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. 2020-089

JULY TERM, 2020

Tabitha Escobedo v. Ernesto Escobedo*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 174-2-14 Cndm
		Trial Judge: Barry D. Peterson, Specially Assigned

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

Father appeals from the trial court's modification of parental rights and responsibilities. He argues that the court erred in denying his efforts to compel production of mother's medical records and erred in evaluating the statutory best-interests factors.[*] We affirm.

The record reflects the following. Parents divorced in 2015 following a ten-year marriage. Their daughter A.E. was born in December 2006. The parties agreed at the time of their divorce that they would share legal and physical rights and responsibilities for A.E. and she would spend 60% of her overnights with mother and 40% of her overnights with father. The exchanges were to occur in Chittenden County. Following the divorce, father remarried and moved to Montpelier, Vermont. Mother lives in Colchester. A.E. has lived in Colchester since birth and she attends school and church there. She is well-adjusted to her life there.

Mother struggles with mental-health issues and has been hospitalized several times. The court found that mother had also engaged in other unusual behavior over the prior six years, including acting out at a private club, acting strangely at a parent-teacher-organization meeting, losing control at the child's doctor appointment, and driving on the wrong side of the road.

Most recently, mother voluntarily sought inpatient hospitalization in the spring of 2017; her hospitalization lasted thirty days. Mother did not inform father of her hospitalization. When father learned of the situation, he moved to suspend mother's contact with A.E. and modify parental rights and responsibilities (PRR). Mother opposed the motions and filed motions of her own. The court suspended parent-child contact (PCC) ex parte and then issued an interim order in April 2017 vacating the ex parte suspension of PCC. The court required that maternal grandmother reside with mother when mother had contact with the child until further order of the court.

[*] Mother did not file a cross-appeal and thus, we do not address her assertion that the court erred in finding a real, substantial, and unanticipated change of circumstances or her claims that the court erred in evaluating several of the statutory best-interests factors.

Between December 2018 and February 2019, grandmother was unavailable and mother was unable to have PCC with the child beyond a one-hour Christmas visit.

The parties agreed to a forensic evaluation, which was conducted by Dr. Claire Gilligan, a licensed psychologist-doctorate. Her report was admitted into evidence at the hearing on the motion to modify. Dr. Gilligan also testified. She stated that mother's mental-health records indicated a significant pattern of mental-health issues through April 2017 but there was no evidence that she needed hospitalization since then. Dr. Gilligan felt mother's mental health had stabilized. Mother's therapist also expressed her belief that mother had maintained mental stability and that mother sought out voluntary treatment when needed. During her hospitalizations, mother arranged for relatives to care for A.E. and father had his usual PCC. Dr. Gilligan recommended that legal rights and responsibilities be split, with father being assigned medical, the parties sharing education, and mother being assigned religion. She recommended that they share physical rights and responsibilities and evenly split PCC.

Maternal grandmother and mother's aunt testified on her behalf. The court found that they actively colluded to conceal mother's episodic mental breakdowns from father on multiple occasions. More troubling, they encouraged A.E. to be complicit and lie to father.

Mother also presented testimony from another individual, Dr. Nicole Brisson, to whom she was referred by her therapist. Dr. Brisson has expertise in "supportive parenting," which focuses on assessing the type of supports that a parent with disabilities needs to be successful and what their child needs for growth and development. Dr. Brisson conducted a competency-based parenting assessment of mother in October 2017. She testified that mother's decisions to seek help from her relatives in caring for A.E. were the type of support that she would encourage for a parent experiencing a mental-health crisis. She observed mother and A.E. together and testified that they were happy to see one another and enjoyed being together. Dr. Brisson testified that mother had excellent insight into her mental health, and she was very open to discussing it. Mother was actively trying to prevent future mental-health crises by being involved with her community, exercising, seeing her therapist and psychiatrist, and following their treatment plan.

Based on Dr. Brisson's testimony, the court found that mother was a very loving and conscientious parent who had been providing for the child's developmental, intellectual, and social needs. It found that mother appropriately and actively sought medical attention and, if needed, hospitalization, but she did not notify father out of fear that he might take A.E. from her.

The court found that, during the pendency of these proceedings, father had asked A.E.'s therapist to discuss with her the prospect that she would be attending school in Montpelier rather than Colchester. Father attended the therapy sessions and also tried to talk to A.E. about the positive aspects of changing schools. The issue was discussed in at least three to four of their sessions and during these discussions, A.E. became "highly distressed" at the thought of changing schools.

Father also testified at the hearing. When asked what issues he was concerned about with respect to his daughter becoming a teenager, he testified that she was very mature-looking for a twelve-year-old and "developed physically" and he was concerned about her dealing with relationships. He stated that he needed to be there to monitor her so she did not get in with a bad crowd, use drugs or alcohol, or have sex. Father wanted custody so that he could keep a close watch on her. The court found that, other than father's own fears, there was no evidence to support a finding that A.E. was at risk for any of those things. The court contrasted this with mother's testimony that she has tried to give A.E. information about the dangers of drugs and sex, relying on informational books that she reviews and reads with her.

Father complained about the driving required under the current PCC schedule. The court found that father voluntarily chose to move from Essex to Montpelier and was considering moving even farther away to East Montpelier. Father sought sole legal and physical rights and responsibilities of A.E., except for decision-making around religion, asked that she attend school in Montpelier, and indicated that he would take her to church if she wanted to go. Father acknowledged that, by agreement in the final divorce order, A.E. was to be raised in the Catholic religion, including attending church classes. A.E. stayed with father between December 2018 and February 2019 when maternal grandmother was unavailable to be present for visitation. Father did not take A.E. to church during this period, nor did he offer to bring A.E. to visit mother in Colchester even though the child was attending school in Colchester each day.

Based on these and numerous other findings, the court found that mother's voluntary admission to the hospital for thirty days was a real, substantial, and unanticipated change in circumstances. It then evaluated the statutory best-interests factors set forth in 15 V.S.A. § 665. It found parents equally able to provide A.E. with love, affection, and guidance. It expressed concern about mother's failure to inform father of her hospitalization and the fact that A.E. was encouraged to lie about the situation. The court was also concerned by father discussing a school-change with A.E., encouraging the therapist to discuss it with her, and taking the child to visit a school in Montpelier, knowing that this issue caused A.E. great anxiety and distress.

The court found father better suited than mother to ensure that A.E. received appropriate medical care, but otherwise, it determined that parents could and had provided the child with adequate food, medical care, and a safe environment, with an isolated exception on mother's part. Mother was better able to meet A.E.'s present and future developmental needs. She had demonstrated that, despite her mental health challenges, she could appropriately do so. The court lauded mother's approach to discussing developmental issues with the child and expressed concern about father's testimony that he needed to monitor and have control over A.E. based on his fears about her development. The court rejected father's assertion that A.E. was unsupervised in mother's home as unsupported by the evidence.

The court found that A.E. was a bright child who was engaged in various activities. Her medical providers were in Chittenden County and her church was in Colchester. She had been born and raised in Colchester and had many friends there. She also had friends in Montpelier. The court reiterated that inappropriate discussions with the child about changing schools caused her significant distress. It found that substantially changing A.E.'s current housing, schooling, and community would not be in her best interests. The court discussed mother's failure to disclose her hospitalization and the stress and anxiety that A.E. suffered from having to lie about the situation. It nonetheless found that mother was better able to foster a positive relationship and frequent and continuing contact with the other parent given father's behavior during the pendency of these proceedings. The court found that father recorded mother and child during a medical appointment without their knowledge, he attempted to have a health care provider file a complaint with the Department for Children and Families against mother following this appointment, he engaged in unsolicited discussions about mother's mental health with the child's school authorities and medical providers, and he discussed changing schools with the child and brought her to visit a new school.

The court further found that the child had a strong relationship with both parents and positive relationships with her extended family with the exception that mother's relatives were not positive role models when they engaged A.E. in their efforts to lie to father about mother's hospitalization. As parents had evenly split their time with the child after the divorce and participated in the child's life, it determined that neither was the child's primary care provider. Finally, the court found that the parties could not cooperate or make joint decisions for the child.

Mother hesitated to communicate directly with father based upon her substantiated fear that father was attempting to take A.E. from her. The court found that father's attempts to gather information and insisting on face-to-face contact with mother was not done out of concern for A.E., but rather to assess mother's mental health and work toward assuming sole custody of A.E.

The court determined that assigning parents individual elements of legal rights and responsibilities was in A.E.'s best interests. It thus assigned medical rights and responsibilities to father and educational, religious, and all other legal rights and responsibilities to mother. It ordered the parties to continue sharing physical rights and responsibilities with PCC evenly split with a week-on, week-off schedule. The court stated that if mother was unable to care for A.E. because her mental health deteriorated, she must immediately notify father so he could assume temporary sole responsibility for the child. The court imposed other conditions as well. Father appealed from this order.

We begin with father's challenge to the trial court's evaluation of the statutory best-interests factors. Father contends that the court substituted its judgment for father's judgment and did not compare parent to parent. Essentially, father challenges the court's assessment of the weight of the evidence. He argues that, contrary to the court's findings otherwise, he is better equipped than mother to guide the child through her adolescence and teenage years. He cites evidence that he believes supports his position. Father argues that mother's failure to disclose her hospitalization was much worse than his decision to repeatedly discuss changing schools with A.E. He attempts to justify his behavior. Father raises similar challenges to the court's evaluation of the evidence as to the other statutory best-interests factors, asserting that: mother is incapable of helping the child with her health care; he is better able than mother to meet the child's developmental needs and the court was wrong to be concerned about this desire to monitor A.E.'s behavior; he can offer A.E. a better home environment than mother; the court should have deferred to his judgment that A.E. would be fine if she had to switch schools; he was better able to foster a positive relationship with the other parent; he was the child's primary caregiver; and the child's relationship with her maternal relatives was destructive while her relationship with his family was positive. Father urges this Court to reweigh the evidence and award him sole legal and physical rights and responsibilities for all issues except religion.

With one exception, these arguments all challenge the trial court's assessment of the weight of the evidence and its evaluation of the credibility of witnesses, matters reserved exclusively for the factfinder. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). We do not reweigh the evidence on appeal. "The family court has broad discretion in determining what allocation of parental rights and responsibilities is in a child's best interests," LeBlanc v. LeBlanc, 2014 VT 65, ¶ 21, 197 Vt. 17, and father fails to show any abuse of discretion here. The court explained in detail how it reached its conclusion. Its findings are supported by the evidence and the findings support its conclusions. Father's disagreement with the way in which the court weighed the evidence does not suffice to show an abuse of discretion. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than disagreement with court's reasoning and conclusion do not make out case for abuse of discretion).

Father challenges one finding as clearly erroneous. He argues that there was no evidence to show that the court had admonished the parties not to raise the possibility of a school change with A.E. The court did not make such a finding. It found that the child's therapist in Montpelier testified that she brought this topic up, during the pendency of this litigation, at father's request. Father acknowledged bringing up this subject with the therapist. The therapist testified that father would try to talk to A.E. about this subject during their therapy sessions and A.E. became "highly

distressed" at the thought of changing schools. They continued to discuss this topic with A.E. and she remained so distressed that she could not speak or articulate her feelings about possibly changing schools. The court acknowledged that, at the hearing, it expressed that father's failure to comply with its directive would not negatively impact its decision. It explained that it did not consider father's failure to comply but rather his lack of judgment and the substantial negative impact this behavior had on A.E. The court acted within its discretion in concluding that the discussion about a school change was inappropriate and stressful for the child. This behavior did not "tip the scale[s]" of the court's decision, consistent with the court's statement on the record.

We thus turn to father's argument concerning the production of mother's mental-health records. The record shows that in April 2017, father subpoenaed mother's medical records from the University of Vermont Medical Center. The hospital objected to providing them because they were privileged, and mother had not consented to their disclosure. Mother moved to quash the subpoena. The court subsequently issued an order directing mother to provide the court and father with letters from her inpatient UVM doctors and her outpatient doctor regarding, among other things, whether mother's condition could interfere with her ability to care for the child at times other than when she was suffering from episodes of recurrent major depression and episodic acute depression. If mother did not consent, the court explained, she must notify the court that a hearing pursuant to Vermont Rule of Evidence 503(d) for release of medical records was necessary. Mother filed the requested letters.

Father now argues on appeal that the court should have held a hearing under Rule 503(d)(7) to determine if the records were not privileged due to "risk of harm to the child." He argues that the records were vitally important. Father fails to show that he preserved this argument. To glean information about mother's mental health and its effect on A.E., the court took the approach cited above and father fails to show that he objected to this decision. He fails to show that he requested a hearing. He therefore waived this claim of error. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). The court did not err by failing to hold a hearing sua sponte. Father raised no direct challenge to the merits of the court's separate ruling regarding records from the Howard Center in his opening brief; he does so for the first time in his reply brief. We thus do not address this argument. Gallipo v. City of Rutland, 2005 VT 83, ¶ 52, 178 Vt. 244 (stating that issues not raised in original brief may not be raised for first time in reply brief). We find no error in the court's decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice