

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2019-188

JANUARY TERM, 2020

Thomas DiZoglio* v. Zara DiZoglio	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 119-5-17 Wmdm
		Trial Judge: Katherine A. Hayes

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

Father appeals the family division’s denial of his motion to modify parent-child contact to grant him unsupervised contact with the parties’ two children. We reverse and remand the matter for the court to reconsider whether father has met the threshold requirement of showing changed circumstances warranting reconsideration of the children’s best interests.

The parties are the parents of two sons born in March 2007 and April 2009. They were living in California at the time they divorced, but mother was planning on moving out of state with the parties’ two boys. The April 2015 final divorce order adopted the parties’ proposed order following a court-ordered custody evaluation triggered by father’s substance abuse, particularly his heroin addiction. The California order awarded the parties joint legal custody, mother physical custody, and father parent-child contact “supervised by mutually agreed upon family members until Father has one year (12 months) of consecutive clean random alcohol and drug testing results.” The order further provided as follows:

Father shall register with a program that will cover him for no less than one year twice a month random alcohol and drug testing. The testing must be clean for a 12-consecutive month period before unsupervised visitation will begin. Failure to test as Court ordered shall be equivalent to a positive test result. As of the date of this order (April 2015), Father is considered to have clean tests since January 2015, and therefore, if Father meets all conditions for unsupervised visitation and tests clean from the present date until December 31, 2015, Father shall commence unsupervised visitation effective January 1, 2016. Even if father tests clean between now and December 31, 2015, if there is other evidence that he has been drinking or using drugs between now and December 31, 2015, his visits shall remain supervised. In the event that Father tests dirty, fails to test as court ordered, or other evidence arises showing that he has used drugs or alcohol (such as DUI or photos of father

drinking), then visitation shall remain supervised until Father has 12 months of clean tests.

The order stated that if father was unable to find any location that provided random drug testing, “he shall inform Mother and Mother shall assume responsibility for notifying Father to take random tests two times per month.” The order also required father to have a valid driver’s license in his state of residence before unsupervised visits could begin. Finally, the order stated that it “may be modified only upon the written stipulation of the parties or a showing of a substantial change of circumstances.”

Mother moved with the children to Vermont in the summer of 2015. Father moved first to Rhode Island in the fall of 2015, and then, within two or three months, to Vermont within sixty miles of where mother and the children were living.

In May 2017, father filed a motion to modify his parental rights and responsibilities by allowing unsupervised parent-child contact. He alleged the following changed circumstances that warranted reconsideration of the children’s best interests: (1) the supervised visitation arrangement was no longer viable because his father, the main supervisor of his parent-child contact, had been diagnosed with prostate cancer and could no longer supervise the visits to the extent he had before; (2) mother had habitually impeded his contact with the children; and (3) after years of clean drug tests, counseling, steady employment, and a stable living situation, unsupervised contact was in the children’s best interests. Mother opposed the motion, and a hearing began on February 20, 2018. Father testified and presented the testimony of his father and a professional supervisor who had been supervising contact between father and the children every two or three weeks for two or three hours since the previous October. At the conclusion of father’s presentation of evidence, during which father acknowledged not complying with the California order’s drug-testing requirements with respect to alcohol, mother moved for the court to deny father’s motion to modify parent-child contact.

In a July 2018 order, the family division concluded “that there is no basis whatsoever to modify the order regarding the requirement of 12 months of being clean and sober before the father may have parent-child contact.” The court explained that father had “repeatedly violated” the explicit requirement in the California order that, in addition to not using illicit drugs, he “not drink alcohol at all, including a glass of wine or an occasional beer . . . for one full year before he will be entitled to unsupervised parent-child contact.” The court also concluded, however, that the hearing needed to be reconvened because father had “presented a prima facie case as to the issues of supervision, and availability of appropriate and safe supervisors, and as to the issue of telephone and Skype contact with the boys.”

At the second day of hearing on February 11, 2019, mother presented evidence in response to father’s claim that his parent-child contact had been reduced because of mother’s actions and changes in the availability of family supervisors. In a May 2019 order, the court denied father’s motion to modify, concluding that father had failed to present evidence demonstrating that his parent-child contact had been significantly impacted by mother’s actions or the lack of availability of family supervisors. The court stated its belief, however, that “father is ready, willing and able to exercise [regular alternating overnight weekend] contact, if the mother will permit it.” “The court anticipate[d] that shortly, if not already, the father will have completed a full year of being free of alcohol, and will therefore be free from any supervision requirement of any kind, largely mooted the issues raised in this current motion.”

On appeal, father argues that the family division erred by: (1) refusing to consider whether his long-term cessation of heroin use was a real, substantial and unanticipated change of circumstances; and (2) denying his motion to modify based solely on his non-compliance with the underlying California order. Father does not contest the court's findings in its May 2019 order concerning mother's actions and the availability of supervisors; rather, his arguments exclusively challenge the court's determination in its July 2018 order that there was no basis to modify the requirement that father be alcohol and drug free for one full year before he is entitled to unsupervised parent-child contact. Noting the Legislature's declared policy of maximizing post-divorce parent-child contact "unless direct physical harm or significant emotional harm to the child[ren] or a parent is likely to result from such contact," 15 V.S.A. § 650, father argues that the court should have considered whether his long-term cessation of heroin use—and the concomitant absence any potential danger he posed to the children—constituted a change of circumstances that warranted revisiting the children's best interests. According to father, the undisputed record demonstrates that: (1) he had not used heroin for several years, since before the California final divorce order issued; (2) the only potential danger he posed to the children was exclusively from his long-since-ceased heroin addiction; and (3) the only time he ever drank alcohol in excess was years ago while his divorce was pending. Father contends that the court erred by refusing to even consider granting him unsupervised contact based solely on the fact that he had not complied with all the drug and alcohol requirements in the California order. He asserts that the court was required to explain why his long-term cessation of heroin failed to satisfy the threshold requirement of showing changed circumstances.

In response, mother argues that the family division acted well within its broad discretion in determining that father failed to satisfy that threshold requirement, given father's failure to abide by the California order's testing and abstinence requirements, which addressed the principal concern at the time of the divorce—father's substance abuse. She asserts that these requirements, to which the parties had stipulated, demonstrate the parties' anticipation that father would either satisfy the requirements and commence unsupervised parent-child contact or fail to satisfy the requirements and thus be barred from unsupervised parent-child contact.

"[U]pon a showing of real, substantial and unanticipated change of circumstances, the court may annul, vary, or modify a [child custody or support] order . . . if it is in the best interests of the child, whether or not the order is based upon a stipulation or agreement." *Id.* § 668(a). Accordingly, "[t]he court must make a threshold finding of a real, substantial and unanticipated change of circumstances before it can examine the merits of the parties' claims and reconsider the best interests of the child[ren]." *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 28, 177 Vt. 577 (quotation omitted). The moving party has the burden of showing changed circumstances, but that burden "with respect to a motion to alter parent-child contact is not as high as the heavy burden of showing changed circumstances with respect to a motion seeking a change of custody." *Hawkes v. Spence*, 2005 VT 57, ¶ 20, 178 Vt. 161 (quotation omitted). "The family court has discretion in determining if the moving party has established a change of circumstances." *Sundstrom*, 2004 VT 106, ¶ 29. "[T]here are no fixed standards to determine what constitutes a substantial change of circumstances; instead, the court should be guided by a rule of very general application that the welfare and best interests of the children are the primary concern in determining whether the order should be changed." *Id.* ¶ 28 (quotation omitted).

In this case, the family division essentially ruled in its July 2018 order that, given father's acknowledged failure to fully comply with the final divorce order's explicit conditions for being allowed unsupervised parent-child contact, the court would not consider modifying the order. We owe no deference to the family division on this question, and we conclude that the ruling was in error because the court failed to engage in a change-of-circumstances analysis.

Generally, we have held that the family division “may establish a reasonable baseline against which future claims of changed circumstances can be assessed.” Terino v. Bleeks, 2018 VT 77, ¶ 13, 208 Vt. 65. In this case, the California final divorce order did not indicate what would constitute changed circumstances, but it stated that the order could be modified upon a showing of a substantial change in circumstances. Notwithstanding father’s acknowledged failure to abide by those conditions with respect to alcohol testing and abstinence, the family division should have assessed whether a real, substantial, and unanticipated change of circumstances existed at the time of the hearing on father’s motion to modify sufficient to warrant reconsideration of the children’s best interests, rather than relying solely on the fact father violated the terms of the California order. Changes in parental rights and responsibilities “must be based on real-time determinations of a child’s best interests and variables are simply too unfixed to determine at the time of a final divorce degree what the circumstances of the parties will be at the time a future contingency occurs.” Knutsen v. Cegalis, 2009 VT 110, ¶ 10, 187 Vt. 99. Here, the drug and alcohol requirements were plainly based on the California court’s concern with father’s potential to relapse, posing a potential danger to the children. Because the order was fashioned to address father’s substance abuse, father may be able to show, despite his continued use of alcohol, that there is an unanticipated change in circumstances if he can demonstrate sufficient control with respect to that concern so as not to endanger the children. See Lee v. Oglibee, 2018 VT 96, ¶ 18.

Mother argues, however, that the drug-testing provisions incorporated in the California order based on the parties’ stipulation demonstrate the parties’ anticipation that if father did not fully abide by the provisions, he would not be entitled to unsupervised parent-child contact. See Terino v. Bleeks, 2018 VT 77, ¶ 14 (“For the purposes of § 668, an unanticipated change is one that was unexpected at the time of the divorce.”). As noted above, however, the court failed to engage in the analysis of whether a substantial change in circumstances existed in the first instance, relying solely on a violation of the order. The family division, and not this Court, must assess in the first instance whether there has been a real, substantial, and unanticipated change of circumstances and, if so, whether the children’s best interests warrant awarding father unsupervised contact. See Miller-Jenkins v. Miller-Jenkins, 2010 VT 98, ¶ 11, 189 Vt. 518 (stating that, in considering motion to modify parental rights and responsibilities, the family division is in “unique position as trier of fact . . . to evaluate the witness’ credibility and . . . weigh[] th[e] evidence”). In addressing on remand whether father has satisfied his burden of showing changed circumstances, the court should consider the parties’ current circumstances; accordingly, the court may schedule an additional evidentiary hearing if necessary.

Reversed and remanded for the trial court to conduct a change-of-circumstances analysis before determining whether the children’s best interests need to be more fully examined.

BY THE COURT:

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice