

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-542

JUNE TERM, 2004

	}	APPEALED FROM:
	}	
	}	Essex Family Court
Kevin Kierstead	}	
	}	
v.	}	DOCKET No.38-7-02 Exdm
	}	
Charlotte Bartholomew	}	Trial Judge: Hon. Barbara A. Zander
	}	
	}	

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

Father appeals from a divorce judgment of the Essex Family Court. He raises numerous claims, principally contending that the court erred in awarding parental rights and responsibilities for the parties' minor child to mother. We affirm.

As found by the trial court, the facts may be briefly summarized. The parties met in Colorado in August 1999, and moved to Vermont to be closer to mother' s family in 2000. Their only child, a daughter, was born in June of that year. The parties were married in February of 2001, and separated a little more than a year later. Father worked intermittently during the marriage until he injured his back. The court found that father spent substantial parts of each day sleeping, on the internet, or at the gym. Mother stayed home to care for the child and was primarily responsible for the cooking, cleaning, grocery shopping, and other household responsibilities. In September 2001, however, she obtained employment with the federal government and left for Georgia in October to attend a training session. Although in father' s care, the child received substantial care from others. Mother returned in December, after injuring her knee. Although mother continued to work while father remained at home, she was forced to hire a babysitter to provide child care for 30 to 40 hours per week because father failed to provide such care. The court also found that father had been physically abusive throughout the marriage.

Mother returned to Georgia in May 2002, to complete her training, at which time father filed a relief from abuse petition against her. Ultimately, mother agreed to temporarily relinquish parental rights and responsibilities during the divorce proceeding in return for father' s dropping the relief-from-abuse petition (an abuse prevention order would have jeopardized her federal employment). In July 2003, father took the child with him to Virginia, where he has a substantial extended family. Following a two-day hearing that month, however, the court awarded sole legal and physical rights and responsibilities to mother, and extensive visitation to father during summers and holidays. Although father was represented by counsel at the hearing, he has appealed pro se.

Father first contends the court had a disqualifying conflict of interest based on an allegation that wife' s mother, a witness at trial, is a friend of the Essex County State' s Attorney, and that the court also deals regularly with the State' s Attorney. A request for disqualification was not made to the court during the proceedings below, and therefore any claim of error has been waived by father' s failure to preserve the issue for appeal. See In re B.L., 145 Vt. 586, 590 (1985) (failure to move for disqualification of judge based on alleged personal bias constituted waiver of issue on appeal). Furthermore, the claim finds no support in the record. Accordingly, we discern no plain error.

Father next contends the court erred in failing to give credence to statements contained in a document purporting to be the results of a polygraph examination to which he had voluntarily submitted. Mother had introduced the document, which contained questions and answers that father had allegedly provided to the examiner relating to mother' s alleged

adultery, father's marital fidelity, and mother's allegations of physical abuse. Father had posted the document on a web site and then invited members of mother's family, friends, and neighbors to access it. The court admitted the document, over father's objection, later noting that it was relevant to the statutory criterion relating to father's ability to foster a positive relationship with mother, under 15 V.S.A. § 665(b)(5). The court subsequently permitted father's attorney to explore the substance of some of the statements in the document, but cautioned that it did not intend to rely on the statements for their truth. In its written decision, the court found that father's posting of the document on the website was abusive and humiliating for mother and the child.

We discern no error or inconsistency in the court's finding that the document was not sufficiently reliable to rely on its contents for the truth of the matters asserted therein. See, e.g., State v. Hamlin, 146 Vt. 97, 108-09 (1985) (no error in exclusion of polygraph examination where there was no expert testimony to lay foundation for probative value of test). In observing that father's conduct in posting the document on a website and inviting others to access it was abusive, the court was not required to rely on the truth of its contents. We thus discern no error.¹

Father next challenges the court's findings and conclusions with respect to each criterion of analysis concerning the best interests of the child under 15 V.S.A. § 665(b). Our review of the court's decision is limited. The trial court enjoys broad discretion in awarding custody of children, and its decision will not be set aside unless that discretion was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence. Payrits v. Payrits, 171 Vt. 50, 52-53 (2000); Myott v. Myott, 149 Vt. 573, 578 (1988). The bulk of father's claims is that the court failed to give sufficient weight to certain evidence that he claims favored an award of custody to him. The trial court is in the best position to weigh the evidence and the credibility of the witnesses, however, and this Court cannot disturb its finding unless, viewing the evidence in the light most favorable to the prevailing party and disregarding modifying evidence, they are clearly erroneous. Mansfield v. Mansfield, 167 Vt. 606, 607 (1998) (mem.).

Although his assertions are numerous, father's brief focuses on several issues². He contends the court erroneously failed to consider that mother was absent from the State, undergoing job training, for approximately eight months of the child's first two years, during which time father was allegedly the child's primary care provider. Accordingly, he claims that several factors, including the relationship of the child with each parent and the ability to meet the child's needs, favored him. The court found that each parent was equally disposed to provide the child with love and affection, but that mother had demonstrated a superior ability to meet the child's needs, noting that father spent extensive periods of each day sleeping, on the internet, or at the gym, and required substantial backup assistance to care for the child properly. The court also found that mother was the child's primary care provider and that the child was strongly bonded with mother and her maternal grandparents, who had provided routine care throughout her young life, that the child had spent almost her entire life in Vermont and had friends and family here, and that father had abused mother during the relationship. The record supports these findings. Accordingly, we discern no basis to disturb the court's findings and conclusions. See id.

Father also claims the court overlooked a number key facts, including allegations that mother had endangered the child on at least two occasions, that father had extensive family in Virginia to provide a nurturing environment, that mother had repeatedly failed to provide her work schedule to father, that father had a strong bond with the child which would be harmed by her living with mother in Vermont, and that mother lied about father's alleged physical abuse. The incidents of alleged endangerment involved one occasion when someone struck mother while she was holding the child. This does not support father's claim that mother was a less fit parent. Father also claims that mother once threatened to throw the child against the wall, but nothing in the record substantiates the allegation. Conversely, the record amply supported the court's finding that father had physically abused mother throughout the relationship. As to father's other claims, the court's findings did, in fact, recognize father's affection for the child and the presence of father's extended family in Virginia, but the court concluded that mother was better able to care for the child. The record supports this finding and conclusion. Accordingly, we discern no basis to overturn the judgment. See id.

Finally, father contends the court was biased against males, but again the claim was waived by father's failure to assert such alleged bias at trial. See B.L., 145 Vt. at 590. We note, moreover, that our review of the record revealed nothing to support the claim.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Marilyn S. Skoglund, Associate Justice

Paul L. Reiber, Associate Justice

Footnote

1. Father also asserts, in this regard, that his “constitutional right to post a family friendly web site” was violated by the court’s decision. Father fails to demonstrate what constitutional rights have been violated, or how, and we therefore reject the claim.

2. Father has raised a number of additional challenges to the court’s findings, or lack of findings in his reply brief (denominated “Response to Appellee’s Brief”), but we decline to address issues raised for the first time in an appellant’s reply brief. *Robertson v. Mylan Lab., Inc.*, 2004 VT 15, ¶ 1 n.2, 848 A.2d 310.