VERMONT SUPREME COURT
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Case No. 22-AP-035

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

JULY TERM, 2022

Melissa DeGuise-Hendershot v. Charles Hendershot*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	CASE NO. 195-8-19 Frdm
		Trial Judge: Robert A. Mello

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

Father appeals from the trial court's order, on remand, amending the parties' final divorce order to provide guidance on modifying parent-child contact (PCC). Father argues that the court's amendment is overly restrictive and unsupported by the evidence. We agree and we therefore reverse and remand for additional proceedings.

In father's first appeal, we affirmed the parties' final divorce order, including the court's PCC decision, but remanded for the court to consider PCC issues raised by father in his motions to reconsider. See DeGuise-Hendershot v. Hendershot, No. 2021-041, 2021 WL 6049533 (Vt. Dec. 17, 2021) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo21-041.pdf [https://perma.cc/F9PP-LD49]. When the parties separated, they temporarily shared legal rights and responsibilities and agreed to continue sharing the marital residence. That arrangement did not work and, by the time of the divorce order, father had moved out of the marital home and was staying with his girlfriend and other friends. The trial court found that, although it was "in the children's best interests to have as much contact with father as possible," father's "proposed week-on/week-off schedule was not currently feasible due to his lack of stable housing." Id. at *2. The trial court indicated that father could move to modify PCC once he obtained suitable housing. Father expressed concern that, because it was anticipated that he would obtain stable housing, he could not make the necessary showing to modify PCC under 15 V.S.A. § 668. He thus asked the trial court to amend its order to require maximum contact with both parents once he obtained suitable housing. The trial court denied the request, reiterating that father could file a motion to modify once he obtained suitable housing. Id. at *3.

On appeal, we held that "the family division incorrectly concluded that [father] could rely on § 668 to modify parent-child contact once he obtained stable housing" because it was anticipated that he would obtain such housing. Id. at *4. At the same time, we held that it would be inappropriate to include "a provision that automatically shifted PCC at a future date." Id.

Citing Terino v. Bleeks, 2018 VT 77, 208 Vt. 65, we held that "the court could have created a benchmark for the parties to understand when circumstances had changed sufficiently to modify parent-child contact." Id. It could, for example, "establish the expectation that the parties will revisit the schedule, through their own negotiation or mediation if necessary, to ensure that it meets the children's best interests once the predictable event of [father]'s obtaining stable housing occurred." Id. (quotation omitted). We explained that while the trial court had expressed its expectation that the parties would work together to maximize PCC in the future, "it did not incorporate this expectation into its written order," which "left the parties without guidance as to whether the expectation was binding." Id. Because the court had mistakenly cited § 668 as providing a basis for father to seek relief, we "remand[ed] for the court to reconsider [father]'s request to amend the parent-child order to provide guidance about when modification would be appropriate, consistent with [our] decision and Terino." Id.

On remand, the parties submitted proposed amendments for the court's review. The court amended its order to include the following provision:

> Within thirty (30) days after [father] files with the court and serves upon [wife] an affidavit demonstrating that he has secured long-term (e.g., minimum of one-year) leasehold or ownership interest in housing located within the school district in which the children currently attend school that provides each of the parties' two children his/her own bedroom, the parties shall revisit in good faith and in the best interests of the children [father's] request for an enlarged parent child contact. The parties' failure to reach an agreement at that time may constitute an unanticipated change of circumstances.

The court explained that the parties could not communicate with one another and needed objective benchmarks. It noted that father had testified at the final divorce hearing that he was looking for housing large enough for the children in the town where the children currently resided. Father appeals from this order.

Father argues on appeal that the court's modification is unduly restrictive, unworkable, and unsupported by the record. He questions why living in a neighboring town or having a room with bunkbeds would be considered unstable housing. He notes that pursuant to the final divorce order, mother must move out of the marital home and it is unknown where she will reside thereafter, which could leave him locked into a lengthy housing arrangement far away from the children. Father also explains that there is no history or pattern of homelessness or substandard housing in this case that would warrant such burdensome requirements; it was expected at the time of the final divorce order that he would obtain stable housing. Father also complains that the court's order essentially directs him to file a motion to modify PCC (as he must file an affidavit and a request for more PCC) before any change of circumstances has occurred, i.e., the parties' inability to reach an agreement as to PCC. He contends that such filing would be subject to dismissal as prematurely filed.

The trial court has broad discretion in making decisions concerning PCC and "we will not disturb its decisions unless its discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." Weaver v. Weaver, 2018 VT 38, ¶ 15, 207 Vt. 236 (quotation omitted). We agree with father that the court abused its discretion here. Neither the record nor the court's findings support the imposition of such restrictive housing requirements. We can discern no reasonable basis why father must secure a year-long lease or

purchase a home, have a bedroom for each child, or live in a particular school district, before his housing is considered stable enough to seek an increase in his PCC. Father is not limited to obtaining the type of housing that he was searching for at the time of the final divorce hearing. These restrictive conditions appear arbitrary and untethered from the record evidence and they could lead to the type of absurd results described in father's brief.

In our initial remand order, we directed the court to amend its decision consistent with our decision in Terino. Terino recognizes that, "in some cases, a court may anticipate that a [PCC] schedule, which was developed specifically to meet present needs that the child will predictably outgrow, may be ill suited to the child's best interests at an identified future time." 2018 VT 77, ¶ 20. While the "court cannot prejudge the child's best interests at that future time," it may "establish the expectation that the parties will revisit the schedule, through their own negotiation or mediation if necessary, to ensure that it meets the child's best interest" at that "predictable next stage." Id.

The "predicable next stage" here was that father would stop "couch-surfing" and obtain more permanent housing. The trial court expected, but did not memorialize its expectation, that the parties would work together to "maximize [PCC] in the future as various life changes occurred." DeGuise-Hendershot, 2021 WL 6049533, at * 4. We suggested that it could include language in its final order, as in Terino, "establishing the expectation that the parties will revisit the [PCC] schedule, through their own negotiation or mediation if necessary, to ensure that it meets the children's best interests once the predictable event of [father]'s obtaining stable housing occur[s]." Id. While the trial court sought to provide the parties with an objective benchmark, the requirements it imposed for "stable housing" are not supported by its findings. Should the court decide on remand that it remains necessary to include or define this term, it must make specific findings to support whatever definition the court may employ.

Reversed and remanded for additional proceedings consistent with this opinion.

BY THE COURT:

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice

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Nancy J. Waples, Associate Justice