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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 29 2009

SUPREME COURT DOCKET NO. 2008-270

MAY TERM, 2009

David Heide	}	APPEALED FROM:
	}	
	}	
v.	}	Orleans Family Court
	}	
	}	
Ying Ji a/k/a Heide	}	DOCKET NO. 5-1-05 Osdm
		Trial Judge: Robert R. Bent

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

Father appeals the family court's order modifying parental rights and responsibilities in favor of mother. The court found that father's move to Bellingham, Washington from Jay, Vermont was a substantial change of material circumstances and awarded physical and legal rights and responsibilities to mother as in the children's best interests. Father argues that the court's order is error because the court did not consider the contact mother was actually exercising in determining a change of circumstances, and improperly considered evidence prejudicial to father. We affirm.

The court found the following facts. The parties were divorced in April 2006. The final order awarded sole physical and legal parental rights of the parties' two children, born in July 2001 and October 2002, to father. Mother was granted "liberal and frequent parent-child contact" including every other weekend. At the time of the final order, father lived in Jay, Vermont where the family had resided since November 2002. The final order explained that although mother had initially been the primary caretaker, in September 2004 she took a job in New York City to provide for the family. Father became the children's primary caregiver. Father remained with the children in Jay, Vermont, where the children were well adapted to their community and life, and mother worked in New York City, traveling to visit the children in Vermont.

Although mother missed visits at times due to temporary duty assignments, she made substantial efforts to have contact with the children. She began the process of changing her work location from New York City to Burlington, Vermont to be closer to the children, and in June 2007, mother obtained a residence in Jay, Vermont to allow her more time with the children. After a vacation to the northwest in the summer of 2007, father decided that he might find better employment in that area of the country. The court found that father's move was motivated by having a lifestyle that involved winter-sports activities. Father did not have a specific discussion with mother prior to his move, but she was aware of the possibility. Father did not make any provisions for how the children would maintain contact with mother following the move.

In August 2007, father moved to Bellingham, Washington. Before he was out of Vermont, he was served with an order prohibiting him from permanently relocating without an agreement or a court order. Despite this order, father moved and relocated with the children. In Washington, father lives in a home with another family and does child care for the homeowner in exchange for rent. Father works at a ski area as a breakfast cook and sells blood plasma for extra money. He takes the children with him to the ski area where he works. The older boy is enrolled in a virtual academy and can do school work on his computer while at the ski area. The two days father has off of work, the children attend a private school. The children have adjusted well to school in Washington.

Mother filed motions for contempt and to modify parental rights and responsibilities due to father's move. The court held a hearing over two days. On April 21, 2008, the court issued a written order, granting mother's motion to modify. The court concluded that father's move was a substantial and unanticipated change in material circumstances because it impaired mother's ability to exercise the parental contact she had been enjoying with the children. The court considered the statutory best interests factors in 15 V.S.A. § 665. The court explained that under most factors the parties were equal, but that mother had a better ability to provide for the children's material needs and was better able to meet the children's developmental needs. The court further concluded that father's attitude toward mother and his lack of support of the children's relationship with mother weighed in mother's favor. Therefore, the court awarded sole legal and physical rights to mother. The court declined to impose sanctions on father for contempt.

Father moved to alter or amend the judgment, arguing that the court erred in finding changed circumstances by focusing on the contact mother planned to have with the children, rather than the contact she was actually exercising. The court denied the motion, and father appealed.

On appeal, father argues that the court (1) did not properly apply the American Law Institute's Principles of the Law of Family Dissolution (ALI Principles) in evaluating whether the move was a change in circumstances because the court failed to consider the parental contact mother was actually exercising; (2) incorrectly considered that father violated a court order by moving and this prejudiced the court against him; and (3) improperly considered evidence predating the final order.

To modify an existing custody arrangement, the moving party must first demonstrate a real, substantial, and unanticipated change in circumstances. 15 V.S.A. § 668. If this initial burden is met, then the court must consider the criteria set forth in 15 V.S.A. § 665 to determine the best interests of the children. In cases involving relocation, we have adopted the standard set forth in ALI Principles § 2.17(1). Hawkes v. Spence, 2005 VT 57, ¶ 13, 178 Vt. 161. Under that standard, "relocation is a substantial change of circumstances justifying a reexamination of parental rights and responsibilities only when the relocation significantly impairs either parent's ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan." Id. (quotation omitted). This determination involves "no precise formula," but requires the court to consider factors including: "the amount of custodial responsibility each parent has been exercising and for how long, the distance of the move and its duration, and the availability of alternative visitation arrangements." Id. (quotation omitted).

Father first argues that the court incorrectly found that his move to Washington was a change in circumstances because the court failed to define what type of contact mother had been exercising with the children. Father claims that the court's decision is internally contradictory because the court found that mother had missed visits with the children and only managed visits every other weekend because of her work schedule, yet the court concluded that mother had a "greater relationship" with the children than an "every other weekend parent." Father argues that the court improperly considered the final order's phrase that mother was entitled to "liberal and frequent parent-child contact" to find that mother had more contact than she actually did. Father also contends that the court considered that mother was planning to have more contact with the children instead of focusing on the contact she had actually exercised.

We find no error. "We will not disturb the family court's factual findings unless, viewing the evidence in the light most favorable to the judgment and excluding the effect of modifying evidence, there is no credible evidence to support them." Rogers v. Parrish, 2007 VT 35, ¶ 15, 181 Vt. 485. In this case, the court properly considered all the relevant factors we enumerated in Hawkes including the amount of custodial responsibility mother was exercising, the distance and permanence of the move, and the availability of alternative arrangements. As to the first factor, the court found that mother had been the children's primary caregiver for the first few years of their lives and thus had a close relationship with the children. The court further found that although mother's job in New York did not allow her to see the children more than every other weekend, she "made substantial efforts to have personal contact with her children given the distance by which they were separated." The court also found it significant that mother had "held and maintained a goal of reestablishing herself in a residence near the children in order to play a more direct and constructive role in their lives." Contrary to father's assertion, the court recognized mother's actual contact with the children, but found that mother had a stronger bond with the children than demonstrated solely by the time she had been able to spend with them. Hawkes, 2005 VT 57, ¶ 16 (in evaluating "whether a move would significantly interfere with the relationship between the child and the nonmoving parent, the court must consider the nature and extent of that relationship, and how the move would affect it"). This bond, combined with the great distance of the move, the permanence of the move, and the lack of an alternative parenting arrangement[1] all supported the court's finding of changed circumstances. Especially given that mother had recently moved her work and reestablished her residence in Vermont so as to

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[1] We are not persuaded by father's argument that the court erred in this regard because an alternative visitation schedule was possible and, in his view, more in the children's best interests than a transfer of parental rights to mother. According to father, a possible alternative plan could have allowed the children to spend six months with father and six months with mother because the older son was enrolled in a computer-based learning program and the children could travel on their own. The family court responded directly to this suggestion in its denial of father's motion to alter or amend. The court explained that while it might be possible to construct a contact schedule that would replace mother's alternating weekend contact in terms of the number of days of visits, "the diminished frequency of contact has a real potential for impairing the relationship between parent and children, particularly since they are fairly young and she had held such a role of primacy in their early lives." The court also found that father's "callous disregard" for mother's relationship with the children would make it difficult to arrange long-distance contact. See Rogers, 2007 VT 35, ¶ 18 (affirming court's finding that the mother's move would impair the father's contact given the mother's past refusal of visitation). Given these unchallenged findings, we agree with the court that an alternative contact schedule was not available.

capitalize on the liberal visitation to which she was entitled, the court did not err in finding that father's move to Washington would significantly impair the responsibilities mother was exercising or attempting to exercise under the parenting plan.

Next, father argues that the court was unfairly prejudiced against him because the court improperly found that father violated a court order when he moved the children to Washington. As explained above, when father moved, there was an existing order that required father to reach an agreement with mother or to seek a court order prior to moving the children. Father did not comply with the order and now argues that he was justified in doing so. According to father, as the custodial parent, he was entitled to move the children out of state without first seeking permission, and therefore the court erred in considering that he violated the order. See Lane v. Schenck, 158 Vt. 489, 497 (1992) ("Vermont has no statute requiring the custodian to make an affirmative showing of cause to justify removal and no statute discouraging relocation.").

We conclude that there was no error. The court considered father's conduct as part of its assessment of the children's best interests. The court found that

> [t]he low regard [father] held for [mother's] role in the children's lives particularly manifested itself in the way he moved. He made no provision with [mother] with regard to her future contact with the children and wholly ignored his obligations under this Court's orders in that regard when he determined to move.

Regardless of the order's legality,[2] the family court had discretion to consider father's contravention of the order as part of its analysis of "the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact." 15 V.S.A. § 665(b)(5). The court explained that it was concerned about father's ability to support the children's relationship with mother given his demonstrated lack of respect for her right to contact. In considering the children's best interests, "the court must consider all of the relevant evidence, including whether the harm caused by one parent's obstruction of visitation outweighs the harm that could be caused by a change in custody." Sundstrom v. Sundstrom, 2004 VT 106, ¶ 38, 177 Vt. 577 (mem.). The court properly considered the manner in which father moved and father's attitude towards mother's contact with the children in assessing the children's best interests.

Finally, father argues that the court improperly considered events predating the divorce in considering whether there was a change in circumstances. Specifically, father challenges whether it was appropriate for the court to consider that mother was the children's primary caregiver for the children during their early years. Again, we find no error. In considering a motion to modify, the court should not take evidence and make findings on events predating the divorce, but should take the findings of the original order and compare them to findings about the parties' current circumstances to determine if there is a change of circumstances. Hayes v. Hayes, 144 Vt. 332, 337-38 (1984). In this case, the court did not make its own findings regarding events predating the divorce, but relied on the findings in the final order of divorce. Cf. Dunning v. Meaney, 161 Vt. 287, 289 (1993) (holding that court's findings concerning events from before the divorce were not prejudicial). The court properly considered mother's early role as primary caregiver in its assessment of changed circumstances. The court also

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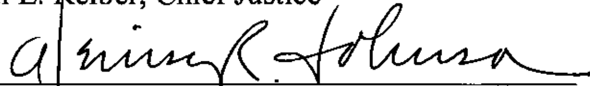
[2] Father did not appeal this order and therefore we do not reach this question.

considered this evidence in its best-interests analysis when assessing "the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development." 15 V.S.A. § 665(b)(6). Again, it was appropriate for the court to consider mother's role early in the children's lives as part of this assessment. See Trahnstrom v. Trahnstrom, 171 Vt. 507, 508 (2000) (mem.) (explaining that "primary-care-giver inquiry should focus on all relevant periods of a child's life, not just the period preceding trial").

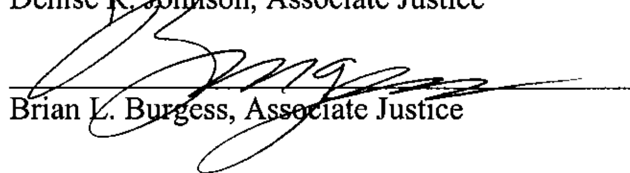
Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Brian L. Burgess, Associate Justice