THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2013-0490, In the Matter of Delmy Rickert and Howard Rickert, the court on August 25, 2014, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The petitioner, Delmy Rickert, appeals final orders of the Circuit Court in her divorce from the respondent, Howard Rickert. She challenges the trial court's decision to exclude from evidence video deposition testimony of a Florida licensed mental health counselor (therapist), who had treated one of the parties' children, on the basis that the therapist's complete file was not made available to the respondent in violation of an earlier order concerning the deposition. She argues that the therapist's testimony was admissible regardless of whether it constituted expert opinion evidence, that the therapist was exempt from expert disclosure requirements, that she satisfied any expert disclosure requirements that applied, and that excluding the therapist's testimony was not the appropriate remedy for any expert disclosure violations.

The parties filed their joint petition for divorce in June 2010. The record establishes that at no point prior to the November 27, 2012 final hearing did the petitioner disclose any expert witnesses. On July 31, 2012, however, the petitioner produced a letter from the therapist (July 31 letter), addressed to her lawyer, that: (1) stated that he had been treating the parties' children; (2) described the mental health diagnosis of the parties' oldest child, and certain behaviors that the children had exhibited allegedly as a result of their exposure to domestic violence allegedly perpetrated by the respondent; and (3) opined as to what type of custody arrangement would be in the children's best interest. She also produced the therapist's curriculum vitae. At the August 2012 trial management conference, the petitioner indicated that she intended to take, and introduce into evidence, a video deposition of the therapist.

The respondent propounded expert interrogatories upon the petitioner relative to the therapist, and requested that she produce the therapist's complete file and billing records. The petitioner moved to strike the discovery, claiming that the therapist was not her "expert," but was merely a "treating psychologist." The petitioner also moved to take the therapist's deposition in Florida so as "to provide current important psychiatric evidence at trial." The

respondent objected, arguing that the petitioner had failed to properly disclose the therapist or provide expert discovery, and that without a complete copy of the therapist's file, he could not meaningfully cross-examine the therapist.

On November 7, 2012, approximately three weeks prior to the final hearing, the trial court granted the petitioner's motion to take the therapist's deposition. The trial court had not yet, however, ruled on the petitioner's motion to strike the respondent's expert discovery. On November 13, the respondent filed a motion for expedited orders, asserting that without the therapist's file, he could not adequately cross-examine the therapist, and requesting that the court deny the motion to strike the expert discovery and stay any deposition until after the petitioner had provided the discovery.

At the November 27 final hearing, the trial court heard argument from the parties concerning the deposition. Counsel for the petitioner claimed not to possess the therapist's file or to know what his testimony would be beyond what he had disclosed in the July 31 letter, and asserted that the petitioner had no obligation to disclose the information because she had not retained the therapist for litigation purposes. The respondent countered that, regardless of whether the petitioner had engaged the therapist for litigation, he was entitled to the therapist's file, and that, because the therapist was the petitioner's witness, the petitioner was obligated to provide it. The trial court took the issue under advisement, and proceeded with the final hearing.

On December 5, 2012, the trial court issued its order concerning the deposition (December 5 order). In the December 5 order, the trial court observed that the July 31 letter did "more than just report[] [the therapist's] observations"; it described the treatment history of the parties' oldest child, "addresse[d] [the therapist's] diagnosis" of the child, and "state[d] his opinion as to custody of the children," an "ultimate issue" in the case. The trial court further observed that, had the parties earlier advised it that such parenting issues were in dispute, it would have appointed a guardian ad litem. The trial court concluded that the parties had waived their right to assert the children's right to confidentiality in their therapy records, and that waiver of the therapist-patient privilege was in the children's best interest. See In the Matter of Berg & Berg, 152 N.H. 658, 666 (2005). The trial court ordered that the deposition would proceed "with both attorneys having full access to all of [the therapist's] records," and with the petitioner being "responsible for any costs incurred in copying the records." We note that the petitioner does not challenge the December 5 order on appeal.

The deposition went forward on March 28, 2013. During cross-examination, the therapist revealed that his file included documents that he had not produced to the respondent, including: (1) progress notes from recent

sessions with the parties' oldest child; (2) records from a Florida treatment facility, to which the child had been admitted in 2011, that the petitioner had provided to the therapist two-to-three months prior to the deposition; and (3) records from a Vermont treatment facility, to which the child had been admitted in 2010, that the petitioner's counsel had provided the therapist in 2011. The respondent moved to exclude the deposition from evidence for failure to comply with the December 5 order. The trial court granted the motion, reasoning that the therapist was the petitioner's witness, that it was the petitioner's obligation to ensure that the deposition complied with the December 5 order, and that, in violation of the December 5 order, the respondent was not provided complete access to the therapist's file, including the documents that the petitioner herself had recently provided the therapist.

The trial court has broad discretion in managing discovery and trial proceedings, and over the admissibility of evidence. See In the Matter of Conner & Conner, 156 N.H. 250, 252 (2007); In the Matter of Hampers & Hampers, 154 N.H. 275, 280 (2006). We have long recognized that justice is best served by a system that reduces surprise at trial by giving parties the maximum amount of information; a party's failure to disclose the basis for a witness's expert opinion testimony, therefore, should ordinarily result in the exclusion of the testimony. See Boissy v. Chevion, 162 N.H. 388, 396-97 (2011); cf. Bursey v. Bursey, 145 N.H. 283, 286 (2000) (holding that trial court did not unsustainably exercise its discretion by not allowing a party to a divorce to provide evidence that he had failed to disclose in discovery).

On appeal, the petitioner has the burden to demonstrate reversible error. See Coyle v. Battles, 147 N.H. 98, 100 (2001). We have reviewed the trial court's well-reasoned orders granting the respondent's motion in limine and denying the petitioner's motion for reconsideration, the petitioner's challenges to the ruling on the motion in limine, and the record that the petitioner has provided, and we conclude that the petitioner has not demonstrated that the trial court unsustainably exercised its discretion by granting the motion.

In light of this order, the petitioner's motion for partial remand or order assuring authority is moot.

Affirmed.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

Eileen Fox,
Clerk