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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-254

APRIL TERM, 2007

Tina Tyminski	}	APPEALED FROM:
	}	
v.	}	Rutland Family Court
	}	
Joseph Bizon	}	
	}	DOCKET NO. 76-1-01 Rddm
		Trial Judge: Richard W. Norton

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

Father appeals from the family court's order denying his motion to modify, and concluding, based on mother's motion for reconsideration, that neither parent could force the parties' fourteen year old daughter, Rebeccah, to attend a particular church. Father argues that the court erred because: (1) its decision usurped his right to shared parental rights and responsibilities; (2) it failed to hold a hearing on mother's motion for reconsideration; and (3) its decision on mother's motion went beyond the matters encompassed in the court's underlying decision. We affirm.

Mother and father divorced in 2001. Pursuant to the final divorce order, mother was awarded physical custody of the parties' three minor children, and the parties shared legal rights and responsibilities. At the time of the divorce order, they agreed that they were able to communicate about issues involving the children, including religious issues. At some point after the divorce, father began attending a Baptist church and taking the children with him. In February 2005, father filed a motion to modify, motion for contempt, and motion for "makeup time" with respect to visitation. As relevant to this appeal, he asserted that wife refused to discuss the issue of church with him despite the fact that they shared legal responsibilities for the children. He averred that mother did not take the children to church and she strongly objected to him taking the children to his church. According to father, mother was "so unpleasant about it the children are afraid to go." Father thus asked the court to modify the final divorce decree to include an order that permitted each parent to take the children to the church of his or her choice. Mother responded to the motion, asserting that the children had been raised Catholic and they should continue attending Catholic church. Mother stated that the children were not comfortable attending a church of a different faith and that father's request was unnecessary and confusing to them.

At a hearing on the motion in November 2005, mother testified that she was opposed to the children attending father's church, and the children were opposed to it as well. Mother referred to a letter that Rebbecah wrote, which described how father forced her to attend his church notwithstanding her objections, and how much she disliked it. Mother testified to the negative effect that this practice was having on Rebbecah. The children's guardian ad litem echoed this testimony,

stating that Rebeccah told him that she did not like the fact that father made her go to his church.

At the close of the hearing, the court made findings on the record. It indicated that it was neither disposed, nor empowered, to direct the children to attend the church services of one particular denomination. As it understood the testimony, the court explained, parents agreed that the children could express their opinion about what particular church they wished to attend, and the children, and particularly Rebeccah, should be given the freedom to decide for themselves. The court stated that it would accept an amendment to the final divorce order stating that the children must not be coerced into any particular religious faith and they were free to express their preference as to when and where they would attend church services.

In preparing a written order, the parties had different recollections about what the court decided, and asked for clarification on the religion issue. Mother believed that the court ordered that neither party could require the children to attend any church services. Father believed that the court declined to issue any order requiring either parent to compel the children to any one or more faith or religion, and thus, the parent having visitation or physical responsibility could compel the children to attend that parent's church. In December 2005, the court issued a written clarification of its oral order. The court explained that, at the hearing, it declined to issue an order that would require either parent to compel the children to attend a specific church or religious services, and it found that the children, particularly Rebeccah, were reluctant to attend their father's church. Because the parties shared legal parental rights and responsibilities, however, the court had concluded that the matter should be discussed between the parties in the best interests of the children. In March 2006, the court issued its final written decision and order, expressly declining to issue any order that would require either parent "to compel the children to any one or more faith or religion."

Shortly thereafter, mother filed a motion to reconsider, asking the court to issue a specific order that neither parent could force or require Rebeccah to attend any church service. Mother attached a letter from Rebeccah, who stated that every time she visited father, he required her to attend his church despite her opposition, and that father made her do extra chores in response to her opposition. Rebeccah explained that she did not want to attend her father's church and she would rather not have visitation with father on Sundays if she had to attend his church. In a May 2006 entry order, the court granted mother's request to reconsider its order. It explained that its original decision left the choice of church or religious preference to be decided between parent and child as a family matter not calling for a court order. In light of Rebeccah's letter, however, it appeared that it was in her best interests to issue an order that neither parent force or require her to attend any church service, and that she, at fourteen years old, could exercise her own judgment on the issue. This appeal followed.

Father first argues that the court's decision usurped his parental rights and responsibilities. He maintains that Rebeccah's religious upbringing should be decided by the custodial parent and that Rebeccah should not be allowed to decide for herself which church to attend.

We find no error in the court's decision. As an initial matter, we note that while the court did not explicitly state that a real, substantial, and unanticipated change of circumstances had occurred since the parties' final divorce order, see 15 V.S.A. § 668, this finding is implicit in its

decision on reconsideration and it is supported by the evidence. The record shows that at the time of their divorce, the parties agreed that they were able to communicate about issues affecting the children's religion. This obviously changed. Subsequent to the final divorce order, father sought to take the children to his church during periods of visitation, which was a different church than the one in which the children had been raised. Mother opposed this practice, believing that it had a negative effect on the children, and she presented evidence to show the effect that it was having on Rebeccah particularly. The parties were unable to communicate about religious issues, as father specifically averred below, and the evidence supports a finding of a change in circumstances since the date of the final divorce order. See Sundstrom v. Sundstrom, 2004 VT 106, ¶ 28, 177 Vt. 577 (mem.) (recognizing that there are no fixed standards to determine what constitutes a substantial change in circumstances, and instead, court should be guided by 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).

The court then acted within its discretion in concluding that a modification of the final divorce order was in Rebeccah's best interests. See Maurer v. Maurer, 2005 VT 26, ¶ 10, 178 Vt. 489 (mem.) (family court has broad discretion in evaluating child's best interests). As reflected above, the court initially rejected father's request that it issue an order directing parents to require the children to follow a particular faith. It found, based on the hearing testimony, that parents appeared to agree not to force the children to attend a particular church against their wishes. This did not turn out to be the case, however, and the court ultimately concluded that neither parent would be allowed to compel Rebeccah to attend a certain church. The court's decision is supported by the evidence and consistent with the law. See 15 V.S.A. § 665 (in making an order as to parental rights and responsibilities, court shall be guided by best interests of the child); cf. Meyer v. Meyer, 173 Vt. 195, 198 (2001) (noting that courts may take into account a parent's religious practices when making a custodial determination if there is evidence that the practices have a direct and negative impact on a child's physical or mental health).

While we have stated that decisions regarding a child's religious upbringing belong to the custodial parent in a case where one parent held sole legal and physical responsibilities, Jakab v. Jakab, 163 Vt. 575, 583-84 (1995), the parties here share legal rights and responsibilities, and were unable to agree on how to resolve the issue of religion. Given the evidence presented below, including evidence about the negative effect that attending father's church was having on Rebeccah, the court did not err in concluding that it was in her best interests that neither parent force her to attend a particular church. While father disagrees with the court's resolution of the parties' disagreement about religious issues—an issue that he brought before the court—we reject his assertion that the court's decision unfairly usurps his parental rights.

Father next argues that the court erred by failing to hold a hearing on mother's motion to reconsider, and it erred by considering matters that were beyond the scope of its original decision. Both arguments are without merit. First, the court was not obligated to hold a hearing under V.R.C.P. 59, nor does the record show that father requested a hearing. Father does not identify any specific prejudice that he suffered from the absence of a hearing, and we find none. See Jewell v. Dyer, 154 Vt. 486, 488 (1990) ("A hearing on a V.R.C.P. 59 motion, while generally favored as the better practice, is not mandatory, particularly where . . . the moving party has failed to show

prejudice flowing from the lack of a hearing.").

We similarly reject father's assertion that the court's decision was based on allegations that went beyond the matters encompassed in its underlying decision. The question of Rebeccah's attendance at church, her opposition to attending father's church, and the negative effect that father's behavior was having on her, was plainly before the court at the hearing. See In re Robinson/Keir P'ship, 154 Vt. 50, 54 (1990) ("Under rule 59(e), the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself." (quotations omitted)). Indeed, the court's decision on reconsideration appears consistent with its initial findings made on the record. Rebeccah's letter to the court largely duplicated evidence presented at the hearing, and it also illustrated that, contrary to the court's earlier understanding of the testimony, father would continue to force Rebbecah to attend church against her wishes, which was not in Rebeccah's best interests. The court did not err in granting mother's motion to modify. Finally, we note that no party sought to call Rebeccah as a witness at a hearing, and thus, father's reliance on V.R.F.P. 7(e) is misplaced.

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