

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-096

SEPTEMBER TERM, 2017

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| Misty Foster | } | APPEALED FROM: |
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| | } | Superior Court, Chittenden Unit, |
| v. | } | Family Division |
| | } | |
| | } | |
| Chad Eddy | } | DOCKET NO. 1022-12-11 Cndm |

Trial Judge: Kirstin K. Schoonover

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

In this parentage action, father appeals the superior court’s order transferring parental rights and responsibilities (PRR) from him to mother. We affirm.

Father did not order a transcript of the relevant hearing and does not challenge any of the superior court’s findings, which reveal the following facts. A final PRR order concerning the parties’ son, born in June 2010, was issued on April 3, 2012. The order awarded father sole legal and physical PRR and granted mother equally shared parent-child contact following a three-month period of gradually increased contact. Shortly thereafter, father filed a motion to reconsider or reopen the final order based on his safety concerns for the child. In a May 25, 2012, order the court confirmed the alternating two-week schedule in which “the parties will divide the time they spend with [their child] equally.” In that order, the court found that father did not assert any facts to support his concerns for the child’s safety in mother’s care. In August 2012, mother filed a motion to enforce and for emergency relief, asserting that father was denying her contact with their son. At a September 25, 2012, hearing, the court ordered father to allow visits with mother and warned him that if he did not, PRR might be transferred to mother. Two days later, father filed a motion asking that mother’s contact with their child be supervised. On October 10, 2012, mother filed another motion to enforce, alleging that father was denying visits. On October 15, 2012, the court again warned father that if the court-ordered visitation schedule was not followed, it might transfer PRR to mother and limit parent-child contact with father.

Between August 2013 and September 2014, mother filed multiple motions with the court seeking modification of the custody order or emergency relief. None of the orders in response to these motions resulted in any significant changes in PRR. In March 2016, mother filed a motion to modify in which she sought sole legal and physical PRR. In May 2016, the court issued an order modifying the 2012 final order by giving mother parent-child contact every weekend between Friday afternoon and Monday morning.

On October 24, 2016, mother filed another motion to enforce parent-child contact. Mother alleged that father was not allowing her visits with their son, and father alleged that the boy had been abused by another boy in mother's home. After confirming that the Department for Children and Families (DCF) had an open investigation regarding the matter, the court issued an interim order limiting contact between the parties' son and the other child until the investigation was completed. After the DCF investigation was closed, the court issued a January 3, 2017, order vacating the interim order. The court noted that father continued to express concerns for the safety of the parties' son in mother's care despite the absence of any evidence to support those concerns. The court warned father that a failure to abide by the parent-contact order could result in a modification of PRR if found to be in the child's best interests.

In early January 2017, mother filed another motion for emergency relief, alleging that father was not allowing her contact with their son and had pulled the boy out of school to prevent that contact. In the motion, she asked the court to award her full custody of the child. For his part, father filed a motion for emergency relief asking that mother not be allowed to see their son because of concerns for his safety, and requesting a restraining order on the child's behalf against another child in mother's household. In a January 11, 2017, order, the court denied father's motion for a restraining order, and set mother's and father's motions for an evidentiary hearing. The court reviewed father's extensive history of interfering with court-ordered parent-child contact between the child and mother, and stated, "Father's repeated attempt[s] to restrict Mother's contact with [their son] despite a lack of proof of any abuse and after repeated warning[s] that his continued interference could trigger a change of custody is concerning to the Court." The court stated further: "Father is duly warned that his repeated interference could be a basis to modify custody, if in [the child's] best interest."

Following a February 8, 2017, hearing in which the parties appeared pro se and testified, the superior court issued an order stating as follows:

Father presented no evidence today to demonstrate that [the parties' son] is at risk of harm when with Mother. He concedes that he has not allowed Mother contact with [the child] since the Court issued its January 3, 2017 order and the Court so finds. He has not allowed [the child] to go to school on Fridays, or pulled him from school early, to intentionally prohibit Mother from picking up [the boy] at school.

Despite repeated notice that his failure to allow visits could trigger a change of custody, Father has failed to allow visits. Father's continued and willful failure to allow visits between Mother and [the parties' son], despite repeated warnings from the Court constitutes a real, substantial and unanticipated change of circumstances pursuant to 15 V.S.A. § 668. The Court finds that a change of custody to Mother is in [the child's] best interests pursuant to the statutory factors of 15 V.S.A. § 665. [The parties' child] has a room at his Mother's residence. She is able to care for him, ensure he goes to school and provide a stable and loving home for him.

Accordingly, the court awarded mother sole legal and physical PRR and gave father parent-child contact every other weekend from Friday after school until Monday morning, as well as every Wednesday afternoon from after school to Thursday morning. In response to father's motion to reconsider, the court stated that father lacked "any insight into his persistent and apparently unshakeable belief that Mother presents a risk of harm to [the parties' child]." According to the court, the result is that father's "repeated interference in [the child's] visits with his Mother has directly and negatively impacted [the child's] ability to foster a positive relationship with his mother [...] 15 V.S.A. § 665(b)(5)." The court stated that it had "considered the statutory factors of 15 V.S.A. § 665 and determined that a change of custody was in [the child's] best interest."

On appeal, father, now represented by counsel, argues that the superior court abused its discretion in transferring custody of the parties' child to mother as a purely punitive measure without considering any of the § 665 factors other than the parties' ability to foster a positive relationship with the other parent. See Miller-Jenkins v. Miller-Jenkins, 2010 VT 98, ¶ 25, 189 Vt. 518 ("The best interests of the child remain paramount in all custody decisions, and a decision to transfer custody cannot be based on a desire to punish the alienating parent."). Father points to a three-year gap "between outbreaks of this behavior" of preventing parent-child contact with mother, which he contends demonstrates that he is motivated by a concern for the child's safety rather than a desire to alienate the child from mother. In his view, the cases in which this Court upheld a transfer of custody involved much more egregious behavior than in this case.

As noted, father did not order a transcript of the hearing and is not challenging the superior court's findings. Apparently, no findings were requested, but when the trial court makes limited findings on its own initiative, "those findings must support the decision." Parker v. Parker, 2012 VT 20, ¶ 13, 191 Vt. 222. With respect to child custody, where the statute makes consideration of itemized factors mandatory, we have not required the trial court to make specific findings on each statutory factor. Harris v. Harris, 149 Vt. 410, 414 (1988) (stating that court's findings must show that court has taken statutory factors into consideration). "As a practical matter, in order to review a trial court decision, the facts essential to the disposition of the case must be stated." Parker v. Parker, 2012 VT 20, ¶ 13 (quotation omitted). Our review of the trial court's determination regarding PRR is deferential. Knutsen v. Cegalis, 2017 VT 62, ¶ 18. "The trial court has broad discretion in determining what course of action is in a child's best interests, and it is for the trial court, not this Court, to evaluate the credibility of witnesses and weigh the persuasiveness of the evidence." Id. (quotations and alteration omitted).

Here, the superior court reviewed father's long history of preventing mother from having parent-child contact despite his failure to produce any evidence of abuse and the court's repeated warnings that his continued and willful conduct in keeping the parties' child from mother could lead to a change in custody. The court found that father's repeated interference in the child's visits with mother, which was based on father's lack of insight into his persistent belief that mother presented a risk of harm to the child, had directly and negatively impacted the child's ability to foster a positive relationship with mother. See Wells v. Wells, 150 Vt. 1, 4 (1988) ("To deliberately sabotage visitation rights calculated to serve the best interests of children bears adversely on the fitness of the custodial parent, whose conduct most certainly does not go unnoticed by the children." (quotation omitted)). The court indicated that it considered all of the statutory factors listed in § 665(b) in determining the child's best interests. Mother had had significant parent-child contact throughout the child's life. The court stated that the parties' child

has a room at mother's residence, and that she "is able to care for him, ensure he goes to school and provide a stable and loving home for him." We conclude that, based on the record before us and the circumstances of this case, the superior court did not abuse its discretion in transferring PRR to mother.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice