VERMONT SUPREME COURT
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Case No. 2021-079

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

DECEMBER TERM, 2021

Eric Messier* v. Becky Lafountain	}	APPEALED FROM:
	}	Superior Court, Addison Unit,
	}	Family Division
	}	CASE NO. 20-DM-00471
		Trial Judge: Thomas Carlson

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

Father appeals from the trial court's determination of parental rights and responsibilities (PRR) and parent-child contact (PCC) in this parentage proceeding. He challenges the court's assessment of the evidence and its application of the best-interests standard, among other arguments. We affirm.

Father filed a parentage complaint in October 2020. Following a hearing, the court issued a February 2021 decision establishing PRR for the parties' minor child. It awarded mother primary legal and physical PRR and it awarded father PCC. Given the nature of father's arguments on appeal, we recount the court's findings in detail.

The parties and their daughter, born in summer 2018, lived together in Monkton, Vermont, primarily in father's mother's home while father worked on finishing a home for the parties. Parents moved out in August 2020 after a dispute with father's family. They stayed first in a hotel and then with a friend in Barre, Vermont. Father worked numerous hours during this time. He engaged in car racing to relax rather than spending his free time with mother and child. Father has since returned to Monkton while mother and child remain in Barre.

The parties' child is healthy and thriving. Mother has always been the child's primary caregiver, even more so after father returned to Monkton. Father has a busy schedule as a contractor, sometimes working fifteen hours per day. Since the parties separated, father has hired more help and shifted more of his management work to his home office.

Mother works as a hair stylist. She and the child share a room in a friend's home in Barre. Mother was somewhat estranged from her own family. While mother appreciated the support of father's family and recognized the child's special bond with her paternal grandmother, she believed that father's family had too much power and control in her life and she reacted in part by remaining in Barre and limiting her interactions with father's family.

Father recognized that he could be a bully, including toward mother. He told mother that she could not see or communicate with her family toward the end of her pregnancy and continuing through the child's birth. Based on circumstances the court found unclear, father made mother choose between him and his family and her own family in an unfortunate and unreasonable way.

Father's family was deeply involved in the parties' lives. The parties lived with father's mother during mother's pregnancy and for the first two years of the child's life. Father's new house was titled to his mother and brother. Grandmother purchased a car for mother and provided her with a job. Grandmother offered to buy mother a home nearby after the parties' separated. Grandmother was very close to the parties' daughter and was the most important person in the child's life besides parents. Mother continued to enable contact between grandmother and child even when parents' relationship became strained.

After the parties separated, mother refused to allow father any overnight visits with the child until the Christmas/New Year's holidays, when she allowed one such visit. Mother allowed three daytime-only visits per week, even when father repeatedly requested overnights, including at grandmother's home. Mother now proposed that father have visitation on alternate weekends four nights in a row and then alternate Mondays during the day. She also proposed a right of first refusal if father could not care for the child during his time and a penalty of loss of his next scheduled time if he missed a weekend visit. Father proposed to have equal time and requested primary legal rights and responsibilities but "only because [mother] ha[d] refused to share." He sought contact Wednesday morning through Saturday or Sunday at noon (alternating).

At the end of the first hearing day in mid-January 2021, mother agreed that father could start having contact with daughter on the schedule she proposed and the court issued an entry order to this effect. At the conclusion of the final hearing day in mid-February 2021, the court asked both parties to submit a brief post-hearing summary of how PCC had been going since mid-January 2021. Mother filed a document stating that father had reported a concerning change in the child's behavior, describing her as anxious, weepy, and prone to meltdowns. Mother observed that the child was tired and needed close comfort when returning from father's care. The court agreed with mother that it seemed likely that this was a big adjustment for the child and that she was acting out her frustrations because she was too young to describe her feelings. Father reported steady improvement over the three weekends that the child was with him, especially with assistance from grandmother. The court found that the parties were talking openly and thoughtfully about managing this change for the child.

The court then considered the statutory factors relevant to determining PRR and PCC. It found both parties equally inclined to provide for the child's basic needs. Mother was better equipped by experience and temperament to provide close daily care and guidance, if only in comparison with father's admitted challenges managing his feelings and his limited experience. Father had significant family support, which was helpful. The court expressed some concern over mother's very close hold on the child, including co-sleeping and continuing to breastfeed and not letting father have the child for overnights for months after the parties' separation. It also recognized the drama that had been present in the early years, however, and it did not question mother's good intentions. Mother had been the child's primary caregiver since birth. Father was not around much, even when the parties were together, and mother filled in his absence. Mother did not do a good job supporting father's relationship with the child but the court found her behavior somewhat understandable given her need to remove herself from the

orbit of father's extended family, whom she found controlling. The parties could communicate with one another, and they did not personally attack each other.

Given these considerations, the court found it appropriate to stick closely to the status quo as to the number of overnights, with a shift in days as requested by father. It awarded mother primary legal and physical rights and responsibilities and PCC of alternate weeks from Thursday morning through Sunday evening; every Wednesday morning through Thursday morning (extending alternate weekends to four nights); and it identified a holiday schedule. The court did not adopt or impose any sort of right of first refusal as mother proposed. Father filed a motion to alter or amend, which the court denied. The court explained that it had reviewed father's motion and the materials he submitted in support of that motion. It had no doubt that father loved his daughter deeply and it appreciated that he wanted equal time with her. Having reviewed the motion and its underlying decision, the court found no mistake of law or fact that would warrant a change in that decision. It found that an affidavit from grandmother included with the motion only reinforced its prior thinking concerning the family dynamics outlined in its findings of fact. This appeal followed.

Father argues on appeal that the court failed to adequately explain why it awarded primary PRR to mother. He also questions why the court awarded him five of fourteen overnights with the parties' child, rather than maximizing his contact. Father challenges several of the court's findings as clearly erroneous and maintains that the evidence and the findings do not support the court's conclusions. He further asserts that the court erred by directing the parties to indicate in their post-trial memoranda how the child was doing and then relying on this information in reaching its decision. Finally, father argues that the court improperly limited the scope of his cross-examination of mother.

We find no error. The trial court has broad discretion in assessing what course of action is in a child's best interests, both with respect to allocating parental rights and responsibilities and determining a visitation schedule. LeBlanc v. LeBlanc, 2014 VT 65, ¶ 21, 197 Vt. 17 ("The family court has broad discretion in determining what allocation of parental rights and responsibilities is in a child's best interests."); Cleverly v. Cleverly, 151 Vt. 351, 355-56 (1989) (recognizing that pattern of visitation adopted will not be reversed unless trial court's discretion "was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented" (quotation omitted)). "We view the evidence in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence, and we will not set aside the findings unless they are clearly erroneous." LeBlanc, 2014 VT 65, ¶ 21 (quotation omitted); see also Peralta v. Brannan, 2020 VT 100, ¶ 21 (explaining that trial court's findings will stand unless clearly erroneous, "meaning that there is no credible evidence to support them"). "We emphasize that it is the exclusive role of the trial court to assess the credibility of witnesses and weigh the evidence; we do not reweigh the evidence on appeal." Peralta, 2020 VT 100, ¶ 21. As set forth below, we conclude that the court's decision is supported by its findings, which are in turn supported by the evidence.

We begin with father's assertion that the court failed to properly consider the child's best interests in allocating PRR and setting a PCC schedule. Father complains that the court failed to explain why it did not award him "maximum contact" given the Legislature's statement that such contact is generally in a child's best interests. See 15 V.S.A. § 650 ("The legislature finds and declares as public policy that after parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant

emotional harm to the child or a parent is likely to result from such contact."). He also argues that the court failed to adequately explain why it awarded primary PRR to mother. Father appears to argue that the court was obligated to articulate why mother was qualified to receive each specific parental right and responsibility identified in 15 V.S.A. § 664 under the definition of "legal responsibility" and "physical responsibility."

The trial court considered the statutory factors and adequately explained the basis for its decision. See Lee v. Ogilbee, 2018 VT 96, ¶ 21, 208 Vt. 400 (recognizing trial court's "broad discretion in allocating parental rights and responsibilities" and explaining that "court must state its reasoning for awarding parental rights and responsibilities in its order, and its reasoning may not be based on an erroneous view of the law or on a clearly erroneous assessment of the evidence" (quotation omitted)). We have recognized that, in reaching its decision, the court must consider the statutory factors but it need "not necessarily expound" on them. Parker v. Parker, 2012 VT 20, ¶ 19, 191 Vt. 222; see also Sochin v. Sochin, 2005 VT 36, ¶ 6, 178 Vt. 535 (mem.) ("As long as the court considers each factor, § 665(b) imposes no specific requirement on how this consideration is to be manifested in the court's findings and conclusions." (quotation omitted)). Based on its evaluation of the statutory factors, the court concluded that it was in the child's best interests "to stick closely to the status quo" with respect to overnight visitation. With respect to PRR, it found mother better equipped to provide close daily care and guidance to the child and recognized that she had been the child's primary caregiver since birth. These factors obviously drove its decision.

Father cites no legal authority for the proposition that the court was required to go through each individual parental right and explain why it should be awarded to mother and we reject this argument. The court similarly did not have to justify a departure from equal PCC. The court stated the basis for its PCC determination, and it awarded father significant PCC. While father would have preferred more PCC, the court's award does not violate 15 V.S.A. § 650. See LeBlanc, 2014 VT 65, ¶¶ 24, 26 (considering and rejecting similar argument, explaining that court awarded "ample contact, consistent with what the court found appropriate under all of the circumstances"). We reject father's assertion that LeBlanc is distinguishable here. We recognized in that case that the court has discretion to fashion a PCC that it deems appropriate under all of the circumstances. That is what the trial court did here.

Father next challenges certain findings as clearly erroneous. He argues that the court erred in stating that father sought primary PRR "only because [mother] ha[d] refused to share" such rights. Father testified that he preferred to share these rights and pursued primary PRR when mother rejected that proposal. That testimony supports the court's finding. Father next challenges the court's finding that he had in the past "wrestled with depression and even self-harming thoughts," taking issue in part with the word "wrestle." Mother presented evidence to this effect at the hearing and the court's use of the word "wrestle" was reasonable. Father argues that the court erred in finding that he acted like a bully and that he recognized doing so. Again, mother's testimony supports the finding that father bullied mother. While father may disagree with this evidence, we do not reweigh the evidence on appeal. Whether father recognized his behavior as inappropriate is immaterial to the court's decision and any error on this point is harmless. Finally, father argues that the court erred in finding that mother "continued to enable contact" between the child and grandmother "even as relations between the parents were strained." Mother testified that she did not take steps to preclude grandmother from having time with the child. While this is not precisely the same as "enabling" such contact, any error is harmless. The court explicitly recognized that mother had been "stingy" in allowing contact and that she had "allowed three daytime-only visits per week, even as Father repeatedly requested

overnights including at [grandmother's] home." It faulted mother for failing to support father's relationship with the child, although it forgave her behavior "to some degree . . . given her need to stay out of the gravitational pull of [father's] family orbit that ultimately felt controlling." The record shows that the court fully considered mother's behavior that impacted contact between the child and grandmother.

Father next asserts that the court erred in recounting information provided by the parties in post-trial memos on how PCC was going after mid-January 2021. He argues that the court circumvented the rules of evidence and admitted these statements without affording the parties the opportunity for cross-examination. Both parties submitted this information to the court without objection. Mother contends that this information largely mirrored the trial testimony and that, even if it was requested in error, the error was harmless. We agree that any error was harmless. In their statements, both parents described bedtime/sleeping difficulties for the child. Mother testified to these difficulties at the February 2021 hearing. Father expressed concern that mother was creating bedtime difficulties by continuing to breast-feed the child at bedtime and co-sleeping with her, concerns that the court acknowledged. Father reported steady improvement as the child adjusted to a new schedule; mother similarly recognized that the child's behavior reflected her adjustment to this change. We fail to discern any harm from the court's recitation of how the parties believed PCC was going and we reject father's argument that these statements formed the sole basis for the court's PCC decision.

Father next asserts that the evidence and findings do not support the court's conclusions and he contends that the court should have recognized the shortcomings in its decision and granted his request to alter and amend. Father cites to evidence that he believes supports conclusions contrary to those reached by the trial court.

Essentially, father wars with the court's assessment of the credibility of witnesses and the weight of the evidence. As previously noted, we do not reweigh the evidence on appeal. The court's findings are sufficient to show what was decided and why, and its findings are supported by the evidence. We find no basis to disturb its discretionary decisions on PRR and PCC. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than a disagreement with court's reasoning and conclusion do not make case for abuse of discretion). The court did not abuse its discretion in denying the motion to alter and amend. N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶¶ 41, 46, 184 Vt. 303 (explaining that "motion to alter allows the trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of a record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party" and trial court has discretion in ruling on such motions) (quotation omitted)). As the trial court recognized, father clearly loves his daughter deeply and wants to spend time with her. The court appreciated this and crafted a decision, based on the evidence, that it deemed in the child's best interests. It acted within its discretion in reaching its conclusion. See, e.g., LeBlanc, 2014 VT 65, ¶ 23 ("Where, as here, the court's award of custody reflects its reasoned judgment in light of the record evidence, its decision may not be disturbed." (quotation omitted)).

Finally, father asserts that the court denied him due process by limiting the scope of his cross-examination of mother. Father sought to explore whether mother had talked to her attorney about her testimony between the January and February 2021 hearings. When father's counsel asked mother if she had had "any conversations with your lawyer" about her testimony, mother's counsel objected, arguing that the question went to attorney-client privilege. The court responded that, it was unaware of any rule that prohibited mother from speaking with her

attorney about her testimony. It stated that if mother's testimony had changed, it could consider the fact that there was a break between the hearings and think about why it had changed. Under the circumstances here, however, the court sustained the objection. Father's counsel responded, "Okay," "I'll see where we go on redirect then." While father's counsel later touched on this issue again, complaining that mother was providing much more detailed testimony than she had previously, he did not raise any specific objection. He stated that he wanted his observation about more detailed testimony on the record and taken into consideration but he was "fine with . . . whatever the court does." The court responded that it was important to hear the parties' stories because it was trying to understand what had occurred with this family, and, up to a point, the more information it received, the better. It acknowledged that father's counsel could recall father to testify, as counsel suggested he might do.

Father now argues on appeal that we should adopt and apply a rule that prohibits a lawyer from conferring with a client with respect to deposition testimony and trial testimony. Father fails to show that he raised this precise issue below or preserved an objection on this basis. He acquiesced to the trial court's ruling and did not directly avail himself of the opportunity to pursue the opening provided to him by the trial court. We will not address this argument for the first time on appeal. See In re White, 172 Vt. 335, 343 (2001) (explaining that "[t]o properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it" and Supreme Court has "repeatedly stressed that we will not address arguments not properly preserved for appeal" (quotation omitted)).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice