VERMONT SUPREME COURT
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Case No. 24-AP-157

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

Nathan Locke* v. Samantha Ferguson (Travis)	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Family Division
	}	CASE NO. 126-5-17 Wrdm
		Trial Judge: Elizabeth D. Mann

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

Father appeals the family division's order granting mother's motion to modify parent-child contact (PCC). We affirm.

In 2017, father filed this parentage action concerning the parties' two children, who are now twelve and nine years old. The parties agreed to an order that gave father sole legal and physical rights and responsibilities. The PCC section stated that "primary [parent] will allow visits when agreed upon" and that "holiday and birthday parenting time shall be as parties agree." The parties also agreed to mediate any disputes before returning to court. The order was approved by the court in July 2017.*

In May 2022, mother, who had relocated to Iowa, moved to modify the PCC order, arguing that father refused to allow her to contact the children more than twice a week, and would only agree to one week of visitation in Vermont in the summer. The court held an evidentiary hearing over two days in March and May 2024, after which it issued a written order granting the motion.

The court made the following findings in its order. The parties lived together for six years. When their relationship broke down, they were living with father's family in Vermont. Mother had no family in the area and decided to move to Iowa, where her family lives. She agreed to give father sole rights and responsibilities for the children because she needed to

* While there is "a strong policy in favor of voluntary settlement of contested custody matters," Harris v. Harris, 149 Vt. 410, 420 (1988), the trial court has an independent obligation to ensure that a stipulated agreement is fair and enforceable. The language of the 2017 agreement regarding PCC was clearly too vague to be enforced. Because no party appealed the order, however, it became final and was only subject to modification under 15 V.S.A. § 668.

reestablish herself and felt she could trust father to cooperatively coparent in the children's best interests. Father said mother could have visits "as agreed."

The court found that both parents were able to provide the children with love and affection and to meet their developmental and financial needs. Mother did not want to uproot the children from father's home, but sought to modify the PCC arrangement to give her a regular and enforceable contact schedule so she could develop her bond with the children and allow them to develop closer relationships with their stepsiblings. The court noted that mother had positive relationships with the father of her son and with her stepson's mother and was able to coparent effectively with those adults. She was also friendly with father's partner.

Mother began requesting a contact schedule with the children shortly after she moved to Iowa, but father either did not respond or rejected her requests for the children to spend time with her there. She spoke to the girls weekly by telephone. They seemed excited to talk to her. She filed a motion to modify PCC in 2021, after father refused to allow her to contact the children by phone. Contact resumed for a period after mother filed her motion, which she subsequently agreed to dismiss.

The court found that father did not appear to support frequent and continuing contact between the children and mother. He allowed no visits in 2017. In 2018, mother traveled to Vermont for one week in February. Her time with the children went well but father would not allow them to stay with her overnight. Mother visited Vermont again in 2019 and rented a home close to father's home. She was able to see the children every day, but father again refused to allow any overnight visits. No visits occurred in 2020 due to the coronavirus pandemic. In 2021, mother traveled to Vermont and had positive visits with the children, but father refused to allow overnight visits. In 2022, mother traveled to Vermont with her two other children, her husband, and her stepson. Father was more cooperative during this visit. The older daughter stayed with mother every night during her visit and the younger daughter stayed overnight twice. Both children got along well with their stepsiblings.

Father believed that the children had reactive attachment disorder based on his communications with the children's therapist. The therapist became involved with the family in 2022 when mother contacted her to establish family therapy. She met jointly with the children and mother once a month and met separately with the children every other week to discuss what they wanted to work on with mother. The therapist spoke separately with father when he dropped off the girls for their sessions.

The court expressed doubt about the therapist's diagnosis, explaining that she appeared to have relied on the conclusions of prior providers who were retained by father; her conclusions were not based on a full forensic evaluation of the family or testing of mother, father, or the children; she did not speak to the children's medical or educational providers or examine their medical or school records; and she did not speak to anyone in mother's family or conduct any home visits. The court also found that her diagnosis conflicted with evidence that the children always had a loving home environment, were never neglected or abused, and were apparently able to form strong relationships with other adults. The court credited the testimony of mother and her husband that the children were happy and engaged during their time with mother and did not appear to be aloof, reserved, or to have unexplained irritability or sadness. The therapist's opinion was based on "seven years of not having Mom around," but the court found this was inaccurate because mother traveled annually to Vermont and had regular weekly contact with the children, which the therapist apparently disregarded. The therapist observed the younger

daughter to have anxiety during two calls with mother early in the treatment process but acknowledged that this did not occur during later visits. The therapist also observed mother to be attentive to the girls during their time and described them as having a general sadness at not knowing mother, as opposed to being sad in her presence.

The court concluded that there was a real, substantial, and unanticipated change in circumstances since the original PCC order, namely, father's refusal to cooperate with mother's requests for contact as anticipated by the order, and the resulting deterioration of the bond between mother and children. The court concluded that modification was in the children's best interests to facilitate the children's relationship with mother. It therefore modified the original order to give mother telephone or video contact with the children at least twice a week and for the children to stay with mother for approximately six weeks during the summer as well as some school vacation periods. Father appealed.

When considering a motion to modify a parent-child contact order, the trial court must first determine whether there has been a "real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 668(a). If this requirement is satisfied, then the court must consider whether modification of the existing order is in the children's best interests according to the statutory factors. Id.; see id. § 665(b) (listing best-interests factors court must consider). "Decisions regarding the granting, modifying or denying of parent-child contact lie within the discretion of the family court, and we will not reverse the court's decision unless its discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." DeSantis v. Pegues, 2011 VT 114, ¶ 26, 190 Vt. 457 (quotation omitted).

On appeal, father first argues that the trial court erred in concluding that there was a change in circumstances since the original order. "There are no fixed standards to determine what constitutes a substantial change in material circumstances; instead, 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." Maurer v. Maurer, 2005 VT 26, ¶ 7, 178 Vt. 489 (mem.) (quotation omitted). A breakdown in communication between parents may constitute a change in circumstances sufficient to justify modification if it represents a new development in the parties' relationship since the time of the final order. Id. ¶ 8; see also Meyer v. Meyer, 173 Vt. 195, 198 (2001) (holding parties' inability to cooperate on parenting issues constituted change in circumstances where evidence showed that this was a new development since divorce). Here, the trial court found that the parties intended to cooperate regarding PCC at the time of the 2017 agreement, but father subsequently refused to grant mother's requests for contact and at times cut her off from the children completely. These findings are supported by the testimony of both parents as well as the language of the agreement itself. The findings in turn support the court's conclusion that there was a change in circumstances sufficient to justify modification of the existing PCC order to protect the children's best interests. See Maurer, 2005 VT 26, ¶ 8 (holding parties' inability to communicate, which developed after divorce and negatively impacted child, constituted change in circumstances sufficient to modify original custody order).

Father argues that the change was not unanticipated because the parties knew mother was moving to Iowa at the time of the original agreement and the breakdown in cooperation occurred almost immediately afterward. Father's argument fails because the court's conclusion was not based on the fact of mother moving to Iowa; it was based on father's failure to agree to visitation as expected under the 2017 order. The issue was whether this conduct was anticipated at the time of the final order, and the trial court found that it was not. See Hoover v. Hoover, 171 Vt.

256, 258 n.2 (2000) (explaining that "[c]ircumstances or arrangements are 'unanticipated' if they were not expected at the time of divorce"); cf. Pigeon v. Pigeon, 173 Vt. 464, 466 (2001) (mem.) (holding that custody modification could not be based on mere fact of child entering school because "a child's maturation from dependent infant to increasingly autonomous and active school-aged child, rather than being unanticipated, is a welcome and expected fact of life"). As we have held, "a breakdown in cooperation between parents can support a modification of a parent-child contact order to the extent the order is premised on shared expectations about the parties' intentions and abilities to cooperate to effectuate parent-child contact." Fabiano v. Cotton, 2020 VT 85, ¶ 29, 213 Vt. 236.

Father also appears to argue that mother should have anticipated his resistance to visitation because the original stipulated order gave him broad authority over when and whether contact should occur. However, the plain language of the agreement contemplated that father would cooperate to provide mother with reasonable visitation, because it stated that contact would be "as agreed" and that the parties would privately mediate any disputes before going to court. This was consistent with the parties' expectations at the time, as the parties testified and the trial court found. There was no evidence that father's subsequent refusal to agree to visitation, or insistence on strict limits on visitation, was anticipated at the time of the agreement. The court therefore did not err in finding that father's behavior constituted an unanticipated change in circumstances. See Clark v. Bellavance, 2016 VT 124, ¶¶ 2, 9, 21, 204 Vt. 111 (affirming change of parental rights and responsibilities from mother to father where parties were initially "committed to a healthy, respectful and supportive co-parenting relationship," but mother began unilaterally withholding father's court-ordered parent-child contact time (quotation marks omitted)).

Father does not challenge the court's determination that increased contact with mother is in the children's best interests, which is supported by its findings and is consistent with public policy. See 15 V.S.A. § 650 (declaring legislative policy that after parents separate, "it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents" unless harm is likely to result from such contact). We therefore see no reason to disturb the decision below.

Affirmed.

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