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. 2017-382

JUNE TERM, 2018

Nga Willey* v. Jesse Willey	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
	}	DOCKET NO. 250-12-14 Cadm
		Trial Judge: Michael R. Kainen

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

Mother appeals the family court's decision granting legal and physical rights and responsibilities for their minor child to father and giving her less than fifty percent parent-child contact. We affirm.

The court made the following findings in its decision. Mother and father met in 2011 in Seattle, Washington. Father grew up in the Seattle area and worked as a licensed plumber. Mother, who is ethnic Chinese, was born and raised in Vietnam. She moved to Seattle when she was 21 to live with her first husband. It is unclear when they divorced. Mother worked two jobs, at a laundry company and a sushi restaurant. Mother's mother and other family members eventually joined mother in Seattle, and she lived with them until she married father in December 2012.

Soon after they were married, mother became pregnant. The couple relocated to Vermont when mother was in her sixth month of pregnancy. They lived with father's parents to save money while they looked for jobs. Father's sister, who is developmentally disabled, also lived with his parents. Father was unable to find work and eventually accepted a paid position as caregiver for his sister.

Mother's relationship with her mother-in-law was initially friendly but quickly soured. Mother would not look at father's sister because she believed that if she looked at a sick or disabled person while she was pregnant, the baby would be born with the disability or sickness. She refused to help with the sister's care or household chores. She spent most of her time in her room, talking to her relatives on the phone. At one point, father's mother asked mother to help clean some windows. Mother believed it was dangerous to raise her hands over her head while she was pregnant and that it would kill the baby. Mother repeatedly referred to her mother-in-law as a baby killer and a murderer after this incident.

The parties' daughter was born in October 2013. After mother and father moved out of father's parents' home in June 2014, mother refused to let her in-laws visit, and insisted that their time with the child be limited to the same time that her parents in Seattle saw the child, which she calculated to be three hours per week. Mother told the child that her grandmother was a murderer,

and told her mother-in-law that she was keeping a list of all the bad things mother-in-law had done and would give it to the child when she turned five years old

Mother was very concerned with waste. She changed the child's diapers infrequently even if they were wet, in order to conserve them. She insisted that the child finish a jar of baby food once opened, even if the child was done eating. On one occasion when her father-in-law wanted to change the child's diaper because it was wet, mother refused to let him do so unless he paid for the diaper. She also objected to father's payment of rent to his parents, apparently because she believed her own parents would not charge them rent for living in their house.

Mother and father took the child to visit mother's family in Seattle in April 2014. Leading up to the trip, mother was upset that father was not making arrangements quickly enough. She repeatedly told father that she was going to take the child to Seattle without him and also threatened to take her to Vietnam where, she said, he would never find them. In November 2014, the family made another trip to Seattle. Mother told father that he and the child should do something on their own one day. Father asked her why and she admitted that she was going to see her lawyer because she did not want to return to Vermont. While mother was out of the house, father took the child and flew back to Vermont. Upon his return, he filed a petition for relief from abuse (RFA). He alleged that mother was acting irrationally, was probably mentally ill, and had told him that if she couldn't have the child, "no one can." Mother also returned to Vermont and filed for divorce.

The court consolidated the RFA petition and the divorce case, and in a December 2014 order denied the request for relief from abuse but awarded temporary sole legal and physical rights and responsibilities to father in the divorce case. It initially limited mother's contact to weekday daytime visits and prohibited her from taking the child out of Vermont. In September 2015, the court increased mother's contact so that she and father had equal time with the child. Mother was permitted to take the child to Seattle for the holidays, although she was ordered to turn over the child's passport to her attorney.

The final divorce hearing took place over two days in March 2016. Mother asked for sole custody. She stated that she intended to move back to Seattle to live with her family. She proposed that father could have contact with the child during the summer and school vacations. Father also asked for sole custody and proposed a plan giving each parent equal time with the child.

The court issued a final order in October 2016 in which it assessed the statutory factors set forth in 15 V.S.A. § 665(b). The court found that mother and father, who both qualified as the child's primary caregiver, had a strong bond with the child and were able to look after her needs, assuming mother remained in Vermont. It found that mother's former residence in Seattle was "at best a marginal place to raise a child." The court found that father was willing and able to communicate with mother and foster a positive relationship between her and the child. Mother, on the other hand, was unwilling or unable to do these things and actively tried to undermine the child's relationship with father's parents. The court also noted that it was concerned about mother's disposition. It found that in 2013 and 2014 mother was "irrational, unreasonable, and volatile." The court attributed her behavior to the stress of living with father's parents and away from her family in Seattle. Although mother's current situation was less stressful, the court questioned "how much adversity mother can be confronted with before she acts irrationally, and contrary to her daughter's best interest." It therefore awarded sole legal and physical parental rights and responsibilities to father and adopted a parent-child contact schedule giving mother six out of every fourteen days with the child. Mother filed a motion to alter or amend the judgment, which the court denied in part and granted in part. The Court considered mother's request for two

weeks of time with the child in the summer, rather than one week, and ordered the parties to reconfigure the summer vacation schedule to put this in place. Mother appealed to this Court.

The family court has broad discretion in decisions regarding parental rights and responsibilities and parent-child contact, and we will not disturb its decision absent an abuse of discretion. Nickerson v. Nickerson, 158 Vt. 85, 88 (1992). We will uphold the court's findings if supported by credible evidence and will affirm its legal conclusions if supported by the findings. Osmanagic v. Osmanagic, 2005 VT 37, ¶ 5, 178 Vt. 538. In this case, mother does not challenge the court's findings. Rather, she argues that the court gave insufficient weight to her role as primary caregiver, ignored evidence that reducing her parent-child contact would detrimentally impact her financial situation, and improperly sanctioned father's racial and ethnic bias against her. She asks this Court to reverse and remand to the family court to award fifty percent contact and to allow mother compensatory parent-child contact time so that she can travel alone to Seattle for longer periods.

We first address mother's argument that she should have been awarded custody because she was the primary caregiver and the court did not find her to be unfit. See Harris v. Harris, 149 Vt. 410, 419 (1988) (holding primary caregiver factor should be given great weight, and "the court should ordinarily find that the child should remain with the primary custodian if that parent is fit"). Mother's argument fails because it ignores the court's finding that both parents now serve as primary caregiver to the child. In assessing the primary caregiver factor, the court must consider all relevant periods of the child's life. Clark v. Bellavance, 2016 VT 124, ¶ 25. The court found that mother was the primary caregiver during the first six months of the child's life, but that both parents played the role of primary caregiver by the time of the final hearing. This finding is supported by the record and is not clearly erroneous. deBeaumont v. Goodrich, 162 Vt. 91, 101 (1994) (affirming court's finding that both parents were primary caregiver). Since this factor favored both parents equally, the principle stated in Harris did not apply.

Mother also argues that the court erroneously ignored evidence that giving her less than fifty percent contact with the child will cause her to receive fewer government benefits. In her Rule 59(e) motion, mother argued that the court failed to explain its decision to award her less than fifty percent contact and that the decision was not in the child's best interests because it would harm her financially. She attached letters from various government agencies indicating that due to mother having less than fifty percent custody, her rent would be increased by $12.00 per month, her food assistance would be reduced, and the WIC benefits she had previously received would be transferred to father as the parent with primary custody. She apparently would also become ineligible for child care subsidies. Mother claimed that the loss of the child care subsidies meant that she would not be able to work on days when the child was with her.

The court denied the motion. It explained that it believed mother should play an important role in the child's life, but that the child should have a "primary" custodian, "even if that were recognized by only a slight imbalance in time." The court stated that "[m]other's inability to talk matters through with father makes this case inappropriate for 'split' or 'joint' custody. Therefore, the court awarded father two days a month he did not ask for." The court stated that it would have found this schedule to be in the child's best interests even if it knew that reducing mother's contact would cause her to lose some of her benefits. The court further noted that Rule 59(e) motions are limited in scope and that mother's motion did not satisfy any of the grounds upon which a Rule 59(e) motion may be granted.

We see no reason to disturb the court's decision. Motions for relief under Rule 59 are "addressed to the sound discretion of the trial court," and are "not reviewable here except for a

manifest abuse of discretion." Houghton v. Leinwohl, 135 Vt. 380, 382 (1977). The court appropriately declined to consider evidence that was not presented at the final hearing, where mother did not demonstrate or even argue that the evidence was newly discovered or previously unavailable. See In re B.K., 2017 VT 105, ¶ 15 (holding that court erred by taking new evidence at Rule 59(e) hearing); 11 C. Wright et al., Federal Practice and Procedure, Civil § 2810.1 (3d ed.) (explaining one of "four basic grounds" for granting Rule 59(e) motion is to allow moving party to present newly discovered or previously unavailable evidence). Furthermore, the issue before the family court was the best interests of the child. DeLeonardis v. Page, 2010 VT 52, ¶ 27, 188 Vt. 94 ("[T]he family court must focus on the best interest of the child, not the best interest of one or more of the parents."). The impact a custodial order has on a parent's qualification for government benefits is not a factor that the court is required to consider in conducting the best-interests analysis. See 15 V.S.A. § 665(b). The family court had discretion to award father increased contact based on its assessment of the child's best interests, even though father did not request it and even if it may have a somewhat detrimental impact on mother's finances. See DeLeonardis, 2010 VT 52, ¶ 29 (holding family court did not abuse discretion in awarding defendant less than fifty percent of parent-child contact where parties did not agree on contact and court found less contact to be in child's best interests).

For similar reasons, the court's denial of mother's belated request for "compensatory time" to allow her to travel alone to Seattle without missing parent-child contact time was not an abuse of discretion where mother did not present evidence on this issue or request such an arrangement at trial. See Wright, supra, § 2810.1 (explaining Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment").

Finally, mother argues that the custody order improperly gives effect to father's bias against mother's race and culture by preventing meaningful contact between the child and members of mother's family. She argues that father's disdain for her heritage is demonstrated by the fact that he unilaterally took the child back to Vermont in November 2014 and requested a restraining order, falsely alleging that she was mentally ill. She further claims that the court's finding that her family's home in Seattle was not an appropriate place to raise a child was indicative of bias.

We see no evidence to support mother's claim that father acted out of racial or ethnic animus or that the court's order reflects such bias. Father was reasonably alarmed by mother's threats to take the child to Vietnam where father couldn't find them, and her statement that if she couldn't have the child, no one could. Even if some of mother's beliefs and behavior could be explained by cultural differences, other behavior was plainly irrational, such as her insistence on telling the child that her grandmother was a "murderer." The court found that father was genuinely concerned about mother's mental health when he testified at the RFA hearing. However, it found no evidence in the record that mother had a diagnosed mental illness and did not base its final custody decision on father's lay diagnosis. Rather, the court found that mother had a loving relationship with the child, kept a tidy home in Vermont, was a "wonderful and caring mother," and was teaching the child Chinese, which it described as "a great thing." Its decision to award primary custody to father was based on findings that mother was unwilling to cooperate or communicate with father, actively tried to sabotage the child's relationship with father's family, and had a volatile temper. Mother does not challenge these legitimate, non-discriminatory findings, which are supported by ample evidence in the record. See DeLeonardis, 2010 VT 52, ¶ 25 (affirming decision to award custody to plaintiff based on findings that plaintiff was better able to cooperate and communicate with defendant and to foster positive relationship and continuing

contact between defendant and children, and noting that "[t]hese factors have been central to many of this Court's decisions on parental rights and responsibilities and parent-child contact").

Nor is the court's description of mother's familial home indicative of bias. Father testified at the hearing that the house in Seattle was a small two-bedroom home in a dangerous neighborhood. At least seven people, including two children, currently lived in the house some or all of the time. Pictures showed that the house was cluttered and the bathroom was dirty. Mother did not rebut this testimony. The testimony and pictures support the court's finding that the Seattle house was a less desirable home for a child than the parents' homes in Vermont.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice