ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-164

FEBRUARY TERM, 2010

Jill Manley-Gaydo	}	APPEALED FROM:
	}	
v.	}	Franklin Family Court
	}	
Ronald Nye	}	DOCKET NO. 307-10-99 Frdm
		Trial Judge: Mark Keller

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

Mother appeals from the family court's denial of her motion to modify parental rights and responsibilities in the parties' minor child, C.N. She argues that the court erred by failing to find a real, substantial, and unanticipated change of circumstances. We affirm.

Mother and father are the parents of a son, now eighteen, and a daughter, C.N., who is thirteen. Mother lives in Michigan and father lives in Vermont. Parents have been divorced since 2001, and they have filed numerous motions—totaling over twenty pages of docket entries—in the family court. By stipulation, mother had custody of the parties' son, while father had custody of C.N. In August 2008, mother filed a motion to modify parental rights and responsibilities, asserting that C.N. was anxious and depressed and that C.N. had requested to move to mother's home. Mother claimed that father "belittled and disempowered" C.N. and that he was stifling the child's ability to communicate with her. At the hearing, mother recounted that father had prohibited C.N. from calling her mother at school. Mother also pointed to a father-daughter hunting trip where father allegedly slapped C.N. Following several days of hearings, the court denied mother's motion to modify on the record, finding no real, substantial, and unanticipated change of circumstances. The court observed that parents mistrusted one another and that C.N. was trying to get her own way. The court acknowledged the incidents cited above, but found them insufficient to warrant modification of parental rights and responsibilities. Mother appealed.

Mother argues that the court ignored evidence that father interfered with the child's ability to communicate with her, and that it overlooked father's physical abuse of the child. Mother also asserts that the court erred in refusing to allow the child to explicitly state where she wanted to live.

As we have often repeated, there must be a threshold finding of "a real, substantial and unanticipated change of circumstances before a court may examine the merits of the parties' claims and reconsider the best interest of the child." Wells v. Wells, 150 Vt. 1, 4 (1988). The family court has discretion in making this decision, and the moving party bears "a heavy burden to prove changed circumstances." Spaulding v. Butler, 172 Vt. 467, 476 (2001) (quotation omitted). On appeal, the court's decision will stand unless appellant shows that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Gates v. Gates, 168 Vt. 64, 67-68 (1998) (quotation omitted).

We find no abuse of discretion here. As the family court reiterated throughout the hearing, parents did not trust one another, and both were harming C.N. by consistently arguing that he or she was right and the other parent wrong. Typical, then, is mother's assertion here that her relationship with the children "is built on love, openness, and trust," while father's is built on "control, fear, and guilt." The family court did

not accept mother's view. There was evidence, for example, that C.N. was doing better in school, both academically and socially, as mother acknowledged at trial. There was also evidence that father consistently allowed C.N. to telephone her mother from home, and it was reasonable that father would want to limit C.N.'s personal phone calls during school hours. As to the hunting incident, the court did not find it sufficient to warrant modification of parental rights and responsibilities. The evidence showed that father, like mother, loves C.N., and the court implicitly found that father was providing her with a good home. The court encouraged father to be more flexible in parenting his daughter, but it ultimately concluded that there was insufficient evidence of a real, substantial, and material change in circumstances. Mother essentially asks us to reweigh the evidence and reach a different conclusion. This we will not do. It is for the family court, not this Court, to assess the credibility of witnesses and weigh the evidence. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). We will not disturb its assessment on appeal.

This case is nothing like Sundstrom v. Sundstrom, 2004 VT 106, 177 Vt. 577 (mem.), as mother asserts. In Sundstrom, the family court found a change of circumstances, and we upheld its decision. Unlike the instant case, the family court in Sundstrom specifically found that one parent had continuously and intentionally violated court orders regarding parent-child contact. The mother in Sundstrom repeatedly sabotaged the father's ability to have telephone contact with the parties' children, essentially cutting off such contact completely. There was also evidence that the mother had involved the children in adult issues, and that she had undermined the children's relationship with their father's new girlfriend. There is no evidence of similar conduct here. To the contrary, the evidence here showed that father facilitates C.N.'s telephone contact with mother. We note that, in one parallel with Sundstrom, there was evidence in this case that mother was attempting to undermine C.N.'s relationship with father's new wife, referring to her in conversations with C.N. in derogatory terms.

There is no support for mother's assertion that the court erred by refusing to allow the child to testify as to where she wanted to live. It was obvious to the court that the child wanted to live with mother. Mother, among others, so indicated to the court, and the court found that this fact had been established. This claim of error is wholly without merit.

Finally, we do not consider mother's argument, raised for the first time in her reply brief, that the court erred by failing to make findings. We reject mother's contention that this issue was raised in her principal brief, or that the introduction of this issue was justified by father's response to her brief. This argument was not clearly raised in appellant's opening brief and therefore it was not properly preserved for review on appeal. See, e.g., Windsor Sch. Dist. v. State, 2008 VT 27, ¶ 31 n.7, 183 Vt. 452 (Supreme Court need not address arguments raised for the first time in a reply brief). We thus grant father's motion to strike this argument.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice