Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-254

JULY TERM, 2019

Sarah Morgan v. Tomas W. Morgan*	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Family Division
	}	
	}	DOCKET NO. 86-7-16 Oedm
		Trial Judge: Michael J. Harris

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

Father appeals the family division's divorce order, arguing that the court committed plain error in determining parental rights and responsibilities by admitting evidence of an investigation conducted by the Department for Children and Families (DCF) without giving him the opportunity for cross-examination concerning the investigation. We affirm.

The facts are not in dispute. The parties married in July 2005 and separated in May 2016, when mother and the parties' two daughters, born in December 2005 and December 2008, moved out of the marital home in Newbury to New Hampshire. Mother filed for divorce in July 2016. A September 2016 temporary order granted mother physical and legal parental rights and responsibilities and father parent-child contact. In the fall of 2016, mother began an intimate relationship with a man who informed her that he was a registered sex offender due to prior convictions for sex-related offenses.[*] In February 2017, mother, her boyfriend, and the parties' two daughters moved into the home of mother's mother in Sharon. Father strenuously objected to mother's relationship with her boyfriend because he believed that the relationship posed a danger to the parties' daughters.

At some point after learning that mother's boyfriend was living with mother and the parties' children, father contacted DCF, which initiated an investigation that led to the boyfriend's moving out of mother's residence in July 2017. As the result of the investigation, DCF completed a safety plan in February 2018. Meanwhile, in April 2017, mother obtained a final relief-from-abuse (RFA) order against father for a period of one year based on an incident in which father

[*] Mother's boyfriend was convicted in New Hampshire in 2005 of using a computer to lure a minor under sixteen years of age to engage in sexual activity with him and of engaging in sexual intercourse with that minor. Apparently, he was twenty-one years old at the time and the victim was fifteen. The boyfriend was also convicted in 2014 of failing to report, pursuant to his sex-offender-registration requirements, his creation and use of a Facebook account with a facially fictitious female name and of an online identifier associated with a social network known as "Chaturbate."

reached into mother's car during transfer of the children and grabbed her face and neck, causing her to sustain scratches and bruises.

A final divorce hearing was held over two days on May 8, 2018, and June 4, 2018. Father represented himself at the hearing, while mother and the children were represented by separate counsel. The family division issued a final divorce order on June 26, 2018. Relevant to this appeal, the court awarded mother primary physical and legal rights and responsibilities, subject to certain conditions, including compliance with the DCF safety plan. It awarded father parent-child contact. The court expressed its ongoing concerns over mother's limited insight and judgment regarding the potential danger to the parties' daughters posed by her boyfriend, but it concluded that the implementation of the safety plan, and both mother's and her boyfriend's compliance with that plan, offset those concerns to a degree. The court also cited other factors influencing its decision, including mother's more prevalent role in providing primary care for the children, father's temperament, and father's past conduct toward mother.

Father appeals the final divorce order, arguing that the family division committed plain error by admitting evidence of the DCF investigation without providing a proper opportunity for cross-examination. Before addressing this argument, we set forth the facts surrounding the admission of that evidence. On May 8, 2018, the first day of the final hearing, the children's attorney elicited testimony from mother about her relationship with her boyfriend, DCF's involvement with the family, and the resulting DCF safety plan. Mother testified that she was complying with the safety plan, that she had completed sex-offender chaperone training, and that her boyfriend had contact with the parties' children only in her presence. On the first business day following that hearing, father filed an ex parte emergency order to transfer physical custody of the girls to him. The court denied the motion, reasoning that DCF's safety plan was sufficient to protect the children; however, the court added certain conditions to the temporary order that limited the boyfriend's contact with the children. On May 30, 2018, the court granted the children's attorney's motion to obtain confidential information from the DCF case file. See 33 V.S.A. § 4921(c)(3) (providing for disclosure of redacted DCF investigation file upon request of attorney representing child in child-custody proceedings). The court initially required the children's attorney to provide copies of the redacted file to father and mother's counsel, but on June 1, DCF intervened and filed a protective order regarding dissemination of the file. That same day, the children's attorney received a redacted DCF file that did not contain a psychosexual evaluation of mother's boyfriend that had been done as part of the DCF investigation. The court ruled that it would consider the motion for a protective order on the second day of the hearing scheduled for June 4.

At the June 4 hearing, the court received a sealed copy of the psychosexual evaluation and determined that if it were to rely on the evaluation it would permit the parties to see it pursuant to an appropriate protective order. Father and the children's attorney indicated that they wanted to see the psychosexual evaluation. The court then stated that it would review the evaluation in chambers before determining whether it would be made available to any or all the parties. Father acquiesced to this procedure. The court also received a sealed copy of the DCF safety plan, which it admitted into evidence subject to a protective order, also with father's acquiescence. When the court informed father that he would be able to get a copy of the safety plan, he stated that he had already received a copy of the plan.

In considering parental rights and responsibilities in its June 26 final divorce order, the family division indicated that it had reviewed the psychosexual evaluation and had not found any significant material information beyond that summarized in the DCF safety plan. The court concluded that in light of the merely cumulative nature of the evaluation, which contained highly

sensitive information regarding the boyfriend, it would not release the evaluation to any of the parties and would not use the evaluation in making its findings regarding parental rights and responsibilities.

On appeal, father argues that by admitting the safety plan on the final day of the divorce hearing, the court prevented the parties from being able to question DCF's investigative process, DCF's findings, or the completeness and appropriateness of the plan. Father further argues that the court improperly accorded special deference to the findings in the safety plan without a proper inquiry into the credibility and reliability of the DCF investigation, thereby abdicating its fact-finding role in assessing the children's best interests with respect to parental rights and responsibilities. Finally, father argues that the court improperly considered DCF records without disclosing those records to the parties pursuant to 33 V.S.A. § 4921(c)(1), which provides that DCF "shall" disclose a redacted investigation file to a child's parents "absent good cause shown by the Department." These arguments are raised for the first time on appeal.

Unpreserved challenges to evidentiary rulings are reviewed "only for plain error." State v. Brochu, 2008 VT 21, ¶ 71, 183 Vt. 269. "[W]e consider plain error in civil cases only in limited circumstances, i.e., when an appellant raises a claim of deprivation of fundamental rights, or when a liberty interest is at stake in a quasi-criminal or hybrid civil-criminal probation hearing." Pcolar v. Casella Waste Sys., Inc., 2012 VT 58, ¶ 21, 192 Vt. 343 (quotation omitted). "Plain error exists only in exceptional circumstances where a failure to recognize an error would result in a miscarriage of justice, or where there is a glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." Brochu, 2008 VT 21, ¶ 71. Accepting father's assertion that fundamental rights are at stake here, we find no plain error, if any error at all, in the court's handling of the DCF investigative file.

Regarding that file, at one point during the June 4 hearing the family division asked the children's attorney if the safety plan was the only document she was seeking to have admitted. The attorney replied in the affirmative and stated that the most important things for the court to consider were the boyfriend's convictions, mother's testimony about her relationship with the boyfriend, and the safety plan, which contained information about what DCF was doing to address the risks to the parties' children. According to the attorney, that was the only information the court needed to determine how best to protect the children, pending its review of the sealed psychosexual evaluation. After addressing the attorneys for the children and mother, the court asked father his position regarding the DCF records. Father suggested that he was satisfied with the response of the children's attorney, but then stated, "I would personally like to glance real quick, but you are the judge, I'm the peon." When the court stated that he was not a peon and that it did not want "to diminish the importance of any person" in the proceedings, father indicated that he would like to get the divorce finalized that day. No party objected to admission of the safety plan or sought to have a DCF employee testify on the thoroughness of the plan or the methodology employed in producing the plan.

For its part, in examining the statutory best-interest factors regarding parental rights and responsibilities, the family division concluded that the recommendations contained in the safety plan, as well as mother's and her boyfriend's compliance with those recommendations, allayed much of its concerns over the children's safety. To ensure that those recommendations were followed, the court conditioned its parental-rights-and-responsibilities determination on mother's fully complying with the safety plan. Specifically, the court required mother, among other things, to comply with all recommendations resulting from her boyfriend's sex-offender-treatment program, to not allow any unsupervised contact between the parties' children and her boyfriend until she received written verification from her boyfriend's treatment providers indicating that such

contact was therapeutically allowed, to not allow her boyfriend to reside at her residence until his treatment providers indicated in writing that it was therapeutically allowed, to participate in any mental health counseling recommended by the safety plan, to ensure that the children continued their therapy, and to comply with any revisions to the safety plan.

We reject father's argument that the court gave undue deference to the plan, which contained safety measures above and beyond those contained in the court's May 11, 2018 modified temporary order concerning parental rights and responsibilities. The safety plan was aimed at addressing potential risks posed by mother's boyfriend, and the court exercised its discretion to determine whether the plan's safety measures and other conditions imposed on mother were sufficient to ensure the safety of the children. Father has failed to demonstrate that the court abused its discretion in concluding, based on the evidence before it, that the plan was sufficient to protect the children. See Lee v. Ogilbee, 2018 VT 96, ¶ 15 (stating that trial court has broad discretion in weighing evidence). In determining parental rights and responsibilities, the court considered all the statutory factors, several of which favored mother because of father's attitude and conduct toward mother. Again, we find no abuse of discretion in the court's decision concerning parental rights and responsibilities, which was supported by numerous unchallenged findings and conclusions. Id. ¶ 21 (stating that "the trial court is granted broad discretion in allocating parental rights and responsibilities").

Further, we reject father's contention that the court took advantage of him as a self-represented litigant by expecting him to understand complex laws concerning the admission of evidence. A review of the record demonstrates that the court was extremely solicitous of father during the proceedings. In any event, "[a]lthough we will not permit unfair advantage to be taken of a pro se litigant, it is not the obligation of the family court . . . to offer affirmative help." Adamson v. Dodge, 2006 VT 89, ¶ 4, 180 Vt. 612 (mem.). No unfair advantage was taken of father in these proceedings.

Finally, to the extent father is arguing that the family division erred by not providing him with a copy of the boyfriend's psychosexual evaluation, we find no plain error, if any error at all—and, in any case, no prejudice. The court viewed the evaluation in chambers and determined that the information contained therein was cumulative in nature with respect to the issues before the court and that it would not rely upon it in deciding the case.

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

Beth Robinson, Associate Justice

_____

Harold E. Eaton, Jr., Associate Justice