessions in true emergency situations when the health or safety of the parties= children is immediately threatened.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice