

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-201

SEPTEMBER TERM, 2002

Denise Labrie

v.

Cannon Labrie

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APPEALED FROM:

Orange Family Court

DOCKET NO. 205-12-97 Oedm

Trial Judge: Alan W. Cook

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

Father appeals the family court's divorce order with respect to the court's award of parental rights and responsibilities and its division of marital property. We affirm.

The parties were married in August 1988 and separated in December 1997. They both have graduate degrees and are teachers in some capacity. Mother, 40 years old, is a high school teacher who earned \$47,000 in 1999. Father, 44, is an editor and college instructor who earned approximately \$31,000 in 1999, but whose salary has fluctuated over the years. The parties have one child, who was born in October 1995. Wife filed a relief-from-abuse petition against father in December 1997, but the petition was dismissed as the result of the parties' stipulation, which gave mother sole use of the marital home and physical responsibility for their child, but provided that the parties would share legal rights and responsibilities, and that father would be given parental contact on all or part of three consecutive days of the week. Divorce hearings were held on seven days between April and December of 2000. On April 4, 2001, the family court issued its decision, in which it (1) awarded mother physical and legal parental rights and responsibilities, while preserving the same amount of parent-child contact that father had under the stipulation; (2) awarded mother sole ownership and possession of the marital home; (3) awarded father two unimproved lots of land; and (4) awarded each party sole ownership of their respective retirement accounts. Father appeals, arguing that the court abused its discretion in awarding parental rights and responsibilities to mother, in refusing to disqualify their child's guardian ad litem, in failing to establish a parent-child contact schedule, and in dividing the marital property.

Father first argues that, in granting mother physical and legal parental rights and responsibilities, the family court ignored extensive evidence demonstrating that (1) mother had attempted to alienate the parties' son from father; (2) mother had violated the interim domestic order on several occasions; (3) father had been justified in expressing concerns about their son's well-being; (4) mother had demonstrated a pattern of dishonesty that should have brought her credibility into question; and (5) the forensic evaluator was unqualified and used flawed procedures in administering a psychological test to the parties. As evidence of parental alienation on mother's part, father focuses on what he considered to be excessive contact between the parties' son and the man who moved into the marital home shortly after the parties' separation. He also claims that mother's allegation that he sexually abused their son was knowingly false and aimed solely at disrupting the forensic evaluation and insuring that mother would obtain custody of the child. He further argues that, given the numerous examples of mother's misrepresentations concerning various matters, the court should have recognized that her sexual abuse allegations and her relief-from-abuse petitions were nothing more than

willful attempts to manipulate the legal system so that she could obtain custody of their son. Moreover, he contends that the court should have accepted the testimony of his expert witnesses, who challenged the credentials, the experience, and the methodology of the forensic evaluator.

Essentially, father is asking this Court to judge the credibility of the witnesses, reweigh the evidence, and substitute our judgment for that of the trial court. This we will not do. See Payrits v. Payrits, 171 Vt. 50, 54 (2000) (when there is conflicting testimony on factual issues, we will not set aside judgment merely because we may have reached different conclusion on same set of facts; credibility of witnesses and persuasive effect of evidence are questions for trier of fact, and thus the trial court's decision will stand if supported by credible evidence); Begins v. Begins, 168 Vt. 298, 301 (1998) (family court is accorded broad discretion in custody matters, given its unique position to assess credibility of witnesses and weigh evidence; we will uphold its decision as long as evidence supports its findings and those findings support its conclusions). Here, notwithstanding father's protestations to the contrary, there was conflicting evidence on virtually all of the points raised by father, and the court considered that evidence carefully before making its decision. The court explicitly acknowledged mother's shortcomings, her tendency to play the victim, and her violation of the interim order on at least one occasion. The court also acknowledged the testimony of father's expert witnesses challenging the forensic evaluation, but determined that other evidence supported the conclusions reached by the evaluator. The court was no more obligated to accept the conclusions drawn by father's experts than it was to adopt those reached by the evaluator.

As for mother's allegation of sexual abuse, the evidence did not require the court to conclude that mother had intentionally made the accusation to manipulate the legal system and further her chances of gaining custody in this divorce action. Rather, the evidence indicated that after learning from her son that father may have touched him inappropriately on one occasion, mother talked to her therapist, her attorney, and the child's attorney before reporting the incident to the Department of Social and Rehabilitation Services, which investigated the matter and found that the allegation could not be substantiated. Cf. Renaud v. Renaud, 168 Vt. 306, 311-312 (1998) (court should infer ulterior motive with respect to allegations of abuse only where evidence indicates accuser knew or should have known that charges were groundless; evidence showing that accuser did not act precipitously, but only after conferring with experts about suspected abuse, weighs against finding ulterior motive for accusations).

Because of the amount of conflict between the parents and the fact that they had not agreed on shared custody, the court was obligated to award parental rights and responsibilities primarily to either mother or father. See 15 V.S.A. § 665(a); Gilbert v. Gilbert, 163 Vt. 549, 553 (1995) (in divorce action involving a child, family court " must award parental rights and responsibilities to one parent when the parties cannot agree"). In the end, after considering seven days of highly contentious, conflicting testimony, the court considered all of the statutory factors and determined that, while both parents love their son and both have some shortcomings, it would be in the child's best interests to continue, as much as possible, the arrangement already in place by awarding legal and physical parental rights and responsibilities to mother, the child's primary caregiver, and by giving father extensive parent-child contact amounting to three days a week. There is ample evidence in the record to support the court's decision.

Father also finds fault with the family court's refusal to grant his motion, filed during the fourth day of hearings, to disqualify the child's court-appointed guardian ad litem. Apparently, what triggered the motion was father's discovery that the guardian ad litem had obtained the services of plaintiff's mother to babysit her child while she testified in the parties' divorce case. Father also alleges bias on the guardian ad litem's part, claiming that she made derogatory remarks about him and failed to visit him with the parties' child. During the colloquy on the motion, father's attorney stated that the purpose of the motion was to prevent the guardian ad litem from expressing an opinion in the case. The court responded by noting that this was a case in which there was voluminous evidence, much of it negative, concerning the parents, and that in such cases, the opinion of the guardian ad litem is less important. The court then indicated that the guardian ad litem would not be offering an opinion, and that, in any event, the court would not consider any opinion offered by her, but rather would decide the case on the evidence. The court also expressed concern that, while much of the information leading to father's concerns had been known to him for some time, the motion to disqualify was not filed until months later. For these reasons, the court denied the motion. We find no abuse of discretion. The reasons offered by the court fully support its decision. We find unpersuasive father's argument that, in effect, the guardian ad litem was able to offer her opinion through the proposed findings submitted by the child's attorney. Nor has father demonstrated that his due process rights were violated by the court allowing the child's attorney to file proposed findings beyond the

deadline originally set by the court.

Father also argues that the family court failed to render a decision establishing a parent-child contact schedule. Apparently, father is claiming that the court's order is ambiguous as to whether it is requiring the parties to observe the schedule set forth in their December 1997 stipulation or the adjusted schedule that has been in place since 1999. Noting that the parties had made adjustments to the schedule set forth in the 1997 stipulation, the court indicated that father should have contact for three days of each week at times convenient to both parties'schedules, and that, in the event the parties could not agree on a suitable schedule, the child' s attorney should make a recommendation to the court. We find no basis for reversing the court's order.

Finally, father argues that the court abused its discretion in dividing the marital property. Specifically, father argues that the court (1) accepted mother's undervalued estimate of the marital property, (2) failed to consider that the down payment on the marital property was given to the parties as a couple by mother' s parents, (3) failed to consider father' s student loan as a marital debt, and (4) exhibited bias by indicating that the property settlement was in lieu of maintenance without ever finding that mother was entitled to maintenance. We find no abuse of discretion. See Williams v. Williams, 158 Vt. 574, 577 (1992) (family court has broad discretion in distributing marital property). The court awarded mother the marital home and her retirement accounts, and awarded father two unimproved lots and his retirement accounts. The marital home had a fair market value between \$121,000 and \$140,000 according to the parties and an outstanding mortgage of just under \$100,000. Mother's retirement accounts were worth approximately \$40,000. Father' s unimproved lots were worth approximately \$30,000 and his retirement accounts were worth approximately \$13,000. Deducting the \$24,600 down payment on the marital homestead paid by mother's parents approximately four years before the parties separated, the division of marital assets is about even. The court did not abuse its discretion in considering the source of the down payment, regardless of whether it was intended for mother or the parties as a couple. See 15 V.S.A. § 751(b)(10) (in dividing marital property, court may consider " the party through whom the property was acquired"). Nor do we find any merit to father' s suggestion that mother should share his student loan debt. The property division made by the court is practical and equitable. See Guiel v. Guiel, 165 Vt. 584, 586 (1996) (mem.) (property distribution must be equitable, not necessarily equal).

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice