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. 2021-036

JUNE TERM, 2021

Olya M. Iver (Krupnova) v. David Simpson*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 452-8-19 Cndm
		Trial Judge: Kirstin K. Schoonover

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

Father appeals from the court's order awarding primary physical and legal rights and responsibilities (PRR) in the parties' child to mother and setting a parent-child contact (PCC) schedule. He argues that his due process rights were violated in various ways, and he challenges as clearly erroneous the inclusion of a statement cautioning him not to harass or intimidate mother during visitation with the child. We conclude that the challenged statement should be replaced with nondisparagement language applicable to both parties and we otherwise affirm the court's decision.

The parties are parents of a daughter, born in April 2019. Father lives in New Hampshire; mother and the child live in Vermont. In August 2019, father filed a parentage action in New Hampshire; the case was dismissed at mother's request based on her assertion that neither she nor the child resided in New Hampshire. That same month, mother filed a parentage action in Vermont. Multiple attempts to personally serve father were unsuccessful and in January 2020, the court granted mother's request for service by publication. Notice was published in March 2020. In September 2020, counsel for father entered a notice of appearance and he filed an emergency request for PCC and a request for permission to file an answer to the parentage complaint. The court granted father's request for an extension but denied his emergency PCC request, finding no basis for an emergency order. The court questioned why father would not have received certified mail sent to his address and why he did not respond to communications and service attempts. The court encouraged the parties to work on at least a temporary contact arrangement pending the filing of father's answer and a case manager conference.

In early October 2020, father's counsel withdrew because father wanted to represent himself; father then entered a pro se notice of appearance. After an unsuccessful case manager's conference, the court provided notice that a hearing would be held in November 2020 on "Parental Rights and Responsibilities Establishment Hearing," "Motion to Establish Parental Rights and Responsibilities," and "Motion to Establish Parent Child Contact." Mother obtained counsel who entered a limited notice of appearance on November 13, 2020. Before the hearing, counsel filed a motion requesting that mother be awarded parental rights and responsibilities and, in response to the court's September 2020 request, mother proposed a temporary PCC schedule for father, which

could equally be described as a graduated visitation schedule running through September 2021 with a more permanent arrangement depending on how things progressed.

The court held a hearing on November 16, 2020, which lasted one hour and nine minutes. At the outset of the hearing, father sought a continuance to obtain counsel. The court explained that it was not inclined to continue the case given the scarcity of court time and the fact that a new hearing would likely not convene for several months. The court stated that it would try to get as much done as it could in the hearing and that if father felt during the proceedings that he could not proceed without counsel, he could inform the court and it would consider his request again.

Because father challenged the court's jurisdiction, the court began the hearing by taking evidence on this issue. It then heard from each party regarding their competing requests for primary PRR. It was undisputed that father had not seen the child since August 2019 and that mother had been the child's primary caregiver throughout the child's life. At the close of the hearing, the court stated that the hearing was "shorter than we would have liked, but this was [the] day to have our hearing." Rather than asking for the parties' PCC proposals at the end of the hearing, it offered the parties the opportunity to submit those proposals in writing. It indicated that it did not need proposals regarding the award of PRR. Both parties filed written proposals with respect to both PRR and PCC.

In a December 2020 order, the court awarded mother primary legal and physical PRR, and it set forth a graduated visitation schedule that began with online visits and then moved to in-person visitation. It made the following findings. The parties' child was about eighteen months old at the time of its decision; she was a happy child with no special needs. Mother lives in Burlington, Vermont with the child; father lives in Concord, New Hampshire. The parties initially resided together in Vermont for four months after the child's birth. Mother was the primary parent. Father's parents, who live in New York, were supportive and helpful. Father's participation was minimal; he was often working, tending to six residential units that he rented out for income.

In July 2019, father sold the house containing the rental units and moved to New Hampshire. He wanted to be closer to his son from a prior relationship who lives in New York, and he also wanted to attend classes in Boston, Massachusetts. Concord, New Hampshire was a convenient midway location. Although father wanted mother to relocate with him, she did not want to leave Vermont. After a brief visit to New Hampshire, mother returned to Vermont with the child and obtained an apartment; they have remained in Vermont since that time. Father had not visited the child for over fifteen months—since August 14, 2019—and the court found the reason for that unclear. It rejected any suggestion that mother alienated father. It noted that father unilaterally decided to move to New Hampshire in July 2019 and this move, rather than mother's actions, directly interfered with father's ability to visit the child. Thereafter, father made no attempts to visit the child. Mother tried to locate father, but he was unavailable. This was illustrated by mother's multiple failed attempts to serve father both in New Hampshire and New York. Mother had to serve father with the parentage complaint by publication and, even then, father did not respond to her parentage complaint until September 2020.

The court found that mother was self-employed and able to provide for the child's needs. She had enrolled the child in full-time daycare where the child was happy and comfortable. The child was closely bonded with mother as mother had been her primary and sole parent for most of her life. It reiterated that the child had not seen father since she was four months old.

With these facts in mind, the court first concluded that it had jurisdiction over this case as Vermont was the child's home state at the commencement of the proceedings. See 15 V.S.A.

§ 1071. The court then considered the statutory factors set forth in 15 V.S.A. § 665(b). It concluded that these factors heavily favored an award of primary physical and legal PRR to mother. It explained that mother was the child's primary caretaker and she provided for the child emotionally and physically. The child was happy and thriving. The child did not know father and had no relationship with him; father had demonstrated little interest in providing the child with love or guidance and he had taken few steps to ensure that the child's needs were met. The child attended daycare and had friends and community ties in Vermont. She had no such ties to New Hampshire. While both parents were financially capable of providing for the child, the court reiterated that mother had been the primary parent for the child's entire life, even when the parties were living together. She woke up to care for the child, fed, bathed, and cooked for her, and ensured that her needs were met. Father had not played this role. Based on its analysis of the statutory factors, the court thus awarded mother sole legal and physical PRR. It also issued a PCC order, mindful of the child's young age and the limited contact she had thus far had with father.

Father then obtained counsel and moved for a new trial or a continuation of the November hearing. He argued that he had not been given a full and fair opportunity to present his case. He raised many of the same arguments he now raises on appeal.

The court denied the motion. It noted that father had the assistance of counsel at the outset of these proceedings but had chosen to proceed pro se before the hearing. It found that the parties were on notice that the court would be taking evidence at the final hearing and both parties had time limitations on their presentations. The court explained that it had been able to take sufficient evidence from both parties to issue its order. It further found that it had considered and rejected many of the arguments father raised in his motion at the final hearing. With respect to PCC, the court indicated that father could file a motion to clarify or reconsider if he had concerns about the effect of the state's COVID-19 guidelines.

The following month, father filed another motion to reconsider, arguing that the court's order prohibited him from having contact with his child unless he relocated to Vermont; he also challenged many of the court's findings and again sought to reopen the evidence. Except for clarifying the COVID-19 requirements, the court denied father's motion. As relevant here, it reiterated that father had an opportunity to present his case at the time of the final hearing. It added that many of the facts that father now alleged via motion were undisputed at the final hearing. The court recognized, for example, that both parents lived together for a time after the child's birth and that father played a parenting role in caring for her. Nor was it disputed that father left Vermont to establish a residence in New Hampshire in the summer of 2019. While father argued at the hearing, and in his motion, that he did so for the benefit of the family, the court found that mother never intended to leave Vermont. It was also undisputed that father relocated to New Hampshire and, as a result, had not played a significant role in the child's life for fifteen months by the time of the final hearing. His lack of contact with the child for such a long period was a significant factor for the court's PRR award. Mother, by contrast, provided for all the child's needs and the child was happy and thriving in her care. The court explained that none of father's proposed arguments would change its award of sole physical and legal PRR to mother. The court also addressed father's arguments regarding PCC and clarified that father was not required to quarantine when entering Vermont. This appeal followed.

Father first complains that he lacked notice that the November hearing would lead to a final PRR and PCC order. He argues that the court could have issued an interim order regarding PRR on a temporary basis and he asserts that there were factors that led him to believe the hearing was for this purpose only. Father suggests that mother appeared to believe that only a temporary order

was contemplated as well. He contends that his due process rights were violated by a lack of notice.

We reject this argument. Following the case manager's conference, father received notice plainly stating that a hearing would be held on the parties' pending requests: mother's request for establishment of PRR and father's motions for PCC and to establish PRR. No reasonable person would construe the court's hearing notice as contemplating a hearing for purposes of issuing a temporary order. This case had been pending since August 2019. The record does not show that mother believed the hearing was for the purpose of a temporary order. Mother's prehearing filing regarding PCC responded to the court's direction to propose a visitation schedule. Mother plainly sought a final award of PRR and there was no reason why the court would issue a temporary PCC schedule when it had the ability to issue a final one. The fact that mother sought a graduated PCC schedule does not demonstrate that she understood that only a temporary order would be issued. Mother recognized, as did the court, that a gradual approach was required because father had not seen the child for fifteen months and he had no relationship with her. There is no question that father received "reasonable notice of what was in issue and an opportunity to be heard," Brown v. Brown, 154 Vt. 625, 629 (1990), on the pending requests, including his own, to establish PRR and a PCC schedule. The cases cited by father are easily distinguishable and do not support father's claim of error here. See, e.g., Plante v. Plante, 148 Vt. 234, 236 (1987) (holding that "[a]lthough the court is not bound by an agreement of the parties relative to custody, it must give notice to the parties of its rejection of an agreement so that they may make a meaningful evidentiary presentation on this issue," and observing that "[o]therwise, the 'sacred legal right' to be heard in defense of parental rights may be denied" (citations omitted)); Martin v. Martin, 127 Vt. 313, 314-15 (1968) (similarly concluding that where parties stipulated that grandmother would have custody of children, and court without notice rejected stipulation and awarded custody to father, "fundamental fairness" required that parties be provided notice and opportunity to be heard on custody question).

Father next argues that he was not given a full and fair opportunity to present his case in violation of his due process rights. He complains about the length of the hearing and notes that mother testified longer than he did. He argues that the court should have asked him if he wanted to cross-examine mother. He also takes issue with the court's response to his testimony that mother perjured herself. Father suggests that he wanted to present evidence that mother cut him off from having contact with the child and that she made false statements. Father further contends that the court decided the question of PRR at the close of the hearing, without allowing him to complete the presentation of his case, because it asked the parties to submit a post-hearing proposal for PCC only.

The trial court twice rejected these arguments as do we. First, father misstates the record. He testified multiple times that mother "cut him off" from his relationship with the child. The court did not prevent him from providing such testimony. Father also testified that he loved the child and that he had contributed financially after her birth. The court recognized this testimony in its findings. Father testified to his belief about whether the parties intended to live in Vermont or relocate to New Hampshire, and again, the court made findings based on this evidence. Father acknowledged that he had not seen the child since August 2019. With respect to his testimony about "perjury," the court explained, on mother's objection, that it did not take the term "perjury" literally; it recognized that there were two sides to each story and that the parties' different version of events was not perjury and that father was presumably using that term loosely. The court was not obligated to ask father if he wanted to cross-examine mother; father could have requested to do so, and it is apparent that the court provided each side the opportunity to present evidence in support of his or her position. As the court explained, moreover, its key findings were based on

undisputed evidence: father's absence from the child's life for fifteen months—for whatever reason—and mother's ongoing role as the child's primary caretaker. The fact that father could not be served in person, despite multiple attempts, is also undisputed. The court did not arbitrarily end the hearing or decide the case before father had completed his case, as father asserts. It concluded that it had sufficient evidence to render its decision and that conclusion is supported by the record. See Varnum v. Varnum, 155 Vt. 376, 390 (1990) (recognizing that trial court has authority "to set reasonable limits on the consumption of time in examining witnesses," and emphasizing "that limits must be reasonable and sufficiently flexible to ensure that important evidence is not excluded due to artificial time constraints"). Father fails to show that his due process rights were violated by the length of the hearing or the way in which it was conducted.

Father next argues that the court should have granted his request to continue the hearing to obtain counsel. He suggests that he had no opportunity to obtain legal advice or respond to mother's prehearing filing.

The trial court has discretion in considering a request to continue and father fails to show an abuse of discretion here. See Office of Child Support v. Stanzione, 2006 VT 98, ¶ 13, 180 Vt. 629 (mem.) ("The denial of a motion to continue will not be reversed absent a clear abuse of discretion, and to support an abuse of discretion claim [party] must show that [factfinder] either totally withheld [its] discretion or exercised it on grounds clearly untenable." (citation omitted)). As previously discussed, this case had been pending for fifteen months by the time of the November 2020 hearing. Father had counsel, but counsel withdrew in October 2020 because father wanted to represent himself. That father changed his mind about being represented on the day of the hearing does not mean the court abused its discretion in denying the motion to continue. The court explained at the outset of the hearing why it declined father's request and it provided reasonable grounds for its decision. With respect to father's reiteration of his request for counsel, the record shows the following. At the conclusion of mother's testimony related to the jurisdictional question, when asked if he had any questions for mother, father indicated that it would be helpful to have an attorney because he was "not used to the standard process." Upon discussion with the court, father then indicated that he could provide evidence as to why he disagreed with mother's version of events with respect to factors governing jurisdiction. The court explained that father did not need to ask mother any questions if he did not want to and that it would hear his testimony about where the parties lived and their intent in moving to New Hampshire. Father then provided such testimony. The court did not err in the way in which it proceeded in the face of father's second statement about counsel.

Father complains that his lack of counsel allowed hearsay evidence to be introduced regarding his evasion of service. Regardless of whether father purposely tried to evade service, it is undisputed, as the court found, that he could not be personally served despite multiple attempts and that service had to be provided by publication. It is undisputed that he had no relationship with the child as he had not seen her for fifteen months. To the extent that father argues that the court erred by excluding certain testimony he offered as hearsay, we reject that argument. We are equally unpersuaded by father's remaining claims of harm due to the absence of counsel, having rejected his argument about the length and conduct of the hearing above and having found the evidence sufficient to support the court's order. Any misunderstanding about COVID requirements was remedied through a post-judgment filing. We note as well that the trial court explicitly held that, even if it accepted all the evidence submitted by father post-judgment (to the extent that it had not already been considered), it would reach the same conclusion regarding its award of primary PRR to mother.

Finally, father argues that there is no basis for the court's statement that he "may not use his time [with the child] to harass or intimidate mother" and he "shall be focused on [the child's] needs." He complains that mother provided no evidence of intimidation or harassment and that she failed to support her assertion that "it's not even about the kid from his side; it's just about he got mad I left him." He questions if the court wrongly believed he harassed mother and whether that affected the court's decision.

We note that courts often include boilerplate nondisparagement language in these types of cases and the evidence shows some anger and distrust between the parties. Mother testified that father was upset that she ended their relationship; she also testified to the statement cited above. Father testified that he envisioned a certain future with mother and the child, and that mother denied him access to the child, "following through on threats she made" when the child was born when he did not meet her expectations about being a coparent to the baby. He complained that mother reacted with anger to his proposal to engage in couples' therapy and again stated that mother told him she would deny him the right to parent the child. He testified that he had a verbal agreement with mother to share custody, that he was going to have the child live with him in New Hampshire and that mother could visit, and that mother then "cut him off" from the child. Mother asked for a clear court order and expressed fear that father would not follow a court order. There is sufficient evidence to support a conclusion that there was animosity between the parties, and we see no clear error in requiring a parent to refrain from disparaging the other parent during online visitation, particularly given that the PCC here began with online communication with a toddler. Nonetheless, the court here found no evidence of abuse and it did not base its decision here on harassment or intimidation. We see no reason why this provision should not be more broadly stated and apply equally to both parties. We thus strike this specific provision from the court's order and replace it with language that both parents must refrain from disparaging the other in the child's presence.

Affirmed, except the statement related to father's behavior during online visitation, which is stricken and replaced with a requirement that neither parent disparage the other in the child's presence.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice