Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-046

OCTOBER TERM, 2020

Michelle Kirby v. Jamie Wool*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 329-5-04 Cndm
		Trial Judge: Thomas Carlson

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

Father appeals the decision of the family court modifying parental rights and responsibilities to give sole legal and primary physical custody of the parties' minor son to mother. We affirm.

The following facts are drawn from the court's orders and are undisputed except where noted. The parties have one son, B.K., who was born in September 2003. After the parties divorced in 2005, mother was awarded sole legal and physical parental rights and responsibilities (PRR) for B.K., subject to parent-child contact (PCC) with father on alternating weekends. In 2014, the court transferred legal and physical PRR to father, with mother to have PCC with B.K. on alternating weekends. In 2015, the court denied the parties' cross-motions to modify this arrangement.

In August 2018, the parties again filed cross-motions to modify PCC, and mother filed a motion to modify PRR, after an incident that resulted in mother being cited for custodial interference and each party seeking a relief-from-abuse order against the other. In March 2019, the court issued an order modifying PCC because B.K. was having serious behavioral issues in his first year in high school that appeared to be related to the parties' custody dispute. Based on its assessment of the statutory factors, as well as the parties' agreement that B.K. did better in school when contact was shared equally, the court concluded that a 50/50 contact schedule was in B.K.'s best interests. However, it denied father's request to make mother's increased contact subject to conditions that she attend co-parenting classes and therapy.

In April 2019, B.K. transferred to an alternative program within Essex High School known as the Mill School. The Mill School has a high staff-to-student ratio and is designed to help students struggling with behavioral and academic issues. Mother was the primary contact with the school. After a slow start, B.K. began to make progress under the program. The program director described B.K. as a kind, sad young man with serious trust issues, and recommended that he be assessed for a language learning disability and an individualized education program (IEP).

In late July 2019, father and his girlfriend took B.K. to Florida for a visit. Father had been talking with B.K. for at least a year about moving to Florida. After the trip, B.K. stopped attending the Mill School during weeks when he was in father's care. When he did reappear at school during father's time in late August, he appeared to be under the influence of marijuana. Mother subsequently discovered that B.K. was staying with friends in Burlington instead of father, who had been evicted from his home in Williston in August and was staying with a friend in New Hampshire.

According to father, B.K. was hesitant to move to Florida even after their visit. Despite this, on September 9, 2019, father filed an emergency motion to modify PCC, stating that he was planning to move to Florida on September 11 and take B.K. with him. Father also told the Mill School that B.K. would be withdrawing from the school. Father then presented mother with a proposed agreement: B.K. would stay with her for ninety days and attend school in Essex, after which B.K. would move to Florida and mother would agree to give up any fight in court. Mother refused to sign. Father left in anger and sent mother numerous text messages blaming her for hurting B.K. B.K. witnessed the whole interaction, at father's insistence. Father subsequently relocated with B.K. to Florida. Mother then filed a motion asking the court to require father to stay in Vermont and continue 50/50 contact or to transfer legal rights and responsibilities to her.

After a hearing, the court issued a decision in September 2019 awarding temporary legal and physical rights and responsibilities to mother. The court found that father's abrupt relocation to Florida constituted a real, substantial, and unanticipated change in circumstances that warranted modification of the existing PRR and PCC orders. It ordered that father could continue to have 50/50 contact with B.K. if he were able to do so.

Following a second evidentiary hearing in December 2019, the court issued a final order awarding sole legal PRR and primary physical PRR to mother. At the hearing, mother submitted a proposed contact schedule. The court asked father to file a proposed contact schedule by the end of December. Father did not do so. In January 2020, the court issued an order awarding father contact with B.K. during B.K.'s school breaks as well as the first two weeks of summer break and reasonable time whenever father came to Vermont for visits. This appeal followed.

Father's primary argument on appeal is that because he had sole legal rights and responsibilities, the family court should have deferred to his decision to relocate. He argues that the family court changed custody solely to assure that B.K. remained at the Mill School, which improperly interfered with father's right to make educational decisions for B.K. He also claims that his move to Florida was not unanticipated and challenges various findings made by the court. Finally, he argues that it was error for the court to award him only six weeks of PCC when it had previously determined that a 50/50 schedule was in the child's best interests.

To modify an order governing PRR or PCC, the moving party must first show that there has been a "real, substantial and unanticipated change of circumstances." 15 V.S.A. § 668(a). If that threshold requirement is met, the court may modify the order if it is in the best interests of the child. Id. The family court has "broad discretion" in determining whether changed circumstances exist and what parenting arrangement is in the child's best interests. Quinones v. Bouffard, 2017 VT 103, ¶ 10, 206 Vt. 66. We will uphold the court's factual findings unless they are clearly erroneous and will affirm its legal conclusions if supported by the findings. Sochin v. Sochin, 2005 VT 36, ¶ 4, 178 Vt. 535.

The trial court did not abuse its discretion in finding a real, substantial, and unanticipated change of circumstances in this case. At the time that father relocated to Florida in September

2019, father and mother had been exercising physical rights and responsibilities for approximately equal amounts of time pursuant to the court's April 2019 order. Although the record shows that father had mentioned a desire to move to Florida in the past, the April 2019 order did not contemplate that father would relocate. To the contrary, it was based on the agreement of father and mother that equal time with both parents was in B.K.'s best interests. Father then abruptly relocated hundreds of miles away from Vermont and indicated that he intended the move to be permanent. The distance of the move would make it difficult to create a contact schedule that did not substantially reduce or alter the nature of mother's PCC. It was therefore reasonable for the court to conclude that this move would substantially interfere with mother's ability to continue to exercise her right to 50/50 contact. See Quinones, 2017 VT 103, ¶ 21 (holding that custodial parent's proposed move to New York City with child constituted changed circumstances).

Father argues that as the parent with sole legal and physical responsibilities, the court should have deferred to his decision to relocate. "[W]hen 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." Hoover (Letourneau) v. Hoover, 171 Vt. 256, 259 (2000) (emphasis omitted). However, "when childrearing and its concomitant decision-making are shared, relocation to a remote location by one parent requires at the very least a reassessment of the custodial arrangement and, because of the practicalities involved in shared parenting, will often necessitate a change in custody." Hawkes v. Spence, 2005 VT 57, ¶ 12, 178 Vt. 161 (quotation omitted). Here, although father nominally had sole physical rights and responsibilities, mother and father had been spending roughly equal amounts of time with B.K. Cf. deBeaumont v Goodrich, 162 Vt. 91, 96 (1994) (explaining that although final divorce order awarded mother physical responsibility, "time allocation for each parent was nearly equal so that a co-parenting arrangement was present"). Under these circumstances, it was not improper for the court to consider a change in custody.

We therefore turn to the family court's determination that a change of custody was in B.K.'s best interests. Although the family court has broad discretion in this area, it may not substitute its judgment for that of the custodial parent. Lane v. Schenck, 158 Vt. 489, 495 (1992). Rather, "the family court must determine, in light of the proposed move, which custodian and parent-child contact schedule will serve the child's best interests, not whether the move itself is in the child's best interests." Quinones, 2017 VT 103, ¶ 13. We have recognized that a "proposed move may be highly relevant to the best-interests analysis, and its negative impact on the child's best interests could outweigh the benefits of continuity with his primary caregiver." Id. ¶ 22.

In its final December 2019 decision, the family court relied on its previous findings in the April and September orders and also made new findings regarding B.K.'s best interests. In the April 2019 order, the court had found that: mother and father were similarly situated in their respective abilities to provide B.K. with love, support, and guidance, as well as to meet his material needs; neither parent was disposed to foster a positive relationship with the other; and mother was slightly better able to meet B.K.'s present and future developmental needs. The court noted that father clearly understood that B.K. was best positioned to address his behavioral issues under a 50/50 contact schedule, yet father had repeatedly vetoed such an arrangement when mother would not agree to his conditions. The court also found that B.K. was adjusted to his community in Essex and had friends there, and was fairly close to his younger half-sister, who lived in mother's home.

In the September 2019 order, the court found that its previous assessment was still valid as to mother. However, it expressed new concern about father's ability to provide B.K. with love, support, and guidance, to meet B.K.'s present and future developmental needs, and to support B.K.'s relationship with mother. This concern was based on father's insistence that B.K. witness

and participate in difficult interactions between mother and father and choose between them; father's berating B.K. for being reluctant to go to Florida; father's lack of regard for the opportunities presented by the Mill School; father's decision to take B.K. out of the Mill School in August "and leave him unsupervised for weeks at a time"; and father's decision to simply move to Florida with B.K. without filing a motion to modify and in spite of his knowledge that it would be better for B.K. to remain in Vermont for at least a few months. The court recognized that father loved B.K. and was anxious for a fresh start of his own. However, it found that father's actions had aggravated the circumstances that caused B.K.'s behavioral issues by interfering with the 50/50 contact schedule that the court had so recently found was in B.K.'s best interests, and by removing B.K. from a school and family setting that offered B.K. an important opportunity to heal and learn. It therefore concluded that a temporary transfer of legal and physical PRR to mother was in B.K.'s best interests.

In its December 2019 order, the court found that since September, both parents had engaged constructively with staff at the Mill School and as a result B.K. had started to make academic and behavioral progress, although that progress was tenuous. The court noted that both parents agreed that B.K. had benefited from participation in an alternative program at the Williston Central School before attending high school and agreed that the regular high school program and environment did not work for B.K. However, while father testified that a school similar to the Mill School existed in a town near his new home in Florida, he did not express any plan for B.K. to enroll there or to seek other services for B.K. Rather, he stated that B.K. did not want to go to a similar school in Florida and indicated that he planned to enroll him in the regular high school. The court found it likely that B.K. was saying what father wanted to hear, and expressed doubt that putting B.K. back in a traditional high school after years of special programming and a clear need for more would be in B.K.'s best interests. The court noted that father was ambivalent about testing B.K. for a learning disability. It found that father did not seem to grasp the importance of getting B.K. all the help he could get, or the unique opportunities presented by the Mill School or a school like it. In contrast, mother wanted to keep B.K. at the Mill School and proceed with testing.

Based on the above findings, the court concluded that the parents were similarly situated in most respects, but that mother displayed a significantly greater ability and disposition to provide for B.K.'s growth and development. The court found that, for all of his good intentions and commitment to B.K., father had put his own needs first and was not recognizing B.K.'s needs. It found that mother's plan to keep B.K. in the Mill School and in counseling that would support him through the remainder of his adolescence reflected a better ability to make decisions in his best interests. The court also concluded that mother was significantly better disposed to foster a positive relationship between B.K. and father. It found that father tended to verbally attack mother when things did not go his way and attempted to enlist B.K. in his attacks on mother, and there was no evidence of similar behavior by mother. The court therefore concluded that it was in B.K.'s best interests to award sole legal and primary physical rights and responsibilities to mother. The court's decision is supported by its findings and was not an abuse of discretion.

Father argues that the court improperly usurped his parental role by effectively directing that B.K. should attend the Mill School. It is true that "the duty of the court is to determine which parent should be making educational decisions, not which educational decision is best, even if the parties call upon the court to do so." Wener v. Wener, 2016 VT 109, ¶ 19, 203 Vt. 582. The court did not violate this principle, however. It determined that mother was better able and disposed to meet B.K.'s present and future developmental needs because she was focused on getting him the educational and therapeutic support that he needed and had a plan to do so. In contrast, father's plan—to the extent that he had one—appeared to be to enroll B.K. in a traditional high school in

Florida, despite his own recognition and the court's repeated findings that such an environment would be detrimental to B.K. The court found that father was putting his own needs ahead of B.K.'s and was unwilling to pursue opportunities that could help B.K. succeed. The court's decision shows that it was appropriately focused on which parent should make educational decisions and did not improperly involve itself in the selection of B.K.'s school.

Father also claims that the court erred when it stated that "[t]his is not a lifestyle decision," apparently interpreting this to mean that the court disapproved of father's decision to move to Florida. To the contrary: the court acknowledged that father had good reasons to want to start afresh in a different state given his eviction, recent divorce, and unemployment. It is clear from the context of the quoted statement that the court was attempting to explain that the primary reason for changing custody was that mother had a more reasonable plan to provide B.K. with the academic and behavioral supports that he needed, rather than the mere fact of father's relocation.

Father claims that the court erred in faulting him for opposing mother's plan to test B.K. for a learning disability because there was no evidence that B.K. has such a disability or needs further testing. This argument is without merit. An administrator at the Mill School testified in September 2019 that school staff suspected that B.K. had a language learning disability and had recommended that B.K. get further testing. Father presented no evidence to contradict this testimony.

Next, father argues that the court unfairly penalized him for having a criminal record because many of his convictions have been expunged. This argument also lacks merit. The court briefly mentioned father's criminal record as part of its discussion of why the court believed it was reasonable for father to want to move away from Vermont. We see no indication that the court's decision to transfer custody to mother was based on father's criminal history.

Father also challenges two findings in the court's September 2019 order. The first finding—that father's relocation had prevented mother from virtually any contact with B.K.—is not clearly erroneous. The court reasonably inferred that father's relocation to Florida, which is hundreds of miles from Vermont, had prevented mother from exercising her right to 50/50 contact, even if mother did not specifically testify to that effect. But the second finding—that the court's statement that father had left B.K. unsupervised for "weeks at a time"—does not appear to accurately reflect the evidence. The record indicates that after father was evicted, father left B.K. with friends in Burlington for approximately one week while father stayed in New Hampshire. There is no indication that he left B.K. for longer than a week. However, father has failed to show that this error was prejudicial to him. See In re M.B., 147 Vt. 41, 44 (1986) ("Reversal is required only where the error complained of results in undue prejudice, not where it is harmless."). The challenged finding was only one of many that the court relied upon in determining that father was less able than mother to meet B.K.'s present and future developmental needs and provide him with guidance, and did not appear to be crucial to the court's decision.

Finally, father argues that the court erred in reducing his PCC schedule when it had previously held that 50/50 contact was in B.K.'s best interests. We review the family court's decision to modify PCC for abuse of discretion, Weaver v. Weaver, 2018 VT 38, ¶ 18, 207 Vt. 236, and we find none here. As discussed above, father's relocation to Florida constituted a real, substantial, and unanticipated change in circumstances warranting modification of the existing PCC order, even though that order was relatively recent. The court provided father with an opportunity to present a proposed contact schedule. Father did not do so. Although father argues that he wanted to maintain the 50/50 schedule, he does not explain how this would be possible. The court exercised its discretion appropriately in modifying the PCC order "to account for the

distance between the parties and the logistical dilemmas this distance presented." Adamson v. Dodge, 2006 VT 89, ¶ 7, 180 Vt. 612 (affirming court's order modifying PCC after custodial parent moved from Vermont to Wisconsin).

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice