

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-433

MAY TERM, 2017

Ashley Bennett	}	APPEALED FROM:
	}	
v.	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
Lex Berezhny	}	DOCKET NO. 89-3-15 Wr dm

Trial Judge: Christine Hoyt,
Specially Assigned

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

In this parentage action, mother appeals the superior court's order granting father primary legal and physical parental rights and responsibilities with respect to the parties' daughter. We affirm.

The parties met on an on-line dating site in 2008 during a period when father and his wife were separated and father was primarily responsible for his and his wife's young daughter. The parties' daughter, Lily, was born in July 2009. Mother left father in 2012 and took Lily with her. Father reunited with his wife. Mother had several changes in employment, residence, and intimate relationships during the following year. Mother was assaulted on two occasions by her boyfriend in one of those relationships. The second assault occurred in Lily's presence, after which mother obtained a relief-from-abuse order and ended the abusive relationship. Mother and Lily then moved in with another man, with whom mother had a child. At some point during the relationship, the man told mother that he was a registered sex offender. Upon learning this, mother ended the relationship. In February 2013, mother began a relationship with another man with whom she was living at the time of the parentage proceedings.

Since their separation, the parties shared custody of Lily to varying degrees until mother filed a complaint to establish parentage in March 2015. It is not entirely clear what precipitated the complaint, but a month earlier the parties had a dispute over whether father could take Lily to Chicago to visit his mother. At the same time she filed the parentage complaint, mother filed a motion to seal her address. She indicated in the motion that she did not want father to know her address, but did not allege any concern for either her or Lily's safety. The court denied the motion in April 2015, but, upon advice of counsel, mother prevented father from having any contact with Lily. In May 2015, mother asked father to sign a document before she would allow him contact with Lily but he refused to do so. In June 2015, mother acknowledged that she was wrong in not permitting father to

have contact with Lily, and she offered to allow him to take Lily for the remainder of the summer.

On September 9, 2015, the magistrate held a hearing to consider child support and parental rights and responsibilities. On September 21, 2015, the magistrate entered written findings and issued a temporary order awarding father sole legal and physical parental rights and responsibilities subject to mother having equal time with Lily on a week-by-week basis. A final parental-rights-and-responsibilities hearing was held over three days in the spring and summer of 2016. On November 21, 2016, the magistrate, having been specially assigned to hear the case as an acting superior court judge, issued findings, conclusions, and a final order regarding parental rights and responsibilities. Upon making extensive findings and considering each of the factors set forth in 15 V.S.A. § 665(b), the court determined that it was in Lily's best interests for father to have primary legal and physical parental rights and responsibilities, but required father to consult with mother before making any major decisions regarding Lily and give mother a meaningful opportunity to have input regarding those decisions. The court awarded mother substantial parent-child contact with Lily, stating that Lily would benefit from having an opportunity for maximum contact with mother.

Mother appeals, arguing, among other things, that the superior court's decision was based on erroneous findings, that she was Lily's primary care giver until the magistrate's temporary order issued in September 2015, and that father and his wife have failed to follow New Hampshire law for homeschooling.

“When considering the trial court's analysis and decision in awarding parental rights and responsibilities, this Court applies a highly deferential standard of review.” Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 12, 193 Vt. 490. “In the highly fact-intensive context of a custody determination, we rely on the family court's determinations of fact and evaluations of credibility.” Chickanosky v. Chickanosky, 2011 VT 110, ¶ 14, 190 Vt. 435. “Given its unique position to assess the credibility of witnesses and weigh the evidence, we will not set aside the [trial] court's findings if supported by the evidence, nor its conclusions if supported by the findings.” Begins v. Begins, 168 Vt. 298, 301 (1998). The trial court's findings “will stand if any reasonable and credible evidence supports them.” Chickanosky, 2011 VT 110, ¶ 14. An appellant cannot prevail by relying on different evidence, interpreting the evidence differently, or offering new evidence. Knutsen v. Cegalis, 2011 VT 128, ¶ 13, 191 Vt. 546 (mem.); see also Osmanagic v. Osmanagic, 2005 VT 37, ¶ 5, 178 Vt. 538 (mem.) (stating that, in reviewing family court's determination of parental rights and responsibilities, “[w]e will disturb the family court's findings only if, viewing the record 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 the findings”).

In concluding that Lily's best interests favored awarding father primary legal and physical parental rights and responsibilities, the superior court concluded as follows with respect to the nine statutory factors. The court concluded that the first factor concerning each parent's ability to provide love and guidance favored father. According to the court, although both parents have a good relationship with Lily and the ability to provide her with love and guidance, father had been the more stable parent since Lily's birth and had a

concrete and consistent parenting approach that would provide guidance to Lily regardless of where she lives or attends school in the future. The court noted that although mother had made progress in improving her life since suffering emotional trauma in her youth and getting involved in difficult relationships after leaving father, she chose, as recently as September 2015, to post extremely negative comments about father on social media. The court expressed concerns about mother's ability to refrain from such disparagement of father in the future if parenting disputes arose. Mother's reliance on testimony suggesting that father had not been living in the same house since 2006, as the trial court found, does not undercut the court's conclusion that father had been the more stable parent since Lily's birth. The court recognized that mother had been in a stable relationship for over three years preceding the final parentage hearing, but nonetheless concluded, with ample support in the record, that father had had a more stable life since Lily's birth. Moreover, mother's citation to her own testimony does not undercut the court's conclusion that father's participation in a certain organization did not impair his ability to provide guidance to Lily.

The court concluded that the second and third factors—concerning the ability and disposition of each parent to provide the child with adequate material needs and a safe environment and to meet the child's present and future developmental needs—did not favor either party. Mother's reference to testimony that father did not attend Lily's medical appointments when he was living with her and Lily does not undercut the court's determination that the second factor was neutral. Nor is the court's conclusion undercut by the fact that Lily was living in father's home in a loft bedroom without doors, which the court determined was not significant at this point in Lily's life. Nor is the court's conclusion that factor three is neutral undermined by mother's contention that father and his wife have not complied with New Hampshire law in homeschooling Lily. On this question, the court concluded that it was unclear whether a stepparent is considered a parent under the definition of parent in the relevant New Hampshire law, but that the law allowed someone other than a parent to provide home school education if permitted by school authorities, and father and his wife had notified authorities of their intent to homeschool Lily. The court further found that the information provided by father and his wife was deemed to be in compliance with New Hampshire homeschool requirements and that Lily's test scores reflected academic achievement above her grade level. Mother has not demonstrated that these findings are clearly erroneous.

The court concluded that factor four concerning the quality of the child's adjustment to her present home, school, and community and the potential for any change favored father. The court concluded that this factor favored father because awarding him parental rights and responsibilities would result in no change for Lily, who would continue to be home-schooled by father and his wife and to have significant contact with mother. In contesting the court's conclusion on factor four, mother again cites the fact that father had not been living in the same home since 2006 and further asserts that awarding parental rights and responsibilities to father would amount to a significant change for Lily. In support of this latter assertion, mother states that she had already enrolled Lily in a public school, which Lily had been attending when the magistrate issued its September 21, 2015 temporary order. In stating that an award of parental rights and responsibilities to father would not result in a change for Lily, the court was referring to the fact that there would no change from the situation existing for the previous year since the temporary order. Lily may have been in

public school for a few weeks in September 2015 before that order was issued, but that does not undermine the court's conclusion that awarding mother primary parental rights and responsibilities would mean more change for Lily.

The court concluded that factor five regarding the ability of each parent to foster a positive relationship and frequent contact with the other parent favored father. In so concluding, the court found that although each parent acknowledged the importance of the other parent's role in Lily's life, in the past mother had prevented father from having contact with Lily for a period of months for no good reason, had filed a motion to seal her address to keep father from seeing Lily for no good reason, and had negatively and inaccurately characterized father's political leanings in a GoFundMe page she set up to pay for her legal costs in the parentage action. Mother's excuses regarding her actions do not undermine the court's conclusion on this factor.

The court concluded that factor six regarding the quality of the child's relationship with the primary caregiver was neutral. In so concluding, the court found that mother had been Lily's primary caregiver until the parties' separation in early 2012, but that, to varying degrees, both parties had cared for Lily since then. The court found that Lily spent more time with father during the period when mother struggled in other relationships after leaving father, that she spent approximately two-thirds of her time with mother during 2014, and that since the temporary order she has spent time equally between each parent. The record supports the court's findings.

“This Court has ‘not enunciated a definitive standard for determining the identity of the primary-care provider under § 665(b)(6),’ and . . . has expressly rejected an invitation to adopt ‘a per se rule that the parent with physical custody at the time of the divorce hearing is the primary-care-provider.’ ” Clark v. Bellavance, 2016 VT 124, ¶ 24, __ Vt. __ (quoting Nickerson v. Nickerson, 158 Vt. 85, 89-91 (1992)). “We have never held . . . that a court may not find that both parents qualify as the primary care provider or that neither parent so qualifies” Payrits v. Payrits, 171 Vt. 50, 54 (2000); Hanson-Metayer, 2013 VT 29, ¶ 20 (“[T]here can be periods in which both parents are primary caregivers or in which neither is the primary caregiver.”). The court should consider all relevant periods of the child's life in resolving the primary caregiver question. See Clark, 2016 VT 124, ¶ 25. “[T]he weight to be accorded the primary-caregiver relationship must be based on the likely effect of a change of custodian on the child.” Payrits, 171 Vt. at 55.

Here, the record supports the court's finding that while mother was the primary caregiver for the first two and one-half years of Lily's life when the parties were living together, each party acted as the primary caregiver to varying degrees over different periods of Lily's life since the parties separated. Given this fact and the lack of evidence demonstrating that awarding father primary parental rights and responsibilities would have a negative impact on Lily, the record supports the court's conclusion that this factor is neutral.

The court concluded that factor seven concerning the child's relationship with other persons was neutral and that factors eight and nine concerning evidence of abuse and the

parties' ability to cooperate were not applicable in this case. Mother does not challenge these conclusions.

In short, the evidence supports the superior court's findings, those findings in turn support the court's conclusions, and the court acted within its broad discretion in awarding father primary legal and physical parental rights and responsibilities.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice