

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-535

OCTOBER TERM, 2007

Patricia Church	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Roger D. Church, Jr.	}	DOCKET NO. 368-5-06 Cndm

Trial Judge: Thomas J. Devine

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

Mother appeals the family court’s order, denying her request to modify parental rights and responsibilities to the parties’ only son. Mother contends that the court (1) erred in concluding that her drug recovery did not meet the threshold requirement of a real, substantial and unanticipated change of circumstances, (2) did not base its findings on credible evidence, and (3) abused its discretion in failing to refer to the recommendation of the guardian ad litem (GAL) its final order. We affirm.

The parties divorced in March 2002 and stipulated to shared legal and physical rights and responsibilities. In November 2003, the parties consented to a change in parental rights and responsibilities because of mother’s drug addiction and consequent recovery. The stipulation granted father sole physical rights and mother visitation on most weekends. In February 2006, mother filed a motion to modify parental rights and responsibilities and to enforce the parent-child contact schedule. Mother argued that she met the threshold for modification based on her drug recovery. Her motion to enforce asserted that father arbitrarily denied her access to her son, and failed to inform her that son was on an independent learning plan at school and had begun therapy. The court held a merits hearing over three days in July, August, and October 2006.

Based on the testimony, the court found the following facts. Mother has “done extraordinarily well in her recovery,” and had been free of opiates since July 2003. Mother has stable part-time employment, is taking classes, and has maintained the same apartment for three years. However, mother has also developed a relationship with another man, who has a history of substance abuse and an extensive criminal record. Father and grandmother, with whom father and the child live, are both concerned for the child’s safety around the new boyfriend, and have observed the boyfriend yelling and behaving angrily.

Based on these findings, the court concluded that mother had not met the threshold requirement for a real, substantial, and unanticipated change of circumstances “in the absence of some showing father’s parenting had become deficient.” The court did find that mother’s recovery constituted a change for purposes of amending parent-child contact. In assessing the child’s best interest to craft a new contact schedule, the court expressed concerns about mother’s new relationship, particularly about the child’s “perception of safety” and accompanying comfort level. Consequently, the court granted mother ongoing weekend visits with overnight contact, but only on weekends when boyfriend is not present. Regarding the motion to enforce, the court found that father had not denied visitation as part of a “mean-spirited campaign” but did so instead on a few occasions when he was concerned for his son’s safety. The court did find father failed to inform mother of son’s therapy and instructed father to keep mother more informed.

The family court has broad discretion in custody cases, and consequently we will affirm its findings unless clearly erroneous. Payrits v. Payrits, 171 Vt. 50, 52-53 (2000). In addition, we will not set aside its conclusions if supported by the findings. Id. To modify an existing order, a party must first demonstrate a real, substantial and unanticipated change of circumstances. 15 V.S.A. § 668. “There are no fixed standards for determining what meets this threshold. . . . however, [] in order to ensure stability in the lives of the children, the burden of showing changed circumstances is ‘heavy.’ ” deBeaumont v. Goodrich, 162 Vt. 91, 97 (1994) (quoting Kilduff v. Willey, 150 Vt. 552, 553 (1988)). If a party meets the threshold, it must show that modification is in the child’s best interests. 15 V.S.A. § 665(b). A finding of changed circumstances does not alone mean that custody should be modified. 15 V.S.A. § 668; deBeaumont, 162 Vt. at 99.

On appeal, mother first contends that her substantial progress in recovery from drug addiction constitutes a real, substantial and unanticipated change of circumstances, and the family court erred in failing to so find. Here, the court found that mother had done very well, but that her recovery failed to meet the threshold requirement because she did not demonstrate any deficiency in father’s parenting. Given the court’s analysis of the child’s best interests, any error in failing to find that mother’s drug recovery met the threshold for a real, substantial and unanticipated change of circumstances was harmless. Rogers v. Parrish, 2007 VT 35, ¶ 21 (“Erroneous or unsupported findings do not require reversal, however, unless they are shown to have been prejudicial.”). Although it did not do so explicitly, the court considered many of the statutory best-interest factors, and concluded that it was in the child’s best interests for father to retain sole physical legal and physical rights, with the exception of weekend visitation for mother. In its analysis, the court recognized father’s strong relationship with his son, as well as mother’s increased stability. However, the court also expressed concern about the presence of mother’s boyfriend in her home. See 15 V.S.A. § 665(b) (instructing court to consider each parent’s relationship with the child, as well as “the relationship of the child with any other person who may significantly affect the child”). The court concluded that, given the concerns about the child’s fear of boyfriend, it was in the child’s best interests to maintain visitation with mother while remaining in father’s custody. The court has broad discretion in custody matters, and we are satisfied that there is sufficient evidence in the record to support the court’s custody decision.

Next, mother argues that the court’s findings are not supported by credible evidence. Specifically, mother contends the court abused its discretion in finding (1) that father did not deny mother visitation on every occasion mother claimed, and (2) that the child does not have a

warm and trusting relationship with boyfriend. Mother essentially argues that she and her witnesses were more credible than father and his witnesses. We will not reweigh the evidence on appeal. See Payrits, 171 Vt. at 54 (“[T]he weight of the evidence, and its persuasive effect are questions for the trier of fact, and its determination must stand if supported by credible evidence.”). The court’s findings were supported by credible evidence and are affirmed.

Finally, mother argues that the trial court abused its discretion because it did not reference the GAL’s recommendation in its findings or order. In a custody case, the court may appoint a GAL to “act as an independent parental advisor and advocate whose goal shall be to safeguard the child’s best interest.” V.R.F.P. 7(d). The GAL can state a position to the court, but not as a witness. Id.; see Gilbert v. Gilbert, 163 Vt. 549, 554 (1995) (explaining that GAL has a limited role at the merits hearing). The court is not required to follow the GAL’s recommendation, and therefore we find no abuse of discretion.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice