VERMONT SUPREME COURT
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Case No. 2021-041

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

DECEMBER TERM, 2021

Melissa DeGuise-Hendershot** v.	}	APPEALED FROM:
Charles T. Hendershot*	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	CASE NO. 195-8-19 Frdm
		Trial Judge: Robert A. Mello

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

Husband appeals the family division's award of parent-child contact in its final divorce order. Wife cross-appeals the marital property division and spousal maintenance award. We affirm the order below, but remand for the family division to reconsider an issue raised by husband in two related motions to reconsider.

The parties were married for ten years and have two minor children together. They separated in 2018 and wife filed for divorce in August 2019. The court held a final hearing in October 2020 and issued its decision in December 2020. The following facts are drawn from the court's final order.

Wife is thirty-five years old and in good health. She was the primary care provider during the marriage and stayed home to care for the children full-time until October 2016, when she began working thirty hours per week as an insurance agent. Husband works for the Vermont Army National Guard and was the primary breadwinner during the parties' relationship. His work frequently required him to be away from home for long periods. He typically worked from 4:00 a.m. to 6:00 p.m. when he was not away from home. After the parties separated, he obtained a new position within the Guard with more flexible hours. Husband has serious health problems, including emphysema, heart disease, and back and shoulder pain due to a herniated disc. He has a disability rating with the military.

In November 2019, the court issued a temporary order giving the parties shared legal and physical rights and responsibilities for the children. When they separated, the parties attempted to continue to share the marital residence, both to minimize the impact of the separation on the children and because their financial resources could not support two full-time households. At the time of the temporary hearing, it appeared to the court that the parties could cooperate

sufficiently to continue this arrangement while the divorce was pending, with wife occupying the bedroom and husband staying in the basement. If this arrangement didn't work, the parties were to alternate staying in the house with the children one week at a time.

The court found that neither party made a serious effort to follow the temporary order. Husband informed wife that he could not share the house with her and insisted that she leave when it was his week with the children. Wife refused to leave, claiming that husband had violated the order by refusing to even attempt to make the sharing arrangement work. Husband eventually moved out and began staying with his girlfriend or with other friends. The parties agreed that he could have the children every other weekend, but he ended up taking the children for only half of his weekends, partly because of his military duties and partly because he lacked stable housing.

In assessing the statutory factors set forth in 15 V.S.A. § 665(b), the court found that both parents had close and loving relationships with the children and were committed to meeting the children's needs. However, it found that the other relevant factors favored wife. It therefore awarded sole legal and primary physical rights and responsibilities to wife. The court found that it would be in the children's best interests for the children to have as much contact with husband as possible, but that husband's proposed week-on/week-off schedule was not currently feasible due to his lack of stable housing. It accordingly ordered husband to have contact with the children every other weekend.

The court awarded husband approximately sixty percent of the marital property. It ordered husband to pay wife spousal maintenance of $750 per month for five years. This maintenance obligation would terminate automatically if husband lost his income due to disability as determined by the military.

Husband moved to amend the parent-child contact portion of the court's order pursuant to Vermont Rule of Civil Procedure 59. He argued that during the period when he lacked housing, he had been caring for the children during weekday afternoons and returning them at bedtime. He argued that wife submitted a chart at the hearing that showed the parties' existing overnight schedule, inaccurately making it look like husband was only seeing the children on weekends. He argued that he had found suitable housing and that the parties had begun following a week-on/week-off schedule by the time of the hearing. He asked the court to modify its order to indicate that proof of suitable housing would be a sufficient basis to modify the parent-child contact order, or to order a contact schedule that automatically changed upon proof of husband's suitable housing.

The court denied husband's motion, concluding that the evidence presented at the October 2020 hearing did not support his claim that he had stable housing at that time. It stated that if husband found stable housing, that would be a change, but declined to speculate whether it would be sufficient to warrant a change in custody. It issued an order stating that the motion was denied "without prejudice to [husband's] right to file a motion to modify parent-child contact upon obtaining secure suitable housing in the future, if all relevant changes in circumstances then warrant."

Husband then filed a second Rule 59 motion, arguing that he now had suitable housing and that wife refused to negotiate a new parenting schedule.* He argued that he would not be able to seek relief under 15 V.S.A. § 668 because it was anticipated at the time of the divorce that he would obtain stable housing. He asked the court to amend its order to require maximum contact with both parents once husband obtained suitable housing. Before the court had a chance to address husband's second motion, he filed a notice of appeal. The court eventually denied the order, reiterating that husband could file a motion to modify if he obtained suitable housing.

On appeal, husband argues that the court erred in suggesting that his acquisition of suitable housing could be a basis for modifying the parent-child contact order in the future because it was an anticipated change in circumstances. He argues that the court should have amended its order to direct the parties to work out an equal contact schedule once he obtained suitable housing. He further argues that the court abused its discretion in giving him less than fifty-percent contact in the final order despite its findings that the children needed maximum contact with both parents.

We apply a deferential standard of review to decisions regarding parent-child contact. Weaver v. Weaver, 2018 VT 38, ¶ 15, 207 Vt. 236. We will affirm the court's findings if supported by the evidence and its legal conclusions if supported by the findings. DeLeonardis v. Page, 2010 VT 52, ¶ 20, 188 Vt. 94. "The family court has broad discretion in awarding, modifying, or denying parent-child contact, and we will not disturb its decisions unless its discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." Weaver, 2018 VT 38, ¶ 15 (quotation omitted).

We first address husband's challenge to the parent-child contact schedule ordered by the court. Husband refers to the legislative policy "that after parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents." 15 V.S.A. § 650. According to husband, the court's order violates this statutory directive by giving him less contact than mother. Husband also argues that the court failed to explain the reason for its decision.

We disagree that the parent-child contact order violates 15 V.S.A. § 650. The court's order awarded husband contact with the children every other weekend from Friday afternoon until Monday morning, and three weekends in those months of the year that have five weekends. It also adopted husband's proposed holiday schedule, giving him half of major holidays and school vacations and two consecutive weeks with the children in the summer. In Bancroft v. Bancroft, 154 Vt. 442, 449 (1990), we concluded that an order giving a father "visitation rights that amounted to fifty percent of the children's time on weekends and school vacations, and approximately twenty-five percent of their time overall," did not violate § 650. The same is true of the nearly identical order here.

Further, the order is supported by the court's findings. The court considered the best-interest factors in 15 V.S.A. § 665(b) and concluded that three of the factors were neutral, and four others weighed in favor of wife. Specifically, the court found that wife had been the

* Both of husband's motions for reconsideration were filed within the thirty-day appeal period from the final divorce order.

primary care provider for the children's entire lives. The court further found that it was in the children's best interests to remain in the marital home, which was in wife's possession, and to remain in frequent contact with wife's mother and sister, who played important roles in the children's lives. The court also found that wife was better able than husband to foster a positive relationship between the children and both parents. The court concluded that these factors weighed in favor of awarding wife primary physical responsibilities. The court further found that although it was in the children's best interests to have as much contact with husband as possible, his lack of stable housing made husband's proposed week-on/week-off schedule currently unfeasible. The court's findings are supported by the record and in turn support the court's parent-child contact order.

We next address husband's argument that the court erred in suggesting that he could use 15 V.S.A. § 668 to modify parent-child contact once he obtained stable housing because that statute requires an unanticipated change in circumstances. "[C]onstruction of a statute, such as 15 V.S.A. § 668[,] is a matter of law that we review without deference." Terino v. Bleeks, 2018 VT 77, ¶ 12, 208 Vt. 65.

To modify a parent-child contact order, the moving party must first show a "real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 668(a). "For the purposes of § 668, an unanticipated change is one that was unexpected at the time of the divorce." Terino, 2018 VT 77, ¶ 14 (emphasis omitted). The record does not suggest that husband intended at the time of the divorce to continue couch-surfing indefinitely, such that his obtaining stable housing would be unexpected. To the contrary, husband testified at the divorce hearing that he was actively looking to rent a home in the town where the children currently lived that was large enough for them. The trial court indicated at the January 2021 motion hearing that it expected husband to secure a permanent housing arrangement at some point in the future. Under the circumstances of this case, we agree that husband's acquisition of stable and suitable housing for himself and the children would not be an unanticipated change that would permit modification of the parent-child contact order under § 668, and that it was error for the court to rely on that provision in denying husband's motion to amend.

The family division appropriately declined husband's request to impose a provision that automatically shifted parent-child contact at a future date. Cf. Knutsen v. Cegalis, 2009 VT 110, ¶ 7, 187 Vt. 99 (holding that automatic change provisions in custody orders are impermissible). However, the court could have created a benchmark for the parties to understand when circumstances had changed sufficiently to modify parent-child contact. For example, the court could "establish the expectation that the parties will revisit the schedule, through their own negotiation or mediation if necessary, to ensure that it meets the child[ren]'s bests interests" once the predictable event of husband's obtaining stable housing occurred. Terino, 2018 VT 77, ¶ 20. At the January 2021 hearing, the court indicated that it did expect the parties to work together to maximize parent-child contact in the future as various life changes occurred. However, it did not incorporate this expectation into its written order. This left the parties without guidance as to whether the expectation was binding.

Because the family division incorrectly concluded that husband could rely on § 668 to modify parent-child contact once he obtained stable housing, we remand for the court to reconsider husband's request to amend the parent-child order to provide guidance regarding when modification would be appropriate, consistent with this decision and Terino.

We now turn to wife's challenge to the court's award of spousal maintenance. The family division may order spousal maintenance if it finds that a spouse lacks sufficient income or property to meet their needs and is unable to support themselves at the standard of living enjoyed during the marriage. 15 V.S.A. § 752(a). The order "shall be in such amounts and for such periods of time as the court deems just, after considering all relevant factors, including" those listed in the statute. Id. § 752(b). "The family court has considerable discretion in determining the amount and duration of maintenance once grounds for the award are established under the statutory criteria, and a maintenance award will be set aside only if there is no reasonable basis to support it." Gravel v. Gravel, 2009 VT 77, ¶ 23, 186 Vt. 250.

Wife argues that the family division abused its discretion in ordering that husband's spousal maintenance obligation would automatically terminate "upon [husband]'s loss of his income due to disability as determined by the military." She contends that if husband leaves the military due to disability, he should be required to seek a modification of the spousal maintenance obligation under 15 V.S.A. § 758.

While we agree that "the family court cannot speculate what the future will bring," we have also recognized that "maintenance orders necessarily involve some predictions of the future circumstances of the parties to minimize the need to return to court for modification." Mayville v. Mayville, 2010 VT 94, ¶¶ 22-23, 189 Vt. 1 (quotation and citation omitted). Accordingly, we have held that the court may fashion a maintenance order that responds to expected changes to a party's financial situation, if it is sufficiently probable that such changes will occur. See id. ¶ 24 (affirming decision modifying maintenance award to require husband to pay higher amount until he stopped receiving unemployment compensation benefits and reduced amount thereafter); see also Coor v. Coor, 155 Vt. 32, 36 (1990) (holding that family court may order that maintenance be terminated upon remarriage of party receiving award). Here, the court found that husband had serious health issues for which he had a disability rating with the military and that it was unclear how much longer he would be able to work. The court also found that if husband elected to go on disability status, he would receive $550 per month from the military, which would be a tenth of his current income. Because there was a significant possibility that husband would separate from his employment with the military due to disability within the next few years, and the effect of such a separation on husband's financial situation was already known, the court did not err in including the automatic-termination provision here.

Finally, wife argues that the family division abused its discretion in awarding sixty percent of the marital assets to husband. The court must "equitably divide and assign" marital property in a divorce case. 15 V.S.A. § 751(a). "However, an equitable division does not necessarily mean an equal one." Lee v. Ogilbee, 2018 VT 96, ¶ 29, 208 Vt. 400. The family court has broad discretion in assessing the statutory factors set forth in 15 V.S.A. § 751. Wade v. Wade, 2005 VT 72, ¶ 13, 178 Vt. 189. "When fashioning an equitable award, the court must explain the underlying rationale for its decision, which we will not disturb absent a showing that the court abused its discretion." Id. (citation omitted).

We see no abuse of discretion in the property award. The family division explained that wife was healthy and could likely earn income and accumulate assets for another thirty years before retirement. In contrast, husband was significantly older and in poor health and it was unclear how much longer he would be able to work. Wife had not yet reached her maximum earning capacity, while husband had. Furthermore, wife would be receiving spousal

maintenance payments for the next five years. The court found that these factors justified awarding husband a greater share of the parties' relatively limited assets.

Wife argues that the family division failed to give sufficient weight to her contributions as primary care provider and to the fact that husband's gross income is twice as much as hers. The court expressly considered these factors in its decision but determined that other factors outweighed them. The court explained the basis for its decision, and we see no reason to disturb it. See Casavant v. Allen, 2016 VT 89, ¶ 15, 202 Vt. 606 (stating that family court has broad discretion in assigning weight to particular statutory factors).

Remanded for the family division to reconsider the issue raised in husband's Rule 59 motions in light of the court's error in relying upon 15 V.S.A. § 668 as providing a basis for future modification of parent-child contact where the change in circumstances is anticipated. The decision below is otherwise affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice