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. 2019-088

OCTOBER TERM, 2019

Jonathan Hough v. Samantha Cronin*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 20-1-18 Wmdm
		Trial Judge: Katherine A. Hayes

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

In this parentage action, mother appeals the family division's order permitting supervised contact between father and the parties' daughter outside of an established visitation center, as previously required by court order. We affirm the court's order in all respects, except that we remand the matter for the family division to reconsider whether father's father should be approved as one of the potential visitation supervisors.

The parties are the parents of a daughter born in May 2012. They have been involved in numerous and contentious legal proceedings since this parentage action was commenced in 2014. The family division issued a final order on parental rights and responsibilities in December 2015. The court awarded mother sole parental rights and responsibilities and granted father weekly supervised parent-child contact at a visitation center. The court required supervised parent-child contact based on the following findings. Father and daughter have a close bond. Father was charged with felony domestic assault as the result of a 2013 incident during which he threatened mother in the presence of their daughter while holding a knife. Father was eventually convicted of misdemeanor domestic assault in March 2014. Father consistently exercised supervised contact at a visitation center between December 2013 and March 2014, but the center terminated the visits due to a combination of conduct by both parents. The parties struggled to arrange supervised contacts in other settings. Father struggles with controlling his emotions, which has resulted in family members obtaining restraining orders against him. The court concluded that father had not completed programs geared to assist him in regulating his emotional outbursts and critical to his being able to safely parent the parties' daughter. The court found that because father was capable of causing physical harm or making credible threats to do so when in a highly emotional state, it would not order unsupervised contact until he followed through on counseling and completed a parenting program. The court indicated that it would "consider relaxed supervision and/or unsupervised contact once dad is able to demonstrate completion of the two programs and that he

is better able to self-regulate his emotions." Accordingly, the court included the following provision in its final order:

> Before modification of the order will be considered [father] must establish proof of the following:
>
> 1) A certificate indicating successful completion of a multi-week parenting program.
>
> 2) Proof of consistent ongoing participation and progress in a counseling program set up to address anger management and mood regulation, in particular, and any other mental health needs identified. Proof would consist of a statement from the therapist outlining the frequency of attendance, progress and indication of ability to self-regulate.

The parties were back in court not long after the final order issued to litigate father's motion to enforce. They were still struggling to arrange parent-child contact at visitation centers. In a July 11, 2016 order, the court ordered bi-weekly contact at a particular center if the center agreed. The court found that much of father's troubles with visitation centers was self-created, but it also noticed that father was calmer and more able to stay focused. The court found no evidence that father had become escalated with the parties' daughter during supervised visits. The court also found that father had completed a multi-week parenting program as required by the final order. Noting that father had indicated he was currently attending bi-weekly counseling sessions, the court stated: "While that does not satisfy the requirements of the [final] order, assuming dad's testimony is accurate, it does show dad has undertaken steps to comply with the order, all of which are necessary before step down supervision and ultimately unsupervised visits are viable."

The parties continued to litigate parent-child contact in multiple proceedings. On October 18, 2018, the family division, now presided over by a different judge than the judge who had issued the final order, held a hearing to consider father's most recent pending motions to enforce and modify parent-child contact.

Immediately after the October 18, 2018 hearing, the court issued an interim order permitting father to have supervised contact at a program in Brattleboro, Vermont. In December 2018, the court received notice, without further explanation, that the program declined to provide services. In a February 1, 2019 decision, after recounting the lengthy history of the case and the prior orders, the court concluded that although father was "still emotionally labile" as described in the final order, he was entitled to parent-child contact with the parties' daughter. In the court's view, both parties' conduct had resulted in there no longer being available any reasonable supervised parent-child contact program. In the absence of any alternative proposal for an objective supervisor, the court determined that the executive director of a Rutland visitation center or father's brother or sister could supervise weekly two-hour visits. The court stated that if none of those people were willing to supervise visits, father was required to notify the court and propose other potential supervisors. The court stated that because father had not yet provided solid evidence of his completion of the counseling requirements in the final order, the court would not grant unsupervised contact at that time. Nevertheless, the court stated that after twelve visits with an

approved supervisor, the court would consider a motion from father seeking unsupervised visitation. In support of any such motion, the court required father to provide—in addition to a certificate of completion of an anger-management or domestic-violence program—certification from an ongoing therapist of his active involvement in treatment. The court further stated that father should be prepared to have his therapist testify by telephone at a hearing on any such motion to modify.

Mother appeals that decision, arguing that the family division abused its discretion: (1) by modifying parent-child contact even though father did not present any credible evidence that he had met the counseling requirement in the final parentage order or that there was a real, substantial and unanticipated change of circumstances warranting parent-child contact outside of a supervised visitation center; and (2) by ordering contact outside of a supervised visitation center with an unqualified supervisor whom she did not agree to, without any adequate provision to ensure the safety of her or the parties' child.

Regarding the first argument, mother contends that the conditions for modifying parent-child contact in the final order specifically defined what would constitute changed circumstances for modifying the order. She asserts that allowing parent-child contact outside of a supervised visitation center absent the presence of a trained supervisor is a substantial and unreasonable modification, given father's ongoing history of violence and mental-health issues. In support of this argument, mother states that father has not presented any credible proof of receiving appropriate mental-health treatment or progressing through counseling in addressing his violent tendencies. According to mother, such proof was not only required by the final order but was critical in light of the court's recognition of father's ongoing mental instability and the fact that since the final order father has been the subject of criminal charges and relief-from-abuse orders. Mother also argues that no evidence was presented at the hearing indicating that the Rutland visitation center that the parties had used in the past was unavailable. She also contests the court's finding that both parents were equally at fault for visitation centers terminating visits.

Regarding her second argument, mother contends that the modified parent-contact order does not adequately provide for the safety of her or the parties' child, considering that since the court's July 2016 order she has obtained a relief-from-abuse order against father and he has been charged with disturbing the peace by phone. She also argues that neither the executive director of the Rutland visitation center nor father's sister were likely to agree to be independent supervisors and that the court mistakenly assumed that one of the named potential supervisors was father's brother rather than his father, which was contrary to the court's rejection of father's mother as a potential supervisor based on its conclusion that grandparents' conflicting roles made them poor choices to supervise their children's contact with their grandchildren.

"[W]e review a court's decision to modify parent-child contact for abuse of discretion." Weaver v. Weaver, 2018 VT 38, ¶¶ 15, 18, 207 Vt. 236 (stating that order modifying parent-child contact will not be disturbed unless court exercised its discretion on unfounded considerations or to extent clearly unreasonable under facts presented). "To modify a parent-child contact order, the court must first determine whether there has been a 'real, substantial and unanticipated change of circumstances.' " Id. ¶ 18 (quoting 15 V.S.A. § 668(a)). "The burden of showing changed circumstances with respect to a motion to alter parent-child contact is not as high as the heavy

burden of showing changed circumstances with respect to a motion seeking a change of custody." Hawkes v. Spence, 2005 VT 57, ¶ 20, 178 Vt. 161 (quotation omitted).

We conclude that the family division did not abuse its discretion in issuing the challenged order. Generally, the family division "may establish a reasonable baseline against which future claims of changed circumstances can be assessed." Terino v. Bleeks, 2018 VT 77, ¶ 17. But a subsequent court is not precluded from evaluating changed circumstances beyond those delineated in an earlier court's order. We have recognized that " 'changes in custody must be based on real-time determinations of a child's best interests' and 'variables are simply too unfixed to determine at the time of a final divorce decree what the circumstances of the parties will be at the time a future contingency occurs.' " Terino, 2018 VT 77, ¶ 16 (quoting Knutsen v. Cegalis, 2009 VT 110, ¶ 10, 187 Vt. 99); cf. deBeaumont v. Goodrich, 162 Vt. 91, 96 (1994) (noting that no "specific statutory authority [exists] for the divorce order to define changed circumstances for purposes of a future modification," but upholding provision stating that move of more than fifty miles would constitute changed circumstances because provision was based on parties' stipulation and it "established a reasonable benchmark to determine changed circumstances").

In this case, the trial court considering the modification motion had ample grounds for modifying the logistical requirements of the supervised visitation because it had evidence that efforts to ensure sustained contact between father and child at the previously named visitation centers had not been successful. The court found here that, due to both parties' actions, father's parent-child contact through a visitation center was no longer working out, and that, as a result, father was being deprived of his right to parent-child contact. Ample evidence in the record, including prior court orders and the testimony of the parties at the modification hearing, supported the court's findings that both parties shared responsibility for that situation. Given this real, substantial, and unanticipated circumstance, which had thwarted father's parent-child contact for a significant period of time, the family division did not abuse its discretion in modifying the parameters of supervision to allow for supervised contact outside of a visitation center with supervisors approved by the court.

Mother argues on appeal that the order does not keep her or the parties' daughter safe, but she raised no such concern at the modification hearing, even though the court suggested to the parties it was considering supervised visitation outside a visitation center, and nothing in the record undermines the court's expressed belief father could have safe visits with the parties' daughter outside a visitation center.[1]

We remand the matter, on one point, however. The family division mistakenly believed that one of the approved potential supervisors was father's brother, when in fact the person the court identified was father's father. This might seem like a harmless mistake, but we note that in declining to approve father's mother as a suitable supervisor the trial court stated: "grandparents' conflicting roles [generally] make them doubtful choices to supervise their children's contact with their grandchildren." Given the court's expressed concern about appointing grandparents to

[1] Mother argues that the court had no evidence that any of the proposed and approved supervisors were willing to serve in that capacity. The trial court anticipated that and provided that if none of them agreed to serve, father should file another motion. We see no error.

supervise visitation, and its mistaken belief that it was approving father's brother as a supervisor when in fact it was approving father's father, we remand the matter for the court to clarify whether it intends to approve father's father.[2]

Affirmed in all respects, except that the matter is remanded for the family division to clarify whether it intends to approve father's father as a potential person to supervise parent-child contact between father and the parties' daughter.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Marilyn S. Skoglund, Associate Justice (Ret.), Specially Assigned

[2] We are aware that, since this appeal was filed, the family division transferred this and other cases involving father from its Windham Unit to its Washington Unit. For that reason, we remand to the Washington Unit.