VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 2021-091

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

NOVEMBER TERM, 2021

Ashley Villandry* v. Wilber K. Williams	}	APPEALED FROM:
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	CASE NO. 295-11-17 Wrdm
		Trial Judge: Robert P. Gerety, Jr.

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

Mother appeals the family division's order modifying parental rights and responsibilities for the parties' two minor children in this parentage action. We affirm the decision to award father sole legal rights and responsibilities, but reverse and remand for the court to reconsider its decision regarding physical rights and responsibilities.

Mother and father were previously in a romantic relationship and have a ten-year-old daughter and a seven-year-old son. Pursuant to a stipulated order issued by the family division in 2017, the parties shared legal parental rights and responsibilities. Mother had primary physical custody of the children and father had parent-child contact on alternating weekends.

In January 2021, father filed a motion to modify the existing order and award him sole legal and physical rights and responsibilities. Father alleged that over the preceding year, mother had made major decisions regarding the children's education without consulting father and had indicated that she planned to relocate with the children to Maine. The court initially denied the motion because the parties had not yet attempted mediation. Following an unsuccessful mediation session, father renewed his motion. The court set a hearing for 11:00 a.m. on April 16, 2021. Mother did not appear at the scheduled time. After waiting a few minutes, the court proceeded with the hearing in her absence.

Father testified at the hearing that he had wanted the children to return in person when schools began to reopen during the pandemic, but mother enrolled the children in remote learning without consulting him. Father stated that he had been left out of parent-teacher meetings for the past year. The children were enrolled in schools in Springfield, where mother lived. However, because mother did not have a driver's license or car, father would drive from

his home in Brownsville to pick up or drop off son at school when son missed the bus. Father testified that this occurred at least once a week because mother had trouble getting son to go to school. On two occasions, father had to drive to Springfield to pick up daughter when she was injured at school. Father testified that it took him approximately forty minutes to get to the school from his home.

Father testified that when the pandemic began in March 2020 and schools switched to remote learning, mother did not have adequate internet, so the children lived with him for the rest of that school year. Father stated that the children did well in school when they were staying with him. During that summer, mother agreed to let father have the children every other week. Father testified that the children's behavior improved significantly. However, mother declined to continue this arrangement beyond the summer.

Father stated that he was the children's only source of financial support, as mother was not employed. Because she did not have a car, he took the children to all their medical and dental appointments, which were at the hospital close to his home. Sometimes, he took them to buy groceries.

Father testified that during the fall of 2020, the children had mentioned that mother was looking into the possibility of moving to Maine, where their grandmother lived. He testified that mother had few family connections in the Springfield area and that he was concerned that she would decide to move away, as she had done so several times during their past relationship.

In addition to his testimony, father presented school records showing that both children had been tardy or absent numerous times during the 2019-20 school year. Son had fifteen absences, eight of which were unexcused. The children's report cards showed that they were struggling academically.

At the conclusion of the hearing, the court stated its decision on the record. The court found that mother's unilateral decisions regarding the children's schooling constituted a real, substantial, and unanticipated change in circumstances and that modification of the existing order was warranted. The court awarded sole legal and physical rights and responsibilities to father and gave mother parent-child contact on alternating weekends.

While the court was announcing its decision, mother joined the hearing. The court informed mother that it had to end the hearing because it was noon, but gave her a brief opportunity to speak. Mother argued that the paperwork she had received stated that the hearing began at noon. The court responded that the hearing notice appeared to give fair warning of the correct time, but mother could file a motion for reconsideration if she believed she had not received proper notice.

Mother subsequently filed a letter indicating that she wished to appeal. She requested that the court stay execution of the order while the appeal was pending and asked to have a social worker or guardian ad litem perform a home visit to observe the children until a final decision was made. The court denied both requests and stated that the matter was on appeal.

The family division may modify an existing order concerning parental rights and responsibilities "upon a showing of real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 668(a). We will affirm the family division's decision regarding changed circumstances unless it exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Hayes v. Hayes, 144 Vt. 332, 336 (1984) (quotation omitted).

On appeal, mother argues that it was unfair for the court to modify parental rights and responsibilities without hearing her version of events. To the extent that mother is arguing that she was deprived of due process, we disagree. The court sent notice to mother of the date and time of the hearing as required by Vermont Rule for Family Proceedings 4.2(b). Mother admits that she received the notice but simply misunderstood the hearing time. The court did not err in holding the hearing without mother under these circumstances. See In re S.W., 2008 VT 38, ¶ 11, 183 Vt. 610 (declining to reverse termination-of-parental-rights decision based on mother's failure to appear at last day of seven-day hearing where record showed court provided mother with direct notice of hearing); In re J.L., 2007 VT 32, ¶ 13, 181 Vt. 615 (holding that court did not err in proceeding with termination hearing where father initially participated by telephone but then hung up and was subsequently unreachable).

Mother also argues that her mental health issues were used against her. However, mother does not identify any part of the record that supports this claim, and there is no reference to mother's mental health in father's motions, the hearing transcript, or the court's orders. Mother also appears to dispute father's testimony and exhibits regarding son's attendance at school and behavioral issues. Because mother did not attend the hearing, she did not raise any objections to this evidence or present countervailing evidence. Accordingly, we are unable to review her claim. See Sundstrom v. Sundstrom, 2004 VT 106, ¶ 21, 177 Vt. 577 ("[T]o preserve an issue for appeal, a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." (quotation omitted)).

Finally, mother argues that since the court issued its order, the children's mental health and behavior has deteriorated, and that father spends little time with them. She states that she is concerned about the children spending time with father's mother because her house is dirty and unsafe. Mother's arguments refer to matters outside the record on appeal and we will therefore not consider them. V.R.A.P. 10(a)(1); see Gauthier v. Keurig Green Mountain, Inc., 2015 VT 108, ¶ 2, 200 Vt. 125.

Although we reject mother's specific arguments, we nevertheless conclude that reversal of the court's order is warranted because the family division failed to adequately consider whether there was a change in circumstances sufficient to justify modifying physical parental rights and responsibilities. The evidence presented by father, which the court found credible, showed that there had been a breakdown in communication regarding important educational decisions for the children. The court properly found that this was a sufficient basis to modify legal rights and responsibilities. See Wener v. Wener, 2016 VT 109, ¶ 18, 203 Vt. 582 (concluding modification of legal rights and responsibilities was justified where parties were unable to agree on where child should go to school). The court analyzed the best interests of the children in accordance with the factors listed in 15 V.S.A. § 665 and determined that it was in

their best interests for father to have sole legal rights and responsibilities. The court acted within its discretion in reaching this conclusion based on the evidence presented.

However, the court's finding that the parties were unable to agree on educational decisions does not necessarily support modification of physical rights and responsibilities. "[T]o ensure stability in the lives of children, a party seeking a modification in the allocation of physical responsibilities has a heavy burden to show changed circumstances." Id. ¶ 11; see also Chase v. Bowen, 2008 VT 12, ¶ 39, 183 Vt. 187 (explaining requirement in 15 V.S.A. § 665(a) that where parents cannot agree, court must award sole parental rights and responsibilities to one parent, "does not mean that the court must award all rights and responsibilities to one parent" (emphasis added)). The court did not separately analyze legal and physical rights and responsibilities, apparently concluding that the breakdown in joint decision-making justified modifying both. We have previously described such an approach as inappropriate. Wener, 2016 VT 109, ¶¶ 21-22. The only other basis for modification on which the court appeared to rely was mother's refusal to continue the increased contact schedule the parties followed during the summer of 2020. But the governing order at that time entitled father to contact only on alternating weekends. If this was in fact the court's reasoning, it essentially faulted mother for asserting her rights under the existing order, which we cannot condone. See Dunning v. Meaney, 161 Vt. 287, 290 (1993) (affirming refusal to find changed circumstances based on increased contact because that "would penalize [mother] for her willingness to allow the contact"). The paucity of the findings and analysis prevents us from affirming the family division's decision to modify physical parental rights and responsibilities. We conclude that the decision regarding physical rights and responsibilities must be reversed and the matter remanded for the court to hold a new hearing and make specific findings on that issue.

The court's decision awarding father sole legal rights and responsibilities is affirmed. The decision to award father sole physical rights and responsibilities is reversed and remanded for further proceedings consistent with this opinion.

BY THE COURT:

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice