

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-374

APRIL TERM, 2017

Daniel D. Sweet	}	APPEALED FROM:
	}	
v.	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
Heather Sweet	}	DOCKET NO. 168-8-14 Cadm

Trial Judge: Robert P. Gerety, Jr.

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

Father appeals the parental rights and responsibilities portion of a final divorce order. On appeal, father argues that the court erred in analyzing the child’s best interests. We affirm.

The parties were married in October 2011. They have a daughter, born in August 2012. They separated in November 2013. Following a contested hearing, the court issued a temporary order on parental rights and responsibilities in September 2014, giving father legal and physical parental rights. The order gave mother parent-child contact. In making that order, the court found that both parents had a close relationship with their daughter and both could provide her with care and meet her needs. The court found that father had more stable housing and employment and that this was a compelling basis to award him primary physical and legal rights. The court established a contact schedule so that the child could have substantial time with each parent.

At the final divorce hearing, both parents sought primary legal and physical rights and responsibilities. Mother sought primary responsibilities because father did not agree to share. The court made the following findings as of the time of the final hearing. Father lives and works in Burke. He had a two-bedroom apartment and planned to move to a single-family residence with his girlfriend. He was employed as a bar manager, working Wednesday through Saturday from later afternoon to very early morning. Father’s father and his girlfriend provide care for his daughter when he is at work. Father has been convicted of driving while under the influence (DUI) twice and had no motor vehicle license due to a suspension. He abstained from alcohol for a period after his conviction and returned to drinking in the summer of 2015. He harbors some ill feelings toward mother due to the circumstances of the termination of their relationship. Mother lives in Island Pond. She has an excellent relationship with her daughter. She works in the area¹ starting

¹ The court’s findings state that mother works “in her home community of Island Pond,” and at another place that “she has employment job in her home community.” The evidence indicates that at the time of the final hearing, mother worked in Lyndonville, not Island Pond. We conclude that this error was harmless. The court’s decision did not depend on mother being employed in Island Pond. Rather, the court’s decision was influenced by the fact that mother had stable employment in an area relatively close to her residence.

from early in the morning until early afternoon. When mother is at work, her daughter is cared for by her maternal grandparents, with whom the child has an excellent relationship, or she goes to childcare. Mother believes it is important for her daughter to have a good relationship with her father and does not make negative comments about father in her daughter's presence.

The court examined the statutory factors and found both parents generally equal on all the factors. Both have an excellent relationship with their daughter, can provide her with adequate food, clothing, medical care, and a good environment, can meet her developmental needs, and have other relatives that have important relationships with their daughter. The court noted that, prior to the separation mother was the child's primary caretaker and continued to play a very significant role in her care while father held temporary parental rights and responsibilities, explaining "[i]t is not possible to describe one or the other as the 'primary caretaker.'" Although the court found that father harbors some ill feelings toward mother, the court found that both parties recognize the importance of fostering a good relationship between their daughter and the other parent. The court found that some factors did not apply including their daughter's adjustment to her current housing, school, and community given her young age. Because its examination of the statutory factors did not favor either parent, the court examined other relevant evidence. Based on father's two convictions for DUI, his period of alcohol abstinence, and then drinking again, the court found there was some concern about father's struggle with alcohol and that it could in the future interfere with his ability to provide guidance and care to his daughter. The court further noted that the primary concern at the temporary hearing—mother's unstable housing and employment—had been resolved. The court concluded that it was in the child's best interests for mother to have primary legal and physical rights and responsibilities subject to father's contact. Father appeals.

"The family court has broad discretion in awarding custody, and its findings will not be overturned unless clearly erroneous." Payrits v. Payrits, 171 Vt. 50, 52-53 (2000). In establishing parental rights and responsibilities, the court is "guided by the best interests of the child" and must consider several statutory factors. 15 V.S.A. § 665(b).

Father first argues that the court erred in its assessment that the statutory factors favored neither parent. He contends that the evidence demonstrates that two factors favor him: "the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs, and a safe environment" and "the quality of the child's adjustment to the child's present housing, school, and community and the potential effect of any change." 15 V.S.A. § 665(b)(2), (4). Father asserts that the evidence showed that mother's house was unclean and did not provide a safe environment. On this point, the court found that, although father did some of the house cleaning during the marriage and mother had some difficulty keeping the house orderly after the break up, she had more recently been able to keep the home clean and that her housekeeping did not have a negative impact on the child. The finding regarding the current state of mother's home is supported by photographs admitted into evidence and mother's accompanying testimony that the photographs were current, that she had completed renovations since father moved out and that her home was clean and safe. Father points to evidence in the record supporting his position and seeks to discredit mother's testimony that her house was clean and orderly. Essentially, father asks this Court to reweigh the evidence. It is up to the family court to assess witnesses' credibility and to weigh the evidence. Payrits, 171 Vt. at 53. Because evidence in the record supported the court's findings, there are no grounds to disturb them. Those findings in turn support the court's assessment of these two statutory factors.

Father also claims that the court erred in granting mother parental rights based on father's use of alcohol and mother's employment situation. He asserts that the court had no basis to conclude that father's use of alcohol might in the future impact his relationship with his daughter.

He also argues that the evidence does not support the court's finding that mother's employment situation was stable.

This was a close case. Ultimately, however, since the parties did not agree to share custody, the court had to award rights and responsibilities to one party. See 15 V.S.A. § 665(a) (court may not award shared custody unless both parents agree). "Where the family court's award of custody reflects its reasoned judgment in light of the record evidence, its decision may not be disturbed." Kasper v. Kasper, 2007 VT 2, ¶ 5, 181 Vt. 562 (mem.). While the court must consider "at least" the statutory factors, it may also consider other evidence to establish an order that is in the child's best interests. See Payrits, 171 Vt. at 53 ("In determining the best interests of the children in custody matters, the court may draw upon its own common sense and experience in reaching a reasoned judgement.").

Here, the court acted within its discretion in considering father's use of alcohol. Although the court found that there was no current physical danger to the parties' child stemming from father's alcohol use, the court was concerned that alcohol could interfere with his ability to provide guidance, care, and safety to his child. This finding was adequately supported by the evidence that father had two prior DUIs, had undergone counseling as a result of the DUI case, had chosen to abstain from alcohol, and had then decided to consume alcohol again.

Similarly, the court properly considered mother's housing and employment situation. Father's greater stability was the reason that the court awarded him parental rights and responsibilities at the time of the temporary order. Therefore, mother's increased stability was an important change since that time for the court to consider in making a permanent award.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Superior Judge,
Specially Assigned