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. 2018-259

MARCH TERM, 2019

David Pariser-Gollon* v. Melinda Pariser-Schmidt	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 438-5-10 Cndm
		Trial Judge: Kirstin K. Schoonover

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

Father appeals from the trial court's ruling on his motion to modify parent-child contact (PCC). He argues that the court erred by failing to maximize his PCC; basing its decision on unfounded considerations; and reaching a clearly unreasonable result. We agree with father that the court's PCC order is unreasonable, and we therefore reverse and remand for additional findings.

Following a hearing, the court made the following findings. Mother and father are the parents of a daughter, born in December 2007. Parents divorced in December 2010. They agreed to share legal and physical rights and responsibilities. The parties modified the final order to allow father to see the child every Tuesday night and every other Friday through Monday. This provided father—who was then self-employed—with five out of fourteen overnights in a two-week schedule. Father is now a correctional officer working the second shift from 3:00 p.m. to 11:30 p.m. Father works on a rolling schedule and his days off change on a weekly basis within a seven-week schedule. As father explained, his days off move forward one day each week within the seven-week schedule, i.e., the first week father has Tuesday and Wednesday off, the second week he has Wednesday and Thursday off, and so on. Father is guaranteed time off for two weekends per month in a six-week period. When father first started working this shift, mother was on maternity leave and she allowed father to have PCC consistent with his days off. Father sought to continue this schedule. Mother sought a more "consistent" PCC schedule. Mother works as a nurse and has every Tuesday, Thursday, and every other weekend free. The court found that mother created her work schedule around father's time with the child and that it provided mother with a consistent schedule to enjoy the child and to make plans. The court found that the child was ten years old and "has other activities."

Father moved to modify PCC in October 2017. The court found father's new employment schedule constituted a change in circumstances. Both parents proposed a new PCC schedule. As indicated above, father requested that the child spend time with him based on his days off. Mother proposed that father have visitation on Wednesday nights and on his three-day weekends with an additional day added to either end of the weekend to create a four-day weekend. Mother argued that father's schedule would significantly impact her time with the child, and that if father had two consecutive weekends in a six-week period, she would lose one of her weekends with the child.

The court found mother's proposal more reasonable than father's proposal. It stated that mother's proposal provided father with the same amount of contact that he had before (ten out of thirty overnights with "mother accommodating his request for visits during his free weekends, to her detriment"). The court acknowledged that father would not be available every Wednesday but noted that he would be available "some of them." The court found that its order provided consistency for the child and that having a set schedule reduced the potential for conflict between parents. Father was thus awarded PCC based on seven-week blocks incorporated into a six-month calendar. Father would have the child on his three-day weekends together with one additional day added to either end of the weekend to create a four-day weekend. Father would have PCC each Wednesday overnight. Father could choose two additional days from any Monday and/or Friday in the seven-week block. Additionally, the court stated that father was free to find times within the schedule to see the child, in addition to his scheduled days, provided it did not interfere with mother's time, i.e., if mother was working while father was not. The order allowed mother to review father's proposed schedule every six months, determine if it was consistent with the court's order, and file any objections with father.

Father moved for reconsideration, arguing that—contrary to the court's assertion—he was not receiving the same amount of contact as before because he could not see the child every Wednesday, as the court acknowledged. Father also noted that the new PCC schedule required him to use nine days of vacation time during each seven-week schedule, which he could not do. Father emphasized that while his work schedule was unconventional, it was fully predictable. Under his proposal, he was guaranteed fourteen overnights with the child without having to take time off from work. Father further asserted that the new plan required a significant increase in coordination and communication between the parties.

The court denied father's motion. The court indicated its awareness that father's rotating schedule was consistent and predicable but noted that his days off varied weekly through the seven-week cycle. The court found that if it adopted father's proposal, the child would not have consistency on a weekly basis. The court acknowledged that father would lose some additional overnights (four days in a seven-week cycle) but stated that it tried to accommodate his work schedule while providing consistency for the child. This appeal followed.

Father argues that the court abused its discretion in setting the new PCC schedule. He maintains that the court's decision is inconsistent with 15 V.S.A. § 650, where the Legislature "finds and declares as public policy" that it is in a child's best interests "to have the opportunity for maximum continuing physical and emotional contact with both parents." Father asserts that there was no evidence that the child was incapable of adapting to his work schedule or that his proposal would in any way interfere with her activities. Father questions why he is expected to use vacation time to have contact with the child while mother is not, and why the court expressed concern over mother's potential loss of time with the child given that she has much more time with the child as he does. Father further argues that his proposal would have provided mother with more time, not less. Father also asserts that his proposed schedule is more likely to eliminate conflict than mother's proposal. Finally, father contends that the court's decision is internally inconsistent and clearly unreasonable given that he cannot see the child on most Wednesdays and that he is expected to use a significant amount of vacation time to engage in PCC.

The trial court has "discretion in setting a visitation schedule," and its decision will stand "unless that discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." LeBlanc v. LeBlanc, 2014 VT 65, ¶ 25, 197 Vt. 17 (quotation omitted). We leave it to the trial court "to determine the credibility of the witnesses and weigh the persuasiveness of the evidence." Cabot v. Cabot, 166 Vt. 485, 497 (1997). Notwithstanding our deferential standard of review, we conclude that the court's exercise of its discretion cannot be sustained in issuing the PCC order here.

First, the linchpin of the court's decision—that father will have "the same amount of contact as he had before"—is erroneous. Effectively, father's time will be greatly reduced. The court's PCC schedule requires father to take nine days of vacation time every seven weeks—or more than two months of vacation time per year—simply to have visitation with his child. There was no evidence that father, who started his job as a correctional officer in 2015, had the ability to take this amount of vacation time, to say nothing of the fact that he would have no vacation time left for other activities. A schedule that requires father to take this level of vacation time is unreasonable. On remand, the court should address the discrepancy between its assertion that visitation has stayed the same with the reality of father's actual ability to see the child on the days awarded. It must make findings as to what father can realistically accomplish. This applies not only to the Wednesday-night visits but also to father's actual ability to take "four-day weekends" multiple times within a seven-week period.

The court's other reasons for adopting mother's proposal are inadequately explained. In finding mother's proposal more reasonable, the court stated that it "provides consistency for [the child] and having a set schedule reduces the potential conflict between the parties." This statement appears equally true of father's proposal and the court did not explain what distinguished the two proposals on these points. The court also failed to explain why "weekly consistency" was critical for the child or why it should take precedence over father's ability to spend time with his child. While the court noted that the child "has other activities," there was no finding that father's visitation time would interfere with these activities. In any event, we have held that "to allow the custodial parent to schedule the child for time that is supposed to be spent with the noncustodial parent ignores the legislative mandate that children should continue 'to have the opportunity for maximum continuing physical and emotional contact with both parents,' 15 V.S.A. § 650," and that "[w]ithin reason," how each parent spends their block of time with the child "has to be left to the individual decision of the parent who is caring for the child at the time." Miller v. Smith, 2009 VT 120, ¶ 7, 187 Vt. 574 (mem.) (alteration omitted). Because the court's key findings are either unreasonable or inadequately explained, we must reverse and remand for additional findings. If the court is to adopt mother's proposal, it must acknowledge that doing so will result in a significant decrease in father's visitation time and make more specific findings justifying its decision.

Reversed and remanded for additional findings.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice