

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-020

AUGUST TERM, 2008

Eric Mayhew	}	APPEALED FROM:
	}	
v.	}	Windham Family Court
	}	
Christine Mayhew	}	DOCKET NO. 3-1-00 Wmdm

Trial Judge: John P. Wesley

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

Father appeals the family court’s order denying his motion to modify parental rights and responsibilities with respect to the parties’ son. Father argues that the court abused its discretion by not holding an evidentiary hearing before determining that he had failed to meet the threshold requirement of showing a real, substantial, and unanticipated change of circumstances. We reverse the court’s decision and remand the matter for an evidentiary hearing on whether changed circumstances exist and, if so, whether the best interests of the child warrant transferring sole legal parental rights and responsibilities to father.

The parties’ son was born in January 1995, and the parties were divorced in December 2000. The final divorce order adopted the parties’ stipulation establishing shared legal and physical rights and responsibilities, with each parent having the child for approximately equal time. In July 2004, mother moved to modify parental rights after father was charged with several crimes based on an incident in which he caused damage to a neighbor’s home. Mother’s motion was denied in May 2005 following an evidentiary hearing in which it was established, among other things, that the incident was an isolated event caused by father mixing alcohol with a prescribed drug and that there was no concern for the child’s safety in father’s care.

In September 2007, father moved to modify parental rights, asking that the family court award him sole legal rights and responsibilities. In an accompanying affidavit, father stated that the parties had ongoing disputes about fundamental issues affecting their son’s mental well-being, and that wife refused to cooperate in attempts at mediation. Specifically, father stated that mother refused to permit therapeutic mental health treatment for the child despite the recommendation of therapists, and also refused to send the child to a school where the child could thrive. Expressing doubt as to whether father had raised any circumstances significantly distinct from those addressed in the previous modification proceeding, the family court gave

father an opportunity to supplement his affidavit in support of his motion. Father filed a supplemental affidavit stating that the parties' child had manifested serious mental and emotional conditions, including rolling into a fetal position and asking for help. Father further stated that the child had been diagnosed with an anxiety disorder with some depressive tendencies, and that the examining doctor had opined that the child's emotional condition was caused by the parties' inability to communicate effectively and by their conflicting views about the child's upbringing. Father also noted that the child was doing poorly in school and expressed concerns about mother's refusal to supervise the child's schoolwork. Father contended that the parties had essentially stopped all effective communication concerning their son, and that the best way to address the boy's problems would be to transfer sole legal parental rights and responsibilities to one parent, preferably him.

After receiving father's supplemental affidavit, the court continued to harbor doubts as to whether his motion justified further proceedings. In December 2007, the court held a status conference on father's motion. Mother appeared pro se, while father was represented by counsel. The court stated at the onset of the hearing that it wanted to hear from mother and assess whether an evidentiary hearing was necessary to determine whether the threshold showing of changed circumstances had been satisfied. After correcting the court's statement that the earlier motion to modify had been filed by father, father's attorney stated that the parties' ongoing animosity was tearing up the child, who was literally crying out for direction and structure in his life. The attorney stated that the boy's grades had slipped considerably and that he had behavioral problems at school. Upon the court's query, the attorney stated that he could not be sure if the behavioral problems were attributable to mother, but that mother certainly was not as responsive as father to the child's school needs. The attorney reiterated that one parent should be solely responsible for making critical decisions about the child's health and education needs because the child was caught between two parents who could not agree on, or even communicate about, his upbringing. After the attorney conceded that father did not want to alter the fifty-fifty child-parent-contact arrangement or transfer the child to another school in the middle of the school year, the court concluded that a change in legal rights and responsibilities would have little practical impact. The court then turned its attention to mother, who acknowledged that the parties' inability to communicate was tearing their child apart. Mother stated that the parties were unable to co-parent, and that she was effectively co-parenting with father's wife.

Near the end of the status conference, the court reiterated its belief that assigning legal rights and responsibilities to one parent would not change anything as long as the physical contact arrangement remained the same. The court expressed doubts about the benefit of enmeshing the child in another full-scale custody battle, which would most likely make him all the more anxious. Four days after the status conference, the court filed a decision denying father's motion based on his failure to allege circumstances sufficient to satisfy the threshold requirement for modifying parental rights and responsibilities. The court stated that father's "concessions" at the status conference made it plain that there were no disputed facts sufficient to meet the threshold requirement of showing changed circumstances and to reopen an inquiry into the child's best interests. The court noted that father was not seeking to alter the parties' pattern of sharing physical rights and responsibilities, was not suggesting that the parties' child be moved to a different school at that time, and had failed to make a proffer indicating that the

child's mental-health condition was critical and untreated. The court concluded that father had done nothing more than restate the parties' longstanding and ongoing communication problems.

On appeal, father argues that the court was obligated to hold a hearing and take evidence to determine whether he had met the threshold requirement of showing changed circumstances. Father contends that the court mistakenly assumed that he had filed the previous motion to modify, and erroneously determined that the issues he raised in his current motion had been fully vetted at the proceeding on the previous motion. According to father, he would have presented evidence demonstrating that the parties' child is being harmed because of the parties' lack of communication and conflicts over education, mental health, and transportation issues, and that he is the parent better suited to guide the child in those matters.

Upon review of the record, we conclude that the family court abused its discretion by denying father's motion without holding an evidentiary hearing. Sundstrom v. Sundstrom, 2004 VT 106, ¶ 29, 177 Vt. 577 (mem.) ("The family court has discretion in determining if the moving party has established a change of circumstances."). The family court may modify parental rights and responsibilities upon a showing of a real, substantial and unanticipated change of circumstances if modification is in the child's best interests. 15 V.S.A. § 668. Although the moving party has a heavy burden of showing changed circumstances, a motion seeking to modify a decision-making arrangement does not have as high a threshold requirement as a motion seeking the physical dislocation of a child. Gates v. Gates, 168 Vt. 64, 68 (1998). "[T]he court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated change of circumstances exists." Sundstrom, 2004 VT 106, ¶ 29. Generally, the trial court should give the moving party an opportunity to present evidence unless the court finds that there is no genuine issue as to any material fact. See V.R.C.P. 78(b)(2). "Rule 78(b)(2) does not require a hearing when what is alleged, even if proven, would not change the result." In re D.B., 161 Vt. 217, 222 (1993). Our standard for reviewing a trial court's decision not to hold a hearing "is narrow and depends on an affirmative showing that the court abused or withheld its discretion." Id.

Here, father averred that the parties' son was being emotionally harmed by their lack of communication, citing a psychiatrist's opinion that the boy's anxiety disorder was caused by the parties' conflicting views on his upbringing. Father acknowledged that mother had eventually agreed to the boy receiving counseling and that he would not have the boy transfer schools in mid-year despite his misgivings about the school, but these facts do not necessarily undermine father's position that the parties' animosity and lack of communication had reached a point at which it was harming their child. Nor does the fact that father wanted to retain the parties' fifty-fifty parent-child-contact arrangement necessarily demonstrate that a transfer of legal rights and responsibilities would have no impact on the family's situation. In effect, the court weighed "evidence" being submitted informally at a non-testimonial status conference, mostly by father's attorney, before concluding that a transfer of legal rights and responsibilities would not improve the situation.

We conclude that father made a sufficient proffer to warrant an evidentiary hearing on whether changed circumstances exist and, if so, whether the best interests of the child warrant a transfer of sole legal parental rights and responsibilities to one parent. Although the parties' communication difficulties were certainly longstanding, father's motion claimed that those

difficulties had risen to a level at which they were having a serious impact on their child's mental health. Father neither withdrew this claim at the status conference, nor made concessions suggesting that it was not true. Indeed, mother agreed with this assessment at the status conference. Moreover, although the 2005 order in response to mother's prior motion to modify noted the parties' communication difficulties, the order also noted the lack of evidence of animosity between the parties. The fact that the parties had always had problems communicating does not mean that the parties' continued communications problems that were having a serious impact on their child's mental health cannot amount to a real, substantial and unanticipated change of circumstances.

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice