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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-423

JUNE TERM, 2006

Lawrence Miller } APPEALED FROM:
}
}
v. } Chittenden Family Court
}
Karen Smith }
} DOCKET NO. 284-4-03 Cndm

Trial Judge: Geoffrey W. Crawford

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

Father appeals the family court=s order adjusting his parent-child contact schedule. We affirm.

The parties were divorced following a two-and-one-half-year marriage that produced one child. The August 2004 final divorce order awarded mother sole legal and physical parental rights and responsibilities and granted father parent-child contact in the amount of ten overnights every four weeks to be phased in over an eight-month period. The final order included a handwritten addendum setting forth schedules for parent-child

contact, at least until father reached the ten overnights anticipated in the final order. The addendum established a schedule that gave father parent-child contact (1) on alternating weeks, from nine o=clock on Saturday morning until five o=clock on Monday evening, and from eight-thirty in the morning until twelve-thirty in the afternoon on Tuesdays; and (2) on the other alternating weeks, from five o=clock on Sunday until five o=clock on Tuesday. The schedule also stated that every two months father would be able to have a three-overnight period from nine o=clock on Saturday until twelve-thirty on Tuesday. Since the final divorce order, the parties have gone to arbitration and initiated court proceedings on several occasions because of their inability to work out the specifics of father=s parent-child contact.

On this occasion, father filed a July 2005 motion to enforce and modify the final divorce order. Father asked that the family court (1) allow him to return the parties= child to mother at five o-clock in the evening rather than twelve-thirty in the afternoon on Tuesdays following his three-night visitation period every other week; and (2) establish a schedule that would eventually give him fifty-fifty parent-child contact. Mother responded by asking the court to clarify the final order as requiring husband to return the parties= child to her by nine o=clock on Tuesday mornings following the three-night stays with father. She claimed that the twelve-thirty drop-off interfered with the child=s napping schedule and was inconsistent with the final order.

After holding a motion hearing on September 21, 2005, the court issued an order requiring father to return the parties= child to mother by eleven o=clock every other Tuesday morning following his three-night parent-child contact. The parties were not sworn in at the hearing, but the court questioned them extensively about the parent-child-contact schedule and gave them an opportunity to state their understanding of the final order and addendum regarding parent-child contact. In the end, the court stated that it would impose Aa bit of a compromise@ by requiring father to return the child to mother by eleven in the morning, which would allow father to spend most of the morning with the child without interfering with the child=s nap schedule. Father appeals, arguing that the family court erred by modifying the parent-child contact order without holding an evidentiary hearing, finding a substantial change of circumstances, considering the best interests of the child, or making findings or conclusions.

The main point of contention in this proceeding was the drop-off time following the child=s three-night stay with father every other weekend. The final order called for a graduated increase in father=s parent-child contact until he reached ten overnights every four weeks. At the time of the instant proceeding, father had reached his maximum parent-child contact under the final order. The body of the final divorce order does not set forth specific days, or drop-off and pick-up times, for the ten overnights, but we can reasonably assume that father is entitled to ten twenty-four-hour periods (overnights) of parent-child contact under the order. The addendum to the final order indicates that every two months father can have parent-child contact from nine o=clock Saturday morning until twelve-thirty on Tuesday afternoon, but the schedules set forth in the addendum apply only A[u]ntil the schedule is up to 10 overnights.@ Nothing in the addendum suggests that father is entitled to more parent-child contact than the ten-night maximum allowed in the final order. Nevertheless, the family court allowed father to drop off the child with mother a couple of hours beyond the three-night (seventy-two-hour) period, reasoning that father could have some additional time in the morning with the child without interfering with the child=s nap schedule. Although mother took the position at the hearing that father was not entitled to more than a seventy-two-hour visitation period between Saturday and Tuesday every other week, she has not appealed the family court=s order.

We find no basis for overturning the order. The court was clarifying, not modifying, the final divorce order, and thus mother was not required to demonstrate changed circumstances. Cf. Schwartz v. Haas, 169 Vt. 612, 614 (1999) (mem.) (noting that modification of maintenance award requires showing of changed circumstances, but holding that provision being challenged was enforcing rather than modifying divorce decree). Essentially, the parties disagreed over the drop-off time on alternate weeks. The body of the final order does not specify drop-off and pick-up times, and the addendum does not clarify what those times would be once father reached his ten-overnight maximum. The court reviewed the parties= submissions and questioned the parties concerning parent-child contact. Father asked the court to allow him to prove that mother had agreed to a five o=clock Tuesday drop-off on alternate weekends, but he did not provide any such proof in his submissions to the court; and, in any event, the final order limited father to ten overnights. Thus, no evidentiary hearing was required.

Father also asks this Court to remand the matter so that the family court can determine if he is entitled to

relief under V.R.C.P. 60(b) with respect to the parent-child contact awarded in the final divorce order. As noted above, father asked the family court in his motion to modify to set up a schedule that would give him fifty-fifty parent-child contact. Father reasoned in his motion, and again in his brief on appeal, that the child is older now and his parent-child contact should not be restricted because of his gender. As the family court indicated, father has failed as a matter-of-law to meet the threshold requirement of showing a real, substantial and unanticipated change of circumstances that would support his motion to modify the final divorce order by increasing his parent-child contact from approximately one-third to one-half of the child=s time. See 15 V.S.A. ' 668 (upon showing of real, substantial and unanticipated change of circumstances, court may modify child custody or support order if it is in best interests of child). Moreover, because father made no showing that he was entitled to relief under Rule 60(b), we decline his request that we remand the matter for the family court to consider a motion under that rule.

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