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. 2017-448

MAY TERM, 2018

Nicholas Jones v. Gretchen Stern*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 2-1-17 Wndm
		Trial Judge: Thomas A. Zonay

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

Mother appeals from the trial court's order awarding father primary legal and physical rights and responsibilities for the parties' minor son. She argues that the court's findings support an award of primary rights and responsibilities to her, not father. Alternatively, she argues that the court's findings are inadequate. We affirm.

Mother and father are the parents of a son who was born in December 2010. Father initiated this parentage action in January 2017. Following an evidentiary hearing, the court made the following findings. Father is a math teacher at U-32 High School in Montpelier. Mother works as the operations director at Hunger Free Vermont; her office is in the Burlington area. Both parents have sufficient income and benefits to ensure that son's needs are met. Parents began dating in 2009 and they lived together for approximately four years after son was born. During this time, they shared child-care duties. After they broke up, mother moved to Winooski and father moved to Calais where the parties had lived previously. Between April 2014 and August 2016, the parties agreed to equally share care of son. They would meet in Waterbury or Montpelier for exchanges. This changed in August 2016, however, when parents had to decide where son would attend kindergarten.

After considering schools and father's location, mother decided to move to Richmond and enroll son in kindergarten there. Mother lives in Richmond with a new partner who has a good relationship with son. Father did not agree with mother's decision to live in Richmond, but worked with her, including engaging in mediation, in order to reach an agreement on a parent-child contact schedule. Father began seeing son every other weekend from Friday night until Monday morning; he also had a mid-week visit for approximately three hours. Initially, because the parties lived an hour apart, the mid-week visit occurred at mother's home. Mother felt that father was not observing appropriate privacy boundaries in her home, however, and she stopped allowing visits there.

As to the weekend visits, parents had agreed that mother would pick son up on Monday mornings at 7:00 a.m. at U-32. Mother was late several times. After father filed this parentage action, mother stopped the three-day weekend visits and advised that she would no longer pick son up at U-32. The parties then began Sunday night exchanges. The court mistakenly stated that mother's decision reduced father's overnights "by four nights per month."

Son has a good relationship with both parents. He is a happy, engaged, and resilient child who adapts well and easily makes friends. He had a great year in kindergarten. He has appropriate school-age relationships in both Calais and Richmond. He also has good relationships with his paternal grandmother as well as other family friends of both parents.

The court found that the parties' disagreements regarding son became more pronounced after father's filing in this case. Mother considered father's manner of speaking to her to be condescending and sarcastic and she felt that he questioned her judgment and decisions. Father felt that mother was excluding and marginalizing him from son's life.

Mother asserted that she was better equipped than father to help son work through his emotions to decompress and understand the world around him. The court found no evidence to show that father had failed to appropriately meet son's emotional needs, however, or that he was incapable of meeting those needs going forward. Further, the court stated, even accepting mother's view of father's attitudes and conduct, the evidence did not establish that father had or would engage in any condescending, intimidating, or other such behaviors with son.

Based on these and other findings, the court considered the best-interest factors set forth in 15 V.S.A. § 665(b). It found that none of the factors weighed in favor of one parent or the other except their respective "ability and disposition to foster a positive relationship and frequent and continuing contact with the other parent." Id. § 665(b)(5). The court concluded that this factor favored father. It explained that parents could no longer work together. While mother was not solely to blame for the parties' difficulties in reaching agreements regarding parent-child contact, it concluded that father's conduct and attitudes toward these issues showed a greater ability and disposition to foster frequent and continuing contact between son and mother than the reverse. The court noted that while father might not have had a legally enforceable right to parent-child contact until a court order was entered, it could not overlook that mother made decisions to restrict contact and alter the terms of prior agreements for contact, i.e., removing the Sunday night overnight, after father filed this action. Contrary to mother's position, the court viewed father's efforts to obtain additional clarity and more contact at the outset of these proceedings to be reasonable and necessary. Based on its analysis, particularly the weight given to factor (b)(5), the court assigned father sole legal and physical rights and responsibilities. Mother filed a motion to amend, which the court denied. This appeal followed.

Mother argues that the evidence and the court's findings support an award of primary physical and legal rights and responsibilities to her, not father. She asserts that there were a variety of reasons why the Monday morning transfer did not work, and that father rejected any alternative to her driving to Montpelier on Monday mornings to pick son up. Mother notes that the court erred in stating that father lost "four" overnights per month after the Monday morning transfers stopped. Mother also asserts that father engaged in unsafe behavior by taking a photo while riding with son on a motorcycle and that father ignored her concerns. She contends that this undermines

the court's conclusion that father has a greater ability and disposition to promote a positive relationship with mother. Additionally, mother argues that the court repeatedly minimized father's "ongoing controlling, intimidating and condescending behavior and attitude" toward her, even when exhibited in front of son. She raises numerous arguments in a similar vein, challenging the court's assessment of the weight of the evidence and pointing to evidence that supports her position. Alternatively, mother argues that the court's findings are inadequate to discern "what was decided and why." Turner v. Turner, 2004 VT 5, ¶ 7, 176 Vt. 588.

The trial court has broad discretion in determining a child's best interests. See Myott v. Myott, 149 Vt. 573, 578 (1988). On review, we will uphold the court's findings "if they are supported by credible evidence, and we will uphold the court's conclusions if the factual findings support them." Maurer v. Maurer, 2005 VT 26, ¶ 10, 178 Vt. 489 (mem.). We emphasize that it is the exclusive role of the trial court, not this Court, to assess the credibility of witnesses and to weigh the evidence. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (explaining that trial court's findings entitled to wide deference on review because it is in unique position to assess credibility of witnesses and weigh evidence).

As the trial court recognized, even if the evidence did not strongly favor one parent, it was obligated to award primary physical and legal rights and responsibilities to one parent. See 15 V.S.A. § 665(a) ("When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent."). The court acknowledged that the evidence only slightly favored father. It considered the statutory best-interest criteria in reaching its conclusion, and its decision is supported by the record.

Mother's arguments focus on the court's evaluation of the weight of the evidence, a matter reserved exclusively for the trial court. While mother contends, for example, that there were various reasons why she decided to stop picking up son at U-32 on Monday mornings, the court found it significant that she decided to stop doing so only after father filed this parentage action.[*] The court's focus was on mother's modification of prior agreements and the consequent loss of contact time for father. Father testified to the timing of mother's decision and his feeling of being marginalized from son's life. The court expressly found that the parties' disagreements regarding son became more pronounced after father's filing in this case. The court was entitled to weigh this evidence as it saw fit. Father also testified to his attempts to gain certainty and clarity in visitation, which the court found reasonable and appropriate. The court considered the evidence presented by mother, including father's hobby of motorcycle riding, the reason mother decided to stop allowing visitation at her home, father's decision to allow his mother to watch son during part of a school vacation, and other issues, and ultimately weighed the evidence as set forth in its findings. The court did not accept mother's characterization of father's attitudes and conduct toward her and it found no evidence to establish that father failed to appropriately meet son's emotional needs. The court concluded that the scale tipped, however slightly, toward father based on the considerations outlined above. See, e.g., Livanovitch v. Livanovitch, 99 Vt. 327, 328 (1926)

[*] While the court erred in finding that father's visitation was thereby reduced "by" four nights per month rather than "to" four nights per month, this error was harmless. The court did not base its decision on the particular amount of time lost. We note that elsewhere in its decision, the court expressly found that father had visits with son every other weekend.

(recognizing that "bare preponderance is sufficient, though the scales drop but a feather's weight"). This Court does not reweigh the evidence on appeal. Mullin v. Phelps, 162 Vt. 250, 261 (1994). We find it clear from the court's decision "what was decided and why," Turner, 2004 VT 5, ¶ 7, and we find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice