

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-044

NOVEMBER TERM, 2006

Corey D=Avignon

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APPEALED FROM:

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v.

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Addison Family Court

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Laurey D=Avignon

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DOCKET NO. 182-10-04 Andm

Trial Judge: Matthew I. Katz

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

Mother appeals a family court order awarding custody of their three minor children to father. On appeal, mother contends that the trial court failed to properly consider all relevant evidence and that its findings are not supported by credible evidence. We affirm.

The parties have three minor children, who, at the time of the final order, were 6, 4 and 8 months. Mother also has a sixteen-year-old child. The parties went through a contested divorce and the family court

conducted a trial, mainly on the issue of custody. In the family court, father was represented by counsel and mother appeared pro se. Following several days of testimony, the family court issued extensive findings and ultimately awarded physical parental rights and responsibilities of all three children to father. The court stayed the order regarding the infant because she was still breast-feeding. Mother appeals.

The family court has broad discretion in awarding custody, and its findings will not be overturned unless clearly erroneous. @ Payrits v. Payrits, 171 Vt. 50, 52-53 (2000). The family court has the unique ability to assess the credibility of the witnesses and weigh the evidence, thus we will affirm its findings if supported by the evidence, and its conclusions if supported by the findings. Id. at 53.

On appeal, mother first claims that the court failed to properly consider all of the statutory factors relevant to determining parental rights and responsibilities. Specifically, mother contends that the trial court failed to consider the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development. @ 15 V.S.A. ' 665(b)(6). Mother argues that the trial court failed to discuss her relationship with the children as primary caregiver and give it the required weight.

The statute directs the trial court to be guided by the best interests of the child, @ and to consider each of the statutory factors. 15 V.S.A. ' 665(b). The statute imposes no specific requirement on how this consideration is to be manifested in the court's findings and conclusion. @ Mansfield v. Mansfield, 167 Vt. 606, 607 (1998) (mem.).

Mother is incorrect in her complaint that the family court did not consider her status as primary care provider. The court discussed at length the weight to be accorded that factor depending upon the quality of the relationship between the child and custodian. @ Habecker v. Giard, 175 Vt. 489, 493 (mem.) (2003). After considering the evidence of impact on the children from a change in primary custody to father, including expected improvements in diet, essential hygiene, education and socialization, the court found the weight of mother's primary care provision underwhelming. This result was entirely permissible. See Payrits, 171 Vt. at 55 (Only when there is no evidence of that effect [of change of custody on the child] should the

court ordinarily find that the child must remain with the primary caregiver if fit.@ (quotations omitted)).

In addition to the children=s relationship with mother, the trial court considered each of the other statutory factors pertinent to the award of physical custody. The trial court did not question mother=s love for her children, but concluded that taking the statutory factors as a whole, the children were better off with father. See Harris v. Harris, 149 Vt. 410, 418 (1988) (explaining that even great weight to the primary custodian factor does not rise to a presumption). The court concluded, based on credible findings, that several factors weighed in father=s favor. Specifically, the court concluded that the children were more likely to have a positive relationship with their aunt and grandmother under father=s care. 15 V.S.A. ' 665(b)(7) (relationship with any other person who may significantly affect the child). Further, the court concluded that with father, the children could remain in their current home. Id. ' 665(b)(4) (child=s adjustment to present housing, school and community). The court concluded that father could better care for the children=s daily needs based on its findings that mother did not make regular meals for the children or properly clean them. Id. ' 665(b)(2) (ability and disposition of parent to provide adequate food, clothing, medical care and other material needs). The court concluded that father provided a better example for the children based on its finding that mother was repeating mistakes that led to a difficult relationship with her older child, and she was not providing positive guidance for the younger children. Id. ' 665(b)(3) (disposition of parent to meet child=s present and future developmental needs). Finally, the court found that the children were more likely to have a relationship with both parents in father=s custody, because mother manipulated father=s visitation rights and limited father=s contact with the children. Id. ' 665(b)(5) (ability and disposition of parent to foster positive relationship and frequent contact with other parent). Given the above findings and conclusions, the court did not abuse its discretion in awarding custody to father despite mother=s role as primary care provider.

Second, mother submits that the court=s findings are not supported by credible evidence. In particular, mother argues that the court=s findings that she did not provide adequate meals for the children and displayed no willingness to keep house were not supported by credible evidence. Mother contends that in reaching several findings, the trial court relied on hearsay testimony, and put emphasis on father=s witnesses rather than her own. Mother, however, failed to object to the hearsay. In a number of instances, hearsay concerning

mother=s deficiencies in minimally hygienic housekeeping, and in keeping the children appropriately fed, clean and educated, was corroborated by the first hand testimony of the parents and others, and some of mother=s photographic exhibits. Essentially, mother asks us to substitute our own judgment for that of the trial court. We will not reweigh the evidence on appeal. Chick v. Chick, 2004 VT 7, & 10, 176 Vt. 580 (mem.). AThe issue is not whether we would have reached the same judgment as the trial court, but rather whether the evidence supports the court=s findings and conclusions.@ Id. In this case, the trial court=s findings are supported by credible evidence.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice