

VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org



Case No. 21-AP-239

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

APRIL TERM, 2022

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| Jenny Sirkin* v. John Zartarian | } | APPEALED FROM: |
| | } | Superior Court, Franklin Unit, |
| | } | Family Division |
| | } | CASE NO. 13-1-20 Frdm |
| | | Trial Judge: Howard A. Kalfus |

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

Plaintiff appeals an order of the family division awarding legal and physical parental rights and responsibilities for the parties' children to defendant. We conclude that the order did not comport with due process and therefore reverse and remand for the court to hold a final hearing on the issue of parental rights and responsibilities.

The following facts are drawn from the record and appear to be undisputed for purposes of this appeal. At the time the court issued its parental rights and responsibilities order, the parties were separated, and their divorce proceeding was not yet complete. They have two minor children who are currently fourteen and eleven years old. During the marriage and at the outset of the divorce proceeding, the parties both lived in Montgomery, Vermont, where defendant runs a local bar and restaurant.

In January 2020, plaintiff filed for divorce. With her complaint, she filed motions to establish parental rights and responsibilities, parent-child contact, and child support. In September 2020, the parties reached an agreement to share parental rights and responsibilities and to have equal contact with the children, which was incorporated into a temporary court order.

In March 2021, plaintiff filed a motion to escrow funds from the sale of defendant's father's home and an "Emergency Motion for Sole Legal Parental Rights & Responsibilities and for Relocation." In the latter, she alleged that her residence in Montgomery had been sold and

she needed a new place to live; that she had found housing in Hinesburg, where she would have access to better job opportunities; and that the schools in Hinesburg would provide better opportunities for the parties' older child, who would be entering high school, and for their younger child, who was struggling due to lack of resources in the Montgomery school. She asked the court to “[g]rant our motion seeking temporary sole parental rights and responsibilities for the parties’ children” and allow her to relocate to Hinesburg with them. The court issued an order in late March 2021 stating:

Plaintiff’s Motion for Emergency Relief is denied to the extent it seeks emergency relief. The Motion seeks a change in the current temporary order on parental rights and responsibilities to allow for a potential move at the conclusion of the school year. The Court is setting a hearing on the other pending motion (relating to the sale funds) and will set a status conference on this motion at that time. The Court’s plan and hope is to schedule the final divorce hearing and decide PRR issues for the final order.

A hearing on the escrow motion was held before Judge Kline in April 2021. In a related entry order, Judge Kline indicated that “[t]he potential scheduling of the final divorce hearing was discussed, in consideration of Plaintiff’s motion as to parental rights and responsibilities based on her planned move,” and stated that the court would “schedule the final hearing in such a time frame to accommodate the parties’ needs. Final hearing—½ day.”

By July 2021, however, the court had not scheduled a hearing date. Plaintiff filed a motion asking the court to schedule a hearing as soon as possible on her request for sole legal rights and responsibilities and relocation because the children needed to enroll in school for the upcoming year. Plaintiff stated that she

had hoped—as the court had indicated—that a temporary hearing on the subject would not be needed, as the court would address all the PR&R issues in a final hearing. However, because there appears to be no hearing time for family cases in Franklin County, an emergency hearing is now paramount because this issue must be addressed.

In response, the court scheduled a ninety-minute hearing for August 13, 2021. The hearing notice stated that the purpose of the hearing was to address “motion for emergency relief.”

Judge Kalfus presided over the hearing. He notified the parties at the outset that the hearing time was limited to seventy minutes, instead of ninety minutes as indicated in the hearing notice, and that each side would have a total of thirty-five minutes to present evidence and conduct cross-examination. Plaintiff presented brief testimony from two special educators, one of the children’s teachers, and herself. Defendant presented testimony from the children’s school principal, then testified on his own behalf. The court ended the hearing before plaintiff could cross-examine defendant.

A few days after the hearing, Judge Kalfus issued a written decision awarding primary legal and physical rights and responsibilities to defendant. The decision did not address parent-child contact because “[t]he motion that precipitated this hearing requested only a determination on parental rights and responsibilities” and the parties had not presented evidence on parent-child contact.

In mid-September 2021, plaintiff moved to change venue to Chittenden County, where she had moved after finding employment. She argued that the case had been pending in Franklin County for nearly two years, she had been forced to request a temporary hearing on parental rights and responsibilities due to lack of hearing time, and when her request was finally granted, she was given only half an hour to present her case and did not have an opportunity to cross-examine defendant. She also asked the court to appoint a guardian ad litem. Defendant opposed the motion, arguing that the August 2021 order was final and that venue should not be changed. Plaintiff replied that the August 2021 order was plainly not a final order because the hearing notice did not indicate that it was a final hearing, the court never told the parties that it was a final hearing, the parties only had thirty-five minutes each to present evidence, plaintiff was not allowed sufficient time to cross-examine, and the court’s order did not decide parent-child contact. Plaintiff asserted that treating the August 2021 order as final would violate her right to due process.

Judge Kalfus, who had issued the August 2021 order, was apparently unavailable at the time the motion was filed, so the motion was given to Judge Morrissey. She denied the motion to change venue because a final hearing would be scheduled shortly. She also denied plaintiff’s request for a guardian ad litem, stating that “nothing in the Order issued on August 19 relative to parental rights and responsibilities to suggest that it was intended to be a temporary order. However, clarification on this issue will be sought from the Court that issued the August 19 Order.” In October, Judge Kalfus issued an entry order stating that the August 2021 order was intended to be a final order regarding parental rights and responsibilities. This appeal followed.*

Plaintiff argues on appeal that the August 2021 order must be reversed because the proceedings below violated her due process rights. She contends that she did not have reasonable notice that the August 2021 hearing was a final hearing on parental rights and responsibilities and was not afforded a meaningful opportunity to be heard on that issue.

* Defendant moved for this Court to dismiss plaintiff’s appeal as untimely because it was filed more than thirty days after the family division’s August 2021 order. We denied the motion, concluding that it was unclear whether the August 2021 order was intended to be a final order until the court issued its October order, and the appeal was timely from that latter order.

In November 2021, another hearing was held before Judge Barra. He issued a final order and decree of divorce in January 2022. The January 2022 order did not address parental rights and responsibilities or parent-child contact, stating, “[t]he current order regarding parental rights and responsibilities is final.”

Defendant responds that plaintiff waived her due process claim by failing to raise it at the hearing below. This argument lacks merit. As discussed below, plaintiff reasonably believed that the August 2021 hearing concerned a temporary order on parental rights and responsibilities and proceeded accordingly. The hearing notice and the ensuing order were ambiguous as to whether they concerned a temporary or final hearing and order. When defendant suggested that the August 2021 order was final in his response to plaintiff's motion to change venue, plaintiff vigorously objected and expressly raised the issue of due process. This prompted the court to seek clarification from the judge who presided over the hearing. We conclude that under these circumstances, plaintiff adequately preserved her claim for our review. See State v. Mumley, 2009 VT 48, ¶ 18, 186 Vt. 52 (“[W]here a litigant’s argument is clear enough for the trial court to evaluate it and for an opponent to respond to it, the claim is adequately preserved for appeal.”)

“Both the right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution.” Paquette v. Paquette, 146 Vt. 83, 92 (1985). Plaintiff therefore “was entitled to reasonable notice of what was in issue and an opportunity to be heard” on that issue. Brown v. Brown, 154 Vt. 625, 629 (1990); see also In re C.L.S., 2020 VT 1, ¶ 25, 211 Vt. 344 (“[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (quotation omitted)). We conclude that neither requirement was met here.

First, the court did not provide reasonable notice that the August 2021 hearing was a final hearing on the issue of parental rights and responsibilities. Plaintiff had clearly requested temporary relief, as stated in her March and July 2021 motions. The hearing notice sent to the parties did not indicate that the court would be holding a final hearing. Nothing in the transcript of the hearing indicates that the court or the parties considered it to be a final hearing. The finality of the resulting order was also ambiguous, as evidenced by the fact that it did not address the issue of parent-child contact and by Judge Morrissey’s decision to seek clarification from Judge Kalfus. It was not until the court’s October entry order that it became clear that the August 2021 order was intended to be final on the issue of parental rights and responsibilities.

Second, plaintiff was not provided with a reasonable opportunity to be heard regarding a final assignment of parental rights and responsibilities. The court permitted each side only thirty-five minutes to present evidence on this hotly contested issue. While defendant had an opportunity to cross-examine plaintiff and her other witnesses, plaintiff was not given time to cross-examine defendant. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” Goldberg v. Kelly, 397 U.S. 254, 269 (1970). It is true that plaintiff did not object on these grounds at the hearing, but as explained above, she likely believed—reasonably—that she would have another opportunity to present evidence and confront witnesses at a subsequent final hearing. Under these circumstances, we conclude that the August 2021 order must be reversed,

and the matter remanded for the parties to have a meaningful opportunity to be heard on the issue of parental rights and responsibilities, including, if necessary, parent-child contact.

Reversed and remanded for the family division to hold a final hearing on the issue of parental rights and responsibilities.

BY THE COURT:

Paul L. Reiber, Chief Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Superior Judge,
Specially Assigned