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. 2018-028

JUNE TERM, 2018

Jennifer Eccles v. Jason Eccles*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 41-2-15 Wndm
		Trial Judge: John L. Pacht

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

Father appeals orders of the superior court, family division, denying his motion to continue the scheduled hearing on mother's motion to modify parent-child contact and adjusting aspects of that contact in response to mother's motion. We reverse the family court's revision of the parties' summer parent-child-contact schedule but otherwise affirm the court's orders denying father's motion to continue and clarifying the parties' final divorce order.

The parties were divorced in May 2014 following an uncontested hearing in which their pro se agreement on parental rights and responsibilities with respect to their two children was incorporated into the final divorce order. Under the agreement and order, the parties shared legal and physical parental rights and responsibilities. Unfortunately, since their divorce became final, the parties have been involved in near-constant litigation over the minutiae of parent-child contact.

On July 13, 2017, mother filed a motion to modify and/or clarify the May 2014 order regarding parent-child contact in the following respects: (1) change the summer contact to a week-on week-off schedule to reduce transition time between the parents, who live more than an hour apart; (2) clarify the provision in the final divorce order concerning each parent's responsibility for transporting the children from one parent to the other; (3) clarify the provision concerning contact when there are five weekends in a month; (4) modify the provision concerning contact on certain holidays; and (5) modify contact during Thanksgiving and Christmas so that the parents alternate those holidays with the children each year.

Four days later, on July 17, the family court issued an order requiring the clerk to schedule a one-hour motion hearing and giving father twenty days to respond to mother's motion. That same day, the clerk set a hearing date of September 27, 2017, and sent notice of the hearing to the parties; notice to Father was sent by certified mail. An August 17 trial court docket entry indicates a failure to complete service of notice of the hearing date on father. An August 25 docket entry indicates an attempt of personal service on father by the sheriff. A September 18 docket entry indicates that service by sheriff was completed on father.

On September 21, six days before the scheduled motion hearing, father filed a motion to continue in which he alleged that he had not received notice of the hearing until the early evening of September 17. He stated that he was seeking a continuance to retain counsel to assist him in responding to mother's motion. He further stated that he had met with an attorney, but that the attorney had a scheduling conflict on September 27. The following day, the court denied the motion, stating that a hearing notice was sent out on July 17 and expressing confusion over father's statement that he first learned of the hearing on September 17. The court also stated that issues presented in mother's motion did not appear to be difficult.

Following the September 27 hearing, at which the court denied defendant's renewed motion to continue, the court gave the parties two weeks to determine whether they could resolve their issues or otherwise clarify and respond to the relief sought. The court also indicated that father would have an opportunity to obtain legal representation if that was what he wanted to do. The parties failed to resolve their differences and in October 2017 filed pro se submissions in support of their respective positions. In December 2017, the court issued an order that: (1) granted mother's motion to alter the summer schedule, to clarify the parties' responsibilities concerning transportation of the children on transition days, and to clarify parent-child contact on months with a fifth weekend and (2) denied mother's motion to alter the provisions in the final divorce order concerning parent-child contact on holidays. Following the court's decision, father obtained counsel and filed a notice of appeal. Father does not challenge the court's clarification regarding months in which there is a fifth weekend, but he argues that no changed circumstances support the court's modification of the summer schedule and that the court failed to take into account the parties' course of conduct in clarifying the parties' responsibilities regarding transportation.

Father first argues on appeal, however, that the family court abused its discretion in denying his motion to continue the hearing on mother's motion to modify/clarify parental rights and responsibilities. Noting the court's expression of confusion in its order denying the motion to continue, father surmises that the court either did not see the return of service indicating that father had not been served with the hearing notice until September 14[1] or was under the mistaken impression that father had refused to accept service of the hearing notice. Claiming an abuse of discretion, father cites the court's failure to consider that he was served with notice only thirteen days before the hearing, that after being served he acted quickly in consulting an attorney, that time was of no import because the matter concerned modification or interpretation of a four-year-old order, and that mother would not have suffered any prejudice by the delay in holding a hearing on her motion. Father further argues that a fair reading of the transcript indicates that father was prejudiced by the court's denial of his motion to continue, insofar as the court conducted a free-flowing hearing in which it jumped back and forth between being a mediator and a trier of fact.

"The denial of a motion to continue will not be reversed absent a clear abuse of discretion," which requires the moving party to show that the court "either totally withheld [its] discretion or exercised it on grounds clearly untenable." Office of Child Support v. Stanzione, 2006 VT 98, ¶ 13, 180 Vt. 629 (mem.). In this case, the court may have initially been confused as to why father had not received notice of the hearing until two months after it had been sent out, but the court denied defendant's motion again at the hearing after hearing father's explanation that he had been on vacation with the parties' children when the original notice was sent and that by the time he went to the post office to retrieve the letter it had been sent back to the court. Notwithstanding

[1] In an affidavit attached to his motion to continue, father averred that he had been served with notice of the hearing at 4:30 in the evening on September 17, 2017; however, when father renewed his motion to continue at the beginning of the September 27 hearing, he told the court that he was notified of the hearing on September 14, 2017.

father's explanation for why he had not received notice until two weeks before the hearing, the court declined to continue the hearing because mother's motion concerned relatively insignificant matters involving parent-child contact and no attorney had entered an appearance on behalf of father. Given the circumstances of this case, we cannot conclude that the family court withheld its discretion or exercised it on clearly untenable grounds in denying father's motion to continue the hearing. Father contends that if he had had an attorney, the attorney could have brought order to his presentation, framed issues to give context to the parties' stipulation, and explained the importance of physical responsibility and the absence of changed circumstances. But the record reveals that at the hearing father was able to express his objections to mother's motion and to challenge the existence of changed circumstances. Moreover, father does not proffer any additional evidence that he would have presented had the continuance been granted, other than a more detailed explanation of evidence presented to the court below.

Turning to the merits of the family court's decision, father argues that mother failed to meet the threshold showing of changed circumstances for the court to modify the parties' summer parent-child-contact schedule. Quinones v. Bouffard, 2017 VT 103, ¶ 11 (stating that, with respect to motion to modify legal or physical responsibilities or parent-child contact, "the moving party must [first] show that there is a real, substantial and unanticipated change of circumstances" (quotation omitted)). Father asserts that a showing of changed circumstances was necessary because mother was seeking an alteration of the final divorce order and thus a modification rather than a clarification of the order. See Patnode v. Urette, 2014 VT 46, ¶ 13, 196 Vt. 416 (stating that if "a conflict arises from the terms of the order, and the family division is asked by a party to clarify its intent for how those terms should operate, an addendum which does not alter the terms is not necessarily a modification but rather a clarification of the original order" that does not require showing changed circumstances). He also contends that no evidence supported the court's basis for finding changed circumstances—the increased distance between mother's home and the children's schools—and that the court modified the final order based on its own preferences rather than the evidence. See Quinones, 2017 VT 103, ¶ 12 (stating that although family court has "great discretion" in resolving motion to modify parental rights and responsibilities due to parent's relocation, "we cannot condone a process that substitutes the judgment of a court for that of the custodial parent merely because the court would have done something different if it had been the parent" (quotation omitted)).

The parties' agreement on parental rights and responsibilities incorporated into the final divorce order established equal time between the parents, with mother having the children on Mondays and Tuesdays plus two weekends a month, and father having the children on Wednesdays and Thursdays plus two weekends a month. The order explicitly stated that there was no special schedule for summer vacations. At the hearing, the court ruminated over whether mother's request to change the parent-contact schedule in the summer to a week-on week-off schedule so as to reduce transportation time was a clarification or modification of the final order requiring a showing of changed circumstances. The court noted that the change to the summer schedule was a small one that had no impact on the relative time the children spent with each parent, but it nonetheless concluded that a showing of changed circumstances was necessary because mother was seeking to alter the parties' schedule as set forth in the final divorce order, albeit to a small degree. Cf. Patnode, 2014 VT 46, ¶ 12 (concluding that superior court did not change terms of original order in clarifying how existing order should be met under particular circumstances and "emphasizing that the superior court did not in any way alter the amount of time that each parent was awarded"). The court then found changed circumstances based on the increased distance between the parties' residences and modified the summer schedule to a week on week off with each parent, citing the children's best interests. "This Court will uphold the trial court's decision concerning whether there has been a substantial change in circumstances unless the discretion of the lower court was

exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Gates v. Gates, 168 Vt. 64, 67-68 (1998) (quotation omitted).

We agree with the family court that alteration of the summer schedule required a showing of changed circumstances because the existing order explicitly indicates that there is no special summer schedule. The burden for showing changed circumstances is not as high when the moving party is seeking to alter parent-child contact rather than to change custody. Hawkes v. Spence, 2005 VT 57, ¶ 20, 178 Vt. 161. But in this case mother has failed to meet even this reduced burden. The court found changed circumstances based on the additional driving time between mother's home in Northfield and where father was living after moving from Williston to Essex Junction. No evidence in the record, however, indicated any significant increase—indeed, any increase at all—in driving distances for mother resulting from father's move within Chittenden County.[2] Absent any such evidence, mother has failed to meet her threshold burden of showing changed circumstances. Accordingly, the family court's revision of the parties' summer schedule must be reversed.

Finally, with respect to the court's clarification of the parties' responsibilities regarding transportation of the children, father argues that the family court erred by clarifying the relevant provision without considering any contextual evidence or the parties' course of conduct. We disagree.

The relevant provision in the parties' agreement states, under the section entitled "Transportation and Exchange of Children," that "Transportation will [be] shared." In the family court, mother interpreted the word "shared" to mean that father should do half of the driving even when she had custody of the children, while father interpreted the word to mean that the party receiving the children must pick them up at school. The court found that mother was doing far more of the driving on transition days than father, and it concluded that this was inconsistent with the parties' agreement that they share transporting the children. Accordingly, the court adjusted the driving responsibilities to lessen mother's burden while accommodating father's schedule.

Father argues that because the parties had different interpretations, the relevant phrase was ambiguous, and thus the court should have considered the circumstances surrounding the agreement. See Osborn v. Osborn, 159 Vt. 95, 98 (1992). Father states that he was doing the bulk of the driving at the time the agreement was made and that appellee understood she would have to do the bulk of the driving if and when the children moved to Chittenden County to go to school, which their agreement explicitly allowed. Father argues that the court erred by ignoring this information. The court did not explicitly indicate that it believed the relevant phrase to be ambiguous, notwithstanding the parties' differing interpretations, but it stated that there was a lack of clarity with respect to that provision. In any event, the court rejected father's argument that mother was required to do most of the driving because he had done most of the driving in 2013 before the children began to attend school in Chittenden County pursuant to the parties' explicit agreement. The court did not err in failing to conclude that these facts demonstrated the parties' intent to have mother do most of the transition driving when the children began school in

[2] The parties agreed in writing in 2014 that it was in the children's best interests to attend school "under the Chittenden Supervisory Union, i.e. Williston." At the motion hearing, father stated that he moved from Winooksi to Essex Junction, and there was no evidence either of him ever living in Williston or of the comparable distances between mother's home and schools in Williston and Essex Junction. In any event, regardless of where father actually lived or moved to within Chittenden County, there was no evidence of any significant increase in driving distance for mother as the result of any move.

Chittenden County. Father's principle argument at the hearing, similar to mother's, was that requiring him to do more of the driving would interfere with his employment. Mother argued that the significant miles she drove on transition days—twice back and forth from Northfield to Essex—interfered with her ability to work full-time. Father also argued that he should not have to do his share of the driving because he had incurred more of the expenses for the children than mother. Based upon our review of the record, we discern no basis to disturb the family court's decision clarifying the parties' agreement with respect to their transportation responsibilities.

The family division's revision of the parties' summer parent-child-contact schedule is reversed; in all other respects, the court's orders denying father's motion to continue and clarifying the parties' final divorce order are affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice