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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-270

FEBRUARY TERM, 2006

Emily Raymond	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Patrick Tinkel	}	
	}	DOCKET NO. F716-10-04 Cndm
		Trial Judge: Helen M. Toor

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

Mother appeals from the family court=s order awarding sole legal and physical parental rights and responsibilities over the parties= minor child to father. She argues that the trial court erred because: (1) its findings and conclusions are not supported by the great weight of the evidence; (2) its custody decision discriminates against her based on a mental condition in violation of state and federal law; and (3) it should have granted her motion to reopen to hear additional evidence. We affirm.

Mother and father are the parents of Independence, born in September 2001. Parents were never married; they met in 1996 and separated in 2004. In October 2004, mother filed a parentage action. After a hearing, the family court issued an order awarding sole legal and physical rights and responsibilities to father. The court made the following findings. Both mother and father were good parents. Mother, who received disability payments and did not work outside the home, was very involved in Indy=s daily life. Father was also devoted to Indy. No witnesses expressed concern about father=s parenting skills, but one of mother=s friends testified that she had seen mother lose her temper and overreact to Indy=s behavior; mother told her that she sometimes felt like throwing Indy against the wall. With the exception of this witness, all other witness agreed that both parents were patient, loving, attentive, and sensitive to Indy=s needs.

Father obtained a relief-from-abuse order against mother in 2004 after she punched him in the face and groin and called him names. The incident occurred in front of Indy, who was upset. Mother had committed other acts of violence against father in the past, including punching him in the face and throwing a plate of food at him. Mother also harmed herself, including hitting herself in the head, banging her head against the floor, and punching herself in the stomach while pregnant. Mother admitted that she had difficulty controlling her anger, but she asserted that this was no longer a problem. Mother initially testified that she had had Aextensive therapy@ to address this issue, but she admitted on cross-examination that until just recently, she had not been to a therapist for a year and a half. The court found that mother was, in general, less credible than fatherCshe appeared to be trying to say the Aright@ thing and she changed her testimony on repeated occasions throughout the hearing.

The court found that mother had been receiving disability payments for a number of years due to post-traumatic stress disorder, which resulted from serious physical abuse and neglect when she was a child. Mother had also told others that she had been diagnosed with Borderline Personality Disorder. Mother had attempted suicide in the past. She was not taking any medication for her illness, and she had just started seeing a new counselor. The court credited testimony from mother=s brother that mother can fly into rages, finding it consistent with similar testimony from several other witnesses. Mother also told others that she could get rid of father by hiring someone to kill him, and she identified the person that she had in mind to hire. That person had pending murder charges, and mother had corresponded with him during his incarceration. The court did not find any evidence, however, that mother intended to follow through on her threats.

The court found that mother was living in Burlington, where Indy had spent most of her life. Mother and Indy regularly attended the AFamily Room,@ a parent-child center in the area. In December 2004, Indy began attending pre-school two days per week in Burlington. Father lived in Huntington, Vermont, where the parties had moved in July 2004 prior to their separation. Father took Indy to a playgroup in Huntington once a week, and he had recently obtained employment as a school bus driver, which would allow him to take Indy on the bus with him and drop her at a day care next to the school.

Based on these and numerous other findings, the court evaluated Indy=s best interests using the factors set forth at 15 V.S.A. ' 665. In conducting its analysis, the court expressed concern about mother=s failure to address her mental health issues. It explained that mother failed to participate in regular counseling or seek medication, despite her clear inability to

control her anger, and that this lack of care for her own needs raised significant concerns about her ability to offer Indy appropriate guidance. The court also concluded that father was better able to provide Indy with a safe environment and was better suited than mother to foster a positive relationship with the other parent. Based on these and numerous other conclusions, the court determined that awarding sole parental rights and responsibilities to father was in Indy=s best interests. Mother filed a motion for reconsideration, which the court denied. This appeal followed.

On appeal, mother challenges the family court=s determination that awarding sole parental rights and responsibilities to father was in Indy=s best interests. She maintains that the family court=s findings with respect to her mental health status and the relationship between her mental health and her ability to raise Indy were not supported by competent evidence, and that many of the court=s findings with respect to the child=s best interests were contrary to the great weight of the evidence. More specifically, she asserts that the family court: (1) failed to recognize the degree to which she had served as Indy=s primary parent and met all of her needs to an extraordinary level; (2) failed to recognize and adequately weigh the harm that would result from a change in custody, particularly in light of Indy=s connection to the community-based preschool program; (3) failed to give adequate weight to the number and quality of supportive individuals available to the child through mother; and (4) failed to adequately recognize the degree to which mother encouraged a positive relationship between father and child and the degree to which father had attempted to undermine the relationship between mother and child.

We reject these arguments, most of which are at odds with our standard of review on appeal. The family court has broad discretion in determining a child=s best interests and rendering a custody determination. Payrits v. Payrits, 171 Vt. 50, 52-53 (2000). On review, we will uphold the family court=s findings of fact unless, taking the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence in the record to support them. Semprebon v. Semprebon, 157 Vt. 209, 214 (1991). We will not set aside the court=s conclusions if they are supported by its findings. Payrits, 171 Vt. at 53. Where there is conflicting testimony on a factual issue, it is the role of the family court, not this Court, to assess the credibility of the witnesses, weigh the evidence, and determine its persuasive effect. Id. at 54. This Court Awill not set aside a judgment solely because we would reach a different conclusion on the facts.@ Id. (quotations omitted).

Mother asserts that because she was Indy=s primary caregiver before the parties separated, and because the court=s consideration of the remaining statutory factors indicated that she was a suitable parent, the court committed reversible error in awarding custody to father. Mother misstates both the law and the facts as found by the family court. The court=s finding that mother was the child=s primary caregiver is not entitled to dispositive weight. See id. (A[W]hile a primary care provider finding is entitled to great weight, we have continually declined to adopt a rule that the primary custodian will be awarded custody as long as the parent is fit.@ (quotations omitted)). Moreover, the court did not conclude that mother was an otherwise fit parent. As noted above, the court concluded that mother=s failure to tend to her mental health issues rendered her less capable than father of serving Indy=s best interests. In reaching its conclusion, the court considered the effect that a change of custody would have on the child. See id. at 55 (weight to be accorded to the primary caregiver relationship must be based on likely effect of a change of custodian on the child). It recognized the bond shared by mother and child as well as Indy=s long-term relationship with the staff at the Family Room. The court ultimately concluded, however, that despite these ties, the balance of the statutory factors weighed in favor of an award of custody of this young child to father.

Mother maintains that the court lacked evidence on which to base its conclusions about her mental health. According to mother, except for isolated incidents, there was no credible evidence that she had a problem with anger toward others, and particularly toward Indy. She argues that the evidence is Astrongly@ to the contrary. It is not the role of this Court, however, to reweigh the evidence. The family court=s findings that mother had physically abused father and herself, that she had gone on tirades and could go from calm to furious in an instant, that she suffered from post-traumatic stress disorder, and that she had not been receiving treatment until just recently for her mental health issues are all supported by credible evidence in the record. Additionally, the court found mother to be a less credible witness than father, and we will not disturb this assessment on appeal. The family court acted reasonably in concluding that mother=s failure to address her mental health problems would have a negative effect on Indy. See Bissonette v. Gambrel, 152 Vt. 67, 69-70 (1989) (in exercising its broad discretion, family court entitled to draw upon its own common sense, life experience, and the common experience of mankind). We note that the family court also found that father was better suited than mother to provide Indy with a safe environment and more capable than mother of fostering a positive relationship with the other parent. See Renaud v. Renaud, 168 Vt. 306, 309 (1998) (A[T]he great weight of authority holds that conduct by one parent that tends to alienate the child=s affections from the other is so inimical to the child=s welfare as to be grounds for a denial of custody to, or a change of custody from, the parent guilty of such conduct.@). The court based its latter conclusion on its finding that mother had placed the child in the middle of her disputes with father. While mother argues that the weight of the evidence supports a contrary finding, she misunderstands the nature of this Court=s review. Where, as here, the family court=s findings are supported by credible evidence in the record, they will not be disturbed on appeal.

We similarly find no basis to disturb the court=s conclusion as to the seventh statutory criterionCthe child=s relationship with any other person who may significantly affect the child. Mother argues, without any citation to the record, that the teachers at the Family Room testified about their relationships with Indy, and mother=s aunt testified to her decision to become very involved in the lives of mother and Indy. Mother also asserts that Indy has a number of other relatives who have contact with

her as well. Contrary to mother=s assertions, the family court found that both parties had only recently increased contact with other family members, and although Indy had been going to the Family Room for years, there was no evidence presented about any particular bond that she shared with other children or adults there. Mother has not demonstrated that these findings are clearly erroneous. Mother=s aunt testified that she visited mother and Indy Aperhaps once every one or two months@ and acknowledged that she was not a frequent visitor. The thrust of her testimony was that mother was a good parent, not that she shared a close bond with the child. Moreover, we note that the family court considered Indy=s long-term relationship with the staff at the Family Room under a separate statutory factor, and mother does not point to any record support for her assertion that Indy had established relationships with these staff members that significantly affected her. Mother similarly does not identify any record support for her assertion as to the Anumber of other relatives@ that have contact with Indy. We find no error in the court=s consideration of this factor.

This case is not like Johnson v. Johnson, 163 Vt. 491 (1995), on which mother relies. In that case, we expressed concern that the family court=s findings and conclusions, as well as the evidence presented at the hearing, had focused more on a few negative incidents involving the mother than on the general parenting skills of the parties and the likely effect that a transfer of custody would have on the child. Id. at 495-96. We recognized, however, that given the wide discretion afforded to the family court in custody matters, we would ordinarily affirm the court=s custody decision as long as it had compared the attributes of each parent in light of the statutory factors set forth at 15 V.S.A. ' 665(b) and had not relied solely on a showing that one parent=s actual or expected performance was inadequate with respect to one factor. Id. at 496. We concluded that the court had failed to follow this procedure because it had not engaged in an even-handed analysis of the statutory factors with respect to each parent, and there was very little evidence to support the court=s findings regarding the father=s ability to provide for his daughter=s physical and emotional needs. Id. In light of the close state of the evidence, and because we could not determine the impact that a recommendation made by a guardian ad litem had had on the court, we reversed the court=s determination on parental rights and responsibilities and remanded for a new hearing. Id. at 497. Unlike Johnson, in this case the family court did engage in a balanced analysis of the statutory factors, and its findings as to both parents= abilities, as well as their shortcomings, were supported by credible evidence in the record. We find no abuse of discretion in the court=s custody determination.

Mother next argues that by awarding custody to father, the family court discriminated against her on the basis of a mental condition in violation of 9 V.S.A. " 4500-4507, the Americans with Disabilities Act (ADA), 42 U.S.C. " 12101-12213, and the state and federal constitutions. She asserts that there was no evidence to support the court=s conclusion that she has an untreated serious mental health problem that required medication and that would interfere with her ability to parent Indy.

While mother alluded to a discrimination claim in her motion for reconsideration, she did not raise this precise claim below. Even assuming that this claim of error was preserved, however, we find it without merit. We addressed an analogous claim in In re B.S., 166 Vt. 345 (1997), where we rejected an argument that the ADA applied in proceedings to terminate parental rights. We explained that such proceedings are not Aservices, programs, or activities@ within the meaning of the ADA. Id. at 352; see also 9 V.S.A. ' 4500(a) (Vermont anti-discrimination statutes to be construed and implemented so as to be consistent with ADA). Even if the ADA did apply, we explained, the termination process did not discriminate against disabled persons because in deciding whether to terminate parental rights, the court must determine a child=s best interests in accordance with the statutory criteria and a mentally disabled parent is capable of meeting those criteria. In re B.S., 166 Vt. at 352. We also noted that nothing in the ADA suggests that denial of TPR is an appropriate remedy for an ADA violation. Id. at 353. Mother identifies no reason why we should reach a different conclusion with respect to parentage proceedings. Like a termination proceeding, the family court=s custody decision is guided by a child=s best interests under 15 V.S.A. ' 665(b), and, in this case, the family court=s decision plainly reflects its consideration of the statutory factors. The court=s decision was not based on the fact that mother had a mental illness, nor that she was receiving disability payments for post-traumatic stress disorder, but rather on the effect that her untreated mental illness had on the best interests of the child. See Begins v. Begins, 168 Vt. 298, 301 (1998) (AThe court=s paramount consideration in awarding parental rights and responsibilities is the best interests of the child.@). We reject mother=s assertion that the court discriminated against her. Mother offers no support for her assertion that her equal protection rights under the state and federal constitutions were violated, and we therefore do not address this argument. See Johnson v. Johnson, 158 Vt. 160, 164 n.* (1992) (this Court will not consider inadequately briefed arguments).

Finally, mother argues that the court abused its discretion in denying her motion under Vermont Rule of Civil Procedure 59 to introduce additional evidence and present a witness that the court had excluded as cumulative. Mother argues that the evidence she offered could not have been discovered prior to trial through the exercise of due diligence. She further asserts that the witness=s testimony was not cumulative because it would have focused on her ability to meet Indy=s developmental needs in the future.

We find no abuse of discretion. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588 (1996) (ADisposition of a Rule 59 motion is committed to the trial court=s sound discretion.@). The record shows that mother offered three affidavits in support of her motion. In the first, one of the trial witnesses who had testified that she observed mother lose her temper with Indy stated that mother was an excellent parent and expressed her confidence that mother would never endanger Indy. The second affidavit was from mother=s sister, who averred that mother=s brother, who had testified at trial, was a racist and his testimony at trial

had been influenced by his racist beliefs. The third affidavit was from an individual who worked at the Family Room who essentially stated that mother was a good parent and that he had never seen her act inappropriately around Indy. The trial court denied mother=s motion based on its conclusions that mother offered no legal basis for reopening the evidence and that the evidence she proffered would not change the court=s conclusions. The court explained that mother=s motion essentially disputed the court=s credibility determinations and did not convince the court that it erred.

Mother fails to demonstrate that the family court abused its discretion in reaching this conclusion. See id. (purpose of a Rule 59 motion is to allow Athe trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party@). We note that, contrary to mother=s assertion, the first affidavit does not contain a Afull recantation@ of the witness=s trial testimony, and, even if it did, we would find no abuse of discretion. Numerous witnesses testified to mother=s anger management problems. Additionally, mother offers no reason why she could not have introduced evidence to impeach her brother=s credibility during the hearing. See id. at 589 (finding no abuse of discretion in trial court=s refusal to consider evidence proffered by defendants in post-trial motions that concerned credibility and reliability of plaintiffs= witness where defendants had ample opportunity to elicit such evidence at trial and their failure to do so was not attributable to mistake of inadvertence of the trial court); see also Gardner v. Town of Ludlow, 135 Vt. 87, 92 (1977) (explaining that post-trial statement by one of defendant=s principal witnesses, which was at best merely admissible for impeachment, did not establish grounds for a new trial). Finally, numerous witnesses from the Family Room testified to mother=s parenting abilities, and it was for this reason that the family court excluded the testimony of the proffered witness as cumulative during the hearing. See V.R.E. 403 (trial court has discretion to exclude needless presentation of cumulative evidence). Mother offers no compelling argument why the evidence should be reopened to allow this testimony. See Gardner, 135 Vt. at 91-92 (holding that where matters alleged in Rule 59 motion were purely cumulative to evidence adduced at trial, and trial court determined that they were not so controlling or persuasive as to make it reasonably probable that different result would be reached, trial court was justified in denying the motion). The family court did not err in denying mother=s motion.

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice