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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-039

AUGUST TERM, 2010

Jasmine Silver	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Trevor Ayer	}	DOCKET NO. 367-5-07 Cndm
		Trial Judge: Matthew I. Katz

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

Father appeals pro se from the family court's order that denied all pending motions in this contentious post-divorce custody dispute. We affirm.

The parties divorced in July 2006. They have a son who was born in November 2002. In the final divorce order, the court awarded mother sole legal and physical parental rights and responsibilities. The court found that mother had been the child's primary care giver, and that she was a capable, devoted mother who had met all of the child's needs. The court also found that father loved the child and that father and son had a good relationship. At the time of the final order, however, the parties had a tense relationship and numerous difficulties had arisen in connection with parent-child visitation. The court found that father had physically and verbally abused mother in the past and that mother was concerned that visitations be safe. Father faulted mother for missing visits, and believed that mother had denied him telephone access to the child and was trying to shut him out of the child's life. The court found mother's behavior inconsistent with father's allegations, and it expressed its concern about father's level of anger toward mother and his inability to take full responsibility for prior abuse. The court noted the existence of another issue involving the child's name. The child's legal name was Zion, but mother called him Morgan.

As to parent-child contact, the court found that mother had legitimate safety concerns about being forced to encounter father who had abused her so many times in the past and who remained so deeply angry with her. Nonetheless, supervised visitation did not appear warranted because once parents were apart, there was strong evidence that father could have safe and happy parent-child contact. The court thus awarded father contact on Wednesday evenings and on three Saturdays per month (two of which included overnight contact), with transitions to occur at the Burlington police station. The order also called for regular telephone contact between father and child.

Numerous post-judgment filings followed. In August 2009, father moved to modify parent-child contact and parental rights and responsibilities. Shortly thereafter, mother moved to modify parent-child contact. Father later moved for a forensic evaluation. Following a status

conference, the motions were scheduled to be heard in December 2009. The court did not swear the parties in at the December 2009 hearing, although it allowed both parties to speak about their concerns. The court issued a written order in December 2009 denying all pending motions.

In its order, the court explained that father sought custody of the child and a forensic evaluation to further that end, while mother sought to limit father's time with the child and to impose supervised visits on him. The court noted that the parties had great animosity toward one another and could not even agree on the child's name. Mother called the child Morgan, and it found that, at this point, everyone but father probably addressed him by that name. Father complained that mother denied him visitation, which he documented in a four page "log." The court found that the log actually suggested omitted visits had become less of an issue than they had been in the past. The court discussed the various other issues raised by the parties, including father's access to the son's counselor, father's attendance at the child's sporting events, and father's ability to help the child with his homework. The court stated that while mother suggested there had been no substantial, unanticipated change in circumstances, her conclusion probably overlooked the obvious and substantial level of alienation that persisted and that she was attempting to transfer to the child. Having said that "such an unfortunate change may well exist," however, the court also stated that mother was "apparently not a bad parent." The child's daily needs were being met, and mother provided a relatively stable home, food, and clothing for the child. Moreover, the child appeared to be doing well generally, although he had developed some anxiety-related issues. The court stated that if parents truly cared about the child more than their hatred of one another, they would work to reduce tension and put the child first. The court thus denied all pending motions. This appeal by father followed.[*]

On appeal, father complains that the court failed to swear the parties in and it did not allow him to present evidence. He states that mother got to speak for a longer period than he did. He also takes issue with the court's statement that, at this point, everyone probably refers to the child as Morgan. Additionally, father argues that the court made a finding on the record that there was a substantial, unanticipated, change in circumstances, which he alleges was echoed in the court's order. He also maintains that the court had no evidence from which to find the child was doing well generally.

We find no basis to reverse the court's decision. As we have often repeated, the court may modify a parental rights and responsibilities order upon a showing of real, substantial, and unanticipated change of circumstances where the modification is in the children's best interests. 15 V.S.A. § 668. The family court has discretion in determining if the moving party has established a change of circumstances. Meyer v. Meyer, 173 Vt. 195, 197 (2001). The moving party bears "a heavy burden to prove changed circumstances, and the court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated

[*] We note that while this appeal was pending, mother filed a motion to modify parent-child contact, and father filed an emergency motion for temporary relief and a motion to modify parental rights and responsibilities. The emergency motion was denied, and the remaining motions were set for a hearing. A hearing was held on August 3, 2010, and it is scheduled to be completed in September.

change of circumstances exists." Spaulding v. Butler, 172 Vt. 467, 476 (2001) (internal quotation marks and citation omitted).

As an initial matter, father did not object to the way in which the hearing was conducted until the close of the proceedings. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). We note, moreover, that the family court need not hold an evidentiary hearing every time a motion is filed, nor is the court required to make findings where they are not requested by any party. See V.R.C.P. 52(a). We conclude that the court acted within its discretion in denying father's motions here. Although the parties here were not sworn in, the record shows that each party was provided ample opportunity to present his or her case in summary form. Father did offer evidence to the court that chronicled visits that he alleged were missed. The court reviewed this document, and found that it showed there were fewer missed visits than in the past. Father's suggestion that the court acted unfairly by allowing mother additional time to speak is without merit. The court addressed the concerns raised by each of the parties in its order, including father's attendance at the child's sporting games and his ability to speak with the child's therapist. The court's statement that everyone but father "probably" refers to the parties' child as "Morgan" is harmless error, if error at all because it was not relied upon by the court to the father's prejudice in formulating its order. The court did not make a finding on the record that there was a substantial, unanticipated, change in circumstances, as father argues, nor did make such a finding in its written order. Even if there was such a finding, the court also stated that mother was meeting the child's needs and that she was a good parent. While father believes the child would be better off with him, the court concluded otherwise. It found father's arguments insufficient to warrant modification of the existing custody and visitation order, and it did not err in so concluding. We note, moreover, that father appears to be receiving the precise relief sought in this appeal. The docket entries indicate that the family court is in the process of conducting an evidentiary hearing on father's most recent motion to modify.

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