

*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. 2018-306

JANUARY TERM, 2019

Brianne Gallagher v. Denel McIntire*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
	}	DOCKET NO. 304-11-17 Wrđm
		Trial Judge: Robert P. Gerety, Jr.

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

Father appeals a final order in this parentage action granting sole legal and physical parental rights and responsibilities to mother and establishing a parent-child contact schedule. On appeal, father argues that the court improperly found that mother was the child’s primary caregiver and accorded this fact too much weight in its assessment of the child’s best interests. Father also contends that the court abused its discretion by decreasing father’s contact when establishing a parent-child contact schedule. We affirm.

The court found the following. The parties met in April 2015. At the time, mother was a post-doctorate fellow and father was working at a bank. Father has a child from a prior relationship. Mother moved into father’s home in February 2016. Mother gave up her full-time employment to parent their child, who was born in May 2016. Mother assumed primary responsibility for the parties’ child and for the house work. Father worked full time and spent substantial amounts of time outside the home engaged in leisure activities. Father did very little to help mother. Mother was home alone and felt isolated. The relationship deteriorated. Both parties began to smoke marijuana and drink alcohol frequently. Mother smoked marijuana and drank alcohol to reduce her stress. Father was concerned about mother’s marijuana use while breastfeeding and took steps to eliminate marijuana from the home.

The parties argued constantly. Mother was angry and father would withdraw from communication. Father occasionally took mother’s phone and car keys. In July 2017, the parties had a dispute and father began recording mother. She was very upset, angry, and crying. During an attempt by mother to take the recording device, father pushed mother and held her down. This caused her pain, but no significant physical injury. After father released mother, she threw two beer bottles at him. The bottles did not hit father. The fight continued later in the evening and father held mother down, causing her pain and inflicting bruises. Another incident occurred in November 2017. Both parties were drinking. Father again began recording mother, which angered her. Based on a note and conversation she overheard,<sup>1</sup> mother thought father planned to hurt her

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<sup>1</sup> The court found that mother misconstrued both the note and the conversation and that father did not plan to hurt mother.

and feared for her safety. Mother went to the attic and posted several statements on the internet, saying that her partner was emotionally abusing her and she was surrounded by “crazy people.” Several people reported mother’s statements to police who responded to the home. Mother’s mother also arrived and the situation was defused. Thereafter, mother began living with her mother.

Each party filed a separate complaint for relief from abuse (RFA). Mother also filed this parentage action seeking primary parental rights and responsibilities. At the RFA hearing the parties agreed to share legal and physical parental rights and responsibilities, and the court established a parent-child contact schedule. Under the temporary order, the parties agreed to a schedule that provided each with an equal number of overnights with their daughter in a two-week period. This agreement was approved in the family division as a temporary order in the parentage case pending a final hearing. The parties then dismissed their RFA complaints.

After the parties separated, mother engaged with a mental-health therapist and psychiatrist. She stopped smoking marijuana and drinking alcohol.

As to parental rights and responsibilities, the court considered the statutory factors under 15 V.S.A. § 665. The court found the parties were equal on all factors but two. The parties were equally capable of providing their child with love, affection, and guidance, and meeting her present and future developmental needs. Both were disposed to encouraging contact with the other parent. The child has a positive relationship with relatives on both sides of the family, including her paternal and maternal grandparents, her half sister,<sup>2</sup> and her maternal aunt. The court found, however, that mother was somewhat better disposed to provide the child with adequate food, clothing, medical care, and other material needs. Most significantly, the court found that mother was and continued to be the child’s primary caregiver and that this was the deciding factor. Accordingly, the court granted mother sole legal and physical parental rights and responsibilities.

The court granted father contact on an alternating week schedule Thursday to Sunday one week and Wednesday evenings the next week. The court explained that this would provide the child with stability and still allow father to have significant time with her. Father appeals.

The family court has broad discretion in evaluating the child’s best interests under the statutory factors and assigning parental rights and responsibilities. Putnam v. Putnam, 166 Vt. 108, 116 (1996). The court’s findings will be affirmed if supported by the evidence. Id. Where there is conflicting testimony on an issue it is up to the trial court to weigh the evidence and decide its persuasiveness. Payrits v. Payrits, 171 Vt. 50, 54 (2000).

On appeal, father argues that the trial court abused its discretion in granting mother sole legal and physical parental rights and responsibilities because the court improperly evaluated the primary-care-provider factor. Father’s argument is two-fold: first, that the evidence does not support the court’s finding that mother was the primary caregiver; and second, that the court accorded this fact too much weight. As to the first point, father acknowledges that mother stayed home with the child from birth but contends that from November 2017 until September 2018 the parties were sharing responsibility for the child pursuant to the temporary order and this changed mother’s status.

The evidence supports the court’s finding that mother was the child’s primary caregiver. The evidence demonstrated that from birth mother was home with the parties’ child, took primary

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<sup>2</sup> The trial court erroneously referred to father’s older child as a step-sister. This error is harmless and does not affect the outcome of the appeal.

responsibility for her medical care and feeding. Father was absent from the home. The court found that even after the parties separated, mother was the person to assume primary responsibility for the child's care. The court found that mother took more responsibility for the child's day-to-day needs and father was less involved. Mother's testimony, including that she was the primary care provider, was responsible for arranging the child's medical care, and for arranging for preschool, supports this finding. Although there may have been countervailing evidence, it is within the family court's discretion to weigh that evidence and credit mother's testimony.

Father next asserts that the court gave mother's status as primary caregiver too much emphasis in its assessment of the child's best interests. We conclude there was no error. In assessing the child's best interests, the court does not automatically award primary legal and physical rights to the primary caregiver, but this fact is accorded "great weight." Harris v. Harris, 149 Vt. 410, 418 (1988) (quality of child's relationship with primary care giver should be given "great weight"). Here, the trial court thoroughly considered each the statutory factors and explained its reasoning. There are no grounds to disturb its decision.

Father also argues that the court abused its discretion in establishing a contact schedule that reduced father's time with the child from the amount of time he had under the temporary order. The family court has "broad discretion" in devising a parent-child contact schedule, which will be upheld "unless its discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." DeLeonardis v. Page, 2010 VT 52, ¶ 43, 188 Vt. 94 (quotation omitted).

Here, the court did not abuse its discretion regarding parent-child contact. Mother testified that the temporary schedule was difficult for their child because she was often staying in several different homes over the course of a week and that this left her without a stable home and disrupted her routine. Mother explained that her proposed schedule would still allow father significant time with their daughter while providing some stability. The trial court credited this testimony, finding that the schedule would accord the child needed stability while still allowing father significant contact.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice