

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

**ENTRY ORDER**

**SUPREME COURT DOCKET NO. 2002-060**

**MAY TERM, 2002**

	}	APPEALED FROM:
	}	
Tina Willey	}	Addison Family Court
	}	
v.	}	DOCKET NO. 91-5-94 Andm
	}	
James K. Michaud	}	Trial Judge: Ben W. Joseph
	}	
	}	

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

Father appeals from a family court order modifying parental rights and responsibilities. He contends the court: (1) was gender biased; (2) abused its discretion in awarding mother sole custody of the parties' minor child; and (3) abused its discretion in reducing his parent-child contact. We affirm.

The parties, who never married, are the parents of a daughter, M. M., who was eleven at the time of these proceedings. In July 1994, the court issued a parental rights and responsibilities stipulation and temporary order providing for joint legal and physical parental responsibilities. In March 2001, both parties filed motions to modify the temporary order, each seeking sole legal and physical responsibilities. Later that month, the court issued a temporary order placing the minor with mother and providing for visitation with father every weekend from Friday after school to Monday morning.

In October 2001, the court held an evidentiary hearing on the cross-motions to modify. Following the hearing, the court issued a written order, finding that there had been a real, substantial and unanticipated change of circumstances, and concluding that it was in the child's best interest that mother have sole custody. The court provided for parent-child contact with father on the first and third weekend of each month, starting on Friday after school and ending on Sunday at 6:00 p.m, as well as every Thursday from 6:00 to 8:00 p.m. In addition, the court provided for parent-child contact with father for two consecutive weeks each summer, and Christmas afternoon from 2:00 to 5:00 p.m. Later, in response to father's motion to reconsider, the court modified its order to provide for additional visitation with father on certain holidays, and to extend the visitation period on Christmas day. This appeal followed.

Father contends the court exhibited gender bias at the hearing and in its written order in two respects. At the conclusion of the hearing, the court summarized some of the evidence and addressed himself directly to the parties, stating his impressions of the case but not his ultimate decision, which later issued in written form. In the course of that statement, the court stressed the importance of setting a good example for the child by minimizing parental conflict. While addressing father in particular, the following exchange occurred:

THE COURT: And for this child to grow up with dignity and self-respect as a woman, I think she has to get the best example she can from you as to how you treat women. Now, it's a challenge to all of us, you know. I don't exclude myself from this group when I say a lot of men seem to have design defects.

MR. MICHAUD: Say that again.

THE COURT: A lot of men have design defects.

MR. MICHUAD: Oh, that's bred into us.

THE COURT: You bet.

MR. MICHAUD: We have no choice.

THE COURT: Well, I hope to think there are choices.

MR. MICHAUD: Well.

THE COURT: But we certainly start with some design defects. Okay, you can argue with me, don't pay attention to your lawyer, go ahead. All right.

MR. MICHAUD: I'm paying her, though.

The court's point of reference if any in referring to men's "design defects" is unclear, although it appears from the general context to have been mother's testimony that father had "cheated" on her on several occasions and was currently in a relationship with the mother of a friend of the minor. That this was the source of the court's observation is supported by the second statement cited by father in support of his gender-bias claim. In its written decision, the court noted that father had "engaged in intimate relations with other women and this has caused [mother] great pain and anguish." The court cited this finding in support of its conclusion that there had been a real, substantial and unanticipated change of circumstances.

Father contends that the foregoing statements were inconsistent with 15 V.S.A. § 665(c), which states that "[t]he court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent." Father asserts that the court's reliance on mother's "pain and anguish" demonstrates such a preference because the finding was one-sided and unsupported by the evidence. The court was entitled to credit mother's testimony concerning father's affairs, however, and the court's finding of changed circumstances was based not only on mother's distress, but also on the court's more general finding that the mutual hostility between the parties rendered the shared custody arrangement no longer viable. Accordingly, we discern no grounds for a finding of gender bias on this basis.

With respect to the court's comments at the hearing, father relies on *Hubbell v. Hubbell*, 167 Vt. 153, 156-57 (1997), where we reversed an award of custody to the father based on the trial court's finding that a male would provide more positive "gender identification" for the parties' son. Unlike *Hubbell*, however, the court here did not overtly apply a gender preference in making the custody award to mother. Nor, viewed in the overall context of the hearing and decision, can we find that the court's remarks suggest gender bias implicitly influenced its ruling. The court acknowledged at the hearing and in its decision that both mother and father enjoyed a good relationship with the child and provided her with a safe and loving environment. The award of sole custody to mother was based on the court's additional findings that mother was the primary care-provider and that breaking that bond would not be in the child's best interests, that the child was well adjusted to her school and environment, and that the child had expressed a preference for mother to be the primary parent. We discern nothing, implicit or otherwise, to suggest that these findings were in any way influenced by the disputed remarks however unwise they may have been and therefore decline to disturb the court's ruling on this basis.

Father also contends the award of custody to mother was an abuse of discretion, and based on findings unsupported by the evidence. Trial courts enjoy broad discretion, when faced with a motion to modify parental rights and responsibilities, to determine the best interests of the child. *Spaulding v. Butler*, 782 A.2d 1167, 1174 (Vt. 2001). We will uphold the court's findings in this regard if supported by credible evidence, and its conclusion if reasonably supported by the findings. *Id.* at 1173-74. We review the findings, moreover, in the light most favorable to the judgment, disregarding the effect of modifying evidence. *Id.*

Father challenges the court's findings that both parents could provide the child with love, affection and guidance and meet the child's developmental needs. Although father contends the court overlooked certain evidence unfavorable to

mother, including testimony that she had at times used foul language, screamed and threatened the child and had once removed the child to New Hampshire for a month, the record also contains ample testimony from other witnesses that she is an affectionate and loving mother who uses appropriate discipline and consistently puts the child's needs ahead of her own. Accordingly, we discern no basis to disturb these findings.

Father also contests the court's finding that the child is well adjusted to her school and that father lives in a different school district. There was testimony, however, that the child is happy and well adjusted with her current living and school situation, and that father lives just over the boundary of another school district. Therefore we discern no clear error. Father also challenges the court's finding that mother had shown a stronger disposition to foster a positive relationship and contact with the other parent. Although both parents professed to support a continuing relationship between the child and the other parent, there was testimony that father had consistently denigrated mother to the child. Thus, credible evidence supported the finding. In addition, father contends the court erred in failing to apply the factor set forth in 15 V.S.A. §665 (b)(9) (court shall consider evidence of abuse, as defined in 15 V.S.A. § 1101). The evidence cited by father in this regard, including testimony that mother used foul language and shouted at the child, did not support a finding of abuse as defined under § 1101 (abuse includes attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm, or placing the child's physical, psychological or developmental welfare at risk).

Finally, father contends the court erred in determining that mother was the primary parent. Although there was evidence of father's substantial participation in the child's care and supervision, ample credible evidence also supported the court's finding that mother provided the bulk of the routine daily child care. Accordingly, there is no basis to disturb the finding.

Lastly, father contends the court abused its discretion in reducing his parent-child contact from every Friday through Monday morning, to every first and third weekend and every Thursday evening. Granting, modifying or denying visitation is within the discretion of the trial court, and its judgment will not be disturbed unless based on unfounded considerations or clearly unreasonable upon the facts presented. *Gabriel v. Pritchard*, 788 A.2d 1, 4 (Vt. 2001). The court here explained in its decision and its subsequent order denying reconsideration that the reduction was in the best interests of the child to ensure that she was home on nights before school, and to provide mother some relaxed "quality" time on weekends with the child, as she had requested. We cannot say that the court's judgment was clearly unreasonable or based upon unfounded considerations. Therefore, the court's ruling may not be disturbed.

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice