

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-041

AUGUST TERM, 2017

Sarah Parrott	}	APPEALED FROM:
	}	
v.	}	Superior Court, Rutland Unit,
	}	Family Division
	}	
Michael Gaylord	}	DOCKET NO. 80-3-16 Rddm

Trial Judge: Nancy Corsones

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

In this parentage action, father appeals an order of the superior court, family division, denying his motion to modify parental rights and responsibilities. We reverse and remand.

The record reveals the following material facts. In March 2016, as the result of an incident involving the parties in the presence of their infant son, father was charged with kidnapping,<sup>1</sup> domestic assault, sexual assault, and interference with access to emergency services. In the same month, mother filed a petition for relief from abuse (RFA) and a parentage action seeking child support.

On March 18, 2016, five days after mother filed her RFA petition, the family division held a hearing, in which only mother participated.<sup>2</sup> After finding that father had abused the minor child by placing him in imminent fear of serious physical harm based on the proximity of the child to events that occurred between father and mother, the court issued an order prohibiting father from contacting mother or the child for one year until March 18, 2017. In February 2017, mother moved to extend the RFA order for another year. Father was notified of a hearing scheduled for March 17, 2017. Following the hearing on that date, in which only mother participated, the court extended the no-contact order for another year, until March 18, 2018.

Meanwhile, in the criminal case, on multiple occasions between December 2016 and April 2017, the criminal division imposed bail conditions that, among other things, prohibited father

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<sup>1</sup> The State later voluntarily dismissed the kidnapping charge and replaced it with a charge of unlawful restraint.

<sup>2</sup> According to the RFA docket entries, father had been served with mother's complaint and a notice of the hearing the day before the hearing, but he was in jail at the time being held without bail.

from contacting mother or coming within 300 feet of mother's home. The conditions also required father to abide by any family division orders governing his conduct, including RFA orders.<sup>3</sup>

Following the final RFA order in 2016, before it was extended, mother filed this parentage action. In this case, the family division issued an order on July 25, 2016 concerning parental rights and responsibilities (PRR). The court granted mother sole legal and physical PRR. Regarding parent-child contact, the court stated that there would be no contact pursuant to orders in the RFA and criminal proceedings. The order noted:

THE COURT NOTES THAT THERE IS A PENDING CRIMINAL CASE, DKT. NO. 276-3-16 RDFA AND A RELIEF FROM ABUSE FINAL ORDER THAT WAS ISSUED IN DKT. NO. 85-3-16 RDFA AND EXPIRES ON MARCH 18, 2017. PARTIES UNDERSTAND THAT WHILE THESE ORDERS ARE IN EFFECT WITH THE CURRENT CONDITIONS, THEY WILL SUPERSEDE THIS ORDER UNTIL THOSE ORDERS ARE MODIFIED OR VACATED, THEN PARTIES UNDERSTAND THAT THIS ORDER WOULD NEED TO BE REVIEWED AND POSSIBLY MODIFIED.

In August 2016, father filed in the parentage case a motion to modify parent-child contact. In September 2016, the family division denied father's motion to modify by motion-reaction form, stating that father was "legally unable to assume parental rights for the child at the time." In January 2017, the family division denied father's renewed motion, also by motion-reaction form, stating that because father had failed to appeal from the initial RFA order and thus had not challenged the findings in that order, it would not "entertain any motion to modify parent child contact while the restraining order is in full force and effect." Father timely appealed that decision, but then filed another motion to modify, which the family division also denied, referring to its previous decision.

On appeal, father points to the lack of evidence that he directly abused the parties' son and asks this Court to remand the matter for a hearing on whether he can have supervised or therapeutic visitation. In response, mother recounts some of the facts of the March 2016 assault and notes that father did not appear for the hearing in which the RFA order was extended for another year.

We conclude that the family division erred by denying father's motion to modify without a hearing based solely on the fact that father failed to appeal an RFA order that was extended and is still in effect. In this case, there are two potentially operative orders regarding parent-child contact and parental rights and responsibilities: the order in the RFA, and the final order in the parentage action, which succeeded the RFA proceeding. The two orders are consistent, insofar as the order in the parentage case cross-references the RFA order and essentially incorporates its terms. The rules provide that where an action is filed for divorce or annulment where there has been a prior abuse prevention action, the court will consolidate the abuse prevention action and the orders in the RFA proceeding will continue in effect until expressly discharged or modified by

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<sup>3</sup> A change-of-plea hearing is set for October 3, 2017 in the criminal case.

the court. V.R.F.P. 4.3(a)(2). This applies to parentage proceedings as well.<sup>4</sup> As we stated in Rapp v. Dimino, 162 Vt. 1, 5 (1993):

[T]he abuse prevention statute is aimed at providing immediate relief for abuse victims, not at determining the parties' rights with respect to custody, support or property. The expedited nature of the hearings and the limited procedural safeguards provided by the statute are ill-suited for custody determinations not involving abuse of the children. Temporary custody decisions based on limited evidence are more susceptible to later reversal, which would adversely affect the children's interests in stability and continuity of their relationships and surroundings. Accordingly, custody determinations are better resolved in proceedings concerning divorce, legal separation, parentage, or desertion and support.

In this case, the court did not formally consolidate the cases, but we treat them as consolidated now. A final order regarding custody and visitation in a parentage case may be modified upon a showing of real, substantial and unanticipated change of circumstances. 15 V.S.A. § 668(a). A final RFA order regarding parent-child contact may likewise be modified upon a showing of changed circumstances. 15 V.S.A. § 1103(e). The existence of a no-contact order pursuant to an extended RFA order is not a per se obstacle to modification of a parent-child contact order in the parentage case. In his motion, father alleged changed circumstances, including that he is no longer incarcerated. He is entitled to present evidence of changed circumstances and best interests. A hearing on father's motion to modify must be set and the court should determine whether there has been a sufficient change in circumstances for the court to discharge or modify its July 25, 2016 order concerning parent-child contact as well as the child-contact provisions in the extended RFA.

Reversed and remanded.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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<sup>4</sup> Restyled Rule 4.3 took effect on December 5, 2016. On its face, it only purports to address the relationship between RFA proceedings and divorce or annulment proceedings. However, the Reporter's Notes make it clear that the restyled rule is not intended to make substantive changes, and that 4.3(a)(2) is intended to carry forward the provisions of old Rule 4(m) and 4(n). Reporter's Notes, V.R.F.P. 4.3. Pursuant to the terms of old Rule 4(a), old Rule 4(n) applied to parentage proceedings. See V.R.F.P. 4(a)(1) ("A civil action for . . . parentage . . . shall be considered an action of divorce for purposes of this rule.") (amended December 5, 2016).