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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-036

JULY TERM, 2017

Sara Benoure	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Family Division
	}	
	}	
Brad Benoure	}	DOCKET NO. 822-10-12 Cndm

Trial Judge: Barry D. Peterson,
Specially Assigned

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

Father appeals the court's order denying his motion to modify parent-child contact. On appeal, father argues that the court erred in concluding that there was not a real, substantial, and unanticipated change in circumstances necessary to modify the existing order. We affirm.

The parties' divorce became final December 31, 2013. They have two children, who were ten and seven years old at that time. The court granted mother legal and physical rights and responsibilities and awarded father parent-child contact every Wednesday after school until Thursday morning and alternate weekends.[1] In August 2016, father filed a motion seeking to modify parent-child contact. At the time, the children were thirteen and ten.

The court held a hearing at which both parents testified. The court made the following findings. Prior to the parties' divorce both the children were involved in sports, particularly soccer. In the time since the divorce, the amount of time the children spend playing sports has increased. In particular, the children's soccer schedule has increased so that they play for most of the year and have practices and games several nights a week and on weekends. The court concluded that the increased time the children were spending on sports as they got older was not unanticipated. The court further found the children were struggling academically in school, both were on an individualized education plan (IEP) and receiving special assistance in school. The court found that this situation was not unanticipated because the girls' academic challenges were not "substantially different" from those they were experiencing at the time of the parties' divorce. The court concluded that father had failed to demonstrate that there was a real, substantial, and unanticipated change in circumstances and denied the motion to modify. Father filed this appeal.

An existing order regarding parent-child contact may be modified only "upon a showing of real, substantial and unanticipated change of circumstances." 15 V.S.A. § 668(a). This is a threshold finding that the court must make before it "may examine the merits of the parties' claims

[1] Initially, father's contact ended on Sunday night, and in February 2015, the parties agreed to extend father's alternate weekend parent-child contact to Monday morning.

and reconsider the best interest of the child." Wells v. Wells, 150 Vt. 1, 4 (1988). The family court has discretion in making this decision, and the moving party bears "a heavy burden to prove changed circumstances." Spaulding v. Butler, 172 Vt. 467, 476 (2001) (quotation omitted).

On appeal, father argues that the court erred in concluding that there was not a real, substantial, and unanticipated change in circumstances. Father points to two circumstances that he asserts changed from the time of the final divorce: the extent of time the children spend at sports, particularly soccer; and the girls' academic struggles. Father contends that the large time commitment to soccer has hindered the children's academic performance in a way that was not anticipated at the time of the final divorce.

Father challenges the court's finding that it was not unanticipated that the children would "continue to be challenged academically." Father asserts that there was a change because at the time of the final divorce hearing neither child was on an IEP and only the older child had received limited tutoring whereas at the time he moved to modify both were on an IEP and both were being tutored. Father also argues that the court erred in finding that the extent of time spent on sports activities was not unanticipated.

On appeal, the court's decision regarding whether there has been a change of circumstances will stand unless the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Gates v. Gates, 168 Vt. 64, 67-68 (1998) (quotation omitted).

Father has not demonstrated that the court abused its discretion. Evidence supported the court's findings that the children experienced academic challenges at the time of the parties' divorce and that both children were involved in sports at that time. The IEP for the parties' older child, which was admitted as evidence, indicates that at her earlier evaluation in September 2013, there was concern over "chronic academic difficulties" and a learning disability had been identified. Father testified both children had struggles in school prior to the divorce and that they knew there were learning disabilities. Mother testified that there were concerns about the children's academic performance at the time of the divorce and both were receiving some kind of extra support. In addition, both parents testified that the girls were playing soccer and doing other sports at the time of the divorce. Given this evidence, it was within the court's discretion to conclude that it was not unanticipated that the children's academic challenges would continue and that their involvement in sports might increase as they got older. These were reasonable conclusions based on the evidence. See Gerety v. Gerety, 131 Vt. 396, 402 (1973) ("There can be no fixed standards to determine what constitutes a substantial change in material circumstances.").

To the extent that father claims the court failed to credit his testimony that the children's academic struggles were more severe than at the time of the divorce, this is essentially a request to reweigh the evidence, something we will not do. It is for the family court, not this Court, to assess the credibility of witnesses and weigh the evidence. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995).

Father also argues that the court failed to make sufficient findings because the court did not address how the children's academic problems or sporting activities affected the children or their relationship with both parents. There was no error. This analysis would be relevant to determining the children's best interests, but the court concluded that the threshold change-of-circumstances requirement had not been met and therefore the court did not reach the best-interests analysis. See Wells, 150 Vt. at 4 (explaining change of circumstances is threshold requirement).

Father's final argument is that the current schedule does not maximize the time with each parent as required by 15 V.S.A. § 650. The existing order on parent-child contact is final and not

subject to modification absent "a showing of real, substantial and unanticipated change of circumstances." 15 V.S.A. § 668(a). Father failed to meet his burden of demonstrating this threshold requirement, therefore, there are no grounds to modify the existing order.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice