

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. 2020-029

AUGUST TERM, 2020

Casey S. Robinson* v. Erin LaRocque } APPEALED FROM:
 }
 } Superior Court, Franklin Unit,
 } Family Division
 }
 } DOCKET NO. 239-9-15 Frdm

Trial Judge: Howard E. Van Benthuyzen

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

Father appeals the family division’s December 20, 2019 order concerning the parties’ parental rights and responsibilities (PRR) and parent-child contact with respect to their three children. We affirm.

The parties are the parents of three daughters, one born in August 2015 and twins born in June 2017. A parentage action was initiated in the fall of 2015. The parties lived together for some time before father moved out of their shared residence in the summer of 2018 after mother filed an eviction action. On August 9, 2018, following a contested hearing, the family division issued an order granting mother sole physical and legal PRR over the children and establishing a parent-child contact schedule based on the parties’ stipulation, which called for each parent to alternate care of the children for two-day, and then five-day, periods. In that order, the court indicated that mother had been the twins’ primary caregiver since their birth and that father had not demonstrated any changed circumstances sufficient to modify mother’s sole PRR rights over the older daughter.

On July 29, 2019, father filed a motion for an immediate change in custody, alleging, among other things, that mother had punched his truck in front of the children and describing other conflicts between the parents. Following an evidentiary hearing on father’s motion, the family division denied father’s motion on September 17, 2019, concluding that father had failed to show a real, substantial, and unanticipated change of circumstances. Following this order, mother filed a motion to modify parent-child contact, and father filed the instant motion to modify both legal and physical parental rights. On December 19, 2019, the family division held a hearing on father’s motion to modify PRR and mother’s motion to modify parent-child contact. Father was self-represented at the hearing, and mother appeared with counsel. The parties were the only witnesses to testify at the hearing, which lasted a little over an hour. The following day, the court issued its decision denying father’s motion and granting mother’s motion. Regarding father’s motion, the court stated that father was raising the same issues that he had raised—and that the court had already dealt with—in prior proceedings. Regarding mother’s motion, the court concluded that: (1) father’s behavior during exchanges and his cyberstalking of mother created unforeseen

changed circumstances warranting a review of the parent-child contact schedule; and (2) a more limited parent-child contact for father was in the children’s best interests.

On appeal, father argues that the family division abused its discretion by admitting mother’s insufficient and irrelevant evidence while limiting and excluding his relevant evidence, and by hastily concluding the hearing and making insufficient findings under 15 V.S.A. § 665 to support its decision.

“Modification of an order governing parental rights and responsibilities and parent-child contact involves a two-step process.” Wright v. Kemp, 2019 VT 11, ¶ 18, 209 Vt. 476. The family division “must make a threshold finding of a real, substantial and unanticipated change of circumstances before it can examine the merits of the parties’ claims and consider the best interest of the child[ren].” Sundstrom v. Sundstrom, 2004 VT 106, ¶ 28, 177 Vt. 577 (mem.) (quotations omitted); see also 15 V.S.A. § 668(a) (“[U]pon a showing of real, substantial and unanticipated change of circumstances, the court may . . . modify [a child-custody] order . . . if it is in the best interests of the child[ren], whether or not the order is based on a stipulation or agreement.”). “There are no fixed standards to determine what constitutes a substantial change in material circumstances; instead, the court should be guided by a rule of very general application that the welfare and best interests of the children are the primary concern in determining whether the order should be changed.” Maurer v. Maurer, 2005 VT 26, ¶ 7, 178 Vt. 489 (mem.) (quotations omitted). The moving party has the burden of showing changed circumstances, Sundstrom, 2004 VT 106, ¶ 29, but that burden “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 review this threshold determination for abuse of discretion and will not reverse unless the court exercised its discretion on grounds or for reasons clearly untenable, or it exercised its discretion to a clearly untenable extent.” Wright, 2019 VT 11, ¶ 18 (quotation omitted).

If the family division “determines that changed circumstances exist, it must then consider whether the best interests of the child[ren] require a change in parental rights and responsibilities or parent-child contact.” Id. ¶ 19. The family division “has broad discretion in deciding the child[ren]’s best interests, and we will uphold its conclusions if they are supported by the factual findings and the record,” but we will “reverse if the court’s findings are not supported by the evidence, or if its conclusions are not supported by the findings.” Id. (quotations omitted).

As an initial matter, we find no merit to father’s contentions that the family division inappropriately limited his ability to present evidence or to contest mother’s evidence. In this regard, father first argues that the family division’s directions to him on objecting to evidence were only appropriate for attorneys and could not be understood by a self-represented litigant such as himself. In support of this argument, he cites one example where the court explained to father as follows, after father objected to the accuracy of mother’s statement regarding her past eviction proceedings against him:

[O]bjections are when you think that the other side is trying to do something that violates the rules of evidence.

....

. . . [I]f you want to object because you think that something that [mother’s attorney] is trying to get in violates the rules of evidence, I’ll certainly give you a ruling on that. On the other hand, if you’re just disagreeing with the facts—which every one of your objections

has been so far—hold on to your thoughts, make a note, and when it's your turn to testify you can tell me what your version of the facts is.

Rather than express confusion, father simply said, “Okay,” to this rather straightforward explanation of when an objection is appropriate. On appeal, father now claims that he could not object thereafter for fear that if he did not know the correct legal basis for the objection, he would be seen as disrespectful to the court. He points out that mother presented no direct evidence other than her testimony on the number of text messages she was receiving from father unrelated to the children, thus suggesting that he would have objected but for the court's directive quoted above. Father also states that the court abruptly concluded his testimony without inquiring whether he had presented all his evidence.

The transcript of the December 19, 2019 hearing reveals that the family division was solicitous of father's needs as a self-represented litigant. The court explained in plain language its rulings on the various objections to evidence made by father and mother's counsel. During her direct testimony, mother cited several incidents involving conflicts between her and father and explained why she wanted to reduce father's parent-child contact to alternate weekends. Father cross-examined mother about the incidents she raised during her direct testimony, but he focused primarily on mother's drinking habits and the cleanliness of her home. At the beginning of his cross-examination, father asked mother about her assertion that she had to initiate eviction proceedings to remove him from their residence during the summer of 2018. After the parties went back and forth as to the nature of those proceedings, father asked the court to postpone the hearing so he could “get some legal counsel due to this.” The court denied the request, noting that the parties' motions had been pending a long time and that father had had plenty of time to find counsel. On several occasions after father resumed his cross-examination, the court asked father if he had any additional questions for mother. Toward the end of father's cross-examination of mother, the court noted that it would have to conclude the hearing at 4:15 because it had to attend two emergency matters. Neither party objected nor sought a continuance to extend the hearing.

Shortly thereafter, father briefly took the stand. His testimony and his proffered exhibits focused primarily on issues that the family division had already ruled on months earlier in deciding his previous motion to modify. When the court asked father what were his primary justifications for seeking a modified PRR order, father mentioned his past allegation that mother failed to respond appropriately to an ear infection one of the children had had, and he stated that he could get witnesses to support his claim that medical attention he had obtained for the children was needed. He also noted mother's drinking. After father responded to the court's questions concerning a then-pending eviction proceeding against him, mother's attorney stated that she wanted to ask defendant one question on cross-examination. After she did so, the court stated that it would take the parties' motions under advisement. Father neither stated that he wanted to put on more evidence nor sought a continuance.

“Although we will not permit unfair advantage to be taken of one who acts as her own attorney, it is not the trial court's responsibility to offer affirmative help to a [self-represented] litigant.” Nevitt v. Nevitt, 155 Vt. 391, 401 (1990); see also Vahlteich v. Knott, 139 Vt. 588, 590-91 (1981) (stating that although self-represented litigants receive some leeway from courts, they are still “bound by the ordinary rules of civil procedure”). We find nothing in the record indicating that the court treated father unfairly or prevented him from presenting his case or contesting mother's case.

Turning to the merits of the family division’s decision, father argues that the court listed the best-interests factors set forth in 15 V.S.A. § 665(b) but failed to make specific findings as to the children’s actual and individual needs or how a significant reduction in his parent-child contact would impact those needs. In father’s view, the court acted inconsistently in concluding that he had not demonstrated changed circumstances with respect to his motion to modify but that mother had shown changed circumstances with respect to her motion. Noting that the court justified its modified parent-child contact order by citing the parties’ conflicts at exchanges, father argues—without making any proffer—that the court could have achieved the goal of limiting the number of exchanges without significantly reducing his parent-child contact. In father’s view, the court failed to weigh the potential harms and benefits to the children that would result from reducing his parent-child contact.

In addressing this argument, we acknowledge that the evidence before the court was limited. During her direct testimony, mother described the current parent-child contact schedule as “every other Friday, Saturday, Sunday. I have them Monday night and Tuesday night and he has them Wednesday night and Thursday night.” She agreed with her attorney that this was a “five, five, two, two type of schedule.” When asked how that schedule had worked for the children, mother responded that it had been “a struggle” for the following reasons: (1) father did not have a stable residence, as evidenced by the fact that he had moved three times since the parties stopped living together in July 2018 and that there was a pending eviction proceeding against him in his then-current residence; (2) father had had multiple day-care providers for the children, some for extremely short periods of time, and he had failed to keep her apprised of whom he had caring for the children; and (3) she was subject to father’s constant, ongoing harassment, including his badgering her and calling her vulgar names, sometimes in front of the children, and his sending her as many as a hundred texts per week telling her what a horrible person she was and how she was destroying the family. Mother described two particular incidents involving the children, one in December 2018 when she had to pick up the children at father’s residence because several police officers were taking father away in handcuffs due to threats he had made against other family members—resulting in the older child’s ongoing fear of police—and one in June 2019 when father blocked mother from leaving his residence and screamed at her—resulting in the older child “calling the police” on her toy phone.

Mother testified that she was “very concerned in regards to the interactions [father] has with the girls and what he exposes them to,” stating that the oldest child told her that father said mother was mean, drank too much, and should not have them at the house. Mother also testified that she had struggled to get the oldest girl into pre-kindergarten that year, noting “the back and forth and the many changes shat she’s had going on.” Mother stated that she wanted to get the girls in a routine of getting up, going to daycare, and coming home, and that she feared the impact on the girls resulting from the constant shuffling back and forth between the parties. As noted, father’s cross-examination of mother and his own testimony focused primarily on his side of the story regarding the pending eviction proceedings against him and his prior complaints against mother that the court had dealt with in previous orders.

In finding a substantial unanticipated change of circumstances with respect to mother’s motion to limit father’s parent-child contact to alternate weekends,¹ the family division cited

¹ We find no inconsistency in the family division’s determinations that there was no change of circumstances with respect to father’s motion to modify PRR but that there was a change of circumstances with respect to mother’s motion to modify parent-child contact. The court’s rulings on each motion were based on its assessment of what each party was alleging in their respective motions, and, as noted, father’s burden to show changed circumstances with respect to his motion

father's behavior at exchanges, his cyberstalking of mother, and the negative impact on the children resulting from too many transitions between the parties. The court stated that the number of exchanges had caused the children to struggle emotionally and had given father more opportunities to yell at and abuse mother. The court noted the "well known" fact that domestic strife is harmful to children's emotional well-being. The court found that although both parties love their children, father is "less tuned in to their need for guidance," as evidenced by his treatment of mother during the exchanges. Citing the past relief-from-abuse orders filed against father by mother and other members of father's family, to which mother had testified, the court found that father struggled with "controlling his emotions and regulating his behavior," which "substantially impaired" his ability to foster a positive relationship between the children and mother. The court also cited the significant difference between the parties in their ability to provide stable housing for the children. Accordingly, the court modified the previous order to give father parent-child contact on alternate weekends, with all exchanges to take place at the St. Albans police department. The court further ruled that if father were evicted from his home, overnights would cease until he found suitable housing for himself and his children.²

Upon review of the record, we conclude that the evidence, though limited, supports the family division's findings, which in turn support the court's conclusions, see Knutsen v. Cegalis, 2011 VT 128, ¶ 13, 191 Vt. 546 (mem.) (noting that "the credibility assigned to witnesses and the weight accorded the evidence are left to the trial court's discretion"), and that the court acted within its broad discretion in modifying the previous order by limiting father's parent-child contact to alternate weekends.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice

seeking a change of PRR is distinct from mother's burden to show changed circumstances with respect to parent-child contact.

² Father does not challenge on appeal, and thus we do not address, this aspect of the family division's decision.