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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-383

APRIL TERM, 2017

Sarah (Whitaker) Kessler	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Family Division
	}	
	}	
David Whitaker	}	DOCKET NO. 14-1-13 Cndm
		Trial Judge: Kristin K. Schoonover

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

Father appeals the court's order modifying the parent-child contact schedule of the parties' final divorce order. Father argues that the court erred in modifying the contact schedule because he claims it reduces his time and allows mother to schedule activities for the children within his time. In addition, Father claims that the court deprived him of a formal calculation of child support. We affirm in part and remand in part.

The parties were divorced in September 2013. They have two children, born in 2008 and 2010. Under the terms of the final divorce order, mother had sole legal parental rights and responsibilities and the parties shared physical parental rights and responsibilities. Father had parent-child contact on a two-week schedule, seeing the children Wednesday and Thursday nights one week and Tuesday, Friday, Saturday, and Sunday nights on the alternating week. This gave father six overnights and two weekend days out of the fourteen days. The parties shared contact equally during summer vacation. Subsequently, both parties relocated from South Burlington. Father now lives in St. Albans and mother in Colchester. Due to these moves, in 2014, by joint agreement, the parties modified the parent-child contact agreement to lessen the number of transitions so that father would have the children from Friday to Monday morning three weekends per month. In February 2016, father changed the schedule back and mother acquiesced because the 2014 modification was not memorialized in writing.

In April 2016, mother moved to modify parent-child contact, arguing that the schedule was confusing, required too many transitions for the children, and interfered with the children's ability to participate in extracurricular activities. At the time, the parties' children were in third grade and kindergarten. Mother proposed that father have the children Wednesday through Monday morning every other week. Father argued that the children's activities interfered with his time and that some activities were too late in the evening. He proposed to have the children every other Monday to Sunday.

The court found that there was a change of circumstances sufficient to modify the contact schedule insofar as parents were no longer residing in the same town and the children are now in school and have various activities. Father agreed that the current schedule was not working. In assessing the children's best interests, the court found that the children are not overscheduled and are generally happy and active. The court further found that mother's approach would allow the children to participate in their activities and yet have meaningful contact with father and modified the contact schedule to give father contact every other Wednesday to Monday. The court explained that this was more time with father than he was getting under the parties' 2014 agreed-on schedule. The court further clarified that each parent was responsible for paying for activities scheduled for the children during their time and any daycare used during their time. The court left unmodified the provision giving equal contact during the summer. Father appeals.

On appeal, father argues that the modification was in error because it reduced his parent-child contact and this reduction was done to accommodate the extracurricular activities that were scheduled by mother. The trial court is granted deference in establishing parent-child contact. Chickanosky v. Chickanosky, 2012 VT 52, ¶ 17, 192 Vt. 627 (mem.). "We view the findings in the light most favorable to the prevailing party, and only reverse if the court exercised its discretion upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." Id. (quotation omitted). In establishing a contact schedule, "the best interests of the child are paramount." Id. ¶ 19.

The court's decision regarding the contact schedule was within its discretion. Under the new contact schedule father has the children for five overnights and two weekends in a fourteen-day period. Although this is one less overnight than in the original order, it still gives father a significant amount of time with the children and it is more contact than he was exercising from July 2014 to February 2016.* Further, the court's findings indicate that the decision was based on appropriate considerations of the children's best interests and not motivated solely by an attempt to accommodate extracurricular activities. The court found that this schedule would lessen the number of transitions, which was important due to the distance between the parties, and also provide father with a meaningful amount of time. The court also considered how to best accommodate the children's changing schedule as they are now in school and have outside activities. This was an appropriate consideration of the children's best interests. See 15 V.S.A. § 665(b)(3), (4) (including in best-interests factors parent's ability to meet child's developmental needs and child's adjustment to school and community).

Father asserts that the evidence does not support the court's findings that the children were not overscheduled and that the 2013 order was too confusing and had too many transitions for the

* Father makes several factual assertions regarding why the contact schedule was initially revised, and claims the change was not voluntary on his part. Because father has not ordered a transcript of the evidentiary hearing, we are unable to review the sufficiency of the court's finding that the original schedule was modified "by joint agreement." See State v. Gadreault, 171 Vt. 534, 538 (2000) (mem.) (holding that appellant's failure to provide transcript on appeal precluded review of claims); In re S.B.L., 150 Vt. 294, 307 (1988) ("[A]ppellant must bear the consequence of the lack of a transcript of the evidence.").

children. He asserts that mother enrolled the children in an excessive number of after-school activities, claiming there were nine within a five-month period. Father has failed to produce a sufficient record for this Court to determine whether the court abused its discretion in making these findings. The appellate rules require an appellant to produce a transcript of all parts of the proceedings relevant to the issues the appellant raises on appeal. V.R.A.P. 10(b)(1) (requiring appellant to produce transcript "of all parts of the proceedings relevant to the issues raised by the appellant and necessary to demonstrate how the issues were preserved"). Because father did not order a transcript, he has waived any challenge to the sufficiency of the court's findings. See Gadreault, 171 Vt. at 538.

Father also argues that the court erred in allowing mother to schedule activities for the children during his parent-child contact time based on language in the amended order stating that father should pick up the children at dance class on Wednesdays at 6:30 p.m. or after school if there are no scheduled activities. Father relies on Miller v. Smith, 2009 VT 120, 187 Vt. 574 (mem.), to support his argument that the custodial parent cannot control activities during time allotted to the noncustodial parent. In that case, this Court held that the trial court acted within its discretion in concluding that the mother could not require the father to bring their child to after-school activities she scheduled during father's time. We explained that "to allow the custodial parent to schedule the child for time that is supposed to be spent with the noncustodial parent ignores the legislative mandate that children should continue 'to have the opportunity for maximum continuing physical and emotional contact with both parents.' " Id. ¶ 7 (quoting 15 V.S.A. § 650).

Here, there is nothing in the modified order that allows mother to dictate how father spends his parent-child contact time with the children. The order states that father's time begins on Wednesday either after school or after dance class. The court acted within its discretion in setting father's pick-up time to accommodate this existing activity. Father still has a large block of time with the children and retains control over the children's activities during their time with him. The order also requires each parent to transport the children to activities scheduled during their time, but does not allow the other parent to schedule new activities during the other parent's time.

Finally, father contends that the court violated father's rights to a formal recalculation of child support. Father asserts that the existing child-support order from 2013 requires mother to pay for childcare expenses and that the parent-child contact order modified this responsibility by stating: "Each parent is responsible for paying for any activities that they schedule for the children during their time, and for any daycare they use during their times with the children." Mother does not contest that the financial implications of the modified contact schedule should be brought before a magistrate.

We agree with the parties that a hearing on child support is necessary and the parties assent to this. The existing child support order calculated father's obligation by factoring childcare expenses into mother's expenses. Therefore, father's child support obligation may be affected if he is obligated to pay daycare expenses directly. Father's obligation may also change because the percentage of time the children spend with each parent has been modified. Therefore, on remand, the court should order that the case be set for a child support modification hearing. See 15 V.S.A.

§ 668(b) (stating that "[w]henever a judgment for physical responsibility is modified, the Court shall order a child support modification hearing to be set and notice to be given to the parties").

The order modifying parent-child contact is affirmed. The matter is remanded. On remand the court shall order a child support modification hearing be set. That portion of the order requiring father to pay child care expenses is stayed until the modification hearing.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Superior Judge,
Specially Assigned