

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-297

APRIL TERM, 2003

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| | } | APPEALED FROM: |
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| Kathleen M. Heffernan | } | Windsor Family Court |
| | } | |
| v. | } | DOCKET No. 455-11-00 Wrdmp |
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| Joseph W. Harbeson | } | Trial Judge: Paul F. Hudson |
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In the above-entitled cause, the Clerk will enter:

Mother and father separately appeal from a parentage order of the Windsor Family Court, awarding mother primary physical rights and responsibilities, ordering joint legal rights and responsibilities, and providing father with substantial parent-child contact. Mother contends the court abused its discretion by: (1) ordering joint legal rights and responsibilities without mother's consent; (2) failing to provide for a reduction of father's parent-child contact when the child enters school; (3) failing to provide for separate vacation time with mother; and (4) failing to provide sufficient time for the child to interact with mother's extended family. Father contends the court abused its discretion in awarding mother primary physical rights and responsibilities. We reverse and remand.

The facts may be briefly summarized. The parties first met in the summer of 1997, when mother was sixteen and father was nineteen. They never married. A child was born in October 1999, and both parties, as well as their parents, have been deeply involved in raising the child. The parties separated in August 2000, and each has since started a new relationship. Mother filed a parentage complaint in November 2000. Following two days of hearings in April 2002, the court issued a written decision containing extensive findings and conclusions. The court found that although mother was the primary care giver since birth, father has provided regular and daily child care while mother worked, and that both parties " while tending toward immaturity in their relationship with each other " were fit parents. After reviewing the factors set forth in 15 V.S.A. § 665, the court awarded primary physical rights and responsibilities to mother, who planned to open a daycare facility and care for the child during the day. The court provided for substantial parent-child contact with father, commencing at 3:30 p.m. on weekdays when father returned from work and ending at 7:00 p.m., as well as three weekends each month, three weeks in the summer, and alternating holidays. The court awarded joint legal rights and responsibilities, admonishing the parties that " an improvement in their ability to communicate and cooperate is their responsibility and not the duty of the court or the laws of Vermont." Mother appealed the order, and father cross-appealed.

Mother first contends the court erred in awarding joint legal rights and responsibilities. In dissolution proceedings, the law currently provides that " [w]hen 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." 15 V.S.A. § 665(a); see Cabot v. Cabot, 166 Vt. 485, 493 (1997) (" where the parents cannot agree, the court must award primary (or sole) parental rights and responsibilities to one parent"). It is not clear, however, whether § 665 applies to actions under the Parentage Proceedings Act, 15 V.S.A. § § 301-308. Section 306 provides merely that, " [i]n an action under this subchapter, the court may determine parentage and may include in its order provision relating to the obligations of parentage, including future child support, visitation and custody." The statute makes no reference to § 665, and we have not had occasion to

address this precise issue. Cf. Bissonette v. Gambrel, 152 Vt. 67, 69 (1989) (upholding custody decision in parentage context based on § 665(b) factors where "[n]either party dispute[d] that these standards . . . should be applied").

As neither party, nor the trial court, here appears to have considered whether the prohibition against shared legal rights and responsibilities in § 665(a) applies to parentage proceedings, we shall remand the matter for further proceedings to address this issue.

Mother next contends the court abused its discretion in failing to include a provision in the order reducing father's parent-child contact when the minor, who was two and a half years old at the time of the order, leaves mother's day care facility and enters school. Mother notes that the court's intent was essentially to equalize contact with both parents, and that her time with the minor will become severely unbalanced when he enters school.

The trial court enjoys broad discretion in awarding 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 reasonably supported by the evidence, and its conclusions if supported by the findings. Payrits v. Payrits, 171 Vt. 50, 53 (2000). Mother has made a compelling showing that the current parent-child contact schedule will undermine the court's intent to equalize contact unless it provides for changes when the child enters school. At that time, mother's contact with the child will consist principally of early mornings and late evenings during the school week, time devoted largely to getting ready for school and bed. Father's contact, in contrast, will include the rich unstructured hours after school between 3:30 and 7:00 p.m, plus three weekends a month. The lack of balance in this arrangement is patent. Accordingly, we direct that on remand the court shall also reconsider the parent-child contact schedule to address this issue.

Mother further contends the court abused its discretion in providing that father would have three weeks with the child during the summer, but in failing to provide vacation time with mother until the child enters school, at which time school vacations are to be divided equally between the parties. For the reasons previously stated, we conclude that the vacation schedule fails to attain the court's stated goals, as mother is provided with no uninterrupted period of unstructured time to enjoy with the child. Accordingly, the court is directed on remand to provide that mother shall be entitled to a period of vacation time with the child during the summer, beginning with the Summer of 2003, in addition to the future division of school vacations.

Finally, mother contends the court abused its discretion in finding that the child should have liberal contact with both his maternal and paternal grandparents, while awarding father such liberal parent-child contact that the opportunity to interact with mother's extended family is limited. While it is often difficult to schedule sufficient time with grandparents, particularly in a divided family situation, we discern nothing in the record to suggest that the child is precluded from contact with mother's family, and therefore discern no basis to find an abuse of discretion. Nevertheless, the court shall consider the issue on remand when it revises the parent-child contact schedule as previously discussed.

In his cross-appeal, father contends the court abused its discretion in awarding mother primary physical rights and responsibilities. Father's precise argument in this regard is unclear. On the one hand, he acknowledges that the time each party currently spends with the child under the court's order approaches a shared custody arrangement, implying that the court should have awarded joint physical rights and responsibilities. On the other hand, he argues that the court erred in failing to award him primary physical rights and responsibilities, allegedly because mother lacked the ability and disposition to foster a positive relationship and frequent contact with father. 15 V.S.A. § 665(b)(5). The court found in this regard that neither party had demonstrated such an ability, and as a result imposed restrictions around the transitions, ordered the parties to engage in parental training, and prohibited either parent from disparaging the other in the child's presence. Without intending to predetermine the question whether § 665 applies in this context, we conclude that the record evidence amply supports the court's findings, and therefore discern no basis to disturb the court's award of primary custody to mother.

Reversed and remanded for further proceedings consistent with the views expressed herein.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned