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

Case No. 2021-161

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

FEBRUARY TERM, 2022

Beth Gray v. Michael S. Gray*

} APPEALED FROM:
} Superior Court, Franklin Unit,
} Family Division
} CASE NO. 268-10-15 Frdm
Trial Judge: Howard A. Kalfus

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

Father appeals the family division's decision modifying the existing parent-child contact arrangement in this case. We reverse and remand for further proceedings.

The parties were divorced in 2016. They have an eleven-year-old daughter and an eight-year-old son. Under the court's order which adopted a stipulated divorce agreement, the parties shared legal rights and responsibilities and had equal parent-child contact with the children.

Father struggled with alcohol abuse during the marriage. The parties' divorce agreement stated that neither parent would be under the influence of alcohol during his or her time with the children. The agreement gave mother the right to administer an alcohol testing device to father prior to any custody exchange for two years after the divorce. The parties also agreed that each would "follow medical advice related to depression, anxiety and any/all other mental health diagnosis and will place the kids in the other parent's temporary care and seek immediate medical and/or psychiatric attention if he/she has suicidal or destructive thoughts."

In March 2021, mother filed an emergency motion to modify the parent-child contact order. Mother asserted that a few days earlier, the parties' daughter had called mother and asked her to pick the children up from father's home because father was drinking and expressing suicidal thoughts. Mother called 911 and went to father's home. When mother arrived, father's car was in a ditch near his driveway and police were on the scene. Police administered a breath test to father, which showed a blood alcohol content (BAC) of 0.40%. Father was taken to the emergency department and subsequently entered detox followed by an inpatient treatment facility. Based on these facts, mother asked the court to temporarily suspend contact and to award her sole legal and physical rights and responsibilities until a hearing could be held. The court temporarily awarded sole legal and physical rights and responsibilities to mother pending a

hearing.[*] It ordered that father could have virtual contact with the children three times a week, and supervised visitation once a week for three hours.

Father subsequently filed a response admitting that the March 2021 incident had occurred basically as mother had described it. He opposed modification of parental rights and responsibilities or parent-child contact, arguing that there was no real, substantial, and unanticipated change in circumstances because father's alcohol addiction, and the potential for relapse, was known at the time of the divorce.

The court held a hearing in July 2021 at which both parties appeared with counsel. Father proposed a temporary parent-child contact schedule giving him alternating weekends and Saturdays with the children until the beginning of the school year, at which point the schedule would revert to the week-on/week-off schedule set forth in the 2016 divorce order. Mother proposed a more limited schedule, beginning with day visits and then progressing to alternating weekends in August 2021. Under mother's proposed order, the parties would be required to attend mediation in June 2022 and agree to further modifications in the best interests of the children if father remained sober. Both proposals contemplated that father would provide frequent BAC test results to mother as a prerequisite to visitation.

Based on the evidence presented, the court found that father had relapsed beginning in January 2021. In February, he denied to mother that he was drinking again. In March 2021, the incident described by mother in her motion occurred. The court found that on that day, father began drinking in the morning while the children were in his care. He attempted to drive to an Alcoholics Anonymous (AA) meeting in the afternoon and drove into a ditch, resulting in police coming to the home. The parties' older child had to rouse father to talk to the police officer. Both children were extremely upset by the incident. Father subsequently participated in a rehabilitation program and continued to engage in intensive outpatient treatment and AA meetings several times a week.

The court found that father's alcohol addiction pre-dated the divorce order and that relapses were an expected part of his recovery. However, it concluded that father's denial of his relapse to mother and the extent of the relapse while the children were in his care constituted a real, substantial, and unanticipated change in circumstances warranting modification of parent-child contact. It adopted mother's proposed parent-child contact schedule. It also ordered father to give mother monitoring privileges on his BAC testing device, to take BAC tests three times a day while the children were in his care, and to submit to additional testing at mother's request. The court did not address modification of parental rights and responsibilities. Father appealed.

When reviewing an order modifying parent-child contact, we will uphold findings if they are supported by the evidence and will affirm legal conclusions if supported by the findings. Weaver v. Weaver, 2018 VT 38, ¶ 15, 207 Vt. 236. "The family court has broad discretion in awarding, modifying, or denying parent-child contact, and we will not disturb its decisions unless its discretion was exercised upon unfounded considerations or to an extent clearly

[*] In her motion, mother also asked the court to permanently modify parental rights and responsibilities, if necessary, after the hearing. At the hearing, the court proceeded as if mother was only seeking to modify parent-child contact, and mother did not argue otherwise below or on appeal.

unreasonable upon the facts presented." Fabiano v. Cotton, 2020 VT 85, ¶ 17 (quotation omitted).

A party moving to modify a parent-child contact order must demonstrate a "real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 668(a); see also Patnode v. Urette, 2017 VT 107, ¶ 4, 206 Vt. 212. "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). In exercising its discretion to determine this threshold issue, "the court should consider the context of all the surrounding circumstances, keeping in mind that the effect on the child is what makes a change substantial." Fabiano, 2020 VT 85, ¶ 24 (quotation omitted).

We conclude that the family division did not abuse its discretion in finding changed circumstances in this case. The court's findings, while not overly detailed, were sufficient to explain its decision and were supported by the record. As both parties testified and as evidenced by their agreement to share legal and physical rights and responsibilities, in the past they had communicated well. However, father testified that he began drinking again a couple of months before the March 2021 incident. Mother testified that she had smelled alcohol on his breath during this period, but father claimed it was mouthwash. Then, in February 2021, he contacted mother "out of the blue" to tell her that he had not been drinking after the parties' son sent some texts to mother. Father continued to drink in secret until March 2021, when he became extremely intoxicated while the children were in his care and then drove his car into a ditch, resulting in his hospitalization and subsequent inpatient treatment. Even if a relapse was anticipated at the time of the divorce, father's failure to be honest with mother about his drinking on multiple occasions, coupled with the severity of the relapse, which threatened the physical safety of the children and caused them great distress, were sufficient to constitute an unanticipated change in circumstances in the context of this case. See Clark v. Bellavance, 2016 VT 124, ¶ 13, 204 Vt. 111 (noting that "breakdown in communication between parents," and "evidence of one party's changed mental condition or ability to effectively parent," are relevant considerations in determining what constitutes change in circumstances under 15 V.S.A. § 668).

Father argues that the court failed to acknowledge that the divorce agreement contained a provision governing what the parties should do in the event one of them suffered a mental health crisis, and that he complied with that provision by asking daughter to call mother and subsequently checking himself into a rehabilitation facility. As discussed above, the court did recognize that a relapse was anticipated by the agreement. Moreover, the record does not support father's argument that he complied with the so-called "relapse provision." Father did not place the children in mother's care or seek help until after the March incident, which was at least two months after he resumed drinking. He also became extremely intoxicated while the children were in his care, despite the provision stating that neither parent would be under the influence of alcohol during his or her time with the children. Neither the existence of the relapse provision nor father's belated efforts to comply with that provision undercut the court's conclusion that there had been an unanticipated change in circumstances. We therefore decline to disturb this aspect of the court's decision.

However, we agree with father that the court's order must be reversed and remanded for further proceedings because the court utterly failed to explain its decision to adopt mother's proposed parent-child contact schedule. When a court finds that changed circumstances exist, it must then consider whether modification of the existing parent-child contact arrangement is in

the best interests of the child using the factors set forth in 15 V.S.A. § 665(b). Although the statute "imposes no specific requirement on how this consideration is to be manifested in the court's findings and conclusions," Sochin v. Sochin, 2005 VT 36, ¶ 6, 178 Vt. 535 (mem.), the court must adequately explain its reasoning so that we may meaningfully review its decision. Maurer v. Maurer, 2005 VT 26, ¶ 12, 178 Vt. 489 (mem.).

Here, the court failed to make any findings regarding the children's best interests or even to indicate that it considered the factors set forth in § 665(b). "[T]he family court's failure to make necessary findings left this Court to speculate as to the basis upon which the trial court made its findings and reached its decision. This we will not do." Maurer, 2005 VT 26, ¶ 15 (quotation omitted); see Parker v. Parker, 2012 VT 20, ¶ 19, 191 Vt. 222 (reversing and remanding court's decision to transfer custody from mother to father because "the current state of the court's findings and conclusions are not sufficient for us to understand the basis of its decision and to engage in informed appellate review, notwithstanding the deferential standard of review on appeal"); Pigeon v. Pigeon, 173 Vt. 464, 465-67 (2001) (mem.) (reversing decision to modify custody and parent-child contact where family court failed to make findings to support decision to award mother sole legal rights and responsibilities or to indicate that it considered child's best interests). Accordingly, we reverse and remand for the family division to make additional findings regarding whether the modified parent-child contact arrangement is in the children's best interests.

Reversed and remanded for further proceedings consistent with this decision.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice