

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2009-429

AUGUST TERM, 2010

David Roy	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
	}	
Betsy Jo Green (Roy)	}	DOCKET NO. 98-2-03 Cndm

Trial Judge: Geoffrey W. Crawford

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

Father appeals from a family court order denying his motion to modify parental rights and responsibilities for the parties' minor child. He contends the evidence and findings fail to support the trial court's conclusion that there was not a real, substantial, and unanticipated change of circumstances sufficient to modify custody. We affirm.

The parties were divorced in 2004 after a three-year marriage. They have one child, who was eight years old at the time of the hearing below. The divorce judgment awarded mother parental rights and responsibilities, but divided custodial time equally between the parents, each caring for the child on alternating weeks. The trial court here noted that the parties' relationship during the divorce proceedings was "rancorous," and that their relationship since then has been "marked by continuing animosity, often quite extreme, involving both parties."

Father filed earlier motions to modify parental rights and responsibilities in April and July 2008, both of which were denied. The instant motion was filed in April 2009, alleging, among other claims, that mother had caused the child to be chronically absent from or late to school, and was unable or unwilling to attend to his dental care. The court held an evidentiary hearing over two days in August and October 2009, and issued a written decision shortly thereafter. The evidence showed, and the court found, a high rate of school absenteeism or tardiness when mother was caring for the child during the preceding two school years. The court found that this was attributable in part to mother's tendency to keep the child home for perceived illnesses, and in part to her difficulty in traveling from her home in Richmond to the child's school in Colchester, especially during the winter months. The court further found that the "dental dispute was typical of the parties' troubles." Father regularly brought the child to a dentist of his choosing in Barre, upsetting mother who holds legal rights and responsibilities. As a result, the court found, the dentist's recommendation to consult with an orthodontist to correct a malocclusion, or underbite, "was lost in the ensuing fury."

The court's concerns over the child's delayed dental treatment and excessive absences from school were mitigated, however, by other findings. The court noted that mother had moved into the Champlain School District and now lived a short walk from the child's current school, so that absences during the first month of school had not been a problem. Mother also testified, and

the court found, that she planned to enroll the child with a new dentist and the orthodontic problems would thus be evaluated and addressed. Accordingly, the trial court concluded that the school-attendance and dental-care issues were not sufficiently substantial to justify altering the parties' custodial arrangement. The court therefore denied the modification motion. This appeal followed.

Our review of the judgment is limited. We assess the trial court's findings "in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence, and we will not set aside the findings unless they are clearly erroneous." Spaulding v. Butler, 172 Vt. 467, 475 (quotation omitted). The trial court's findings must be upheld "if supported by credible evidence, and [its] conclusions will stand if the factual findings support them." Id. When faced with a motion to modify a parental rights and responsibilities order, the court must make a threshold finding that there has been a real, substantial, and unanticipated change of circumstances before it may determine whether a modification of custody is in the child's best interests. Gates v. Gates, 168 Vt. 64, 69 (1998). The burden of proving such a change of circumstances is on the moving party, but the decision lies within the sound discretion of the trial court, which will not be disturbed absent a showing of abuse. Spaulding, 172 Vt. at 475; see also Meyer v. Meyer, 173 Vt. 195, 197 (2001) (emphasizing that "the standard of review regarding a trial court's finding of changed circumstances is a deferential one").

Father contends the trial court erred in two basic respects. First, father notes that the court also concluded that the school and health-care issues were not unanticipated, and asserts that this conclusion was unfounded. Father may be correct that mother's financial and emotional instability at the time of the divorce did not, as the trial court suggested, signal future difficulties in assuring that the child attend school or obtain necessary dental care. As noted, however, the court based its holding on the separate ground that any changes in the child's welfare were not "substantial," and this was sufficient to support the judgment. See Reed v. Zurn, 2010 VT 14, ¶ 21 (error does not require reversal where court reached result based upon independent rationale which was sufficient to support the judgment).

Father also contends the evidence does not support the court's finding that the child's school-attendance and dental problems had been largely addressed and therefore were not a substantial change of circumstances. Father asserts these findings were "speculative," but mother testified, and the court found, that the school-attendance problem was related to mother's residing outside the school district; that she now lived a short distance from the child's new school; and that consequently the child's attendance during the first month of the new school year had ceased to be a problem. There was sufficient credible evidence to support the court's findings and conclusion.

There was also evidence that mother's failure to attend to the child's dental care was linked to father's assertion of control over the matter, and that mother had chosen her own dentist closer to home and planned to enroll the child there. Accordingly, there was sufficient evidence to support the court's conclusion that the issue was not so substantial as to warrant a change of custody. As we have observed, "there are no fixed standards to determine what constitutes a substantial change in material circumstances" and consequently courts must apply a general rule focused on the overall welfare of the child viewed in light of the particular facts and circumstances. Maurer v. Maurer, 2005 VT 26, ¶ 7, 178 Vt. 489 (mem.) (quotation omitted). The trial court here found that the child

is attending school regularly and spending equal time with his mother and his father. His physical health is good. He sees the

pediatrician often. He is getting some extra attention from the school for some educational delays which are of concern to the parent but not unusual for a third grader. He is playing soccer which he enjoys. The cards he writes to his mother and the pictures in which he appears with his father are ample proof of his love for both parents.

These findings are supported by the evidence and, together with the evidence and findings cited earlier, support the trial court's conclusion that there had not been a change of circumstances sufficient to modify parental rights and responsibilities.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice