

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-576

AUGUST TERM, 2006

Sandra L. LeBarron

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APPEALED FROM:

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v.

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Chittenden Family Court

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Scott J. Spence

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DOCKET NO. 948-11-98 Cndm

Trial Judge: Geoffrey W. Crawford

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

Mother appeals the family court=s order modifying parent-child contact. We reverse.

This is the second appeal arising from the parties= divorce proceedings. Mother and father have one child from their marriage. When the parties were divorced in 1999, they both lived in Vermont. At that time the parties stipulated that mother would have sole parental rights and responsibilities for child, but that parent-child contact would be split more or less evenly between mother and father. Then, in 2003, mother moved from Vermont to Maryland. Accordingly, she filed a motion to modify the parent-child contact order to accommodate the new situation. Father filed a motion to modify parental rights and responsibilities, arguing that mother=s move to Maryland was a Areal, substantial, and unanticipated change in circumstances@ that allowed the family court to revisit the question of awarding parental rights and responsibilities to father instead of mother. See 15 V.S.A. ' 668 (family court has jurisdiction to modify parental rights and responsibilities where there has been a Areal, substantial and unanticipated change of circumstances@ since the original order).

The family court determined that mother=s move was not a Areal, substantial, and unanticipated change of circumstances,@ and denied father=s motion to modify parental rights and responsibilities on that basis. At the same time, the court granted mother=s motion to modify the parent-child contact schedule in light of the move. Father appealed the family court=s decision on the motion to modify parental rights, but did not appeal the parent-child contact order. On review, we determined that mother=s move to Maryland, in combination with the other circumstances present in the case, did rise to the level of a Areal, substantial, and unanticipated change in circumstances@ such that the family court could revisit the allocation of parental rights and responsibilities. Hawkes v. Spence, 2005 VT 57, & 19, 178 Vt. 161.

The matter was remanded for that purpose. By the time of the remand hearing, however, father had decided to withdraw his motion to modify parental rights and responsibilities. In light of this development, mother sought to cancel the remand hearing, arguing that the issue of parent-child contact should not be revisited because father did not raise the issue in the first appeal. The family court determined to go forward, reasoning that the issues of parental rights and responsibilities and parent-child contact were inextricably linked. The family court further concluded that the remand from this Court was not limited to the issue of parental rights and responsibilities; rather, the remand required the family court to conduct a broad review of the best interests of the child. Following the hearing, the family court modified the parent-child contact order, including assigning

additional responsibility to mother to pay for child=s transportation to and from Vermont. Mother filed this appeal.

Mother presents a number of arguments on appeal, including that father is collaterally estopped from challenging the parent-child contact order, the family court lacks jurisdiction to revisit the parent-child contact order, that she did not receive notice of the subject of the remand hearing, and that the modifications are not in the child=s best interests. We conclude that resolution of the appeal turns on the application of collateral estoppel. Accordingly, because application of collateral estoppel is a matter of law, our review is de novo. See State v. Pollander, 167 Vt. 301, 304 (1997) (application of collateral estoppel to set of facts is question of law reviewed de novo). That doctrine bars a party from relitigating an issue Awhich was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.@ Sheehan v. Dept. of Emp. & Training, 169 Vt. 304, 308 (1999). Here, father did not appeal the parent-child contact order, which he was required to do to preserve his rights on the issue. See id. at 305 (holding that collateral estoppel precluded party from relitigating issue where party failed to pursue appeal on the issue). Father was a party to the earlier action, the issueCthe proper allocation of parent-child contactCis identical, the issue was decided on the merits in a final judgment, and the issue was necessary to the resolution of the action. In other words, father had a full and fair opportunity to litigate the issue in the first proceeding. See id. at 309 (applying collateral estoppel where party had full and fair opportunity to raise its arguments in first proceeding).

Father does not argue that the elements of collateral estoppel are not present, but instead asserts that our remand in Hawkes mandated that the family court reconsider parent-child contact. Specifically, father arguesCand the family court agreedCthat our remand in the first appeal required the court to reconsider child=s best interests, generally, under the current circumstances.* There, we remanded Afor the court to consider the best interests of the child under the parties= current circumstances.@ This mandate, however, must be considered in the context of our substantive holding earlier in the opinion, stating: A[W]e see little point in delaying matters further by having the family court hold another change-of-circumstances hearing before addressing the best-interests prong of 15 V.S.A. ' 668 under the parties= current circumstances.@ Hawkes, 2005 VT 57, & 19. In other words, because we had decided in the appeal that there had been a Areal, substantial, and unanticipated change in circumstances,@ we remanded solely on the second prong of the parental rights and responsibilities analysis: the best interests of the child. It is this analysis to which the mandate reversing the matter refers. When father withdrew his motion to modify parental rights and responsibilities, the remanded issue became moot and left nothing for the family court to address.

The family court also relied on the language from Hawkes in which we stated: AIn Hawkes, we reverse the family court=s decision and remand the matter for the court to consider the best interests of the child in light of the parties= motions to modify.@ Id. & 1. The family court emphasized that the use of the plural term Amotions@ to conclude that both the parental rights and responsibilities and parent-child contact motions were to be addressed. The fact that a plural term was used in describing the holding does not alter the fact that the parent-child contact order was not appealed, was not before this Court, was not ruled upon by this Court, and was therefore not a subject of the remand.

Because the appeal is resolved on the basis of collateral estoppel, we need not reach mother=s other arguments for reversal.

Reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

* Father also points to our statement in Hawkes that the reversal effectively moots father's argument that the family court erred by applying a different standard for changed circumstances in the context of parental right and responsibilities versus the context of parent-child contact. This statement does not constitute a ruling on the merits of the family court's parent-child contact order and did not revive issues related to the merits of that order for purposes of remand.