DOCKET NO: LLI FA20 6026113 S :: SUPERIOR COURT

COE, MARGARET :: JUDICIAL DISTRICT OF LITCHFIELD

V. :: AT TORRINGTON

PEPICE, JUSTIN :: MAY 24, 2024

DECISION

The above parties entered into a dissolution agreement (#112) which granted joint legal custody of the minor children, with the primary residence being with the plaintiff.

Article 1.4 states that "[e]ach party shall be afforded reasonable and exclusive vacation parenting time with the minor children each year to be arranged by mutual agreement of the parties. Each party shall provide to the other party reasonable advance notice of the dates each party requests for his or her respective vacation parenting time."

Article 1.6 indicates "...[t]he parents shall consult with one another in those substantial question relating to ... non-emergency health care of their child. Mother has final decision-making authority regarding health and safety issues . . .[t]he mother shall make every reasonable effort to discuss all non-emergency decisions regarding the health and safety of the children with the father before any action is taken. Non-emergency decisions shall include but not be limited to the following areas: a) non-emergency medical, dental, psychological, psychiatric, or orthodontic care including the selection of the care providers and the prescribing of medications and of health and safety recommendations made by such providers: and b) other issues that materially affect the health and safety of the minor children. The mother shall propose to the father a course of action as to the decision that needs to be made. The proposal shall be in writing and shall contain sufficient information and appropriate documentation as necessary to fully explain the complete nature of the intended decision. Upon receipt, the father shall have forty-eight hours to respond in writing. In his response he shall indicate his approval or disagreement. If he disagrees with the mother's proposal his response shall include a counterproposal. If the father fails to respond within forty-eight hours, his failure to responds shall be deemed an acceptance of the mother's proposal. If the negotiations shall fall apart between the parties and more than one week has passed, the mother shall have the final authority to make the decision. The [m]other shall be able to make all decisions regarding the minor children's health and safety without first consulting the father if an immediate decision is required."

Article 1.8 indicates that "[n]either party shall do anything that may estrange the children from the other party."

On September 30, 2022, the parties entered into a temporary agreement which was finalized on December 6, 2022 (#132.10). On October 19, 2022, the court ordered that,

#195.00

"[p]arties shall engage in co-parenting counseling and the matter is referred to family relations for General Case Management and a referral to a co-parent counselor if necessary".

About three and a half months later on March 16 2023, defendant filed a post judgment motion for modification (#155) arguing that the parties participate in co-parenting counseling, mother list the children on her health insurance as a secondary insurer, that father be involved in any decision making of medical treatment of the minor children, all medical appointments be posted on Our Family Wizard ("OFW") two weeks prior to any appointments, and his Sunday visitation be extended until 8:00 pm. On March 16, 2023, the defendant filed a motion for contempt alleging the mother denied the father reasonable and exclusive vacation time and alienating the defendant father from having a parent child relationship (#156).

On September 12, 2023, the father filed a post-judgment motion for contempt alleging the mother further interfered with father's vacation and didn't share medical information with the father (#168).

On November 13, 2023, the father filed another motion for contempt again alleging alienation by mother and denial of vacation time (#173).

"The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties . . .." (Internal quotation marks omitted.) Cavolicky. DeSimone, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn.906, 876 A.2d 1198 (2005). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact] . . .. The trier is free to accept or reject, in whole or in part, the testimony offered by either party. . ..That determination of credibility is a function of the trial court."(Citations omitted; internal quotation marks omitted.) Heritage Square, LLC v. Eoanou, 61 Conn. App. 329, 333, 764 A.2d 199 (2001). "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . [I]t is the [factfinder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder]is best able to judge the credibility of the witnesses and to draw necessary inferences there from." (Internal quotation marks omitted.) State v. Lawrence, 282 Conn. 141, 155,920 A.2d 236 (2007)."It is the sole province of the trial court to weigh and interpret the evidence before it and to pass on the credibility of the witnesses. . .. It has the advantage of viewing and assessing the demeanor, attitude and credibility of the witnesses and is therefore better equipped than we to assess the circumstances surrounding the dissolution action." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Zahringer v. Zahringer, 124 Conn. App.672, 679-80, 6 A.3d 141 (2010).

The court heard testimony on March 19 and May 20, 2024, from both parties, the plaintiff submitted 20 full exhibits, and the defendant submitted one exhibit totaling sixty-eight pages. In reaching its decision, the court has listened to the witnesses and assessed their credibility. The court has reviewed the exhibits and given them the appropriate weight. The court has applied all applicable law and statutory criteria and unsealed the most recent financial

affidavits filed on by the plaintiff on February 9, 2024 (#180) and by the defendant on November 30, 2022.[1]

Accordingly, the court makes the following findings of fact associated with the modification request by a fair preponderance of the evidence, and the motions for contempt by clear and convincing evidence.

MOTION TO MODIFY VISITATION, INSURANCE AND MEDICAL ORDERS (#155)

Modifying visitation is discussed in Balaska v Balaska, 130 Conn.App 510. General Statutes § 46b–56 (a) provides the court [with] broad authority to make or modify any proper order regarding the custody, care, education, visitation, and support of minor children in dissolution actions." (Internal quotation marks omitted.) Tomlinson v. Tomlinson, 119 Conn.App. 194, 202, 986 A.2d 1119, cert. granted on other grounds, 295 Conn. 916, 990 A.2d 868 (2010). General Statutes § 46b–56 (a) provides in relevant part: "In any controversy before the Superior Court as to the custody or care of minor children ... the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children...."

In ruling on a motion to modify visitation, the court is not required to find as a threshold matter that a change in circumstances has occurred. Szczerkowski v. Karmelowicz, 60 Conn.App. 429, 433, 759 A.2d 1050 (2000); see also McGinty v. McGinty, 66 Conn.App. 35, 40, 783 A.2d 1170 (2001). Instead, "[i]n modifying an order concerning visitation, the trial court shall 'be guided by the best interests of the child....' General Statutes § 46b–56 (b)."

"[O]ur Supreme Court has limited the trial court's broad discretion to modify custody, requiring that a modification order be based on either a material change of circumstances which alters the court's finding of the best interests of the child ... or a finding that the custody order sought to be modified was not based upon the best interests of the child." (Emphasis added; internal quotation marks omitted.) Malave v. Ortiz, 114 Conn.App. 414, 416, 970 A.2d 743 (2009). Kelly v. Kelly, 54 Conn.App. 50, 57, 732 A.2d 808 (1999); see Szczerkowski v. Karmelowicz, supra, at 432, 759 A.2d 1050 ("[w]hen a court rules on a motion to modify visitation, it is statutorily incumbent on the court that its order be guided by the best interest of the child standard"). Section 46b–56 (b) provides in relevant part: "In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered, and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests....".

The defendant's motion, filed three and a half months after this court's prior decision, requests that the mother list the children on her health insurance as a secondary provider, father be involved in decision making of medical treatment of the children and to attend medical appointments, appointments be posted on Our Family Wizard ("OFW") two weeks prior to any appointment, Sunday visitation be extended to 8:00 pm, and the parents divide weekly pickup and drop off of the minor children.

[1] The defendant failed to comply with the scheduling orders entered on April 12, 2023 (#160).

The court denies the defendant's request for the plaintiff to carry the children on her health insurance as mother does not have access to health insurance through work. Although father alleges mother is causing a breakdown of the parent-child relationship, the evidence proves the opposite. The defendant alleges that he is not involved in medical treatment decision making nor allowed to attend appointments, the court received no credible evidence that he is not apprised of the child's medical decision. The defendant has every right, should he so choose, to attend his children's appointments. Although the plaintiff ultimately has final decision making regarding medical treatment, she nonetheless timely uploads the appointments to Our Family Wizard. As discussed in this court's decision of December 2, 2022 (#154.10), it is the defendant's responsibility to access said information either through OFW or communicating with the medical providers. Although the defendant has tried to unilaterally change the agreement regarding transportation as outlined in the parties' September 30, 2022, agreement (#142), this court sees no reason to modify said order as said agreement equitably shares in transportation.

The plaintiff objects to the modification request that the child Matteo have extended visitation for an additional three hours on Sundays with the defendant during the summer. Matteo has been regularly visiting with his father since the agreement of September 30, 2022. The plaintiff's most compelling objection to the extension involves Matteo's medication management, which is a valid one. Said concern is the reason paragraph #6 in order #142 was accepted by the court. Paragraph #6 indicates that "...father shall follow the children's medication schedule to be administered by 8:30 am and 7:30 pm whenever the children are in his care." This order was established to ensure father gave Matteo his medications, upon which he has been dependent for years, and to follow the instructions that there be a window of 12 hours between doses. This also allows Matteo to go to bed at a reasonable time. As the medication labels indicate the medications are to be given in the am and the pm, which is consistent with this court's order, the court finds father's testimony disingenuous that he was following doctor's orders instead of the court orders.

THEREFORE, provided father follows the court's orders as to Matteo's medication administration, the court finds it in the child's best interest to extend father's visitation with Matteo, on his assigned weekends, for an additional three hours on Sundays. Said additional hours shall terminate at the beginning of the school year to ensure the child gets adequate sleep for the next school day. Should father not follow the court's orders pertaining to the medication schedule, those extra three hours shall be revoked.

Turning to the defendant's contempt filings, the court makes the following findings of fact associated with the contempt requests by clear and convincing evidence.

CONTEMPT (#156, #168, #173)

For this court to find contempt, there must be a clear and unambiguous order, the party is to have notice of said order, and the court must find that there was willful non-compliance by the defendant with said order. The orders at issue in this hearing were both clear and

unambiguous, and the defendant has had notice of same. See Brody v. Brody, 315 Conn. 300 (2015).

Defendant's motion filed at #156 alleges mother denied father reasonable vacation time, that educational programs were not discussed along with non-emergency health issues, and mother was violating the dissolution agreement regarding day-to-day decisions. Section 1.4 of the dissolution agreement indicates that each year reasonable and exclusive vacation parenting time is to "be arranged by mutual agreement of the parties". Per the evidence, nowhere is there an indication that an agreement existed regarding father's demands for certain vacation weeks. After the plaintiff rejected the defendant's initially proposed weeks, the defendant did not follow up with or proffer any alternatives via OFW of alternate weeks. Therefore, no agreement arose from these limited negotiations. Consistent with order #154.10, not only does father have access to the children's educational records and can follow up with each school as needed, but no credible evidence was also presented that any information was being intentionally withheld held from him to which he is entitled. As article 1.7 dictates, not only are day-to-day decisions of a routine nature to be made by the parent with whom the children are with at the time, no evidence was presented by the defendant as to any alleged violation of any order pertaining to "day-to-day decisions". It is unreasonable to require each parent in a healthy relationship to give the other parent a daily accounting as to what comprises their day, never mind in a relationship with the dysfunctionality that exists between these two parties.

THEREFORE, the court denies motion #156.

In defendant's motion #168, no credible evidence was presented that the plaintiff is interfering with the defendant's contact with his children. The small medical procedure referenced by the defendant to which he claims lack of notice was the removal of an infected toenail, which the doctor recommended occur during the provider's visit and which the plaintiff quickly posted on OFW. The evidence presented for the defendant's missed weekend visit in early August of 2023 indicates that the defendant asked the plaintiff to switch weekends as he intended to attend a wedding during his weekend visit. The plaintiff refused to switch visitation, and the defendant then told his children he would not be seeing them for that wedding weekend. With this information, the plaintiff made her own plans with the children. Analogous to an earlier wedding weekend where the defendant never shared with the plaintiff his established childcare plans, the defendant told the plaintiff two days before the second wedding that he had arranged for childcare and expected to have the children during the second wedding weekend. The plaintiff then refused. Based upon the miscommunication throughout this limited discussion, this court cannot find any violation to be willful regarding the August 2023 missed visit.

THEREFORE, the court denies motion #168.

Defendant's motion #173 argues the plaintiff be held in contempt for denying vacation time but, again, article 1.4 indicates that reasonable and exclusive vacation parenting time is to be arranged by mutual agreement of the parties. The wording of said article does not allow this court to find, by clear and convincing evidence, the plaintiff in contempt as there was no established agreement.

THEREFORE, the court denies Motion #173.

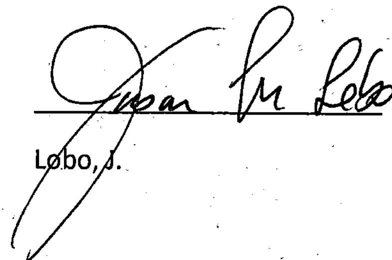
Due to the parties' inability to agree on practically anything, as well as their inability to communicate productively, the current orders pertaining to the defendant's yearly vacation requiring a mutual agreement remains ineffective, and will continue to be, absent modification.

THEREFORE, this court modifies the order pertaining to exclusive vacation parenting time to include the following:

Each parent shall each have two nonconsecutive weeks of summer vacation with both children. Jackson, the parties' eldest child, retains his ability in deciding whether or not he wishes to accompany father on vacation. Mother will have first choice in even numbered years and father will have first choice in odd numbered years. The parent with first choice that year will give the other parent 60 days' notice of his/her selection of vacation weeks, or by April 1, 2023, whichever is sooner. The other parent will have the next 14 days to provide his/her vacation schedule. Vacation weeks will run from Friday to Friday. No make up visitation is required for missed visitation due to vacations or holidays. Neither party shall request vacation time during the other party's designated holiday time or assigned weekends.

Plaintiff's request for counsel fees pursuant to #179 and #181 shall be addressed in a separate order.

All other previous orders shall remain in effect.



Lobo, J.