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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-246

NOVEMBER TERM, 2004

Steven Thomas, Jr.	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Family Court
	}	
Danielle Fine	}	
	}	DOCKET NO. 289-10-03 WmDm
		Trial Judge: Katherine A. Hayes

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

Mother appeals the family court's order awarding primary physical rights and responsibilities of the parties' son to father in this parentage action. We affirm.

The parties began their relationship in Florida in 1998. Their son was born in October 1999. In the fall of 2000, they moved to Vermont. Their relationship deteriorated, and the parties separated in the summer of 2003. They shared time with their son until October 2003, when mother took the boy to Florida without giving father any advance warning. Father filed a parentage action in Vermont. Following a hearing in which mother participated from Florida by telephone, the family court ordered that the parties share legal parental rights and responsibilities, but that father have primary physical rights and responsibilities, with mother receiving significant parent-child contact. Mother appeals, arguing that the court's findings and conclusions are unsound.

In making its decision, the family court relied on the factors contained in 15 V.S.A. § 665(b). See Bissonette v. Gambrel, 152 Vt. 67, 69 (1989) (reviewing § 665(b)'s best interest factors in parentage proceeding). The court found that five of the nine factors favored father, some only slightly, while one factor favored mother, with the other three being neutral or not applicable. In general, the court concluded that if the parties were living in the same area, a shared arrangement would work fine, but that, given their separate locations, awarding father primary physical rights and responsibilities made more sense because father had a greater ability and disposition to meet their son's needs, and the boy had more significant family and community relationships in Vermont. Mother challenges the court's findings and conclusions on several points, which we examine in turn.

Mother first challenges the family court's conclusion that father had a greater ability to provide appropriate housing for the parties' son. The court noted that the boy would have his own

room if he were to live with his father, but did not have even his own bed let alone his own room while living with his mother at his grandmother's house in Florida. The court also expressed concern that mother had not acted expeditiously in trying to obtain a wheelchair for her son, who was receiving medical treatment that required a cast on his legs. Moreover, the court felt that mother had not been proactive in arranging pre-school or playgroups for the child. Mother contends that any shortcomings regarding her ability to meet the boy's needs were the result of her financial circumstances, which could have been addressed by giving her a maintenance supplement. We find the court's concerns to be legitimate. Mother had been in Florida for nearly six months at the time of the custody hearing. She had moved first to her father's home and then to her mother's home, where her brother and sister were also living. The court properly considered the accommodations that mother was able to provide the parties' son during that period. At no time during the hearing did mother request or express a need for a maintenance supplement. We also find support in the record for the court's concerns that, while mother had inquired about insurance coverage for a wheelchair, she had done nothing to explore the possibility of renting one for the parties' son, who was immobilized for a significant period of time by his cast. Finally, we find nothing speculative about the court's conclusion that father would be able to deal with the boy's medical needs in Vermont. See Payrits v. Payrits, 171 Vt. 50, 52-53 (2000) (reviewing findings in custody decision for clear error).

Next, mother challenges the court's conclusion that the parties' son had stronger ties to Vermont than Florida, and that mother had given little thought to what impact the move to Florida would have on the boy. Viewed most favorably to father, the evidence supports the court's conclusions. Father's testimony that the parties' son did not seem as happy to see him as he had hoped when he visited the boy in Florida does not undermine the court's conclusion that the boy's family and community ties were stronger in Vermont than Florida. There was evidence that the boy had strong ties to his family and the community in Vermont, and that mother had been slow to develop such ties in Florida. Further, all of the reasons that mother gave the family court for going to Florida were ones that addressed her needs rather than the needs of the parties' son.

Mother also argues that the court made contradictory conclusions by stating that she had been reluctant to promote regular parent-child contact with father and had shown insufficient respect for father's role in their son's life, but, once legal rights were established, would encourage appropriate contact. We find nothing contradictory about these conclusions. The evidence supported the court's conclusion that although mother had been hesitant about promoting father's role in their son's life, she would do what was best for the child in the end.

Next, mother criticizes the court for failing to mention father's live-in girlfriend in discussing other persons who might significantly affect the child. See 15 V.S.A. § 665(b)(7) (requiring court to consider "the relationship of the child with any person who may significantly affect the child"). Although it may have been helpful for the family court to examine the effect that father's relationship with this woman might have on the boy, the evidence demonstrated that the child had virtually no relationship with the woman up to that point. Father testified that his girlfriend had spent time with the parties' son for a day before mother took the boy to Florida, that the woman had gone to Florida with father to visit the boy while he was in the hospital, that she spent one day with

the boy at the hospital, that the boy enjoyed her company, and that mother was unhappy about the woman's possible involvement in their son's life. This evidence provided little for the court to work with in terms of making findings concerning the boy's relationship with husband's girlfriend. We discern no basis for reversal based on this argument.

Finally, mother argues that the court failed to give adequate weight to its finding that father had a violent temper, which was not a good role model for the boy. Again, we discern no basis for reversal. In explaining why she took the parties' son to Florida without giving father advance warning, mother stated that she was afraid of father, who was much bigger than she. On further inquiry from the court, she testified that father had never hit her, but that he had pushed her and grabbed her neck on occasion, and that he would act like he wanted to punch something when he got angry. Father denied ever hitting mother, but acknowledged that he had engaged in verbal abuse on occasion by yelling at her. He further acknowledged that on one occasion the parties' son had told him not to yell at his mom. The court found father's violent temper to be disturbing, but felt that his awareness of the problem would help him avoid such conduct in the future. Apparently, mother believes that the court's findings and conclusions regarding father's temper required the court to give her primary physical rights and responsibilities over the parties' son. We disagree. The record does not indicate that father engaged in, or exposed the parties' child to, a regular or ongoing abusive relationship, which undoubtedly would have tipped the scales in favor of giving mother physical parental rights and responsibilities. Notwithstanding the instances of inappropriate conduct by father, the court concluded that, on balance, father would better be able to provide for their son's needs, and that the boy had stronger family and community support in Vermont. Our role is not to reweigh the evidence and make our own decision about who is better suited to be the custodial parent, but rather to determine whether the record supports the decision of the trial court, which is in a better position to assess the witnesses' credibility. Chick v. Chick, 2004 VT 7, ¶ 10, 844 A.2d 747 (recognizing family court's broad discretion in awarding physical rights and responsibilities). In this case, there is support in the record for the court's decision.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned