

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-119

JUNE TERM, 2003

	}	APPEALED FROM:
	}	
Trudy Manning, M.M., Juvenile ,	}	Lamoille Family Court
Office of Child Support	}	
	}	
v.	}	DOCKET NO. 34-3-00 Ledm
	}	
Louis LaFountain	}	Trial Judge: Edward J. Cashman
	}	
	}	

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

Father appeals pro se from a family court decision denying his motion to modify parental rights and responsibilities. He contends the court erred in: (1) failing to find a real, substantial, and unanticipated change of circumstances; (2) denying his proffers of evidence; (3) denying him an opportunity to make a meaningful presentation of evidence; (4) making findings not supported by the evidence, and conclusions not supported by the findings; and (5) failing to consider the factors set forth in 15 V.S.A. ' 665(b). We affirm.

The facts may be briefly summarized. The parties have a daughter, who was eleven years old at the time of these proceedings. The parties were never married. In August 2000, the family court entered an interim order, based on a stipulation between father and mother, providing that mother was to have sole legal and physical parental rights and responsibilities. The stipulation also stated that the parties agreed A that after 1 year from the date of this stipulation and order either party upon filing a written request can petition the court to revisit legal rights and responsibilities without a showing of a real substantial change in circumstances.@ In October 2000, the court entered a final order, based upon a stipulation between the parties, which provided that the interim order A shall be the only custody order in effect@ with a number of modifications, including provisions relating to parent-child contact, mother= s continued counseling with Lamoille County Mental Health, a provision ensuring that the child remain in counseling, a provision relating to telephone contact, and prohibitions against the use of corporal punishment, removing the child from the state, making negative comments about the other party, and using drugs or alcohol in the child= s presence.

Father later moved to modify parental rights and responsibilities, seeking sole custody. The court eventually ordered a bifurcated hearing on the motion, with the initial hearing in October 2002 limited to the question whether there had been a real, substantial and unanticipated change of circumstances. Father appeared pro se at the hearing. The court initially ruled that it was not bound by the stipulated waiver on the question of whether there had been a real and substantial change of circumstances. Father then testified on his own behalf. In response to questioning by the court, father explained that his motion was based on mother= s alleged failure to comply with provisions of the October order. Father cited the provision relating to drug and alcohol use, but when asked if there were incidents where mother had violated this provision, he responded, A No.@ Father then mentioned the provision relating to the child= s attendance at counseling, but acknowledged that mother was bringing her to counseling. Father then referred to the provision concerning mother= s continued attendance at counseling, but acknowledged that he had no way of knowing whether or not she was in compliance.

Father continued his testimony, citing the provision relating to corporal punishment and stating that the child often

appeared at his home with bruises which she attributed to play. He offered no evidence that the bruises were the result of corporal punishment or physical abuse by mother. Father concluded with an allegation that mother had violated the provision prohibiting either parent from making negative comments about the other in the child's presence, but offered nothing to substantiate the claim other than a hearsay statement by the father's twelve-year old niece and a purported tape recording of a conversation between the child and mother which he did not offer into evidence. Finally, father indicated that he had brought his mother and sisters to testify about his good character and parenting skills.

Father did not have an opportunity to call the witnesses. Instead, the balance of the hearing was devoted to issues relating to parent-child contact and disputes over the transfer point and logistics. At the conclusion of the hearing, the court modified father's visitation schedule, and found that father had failed to adduce evidence of a real, substantial and unanticipated change of circumstances. The court issued a written decision denying father's modification motion in February 2003. This appeal followed.

Before the court can modify a custody order, it must first find that there has been a real, substantial and unanticipated change of circumstances. 15 V.S.A. ' 668. If that threshold is met, the moving party must then show that modification of parental rights and responsibilities is in the best interests of the child. *Id.*; Gazo v. Gazo, 166 Vt. 434, 440 (1997). We have held that a custody order may attempt to define a change of circumstances for purposes of conferring jurisdiction on the court in a future modification proceeding only in very limited circumstances. Gazo, 166 Vt. at 440. We have identified two required elements for such an order: first, where it sets a reasonable benchmark to determine changed circumstances; second, where the parties have stipulated about their expectations concerning their living arrangements and the effect of a change on these arrangements in a co-parenting situation. *Id.*; see deBeaumont v. Goodrich, 162 Vt. 91, 96 (1994).

The provision in the order here did not establish a reasonable benchmark to determine changed circumstances. It merely provided that either party may seek to modify legal parental rights and responsibilities after one year without establishing the threshold change of circumstances. This was plainly inadequate under Gazo. Accordingly, there was no valid waiver of the statutory requirement.

Father also contends the court improperly rejected his offers of proof and denied him an opportunity to make a meaningful evidentiary showing. The record evidence reveals, however, that father was afforded ample opportunity to testify and present evidence on the issue of whether there had been a real, substantial and unanticipated change of circumstances. Although he alleged that mother had willfully and continually failed to comply with provisions of the parties' agreement, his testimony failed to substantiate that claim, and he offered no other evidence except, perhaps, the testimony of his mother and sisters as to his own good character and parenting skills. This was not relevant, however, to the threshold question of whether there had been a real, substantial and unanticipated change of circumstances. Accordingly, we discern no error.

Father also contends the evidence failed to support the court's findings and conclusions. As noted, however, the record amply supports the finding that father failed to carry his burden of demonstrating a real, substantial and unanticipated change of circumstances. Finally, father contends the court erred in failing to consider the factors set forth in 15 V.S.A. ' 665(b), for determining the best interests of the minor. Absent a threshold showing of changed circumstances, however, the court was not authorized to address this issue. Gazo, 166 Vt. at 440. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned