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. 2020-115

AUGUST TERM, 2020

Kristi Lee Whalen v. Abderrahim Mellal*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 19-1-18 Wmdm
		Trial Judge: Robert P. Gerety, Jr.

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

Father appeals the family division's final divorce order, arguing primarily that the court's findings, some of which he challenges as clearly erroneous, are insufficient to support its award of parental rights and responsibilities (PRR) and parent-child contact with respect to the parties' two children. We affirm the court's order in all respects, except that we remand the matter for the court to consider father's request for a few personal items he alleges remain in wife's possession.

The evidence presented at trial reveals the following uncontroverted facts. At the time of the final divorce hearing in the summer of 2019, the parties were in their mid-thirties. Mother met father, who is Moroccan, in 2012 while visiting Morocco. In April 2013, mother returned to Morocco, and the parties began an intimate relationship. Mother came back to her home state of Vermont in October 2013 without father and lived with her mother and de facto stepfather in Halifax, Vermont. The parties' son was born in February 2014. Father visited mother in April 2014 for about a month before returning to Morocco.

Father came to the United States to stay in October 2014, when the parties' son was about eight months old. He lived for more than a year with mother and the parties' son in the home of mother's mother and stepfather. The parties married in February 2015. In late 2015, they moved into their own apartment in nearby Westgate, Vermont. The parties' daughter was born in December 2015. Approximately one year later, father moved out of the parties' residence. He lived with mother's biological father for three months before he began living with another woman, with whom he had a child in the spring of 2018. Father and his partner initially lived in a yurt in at least two locations in southern Vermont before moving first to Walpole, New Hampshire, for about a year and eventually to Putney, Vermont.

Mother filed for divorce in January 2018. On February 20, 2018, the family division granted mother's emergency motion for a temporary award of sole physical PRR. The court granted father parent-child contact "as agreed between the parents." The court also required father to inform mother of his current residence and prohibited father from taking the children outside the State of Vermont without mother's written approval. The court invited father to file a written, notarized response to mother's emergency motion if he objected to the court's order. The court

also indicated that it would schedule a hearing on temporary PRR and parent-child contact if the parties could not reach an agreement at their case manager conference.

On May 4, 2018, following an evidentiary hearing, the family division entered an interim order that modified the existing parent-child-contact order as follows: (1) father would have unsupervised contact from nine in the morning until six in the evening every Saturday; (2) father could have additional contact during the week as agreed to by the parties; and (3) neither party could take the children out of state without the other party's written consent. The court indicated that it would schedule an additional hearing before issuing a temporary order on PRR. On June 15, 2018, the court issued a temporary order that awarded mother sole physical and legal PRR and father parent-child contact every other weekend.

Following a divorce hearing that was held over three days between July and September of 2019, the trial court issued a final divorce order granting mother sole physical and legal PRR and father parent-child contact every other weekend, as well as half of school breaks and two separate week-long visits during the summer.

Father appeals, arguing primarily that the family division's findings are insufficient to support its award of PRR and parent-child contact. Father challenges several of the court's findings as clearly erroneous, including findings concerning which parent was the children's primary caregiver. He asserts that the court abused its discretion by failing to sift through the evidence and credit, or even consider, any testimony other than wife's direct testimony.

The family division has "broad discretion in allocating parental rights and responsibilities" and "establishing parent-child contact." Lee v. Oglibee, 2018 VT 96, ¶ 21, 208 Vt. 400. We will not disturb the court's findings of fact unless, "viewing the record in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence to support the findings." Hoover v. Hoover, 171 Vt. 256, 258 (2000). We will not overturn the "court's legal conclusions so long as they are supported by its findings." Sochin v. Sochin, 2005 VT 36, ¶ 4, 178 Vt. 535 (mem.). "We will, however, reverse if the court's findings are not supported by the evidence, or if its conclusions are not supported by the findings." Cloutier v. Blowers, 172 Vt. 450, 452 (2001) (citation omitted).

As we have noted on many occasions, the trial court is in "the unique position" to weigh the evidence and assess the credibility of witnesses, and we presume "that the court exercised its own judgment in making its findings." Bonanno v. Bonanno, 148 Vt. 248, 250-51 (1987); see Knutsen v. Cegalis, 2011 VT 128, ¶ 13, 191 Vt. 546 (mem.) ("That a different weight or conclusion could be drawn from the same evidence may be grist for disagreement, but does not show an abuse of discretion."). Although the trial court must consider the evidence impartially upon adequate reflection, "[t]he mere fact that a court's findings closely parallel the requested findings of one or both parties does not overcome the presumption that the court exercised independent judgment in weighing the evidence and making its findings, if the findings are supported by the evidence." Bonanno, 148 Vt. at 250.

It is important, however, for this Court, in reviewing the family division's decision, "to know how the trial court weighed the facts" so that we are not "left to speculate as to the reasons the court favored one party over the other when comparing their respective attributes." Lee, 2018 VT 96, ¶ 22 (quotation omitted). In awarding PRR and parent-child contact, the family division must consider all relevant evidence concerning the statutory factors set forth in 15 V.S.A. § 665(b) that address the best interests of the children. Id. ¶ 21; Cloutier, 172 Vt. at 452. But § 665(b) "imposes no specific requirement on how this consideration is to be manifested in the court's

findings and conclusions." Trahnstrom v. Trahnstrom, 171 Vt. 507, 507 (mem.) (quotation omitted).

Father challenges several of the family division's findings, most significantly the court's finding that "[m]other is the primary caretaker for the children, and she has been the primary caretaker throughout their lives." As father acknowledges, although not necessarily controlling, a parent's role as primary caregiver "is entitled to great weight" in determining PRR unless that parent "is unfit." Id. at 508. In inquiring into the question of which, if either, parent is the primary caregiver, the trial court "should focus on all relevant periods of a child's life, not just the period preceding trial." Id.

In father's view, the record "reveal[s] that both parents were primary caregivers for the children at various times in their lives, with Father's primary care far outweighing Mother's." We disagree. To the contrary, the testimony at the final divorce hearing concerning the care of the children, which in large part was undisputed, could support the family division's finding that mother is and has been the children's primary caregiver.

Except for father's month-long visit in April 2014 when he helped mother care for their son, mother was the only parental caregiver for the first eight months of their son's life. From October 2014 when father arrived in the United States to stay until late 2015 shortly before the birth of the parties' daughter in December 2015, father, with the help of mother's mother and stepfather, took care of the parties' son during the day while mother worked. Father also worked part-time during that period, and mother cared for the children when she was not working. Essentially, the same coparenting arrangement continued in the year between December 2015 and December 2016, when the parties lived together in their own apartment before husband left. From early 2017 until early 2018—the year preceding the divorce complaint—the children lived with mother. The court heard testimony that during this period father spent time with the children after work on Tuesdays and Thursdays and took care of them at other times when mother needed to be away. Between February 2018 when the family division granted mother's emergency motion for temporary custody and May 2018 when the court entered an interim order of temporary custody, father did not see the children. From the May 2018 order through the final divorce hearing in the summer of 2019, and thereafter, mother had sole legal and physical PRR and was the children's primary caregiver pursuant to court orders. Mother testified that she was the parent who arranged the children's "medical care, routine care, or special things that come up." In short, the testimony at the final divorce hearing adequately supported the court's finding that mother is and has been the children's primary caregiver, considering all time periods of the children's lives.

Father's challenges to other findings related to the court's primary-caregiver finding do not undermine the latter finding. Mother concedes that the family division's finding that father saw the parties' son for the first time when he came to the United States in October 2014 is erroneous, given that father saw the child during his earlier visit in April 2014. But the erroneous finding does not undermine in any significant way the court's finding that mother was the child's sole caregiver for the first eight months of his life.

Regarding the family division's finding that father visited the children on Tuesdays and Thursdays during the period following the parties' separation, father points to testimony that he often fed the children and stayed overnight with them on those days. Whether mother fed the children and put them to bed on the Tuesdays and Thursdays when father saw the children after the parties separated is not particularly significant with respect to the court's overall primary-caregiver finding.

Nor do we find particularly significant that the family division did not acknowledge, as father argues it should have, that the grant of mother's emergency motion for temporary custody in February 2018 was the reason he did not see the children during the first half of that year. The testimony concerning the emergency order and parent-child contact during that period of time is spotty. The evidence indicates that mother sought the emergency order because of father's threats to take the children with him to Morocco. The emergency order gave mother sole physical custody of the children and allowed father parent-child contact only "as agreed between the parents," but the order also invited father to respond to mother's motion. Father did not testify that mother refused to allow him to see the children; rather, he testified that he did not "feel safe" seeing them after the court granted mother's emergency order. Father also testified incorrectly that the emergency order did not allow him to see his children. There is no clear testimony as to any discussions the parties might have had during this period concerning parent-child contact.

Father also wars with the family division's findings concerning which parent took the children to medical appointments and which parent had better routines in dropping the children off at daycare. Father testified that sometimes he was there for the children's medical appointments and that mother often would not inform him of the children's appointments. He also disputed that he or his partner were often late in dropping the children off at daycare, noting testimony that activities did not actually start until after he normally dropped the children off. There was disputed testimony on these points, but the court's findings that daycare drop-offs with mother were earlier and smoother than with father and that mother was the parent who made arrangements for the children's medical appointments and routine care were not clearly erroneous.

Further, father challenges the family division's finding that the parties lived together in "mother's residence" from when father came to the United States until the end of 2016. As noted above, the parties lived with mother's mother and stepfather between October 2014 and late 2015. In father's view, the reasonable inference to draw from the court's finding is that mother had a stable residence independent of father from the time the parties' first child was born until the parties separated. Father reads too much into the court's failure to explain that mother's residence during that period was at the home of her mother and stepfather.

Finally, father expresses concern about the family division's failure to consider the implications of its finding that mother's stepfather, who has had a significant relationship with the children, "holds generally negative views about Father, and about all Muslim people" and that mother is aware he "holds these views." According to father, the court should have explained how the stepfather's views in this regard impacted its decision concerning PRR and the children's best interests. Without question, any negative views stepfather has toward father or Muslims in general is concerning, given the children's multi-cultural heritage and the stepfather's close relationship with the children. But father fails to cite to any testimony in the record concerning the stepfather's views or whether the stepfather had ever expressed those views to the children or disparaged father in front of the children. Father's counsel sought to admit Facebook posts that father allegedly had written or endorsed, but the court ultimately denied their admission, and father does not challenge that ruling on appeal. In his testimony, the stepfather noted issues he had with father, but he specifically testified that he did not talk about father in front of the children. On this record, we find no basis to disturb the court's custody determination because of this finding.

In addition to attacking the above findings, father argues that the family division failed to use its reasoned judgment or credit any testimony other than wife's direct testimony. In making this argument, father cites the court's findings that: (1) the parties' primary method of communication was texting, and father had not provided mother with a working phone number for her to contact him; (2) it took a significant period of time for father to obtain a driver's license

after he came to the United States, and father initially did not have immigration status that allowed him to work; (3) father worked various short-term jobs after he got his work visa, and mother has had more stable employment; and (4) father was secretive at times about where he was living after he moved out of mother's residence. Father asserts that these findings were either unsupported by the record or had no nexus to his ability to care for his children. We disagree. The findings were all supported by the record and, to a lesser or greater extent, met the relatively low relevancy threshold. There was testimony at the final divorce hearing supporting the court's findings that at times mother had difficulty reaching father, that father was not always forthcoming about his living situation or other circumstances, that father was without a driver's license for a significant period of time after he came to the United States, that father had a series of relatively short-terms jobs, and that mother had more stable employment.

In sum, we find no basis to reject the family division's material findings, which support the court's conclusions and its custody determination. Although the court's findings and conclusions were minimal considering the amount of testimony presented at the final divorce hearing, we are able to discern from those findings and conclusions how the court reached its decision regarding PRR and parent-child contact.

In addition to challenging the family division's custody award, father also argues that the court erred in finding that the parties had divided their tangible personal property. He cites his oral request on the last day of the divorce hearing and his written request for relief following the hearing that the court award him a small pine box containing various currencies, as well as rugs, tapestries, and artwork from Morocco that he claims were still in mother's possession. When the court asked mother's attorney at the hearing about personal property father wanted, the attorney responded that to the extent mother possessed those objects and could find them, she would return them to father. In its final divorce order, the court awarded each party the personal property in their possession. Given this record, the family division's finding that the parties had divided their personal property is clearly erroneous. Accordingly, the matter is remanded for the family division to address father's request for the items of personal property he claims are still in mother's possession.

The family division's February 9, 2020 order is affirmed in all respects, except that the matter is remanded for the court to consider father's request for the few personal items he alleges are in mother's possession.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice