

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-137

OCTOBER TERM, 2010

Michael J. Bott	}	APPEALED FROM:
	}	
v.	}	Orange Family Court
	}	
Lori Castro	}	DOCKET NO. 74-5-03 Oedm

Trial Judge: Thomas J. Devine

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

Father appeals from the family court's order denying his motion to modify parental rights and responsibilities and granting mother's motion to modify parent-child contact. We affirm.

Mother and father are the parents of a daughter born in March 2003. Parents never married, and father filed a parentage action shortly after the child's birth. At the time, father lived with his parents in Randolph, Vermont, while mother resided in Rochester, Vermont. A final order was issued in August 2004, awarding mother sole legal and physical rights and responsibilities. The court noted in its order that it was "very concerned" about father's safe driving skills. The 2004 order provided for increased parent-child contact over time. The contact was to occur in father's parents' home until father had been steadily employed for at least one year and had a suitable home for himself and the child. Shortly after the court issued its order, mother took the child on an extended trip to Colorado without providing proper notice to father. Father moved to modify parental rights and responsibilities and to enforce his visitation rights. The court found that mother had violated the terms of the order, but it did not find that modification of parental rights and responsibilities was warranted.

Between 2004 and 2009, mother remained the child's primary caregiver, and father continued to reside in his parents' home. In July 2009, however, mother's live-in boyfriend attacked mother's teenage brother, and threatened mother and her brother with a knife. The boyfriend was arrested. Mother fled the home and later obtained a restraining order against the boyfriend. Mother decided that she needed to relocate and chose Colorado, where many of her relatives lived. When father learned of mother's plans, he filed the motion to modify at issue in this case. Mother then filed her motion to modify parent-child contact.

Following an August 2009 hearing, the court issued a temporary order awarding father temporary legal and physical parental rights pending a best-interest hearing. A final hearing was held in March 2010, and the court concluded that the child should remain with mother. The court found as follows. Father continued to live at home, although he indicated that he was thinking of moving out, perhaps in the summer of 2010. He had been employed for several months on the night shift, working from 11:00 p.m. to 7:00 a.m. Father's mother thus cared for the child in the morning, while father cared for her in the evening. Father acknowledged that the child missed mother tremendously, but he believed the child had otherwise adjusted to life with father reasonably well. Father had access to his parents' vehicle but had no car of his own. The court found that father had crashed his parents' car the previous summer while the child was in

the car. He became distracted when he bent down to pick something up off the floor, and he lost control of the vehicle and crashed into a bridge abutment. The car was badly damaged, and although the child was in a child safety seat, she suffered a black eye. Father did not bring the child to the hospital or take her to see a doctor.

The court explained that mother planned to remain in Colorado. She believed her relocation was a good decision in terms of personal safety and job opportunities. Mother had been employed as a waitress since October 2009, working from 12:30 p.m. to 9:00 p.m. with Sundays and Mondays off. Mother also had a second job selling cutlery on commission. Mother lived in a two-bedroom apartment within walking distance to an elementary school. Many of mother's extended family members lived nearby. Mother indicated that she would be able to care for the child in the mornings and on her days off. Her sister-in-law had offered to watch the child until mother got home from work.

Based on these and other findings, the court found a real, substantial, and unanticipated change in circumstances, and concluded that it was in the child's best interests to remain with mother. In reaching its conclusion, the court evaluated the statutory best-interest criteria and made detailed findings. It found that both parents loved the child and were able to provide her with love, affection, and guidance. Mother, however, had a well-established track record of providing good care for the child. Mother had also found employment, housing, and obtained a vehicle within a short time after moving to Colorado, and the court found it clear that mother was currently in a position to meet the child's material needs. The court observed that while father had assumed these responsibilities in recent months, he had done so only with the assistance of his parents and extended family. Father remained dependent on his parents for housing and access to a vehicle, and his need to establish suitable housing was a longstanding issue.

The court also found that mother was better able to foster a safe environment than father. It found that mother had the insight to end an abusive relationship immediately and to remove the child from this situation. She went to Colorado not to impede father's relationship with the child, but to find refuge and safety. It found that father's own ability to ensure a safe environment remained in question given his driving issues. While father argued that this recent car accident was an isolated event, it came against a backdrop of prior testimony raising concerns about father's frequent inattentiveness at the wheel. The court also found it significant that mother had been the child's primary caregiver from her birth until six months prior to the final hearing. She and the child had a very strong bond, and the court found that the likely effect of a long-term change in custodial responsibilities could be highly detrimental. In the end, the court reasoned that uncertainties about father's ability to demonstrate that he could make it on his own and provide a safe environment, coupled with the potentially detrimental impact on the child of a change in primary custodian, dictated that parental rights should remain with mother. Father filed a motion to reconsider and to stay the court's order, both of which were denied. This appeal followed.

Father argues that the court misapplied the statutory best-interest factors. He maintains that the court improperly dwelled on his isolated minor car accident while ignoring the possibility that mother may choose abusive partners. Father also complains that the court failed to explain why his housing situation was deficient as compared to mother's living situation. According to father, he has a greater ability to meet the child's present developmental needs and he is better able to foster "frequent and continuing contact" than mother. Finally, father argues that the court did not give enough weight to the fact that he had been the child's caretaker for the six months prior to the hearing, and he suggests that the court made its decision based on mother's best interests rather than those of the child.

The family court has “broad discretion” in determining a child’s best interests. Harris v. Harris, 149 Vt. 410, 416 (1988) (quotation omitted); see also 15 V.S.A. § 665(b) (identifying factors that family court must consider in evaluating child’s best interests). On review, we will uphold the family court’s findings of fact unless they are clearly erroneous; its conclusions will stand where supported by the findings. Payrits v. Payrits, 171 Vt. 50, 52-53 (2000); Begins v. Begins, 168 Vt. 298, 301 (1998). “We afford the trial court wide discretion in custody matters because only that court is in the unique position to assess the credibility of witnesses and weigh the evidence.” Chick v. Chick, 2004 VT 7, ¶ 10, 176 Vt. 580 (quotation omitted) (mem.).

Father fails to show that the court abused its discretion here. First, the court applied the appropriate statutory factors in evaluating the child’s best interests. It properly focused on the child’s best interests, and not mother’s best interests. The court’s finding about mother’s motivation for moving to Colorado in no way shows that the court applied the wrong legal standard. We similarly reject father’s assertion that the family court misconstrued the standards governing relocation cases. We recognized in Hawkes v. Spence that where a custodial parent’s relocation constitutes changed circumstances, the family court “must give deference to the custodial parent’s choice of residency” in considering the child’s best interests. 2005 VT 57, ¶ 11, 178 Vt. 161. Thus, we explained, “when a noncustodial parent seeks a change in custody based solely on the custodial parent’s decision to relocate, the moving party faces a high hurdle in justifying the violent dislocation of a change in custody from one parent to the other.” Id. (quotation omitted). Father had custody of the child for the six months prior to the hearing pursuant to a temporary order; he was not the custodial parent at the time he filed his motion to modify.

As set forth above, the court made numerous findings in reaching its conclusion, and father fails to show that any of the court’s key findings are clearly erroneous. See Poulin v. Upham, 149 Vt. 24, 28 (1987) (“Findings . . . will not be set aside upon appeal unless, taking the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, they are clearly erroneous” (quotation omitted)). The court recognized that some of the statutory factors favored father and that he should be commended for providing competent care during the difficult situation that arose for mother and the child the previous summer. Ultimately, however, it concluded that father had yet to demonstrate that he could make it on his own and provide the child with a safe environment, and that a change in custody could have a detrimental impact on the child.

Father identifies no record evidence to show that mother had a propensity to choose abusive men as partners, and the court made no finding to this effect. To the contrary, the court found that mother had the insight to immediately remove herself and the child from a bad relationship. The court similarly did not err in stating that father relied on his parents in meeting his and the child’s needs, while mother had her own apartment, job, and car. Additionally, the court acted within its discretion in finding that both parties had the ability and disposition to meet the child’s present and future development needs. Father’s work schedule dictated that he was unavailable to care for the child on school mornings, just as mother’s schedule did not allow her to spend quality time with the child four evenings per week. While father suggests that he is better able to foster contact with mother, the family court found otherwise, noting that the parties did not talk to one another and had no history of ever attempting to communicate and work out the simplest of issues. Father fails to show that this finding was clear error, and we disregard the modifying evidence on which he relies. Finally, the court recognized that father had cared for the child during the six months prior to the hearing. It did not err in also finding that mother had been the child’s primary caregiver for most of the child’s life and giving weight to this factor. See Harris, 149 Vt. at 418 (where one parent is established as primary caretaker, “this factor

should be entitled to great weight unless the primary custodian is unfit”). Father cites no evidence to support his contention that the parties actually shared primary caregiving responsibilities during this period. See In re S.B.L., 150 Vt. 294, 297 (1988) (appellant bears burden of demonstrating how the trial court erred warranting reversal, and Supreme Court will not comb the record searching for error); see also V.R.A.P. 28(a)(4) (appellant’s brief should explain what the issues are, how they were preserved, and what appellant’s contentions are on appeal, with citations to the authorities, statutes, and parts of the record relied on).

Essentially, father challenges the family court’s evaluation of the weight of the evidence and its assessment of the credibility of witnesses—matters reserved exclusively for the family court. As we stated in Chick, “[t]he 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.” 2004 VT 7, ¶ 10. The evidence here supports the court’s findings, which in turn support the court’s conclusions. We thus find no grounds to disturb the court’s decision.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice