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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-561

JUNE TERM, 2003

Anita L. Cohn v. Robert D. Guthrie	}	APPEALED FROM: Chittenden Family Court DOCKET NO. 647-8-00 Cndm Trial Judge: Linda Levitt

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

Father appeals the family court' s final divorce order, arguing that (1) the court failed to implement Vermont statutory law regarding parental rights and responsibilities; and (2) the record does not support the court' s property and maintenance awards. We affirm.

The parties were married in July 1989. They separated in March 2000, when they both were in their late forties. They have two daughters adopted as infants, the older one born in June 1995 in China and the younger one born in June 1997 in Cambodia. Father earned between $100,000 and $200,000 annually as a stockbroker between 1992 and 2002. Mother worked part-time during the marriage as a speech pathologist, earning approximately $20,000 annually. With her education and experience, she has the ability to earn approximately $50,000 a year working full time.

The family court's temporary order gave mother sole physical and legal parental rights and responsibilities, with husband receiving significant parent-child contact. Father was also ordered to pay $4000 per month in maintenance and $1350 per month in child support. Father sought a reduction of his maintenance obligation, but this request was not ruled on until the final order, which followed four days of hearings occurring between April and October 2002. The court' s November 2002 final order awarded mother sole physical and legal rights and responsibilities, with father retaining significant parent-child contact. The court divided the marital property equally between the parties and ordered father to pay mother maintenance for a period of ten years, beginning at $3000 per month and gradually decreasing, first to $2000 per month and finally to $1500 per month. On appeal, father contests the custody, property, and maintenance awards.

Father first argues that the family court' s award of physical and legal parental rights and responsibilities to mother cannot be reconciled with either a proper implementation of the statutory factors contained in 15 V.S.A. § 665(b) or this Court' s holding in Johnson v. Johnson, 163 Vt. 491, 496 (1995) (custody decisions should compare attributes of each parent in light of statutory factors and not rely solely on alleged inadequacy of one parent' s actual or expected performance with respect to one factor). According to father, the court' s failure to barely even mention the family evaluation requested by father and ordered by the court, let alone rely on the evaluator' s judgment as to the likely affect that a change of custody would have on the children, requires reversal of the court' s custody award. Father contends that the court gave undue emphasis to mother' s role as the primary care giver before the parties' separation and failed to examine closely either father' s increased care giver role following the parties' separation or the quality of each parent' s interaction with the children. Father suggests that the court should have given little or no weight to mother' s role as the primary care giver, given the evaluator' s statements that the children had adjusted well to living in two homes, and that

the notion of primary care provider was becoming less important as the girls got older. In father' s view, the court' s custody award was based on the parties' statements about each other' s failure to cooperate or communicate with one another rather than on their daily interactions with the children.

Father' s arguments are, to a large extent, puzzling. Although the family court did not engage in an in-depth analysis of the parties' relationships with each other or their children, as did the family evaluator, the court addressed each of the statutory factors and ultimately did what the family evaluator recommended. The family evaluator stated that mother, who had always been the primary care provider for the children, felt threatened when father became more actively involved in the children' s lives following the parties' separation. The evaluator found mother' s attitude to be understandable, given the lack of support she had felt from father during the marriage, but opined that mother needed to accept the change, especially as the children got older and the notion of primary care giver became less important. The evaluator stated that shared custody would be the preferred option if not for the parties' inability to cooperate and communicate with each other, but, under the circumstances, recommended that mother retain parental rights and responsibilities based " predominantly on the fact that [she] has served as the girls' primary care provider and has been an excellent mother to the girls."

The family court' s findings and conclusions essentially track the recommendations of the evaluator, even though the court was not obligated to follow those recommendations. See deBeaumont v. Goodrich, 162 Vt. 91, 104 (1994) (court may disregard recommendations of expert); Bonanno v. Bonanno, 148 Vt. 248, 251-52 (1987) (custody evaluation reports " are only advisory in nature, and it is within the discretion of the court to accept or disregard a custody evaluation team' s recommendation"). The court found that both parties were loving parents but were unable to communicate with each other about the children and had difficulty fostering a positive relationship between the children and the other parent. In the end, the court awarded mother sole parental rights and responsibilities because she had been the primary care giver for the children, and the girls were still young enough that it was in their best interests to maintain that relationship. The court, however, awarded father substantial parent-child contact with the children, as recommended by the evaluator.

We find nothing in the court' s order that is inconsistent with the statutory factors in §665(b) or Vermont case law, or, for that matter, the family evaluator' s recommendations. Because the parties did not agree to shared custody, the court had to award parental rights and responsibilities to one of them. See Cloutier v. Blowers, 172 Vt. 450, 452 (2001). Given that mother had been the children' s primary care giver for the children' s entire lives, and had been an excellent mother, the court acted well within its discretion in awarding her those rights and responsibilities. See Harris v. Harris, 149 Vt. 410, 418 (1988) (quality of child' s relationship with primary care giver should be given " great weight"). Certainly, the children had not reached ages where the primary care giver factor was irrelevant or even greatly diminished. Cf. Mansfield v. Mansfield, 167 Vt. 606, 607 (1998) (mem.) (primary care giver factor applied in case involving children ages twelve, ten, and seven); Harris, 149 Vt. at 418 (primary care giver factor applied in case involving children ages ten, eight, and three). In short, the record fully supports the court' s custody decision. Payrits v. Payrits, 171 Vt. 50, 53 (2000) (family court had broad discretion in awarding custody, given its unique position to assess credibility of witnesses and weigh evidence).

Further, we find no merit in father' s argument that the family court violated his right to the free exercise of religion by basing its custody decision, in part, on a comparison of the parties' religious practices, and by requiring him to ensure that the children attend Hebrew class. The parties, who are both Jewish (father converted to Judaism), disagreed about father' s obligation to ensure that the children attend Hebrew class regularly. Father felt like the classes cut into his time with the children and restricted the other activities which they could enjoy as a family. The court did not base its custody decision on the parties' religious practices, but merely described and resolved the parties' disagreements by requiring father to abide by the decision of the custodial parent with respect to matters of religion. See Meyer v. Meyer, 173 Vt. 195, 200 (2001) (provision ordering father not to involve children in his religious observances was merely making explicit mother' s decision as custodial parent charged with legal responsibility for child); Jakab v. Jakab, 163 Vt. 575, 583 (1995) (legal responsibility includes right to determine matters affecting child' s upbringing, including religion, citing 15 V.S.A. §664(1)(A)); cf. Johns v. Johns, 918 S.W.2d 728, 731 (Ark. Ct. App. 1996) (order requiring father to ensure that his children attend religious services according to regimen set forth by mother as custodial parent did not violate his religious freedom); In re Marriage of Tisckos, 514 N.E.2d 523, 529 (Ill. App. Ct. 1987) (order directing father to take his daughter to Catholic church pursuant to wishes of custodial parent did not violate his

religious freedom); Overman v. Overman, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986) (trial court abused its discretion by ruling that father was not responsible for transporting parties' child to catechism class pursuant to request of custodial parent).

Father also argues that the family court' s property and maintenance awards must be reversed because three of the court' s findings " all bearing on the property division " are not supported by the evidence. First, father contends that the record does not support the court' s finding that his income was sufficient for him to have been able to pay $4000 per month in temporary maintenance in the year and one-half between his motion to modify maintenance and the court' s final divorce order. As a result of this erroneous finding, father argues, the court' s overall property distribution was inequitable. Father would have us conclude that he could not afford to pay mother $4000 per month in maintenance, even though he earned $133,000 in 2001, not including an $11,000 bonus received in March 2002 and over $10,000 that he contributed to his 401k account, and he earned roughly $100,000 in 2002, a year in which he again made the maximum contribution to his 401k account. In support of his argument, father cites his $1350 monthly child support obligation and approximately $6600 in monthly expenses claimed at the time of trial. We find father' s argument unpersuasive. The court noted father' s claimed expenses, but made no finding that $80,000 per year was a reasonable amount. In short, the record before us does not demonstrate that the court abused its discretion in refusing to set off a portion of father' s temporary maintenance payments against mother' s share of the marital property.

Nor does the record demonstrate that the court erred by failing to find a higher fair market value for the marital home or award father $1844 in carrying costs based on mother' s delay in signing papers necessary to sell the parties' camp. Mother' s appraiser testified that the fair market value of the home, which had last been appraised in January 2001, was still $233,00 as of the first day of trial, and that, without reviewing more recent comparable sales, he could not provide an opinion as to whether it had increased in value since then. Father estimated that the house was worth $285,000, but never sought to have an independent appraisal done. Under these circumstances, the court did not err in valuing the property at $233,000. Father' s argument concerning the $1844 in carrying costs for the delay in the sale of the camp is quibbling, considering the size of the marital estate. The court expressed its intent to divide the marital property equally. In the end, mother received roughly $320,000, and husband received approximately $334,000. We conclude that the property division was well within the court' s discretion. See Cabot v. Cabot, 166 Vt. 485, 500 (1997) (property division is not " an exact science," and court has broad discretion in considering statutory factors and fashioning appropriate award). Accordingly, there is no need to disturb either the property division or the maintenance award.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned