

VERMONT SUPREME COURT
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Case No. 21-AP-277

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

MAY TERM, 2022

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| Holly Billado* v. Daniel Billado | } | APPEALED FROM: |
| | } | Superior Court, Franklin Unit, |
| | } | Family Division |
| | } | CASE NO. 14-1-21 Frdm |
| | | Trial Judge: Howard A. Kalfus |

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

Mother appeals the family division's order awarding sole parental rights and responsibilities for the parties' two minor children to father. We conclude that the court did not provide reasonable notice to the parties of its intention to issue a final order, and therefore reverse and remand for the court to hold a final hearing on parental rights and responsibilities.

Mother filed a complaint for divorce in January 2021. The parties initially had an informal agreement to share custody of their two children equally. By the summer of 2021, however, mother and father were living in different towns, forty-five minutes away from each other, and they could not agree on where to enroll the children for school that fall. In May 2021, each moved for a hearing to establish temporary parental rights and responsibilities. Both motions clearly indicated that the parties were seeking temporary relief and not a final order.

The court scheduled a one-hour hearing for August 2, 2021. The hearing notice did not indicate that it would be a final hearing on parental rights and responsibilities. Both parties attended with counsel. At the beginning of the hearing, the court asked the attorneys whether they planned to call any witnesses other than mother and father. Father's attorney noted that with only one hour of time, they would not be able to call any other witnesses. The court informed the parties that the next hearing had been cancelled, so they would have an additional half hour. That meant each party would have forty-five minutes to present evidence. The court then asked mother's counsel to begin. Father's counsel asked if she should go first, since it was her client's motion. Mother's counsel responded, "Well, we both filed requests for a temporary hearing," but agreed that father had filed his request first. The court responded, "Okay." The

parties agreed that father's counsel could go first. Father testified. He attempted to call his mother as a witness but was unable to proceed due to technological issues. Mother then testified.

At the close of the hearing, the court made findings on the record. Stating that it was "a close call," it awarded sole legal and physical custody to father because it found that he was slightly better disposed to foster a positive relationship between the children and the other parent. The court encouraged the parties to work out an equal parent-child contact schedule. At no point during the hearing did the court or the parties suggest that the hearing was final.

The court subsequently issued a written order on a standard court form awarding sole parental rights and responsibilities to father and directing the parties to work together to propose a parent-child contact order. It did not make any additional findings. A checked box on the form indicated that the order was final.

At the end of August 2021, the parties filed a stipulated final parent-child contact agreement that did not address parental rights and responsibilities. In October, the court notified the parties that a final dissolution hearing would be held in November 2021. Mother filed a motion asking the court to conduct a final hearing on parental rights and responsibilities as part of the November hearing. Mother argued that the purpose of the August hearing was to address the parties' requests for temporary relief and that the court erred in checking the box indicating that its order was final. She argued that she was afforded inadequate time to present her case at the August hearing and that she had additional evidence and testimony relevant to the issue of parental rights and responsibilities. Father opposed the motion. He conceded that he had only requested temporary relief but argued that mother had waited too long to object to the finality of the order. He argued that mother had agreed to a final parent-child contact schedule that gave father the children during most of the school week based on the August order, indicating that she understood it to be final.

In late October, the court issued an order clarifying that its August order was final. The court reasoned that it had never indicated to the parties that the hearing or corresponding order would be temporary in nature. The court stated that there was no reason to think that the parental rights and responsibilities order was temporary where the parties had entered into a final parent-child contact order. On November 1, the parties stipulated to a final property division, which the court approved. Mother renewed her objection that she had been denied a final hearing on parental rights and responsibilities. This appeal followed.

On appeal, mother argues that the court's failure to provide reasonable notice to the parties that it planned to issue a final parental rights and responsibilities order after the August 2021 hearing violated her right to due process. We agree. "Both the right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution." Paquette v. Paquette, 146 Vt. 83, 92 (1985). Mother therefore "was entitled to reasonable notice of what was in issue and an opportunity to be heard" on that issue. Brown v. Brown, 154 Vt. 625, 629 (1990); see also In re C.L.S., 2020 VT 1, ¶ 25, 211 Vt. 344 ("[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (quotation

omitted)). The record shows that mother was not afforded reasonable notice that the court intended to issue a final order on parental rights and responsibilities following the August 2021 hearing.

Both parties clearly requested temporary relief in their May 2021 motions. The corresponding hearing notice stated that the court would address the motions for temporary parental rights and responsibilities and other pending motions. Nothing in the hearing notice or the transcript of the August hearing indicates that the court or the parties considered it to be a final hearing. To the contrary, mother's attorney explicitly stated that the purpose of the hearing was to address the parties' cross-motions for temporary relief, and the court did not contradict this statement. The parties were given only forty-five minutes to present evidence on the issue of parental rights and responsibilities, the central dispute in the case—a timeframe that is more consistent with a temporary hearing than a final one. Mother did not object to the brevity of the hearing or ask for additional time, but she had reason to believe that she would have an opportunity to fully present her case at a final hearing. And, while the subsequent order contained a checked box stating that it was final, the court acknowledged that there was confusion on this point when it issued its October order clarifying that the order was intended to be final. This record indicates that mother did not have reasonable notice of the court's intention to hold a final hearing. Cf. Thompson v. Pafundi, 2010 VT 80, ¶ 10, 188 Vt. 605 (mem.) (holding that court did not violate mother's due process rights by converting hearing on modification of parent-child contact into final hearing on parental rights and responsibilities because record showed mother was clearly on notice and waived any objection by agreeing to expedited review of that issue).

Father responds that mother did not tell the court at the August hearing that she had additional evidence or wanted more hearing time. He also argues that mother did not object or seek clarification immediately after the August order issued. Father is essentially claiming that mother waived her due process claim by failing to adequately raise it below. We are unpersuaded by these arguments. As discussed above, mother reasonably believed, based on the parties' motions and the hearing notice, that the purpose of the August hearing was to establish a temporary order on parental rights and responsibilities, and acted accordingly. Although mother did not immediately object to the order's statement that it was final, she did raise the issue prior to the final dissolution hearing. In her motion for a final hearing, she argued that both sides had sought temporary relief, the court had mistakenly checked the wrong box in its order, and that she needed additional time to present evidence. Father opposed her motion, arguing that it was too late to object. This prompted the court to issue an order clarifying that the August order was intended to be final. We therefore conclude that mother preserved her claim for our review. See State v. Mumley, 2009 VT 48, ¶ 18, 186 Vt. 52 (“[W]here a litigant's argument is clear enough for the trial court to evaluate it and for an opponent to respond to it, the claim is adequately preserved for appeal.”); see also Sirkin v. Zartarian, No. 21-AP-239, 2022 WL 1055144, at *3 (Vt. Apr. 8, 2022) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo21-239.pdf> [<https://perma.cc/9APB-AYBF>] (holding that where parental rights and responsibilities order was ambiguous as to finality, and plaintiff objected below to defendant's characterization of order as final, issue was preserved for review).

We disagree with father’s contention that the court’s failure to give reasonable notice was harmless. The family court acknowledged that its decision to award sole parental rights and responsibilities to father was a “close call.” It is therefore possible that, with notice and sufficient hearing time, mother could have presented additional evidence or witnesses that might have altered the court’s assessment of the children’s best interests. Under these circumstances, we conclude that the August 2021 order must be reversed and remanded for the parties to have a meaningful opportunity to be heard on the issue of parental rights and responsibilities.

Reversed and remanded for the family division to hold a final hearing on the issue of parental rights and responsibilities.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice