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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2009-094 & 2009-444

MAY TERM, 2010

Michael Chickanosky	}	APPEALED FROM:
	}	
v.	}	Addison Family Court
	}	
Margaret Chickanosky	}	DOCKET NO. 105-6-05 Andm
		Trial Judge: Cortland Corsones

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

Mother appeals from a family court order awarding father primary decisonmaking responsibility over their daughter's extracurricular activities, as well as a subsequent order denying a motion to modify. Mother contends the orders impermissibly infringe on her shared physical rights and responsibilities. We affirm.

The record reveals an exceptionally contentious post-divorce relationship between the parties. The original 2005 divorce decree awarded the parties shared legal and physical rights and responsibilities over their daughter, who was five at the time of the judgment. Mother generally has four and father has three overnights per week, with a modified schedule during the summer. Each parent is also entitled to two uninterrupted weeks of vacation with the child during the year. Both parents have new partners and children, and the trial court's findings indicate that this has injected additional tension into the parties' relationship, particularly as a result of mother's animosity toward father's new wife. Another source of contention has been the child's participation in extracurricular activities.

These tensions and disputes led to father's filing a motion to modify parental rights and responsibilities in January 2008. Following a hearing over the course of five days, the court issued a written ruling in January 2009. Relying in part on an extensive court-ordered forensic evaluation, the court found that the parties were unable to effectively communicate, that mother has been unable to set aside her animosity toward father's new family to allow effective communication to occur, and that the conflict had led to emotional trauma and disruption for the child. The court found in this regard that mother had engaged in a number of behaviors with the child—including blaming father's new wife for the break-up of the marriage—that were interfering in the child's relationship with father. Indeed, the court found that mother's overt hostility and interference in the child's relationship with father's new family was having a "devastating emotional effect on [the child]."

The breakdown in communication had been particularly damaging to the child's ability to participate in extracurricular activities. Each party had effectively vetoed the other's decisions to enroll the child in activities such as dance and swim lessons by declining to follow the schedule when it was inconvenient. Mother's hostility to father's choice of activities had resulted in a number of unsettling outbursts in the child's presence, including mother's forcible removal of the child from a soccer game because she was playing on a team coached by father. The court thus found that the circumstances had substantially changed, in that the parties' ability to cooperate had "deteriorated to the point where they cannot make any . . . joint decision for" the child, who "is suffering as a result." In particular, the court found that the parties had been unable to "[m]ake any joint decisions concerning [the child's] participation in extracurricular activities" and that "[a]s a result [the child was] unable to participate in any extracurricular activities, without a court order, even though she had traditionally enjoyed many extracurricular activities."

Finding that mother had been the party primarily responsible for the child's heightened anxieties and that father "is better able to set aside his feelings about [mother] and make decisions in [the child's] best interests," the court concluded that it was in the child's best interests to award father "primary legal responsibility" subject to certain "caveats." These included requirements that father not remove the child from her current school unless the parties agreed, nor change her current church membership without mother's approval. Responding to the parties' stand-off on extracurricular activities, the court also specifically ordered that the child "shall be allowed to participate in any appropriate school-related extracurricular activities that she would like to participate in, and each parent shall be responsible for transporting her to any such activities while [the child] is with him or her. [Father] shall be the primary decision-maker for any non-school related extracurricular activities."

Mother moved to alter or amend the judgment, expressing concern that—among other things—father would over-schedule the child for activities during her custodial time. The court denied the motion, and mother appealed. Several months later, in July 2009, mother filed a motion to "modify, clarify, and enforce" the order asserting—among other claims—that the time required to transport the child to swim and dance lessons was "taking away the quality mother-daughter time" she used to enjoy, that it was not in the child's best interests, and that father's decision to send the child to a one-week overnight Girl Scout camp improperly interfered with her shared physical custody rights. Mother sought to modify the order to limit father's authority to schedule extracurricular activities during her time with the child to one day per week within a limited timeframe and distance from her home. She also sought "to clarify" that father lacks authority to schedule the child for overnight camp without mother's consent. Following a hearing in September 2009, the court issued a written order denying the motion insofar as it sought to clarify or modify father's rights regarding extracurricular activities. The court also denied a subsequent motion to amend, ruling that "the court has determined that the only way [the child] can successfully participate in extracurricular activities is for one parent to have sole decisionmaking authority thereon." This appeal, which we have consolidated with the first appeal, followed.

The essence of mother's claims in both appeals is that the trial court's orders granting or sustaining father's authority to make unilateral decisions concerning the child's extracurricular activities impermissibly violates her custodial rights when those activities occur during her time with the child. Mother asserts in this regard that extracurricular activities necessarily fall within

the category of "routine daily care and control" within the meaning of "physical responsibility," 15 V.S.A. § 664(1)(B), rather than the category of "matters affecting a child's welfare and upbringing" subject to father's legal rights and responsibilities under 15 V.S.A. § 664(1)(A).[1] Having carefully reviewed the record, however, we find that mother's argument was only partially preserved for review on appeal. Mother's position throughout these proceedings has not been that the court lacked statutory authority to grant father the right to schedule any extracurricular activities during her custodial time, but rather that the activities he scheduled were so time-consuming and inconvenient that it had effectively interfered with her shared custodial rights and was not in the child's best interests. Thus, mother's argument focused principally on the facts, not the law, and we address it as such. See Follo v Florindo, 2009 VT 11, ¶ 14, 185 Vt. 390 (issues not raised at trial are not preserved, and this Court will not review them on appeal).[2]

We begin, however, by addressing mother's claim that the issue is controlled by our decision in Miller v. Smith, 2009 VT 120, 989 A.2d 537 (mem.), which was not decided at the time of the proceedings below and therefore could not have been cited. That case involved a motion by the mother, the custodial parent, to require the father to bring the child to her scheduled activities on his visitation days. The trial court declined, ruling that how each parent spent his or her time with the child should be "left to the individual parent who was caring for the child at the time." Id. ¶ 3. In affirming, we rejected the mother's claim that "she has the

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[1] "Physical responsibility" is fully defined to mean "the rights and responsibilities to provide routine daily care and control of the child subject to the right of the other parent to have contact with the child. Physical responsibility may be held solely or may be divided or shared." 15 V.S.A. § 664(1)(B). "Legal responsibility" is fully defined as

> the rights and responsibilities to determine and control various matters affecting a child's welfare and upbringing, other than routine daily care and control of the child. These matters include but are not limited to education, medical and dental care, religion and travel arrangements. Legal responsibility may be held solely or may be divided or shared.

Id. § 664(1)(A).

[2] Mother moved to modify the order granting father authority over extracurricular activities to require that father provide advance notice of any scheduled activities and to provide that mother had authority to choose the child's activities during the summer. Mother did not challenge the statutory validity of the order. In her motion to "modify, clarify, and enforce" she argued that father was enrolling the child in excessive activities, "taking away the quality mother-daughter time [they] used to enjoy" but again did not assert that father's legal authority could not extend to scheduling any activities during her custodial time. Mother distinguished father's authority to send the child to overnight camp during four of mother's overnights, asserting that it impermissibly "crosses into the realm of physical rights." At the hearing on the motion, mother again differentiated the claims, observing that "extracurricular [activities] are one thing" and were arguably not in the child's best interests but that overnights crossed the line and impermissibly infringed on her physical custodial rights.

right to control the child's activities during father's visitation," noting that such unfettered authority could reduce the noncustodial parent's child contact to a nullity. Id. ¶ 7. In so holding we distinguished Gazo v. Gazo, 166 Vt. 434, 444 (1997), which recognized that, if the custodial parent desired such restrictions, the court could impose them "[w]here the best interests of the children clearly require it."

The case before us is clearly distinguishable from Miller, in that the trial court here expressly found, based on history of the parties' contentious relationship and the extremely deleterious impact of mother's behavior on the child, that it was absolutely necessary for the child's best interests to grant father the authority to schedule the child's extracurricular activities. Mother also makes much of the general legislative policy of ensuring "maximum continuing physical and emotional contact with both parents," but acknowledges that it is subject to an exception where "direct physical harm or significant emotional harm to the child . . . is likely to result from such contact." 15 V.S.A. § 650. Here, as noted, the court's order granting father decisionmaking authority over the child's extracurricular activities was based upon specific and detailed findings that it was necessary to alleviate an intolerable situation that had caused the child great emotional distress.

As to mother's claim of inconvenience caused by the order, the trial court found that her argument was essentially indistinguishable from the lengthy arguments and bickering that had resulted in the original impasse between the parties, in which each had insisted that the child's activities be conducted at different times or places to suit them. As the court explained, the parties were "fighting over the same things they've always fought over" and thus found no change of circumstances warranting a modification of the order. We have observed that in matters affecting custodial rights and visitation "[t]he opposing desires of hostile parents . . . must yield" and decisions must be "structured in a manner that serves the welfare of the child." Cleverly v. Cleverly, 151 Vt. 351, 355 (1989) (quotation omitted). Moreover, such decisions will not be disturbed on appeal unless "exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." Id. at 355-56 (quotation omitted). We find no basis to conclude that the court's ruling here was unfounded or unreasonable and therefore no basis to disturb the judgment.

Mother also claims that the court's decision upholding father's authority to schedule the child for a one-week overnight Girl Scout camp violates her custodial rights. Mother cites no authority, nor have we uncovered any, holding that father's legal rights and responsibilities exclude any decisionmaking authority that has any effect on mother's overnight custodial schedule. None of the out-of-state cases cited by mother are apposite. Father's legal authority over matters affecting the "child's welfare and upbringing," 15 V.S.A. § 664(1)(A), clearly encompasses a decision to afford the child an opportunity to attend a one-week Girl Scout camp, and any effect on mother's custodial schedule during the four overnights in question is a relatively minor one and cannot be characterized as an illegitimate and impermissible infringement on her custodial rights. Accordingly, we find no grounds to disturb the judgment.

Mother also briefly argues that the trial court erred in giving the child unfettered discretion to determine which school-related activities to participate in. The issue was not raised below and therefore was not preserved for review on appeal. Follo, 2009 VT 11, ¶ 14. We note, however, that father has reasonably interpreted the provision to require that he take the child's

interests "into consideration" when determining her school-related extracurricular activities. The trial court obviously cannot literally authorize a child to participate in any activity "that she would like" without improperly interfering with the parents' custodial rights and responsibilities.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice