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

Case No. 24-AP-183

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

JANUARY TERM, 2025

Olya Iver (Krupnova) v. David Simpson* } APPEALED FROM:
} Superior Court, Chittenden Unit,
} Family Division
} CASE NO. 452-8-19 Cndm
Trial Judge: Elizabeth Novotny

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

Father appeals from the trial court's denial of his motion to modify parent-child contact (PCC). We affirm.

The parties are parents of a daughter, born in April 2019. Pursuant to a December 2020 parentage order, mother was awarded primary legal and physical parental rights and responsibilities (PRR). At the time of the parentage order, father was living in Concord, New Hampshire and mother and the child were living in Burlington, Vermont. Father had not seen the child for fifteen months and did not attempt to visit the child after he moved to Concord. Father proposed to temporarily relocate to Vermont. The court set forth a graduated PCC schedule for father, mindful of COVID-19 restrictions in place at the time and the need for father to be reintroduced to the child. The contact schedule began with online visitation and progressed to in-person visits if father relocated to and remained in Vermont, culminating in an overnight visit each weekend. The order provided that once COVID-19 restrictions ended, and father had presumably returned to New Hampshire, he would have PCC every other weekend and virtual contact once a week. The court also included a school vacation schedule, holiday schedules, and related matters. Father filed several motions for reconsideration, which were denied. In its post-judgment rulings, the court explained, among other things, that its PCC order applied whether father relocated to Vermont, as he had proposed, or if he continued residing in New Hampshire. We affirmed the court's final order on appeal. See Iver v. Simpson, No. 2021-036, 2021 WL 2396244 (Vt. June 11, 2021) (unpub. mem.) [https://perma.cc/XRE4-WT66].

In June 2023, father moved to modify PCC. Father argued that the existing PCC order was based on him residing in New Hampshire and he had since purchased and renovated a home in South Burlington, Vermont. He sought additional in-person PCC and sought to pick up and drop off the child at school rather than have transitions occur with mother. Father maintained that he demonstrated a real, substantial, and unanticipated change of circumstances because the prior order anticipated that he would reside in New Hampshire and his move made more regular contact possible.

Mother opposed the motion pro se, challenging whether father had in fact moved to Vermont. She noted that father owned multiple homes in various states and that all pick-ups continued to happen at father's home in West Lebanon, New Hampshire. Given father's background in property ownership and management, mother argued that father's purchase of a home in Vermont was not unanticipated. Mother highlighted father's greater financial resources and complained about his litigious behavior. Mother retained counsel who moved to deny and dismiss father's motion. Counsel reiterated that father was not living in the Burlington home and that, in the eight months following the filing of his motion, father's PCC and PCC transitions continued to occur in New Hampshire. Counsel added that the December 2020 order considered that father might move to Vermont.

The proceedings were bifurcated, and the court held a hearing in June 2024 to determine, as a threshold matter, if father established a "real, substantial, and unanticipated change of circumstances" sufficient to warrant modifying the existing order. 15 V.S.A. § 668(a). Both parties testified. The court made findings on the record at the close of the hearing and issued a written order summarizing those findings. It found as follows. Father lived in Concord, New Hampshire at the time of the final parentage order, which was two-and-a-half hours away from mother's residence in Burlington. Father's PCC occurred in Concord and gradually increased as set forth in the order. At some point, father purchased and moved into another residence in West Lebanon, New Hampshire. In early 2021, father also purchased a residence in South Burlington. Father continued to own the West Lebanon and South Burlington homes at the time of the hearing on his motion to modify. Father had contact with the child at the South Burlington home since 2022; he also had PCC at his home in New Hampshire. Father moved into the South Burlington home sometime in 2023 and obtained a Vermont driver's license in March 2024. Throughout this time, the parties followed the existing PCC schedule.

The court concluded that father failed to show a real and substantial change in circumstances sufficient to modify the 2020 order. Given its conclusion, the court found it unnecessary to determine if father's move was also unanticipated. It did not consider father's move from West Lebanon to South Burlington significant. It noted that father deemed this an easy commute, taking the parties' daughter to swim lessons in New Hampshire, for example, from South Burlington. The parties had consistently followed the PCC schedule set forth in the final order. The order had contemplated the possibility that father would have PCC in either New Hampshire or Vermont and it set up a schedule consistent with that understanding. The order gradually increased father's PCC, allowing the child to be reintroduced to him given his long absence from her life, and it culminated in providing a particular amount of PCC time, whether father was in New Hampshire or Vermont. The court reiterated that, although father moved from Concord to West Lebanon to South Burlington, his PCC had continued as ordered and nothing had changed. The court thus concluded that father failed to meet his burden under 15 V.S.A. § 668. This appeal followed.

Father essentially restates the arguments he made below. He contends that his move to South Burlington constitutes a substantial change in circumstances. According to father, the PCC schedule contemplated travel time in awarding him PCC every other weekend and his move eliminated travel time. He maintains that the move to Vermont was unanticipated. Father adds that given his physical proximity, the remote weekly visit provided in the final order should be modified to provide for an in-person visit, which would provide better quality time. Father suggests that the court was required to consider whether the child's best interests would be served by more PCC and argues that the denial of his motion was contrary to public policy set forth in 15 V.S.A. § 650. Father provides his view of what would be in the child's best interests.

"[T]o modify a custody determination, a moving party must traverse two hurdles." deBeaumont v. Goodrich, 162 Vt. 91, 95 (1994). The party must first show a "real, substantial, and unanticipated change of circumstances," 15 V.S.A. § 668(a), and "[o]nce that threshold is met, the moving party must then show that . . . modifying a prior parental rights and responsibilities determination is in the best interests of the child." deBeaumont, 162 Vt. at 95. "There is no bright-line test for determining whether the required change in circumstances has occurred," Gates v. Gates, 168 Vt. 64, 69 (1998), and "relocation without more is not per se a substantial change of circumstances." deBeaumont, 162 Vt. at 97. We review the court's determination "for abuse of discretion and will not reverse unless the court exercised its discretion on grounds or for reasons clearly untenable, or it exercised its discretion to a clearly unreasonable extent." Wright v. Kemp, 2019 VT 11, ¶ 18, 209 Vt. 476 (quotations omitted).

Father fails to show an abuse of discretion here. It is true that we have stated that, in evaluating changed circumstances, "the court should be guided by a rule of very general application that the welfare and best interests of the children are the primary concern in determining whether the order should be changed." Id. Notwithstanding this general reference to a child's best-interests, it is well established that modifying a PCC order "involves a two-step process." Id. As we have explained:

> Without question, the distinction between evidence that the court is proscribed from considering and evidence that it is permitted to assess during the first phase is subtle. In anticipation of this potential difficulty, we have warned the courts that they must not confuse their analysis of changed circumstances with their determination of the children's best interests. And yet, we have held that the court must also determine whether the new circumstances have such an effect upon the children that it renders the change substantial. Thus, while the court is not permitted to decide what is in the best interest of the children during the first phase of the hearing, it may still consider the impact of the change upon the children in deciding whether the circumstances have substantially changed.

Gates, 168 Vt. at 69-70 (quotations and alterations omitted).

In a similar vein, we have recognized that "[a]ny relocation will, as a matter of course, involve disruption and change in children's lives, but a court must not confuse its analysis of changed circumstances with its determination of the children's best interests." deBeaumont, 162 Vt. at 97. The question of "whether . . . any given change is substantial must be determined in the context of the surrounding circumstances," and "it is the effect upon the child which renders a change substantial." Id. (quotations and alteration omitted).

The court applied the appropriate standard here. It considered the impact of father's relocation on the child in determining if there had been a substantial change in circumstances. It found that father's moves from Concord to West Lebanon to South Burlington had not affected the PCC schedule in the final order; the parties continued to follow the schedule despite father's moves. The court noted that the final order contemplated that PCC might occur in New

Hampshire or in Vermont. The court's findings support its determination that there was no real or substantial change here sufficient to warrant a modification of the existing final order.*

Father asserts that, in considering his motion to modify, the court had a "duty to inquire . . . whether maximum continuing physical and emotional contact is sufficient to support a finding that 'direct physical harm or sufficient emotional harm to the child or parent is likely to result from such contact.' " (Quoting 15 V.S.A. § 650.) That is not the question before the court on a motion to modify and father cites no persuasive legal authority in support of this proposition. The court was similarly not asked to decide if more PCC was in the child's best interests, as father asserts, given that father failed to satisfy the threshold requirement of changed circumstances. To the extent it is a different argument, we do not consider father's assertion—raised for the first time in his reply brief—that the court was also required to "expand its review" in this case by considering the child's right to contact with the parents. See Gallipo v. City of Rutland, 2005 VT 83, ¶ 52, 178 Vt. 244 (stating that issues not raised in original brief may not be raised for first time in reply brief). While father disagrees with the court's conclusion, he fails to show any abuse of discretion. See Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than disagreement with court's reasoning and conclusion do not make out case for abuse of discretion).

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice

* As indicated above, the court did not decide if father's move to Vermont was unanticipated, finding it unnecessary to do so given the absence of any real or substantial change. We thus do not address father's assertion that the change was unanticipated.