

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-185

FEBRUARY TERM, 2006

Grethe Luman	}	APPEALED FROM:
	}	
v.	}	Franklin Family Court
	}	
Philip E. Luman	}	DOCKET NO. 148-5-04 Frdm
	}	

Trial Judge: James R. Crucitti

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

Mother appeals from the family court=s final divorce order awarding primary legal and physical rights and responsibilities for the parties= son to father. She argues that the family court ignored relevant facts and placed too much weight on father=s alleged willingness to foster a positive relationship with mother. We affirm.

Mother and father were married in 1997 and separated in April 2004. Their son, Brandon, was born in May 1998. In May 2004, mother obtained a five-month relief-from-abuse order against father based on a finding that father told mother that if she were ever to leave him, she Awould never see the light of day.@ There was no claim or finding of physical abuse. Mother=s request to extend the relief-from-abuse order was denied, and the order was vacated. In October 2004, the court issued a temporary order awarding parental rights and responsibilities to mother. The court expressed concern about mother=s lack of cooperation with father but it concluded that, given her role as the child=s primary care giver and father=s current work schedule, an award of temporary sole legal and physical rights and responsibilities to mother was appropriate. The order was issued with the understanding that mother would continue to reside in Vermont.

In April 2005, the court issued its final order and divorce decree. It considered the factors set forth in 15 V.S.A. ' 665 and made the following findings. Both parents had a positive relationship with Brandon; and each had the ability and disposition to provide him with love, affection, and guidance. Each parent was currently able to meet Brandon=s material needs and provide him with a safe environment. The court found that father had maintained consistent employment for twenty-one years, but mother=s future stability was uncertain. She intended to move to North Carolina to reside with, and marry, an individual, Mr. Mitchell, whom she met on the internet. Mr. Mitchell was retired from the military, but did not yet receive a pension, and was facing surgery. Mother did not yet have a job in North Carolina, and it was not clear when Mr. Mitchell would be able to resume work. The court found that the move to North Carolina under these circumstances presented a real possibility that mother would be unable to assure that Brandon=s material needs were consistently and adequately met.

The court found that both parents were similarly able and disposed to meet Brandon=s present and future developmental needs. Brandon has Attention Deficit Hyperactivity Disorder and was receiving special help at school. Brandon had established a good relationship with his teachers and special educators, and also had familiar day care providers, all of which, the court found, would be disrupted by a move to North Carolina. The court also found that father had a much greater ability and willingness than mother to foster a positive relationship between Brandon and mother. The court explained that since the date of the temporary order, mother continued to engage in a pattern of

excluding father. The court recounted several incidents of mother=s noncooperation with father=s attempts to speak with Brandon by phone, which indicated to the court that mother would be unlikely to facilitate father=s ability to communicate with Brandon while mother was in North Carolina. The court found that, in contrast to mother, father had demonstrated a willingness to accommodate mother=s requests concerning Brandon.

The court recognized that mother had been the child=s primary care provider in his early years, although it found that father assisted with a number of aspects of caring for Brandon during this time as well. When mother=s work schedule changed, the court found that father became quite involved in Brandon=s care. Father and son engaged in a variety of activities together. After mother met Mr. Mitchell in April 2004, father=s responsibility for meal preparation and household care increased. The court acknowledged that mother obtained a relief-from-abuse order against father for threatening her, but noted that the order was vacated. The court concluded that a balance of the statutory factors weighed in favor of awarding sole legal and physical rights and responsibilities for Brandon to father. Mother appealed.

On appeal, mother argues that she had been doing a good job parenting Brandon and the court ignored facts in her favor. According to mother, although the court discussed certain instances of her noncooperation with father, it failed to discuss other factors that showed father=s unsuitability and lack of concern for the child. She asserts, for example, that father did not pay child support after she obtained a relief-from-abuse order against him and he allowed the marital home to go into foreclosure without informing her. Mother also argues that the family court Aexplained away@ father=s noninvolvement with the child=s school affairs. Finally, mother asserts that the family court erred by failing to give adequate weight to her role as the child=s primary care provider.

Mother=s arguments on appeal are at odds with our standard of review, and we find no basis to disturb the family court=s decision. 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.

In this case, the family court considered the factors set forth in 15 V.S.A. ' 665(b) in evaluating Brandon=s best interests and made numerous findings of fact. Mother does not challenge these findings as clearly erroneous. Instead, she asserts that the court should have focused its analysis on other facts and weighed certain factors more heavily in her favor. It is the role of the family court, however, not this Court, to weigh the evidence and determine its persuasive effect. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). The court=s finding that mother was Brandon=s primary care giver in his early years is not entitled to dispositive weight. See Payrits, 171 Vt. at 54 (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.@ (internal quotations omitted)). The family court found, among other things, that father had provided significant care for Brandon and was better suited to provide Brandon with stability and foster a positive relationship with mother. Cf. Bell v. Squires, 2003 VT 109, & 17, 176 Vt. 557 (mem.) (repeated acts of mother and her family to prevent father from forming positive relationship with children was grounds for modification of custody). The court also found that Brandon had positive attachments to his teachers, special educators, and day care providers in Vermont. The court=s findings are supported by the record, and the findings support the court=s conclusion that an award of primary physical rights and responsibilities to father was in Brandon=s best interests. We find no error.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice