

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-267

FEBRUARY TERM, 2006

Thomas Rowden	}	APPEALED FROM:
	}	
v.	}	Orleans Family Court
	}	
Julie Levri	}	DOCKET NO. 65-3-04 Osdm
	}	
		Trial Judge: Dennis R. Pearson

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

Mother appeals from a divorce judgment of the Orleans Family Court, contending that the court erroneously: (1) awarded father legal and physical parental rights and responsibilities for the parties= two children; (2) assigned her a disproportionate share of the marital debt; and (3) under-valued the marital home. We affirm.

The parties met in the mid-1990s in Pittsburgh, and together moved to the British Virgin Islands. They were married there in February 1997, and their first child was born in September of that year. The parties moved to Vermont in August 1998. In 1999, they purchased a former camp in Westmore, which father worked to convert to a year-round residence. The modest house was purchased for \$70,000, carried a \$69,000 mortgage at the time of the hearing, and is situated on about thirty-five acres in the hills above Lake Willoughby. After moving to Vermont, father worked at several different jobs before he assumed his current position as a correctional officer with the Department of Corrections, where he earns about \$38,000 annually. Mother worked part-time for several years as a substitute teacher and later at a parent-child center in Newport. During this time, father worked the nightshift and provided child care in the mornings and early afternoon, while mother had the late afternoon and evening responsibilities.

In April 2001, the parties= second child was born. Mother took six months off to provide full time child care, quit her job in June 2002, and stayed home with the children full-time for the next year. In mid-2003, mother accepted a position with the INS (later the Department of Homeland Security), and trained for six weeks during the summer in Georgia. Father provided primary child care during this period. It was also during this time that the parties experienced substantial marital discord. In November 2003, mother accepted a full-time position at the port-of-entry in Champlain, New York. She lived with relatives in New York and returned to Westmore on weekends. Father provided principal child care during the week, and mother assumed these duties on weekends.

In February 2004, mother returned to Georgia for five additional weeks of training. In March, father filed for divorce. When mother returned from training, she rented a house in Plattsburgh, New York (she has since moved to Rouses Point, New York), and the parties commenced an informal child-share arrangement in which the children lived with father in Vermont during the week and spent most weekends with mother. At the time of the final hearing in February and April 2005, the children, who were eight and four years old, continued to live with father in Westmore. They attended school in Newport, where father would typically pick them up after work, return home, prepare dinner, and supervise their evening activities until bedtime at 8:00 p.m.

Reviewing the foregoing evidence, the court expressly declined to find that either father or mother was the primary care provider for purposes of determining the best interests of the child under the statutory factors set forth in 15 V.S.A. ' 665(b). The court noted that both parents had filled that role for extended periods in the past, that both currently provided significant care for the childrenCfather during the week and mother on most weekendsCand that over the years neither dominated over the other in that role. The court found that each parent was able to provide the necessary supervision, encouragement, and direction

to foster the children's growth and development. The court also found that each party was equally able to foster the children's relationship with the other parent.

The court acknowledged mother's concern about the social isolation of living on a remote dirt road in the Vermont countryside, and recognized the potential benefits of mother's home in New York, which is within walking distance of a park and schools. Nevertheless, the court found that the children's need for continuity and stability tipped the balance in favor of awarding father legal and physical parental rights and responsibilities. The court provided mother with the maximum feasible parental contact, consisting of a minimum of three weekends out of every four, regular telephone and e-mail contact during the week, split or alternated holidays and school vacations, and at least four full weeks during the summer.

The court awarded the marital home to father. It valued the home at \$125,000, leaving a total equity of \$55,000, and awarded half, or \$27,500, to mother, to be paid by father either in full within several months or over a period of six years with interest. The court assigned marital debt of \$3000 to father, and \$10,000 to mother. This appeal followed.

Mother first challenges the award of parental rights and responsibilities. Our review of the issue is limited. Given its unique position to assess the credibility of witnesses and weigh the evidence, we will not set aside the [family] court's findings if supported by the evidence, nor its conclusions if supported by the findings. In determining the best interests of the children in custody matters, the court may draw upon its own common sense and experience in reaching a reasoned judgment. @ Payrits v. Payrits, 171 Vt. 50, 53 (2000) (citation and internal quotations omitted) (alteration in original).

Mother raises three claims in this regard. First, she contends the court erred in failing to find that she was the primary care provider and affording that factor sufficient weight. The court here found, and the record showed, that both parents had served in this role for substantial periods of time, and we therefore see no reason to disturb the court's conclusion that neither party was favored by this factor. See id. at 54 (AWe have never held . . . that a court may not find that both parents qualify as the primary care provider or that neither parent so qualifies . . . @). Nor does the record support mother's contention that the court improperly focused solely on the period after the parties' separation. See Nickerson v Nickerson, 158 Vt. 85, 89 (1992) (cautioning that Amere physical custody by one of two fit parents, during the time the estranged spouses live >apart= to satisfy the no-fault divorce requirements, should not in itself cause a former primary-care-provider to lose that status@). Although the court praised mother's decision to allow the children to remain with father while she lived and worked elsewhere, its ultimate finding was based on the parties' provision of care for the entire period of the children's lives, not merely the period preceding the trial.

Mother also contends the court's custody decision ignores its finding that mother's residence in New York Aoffer[ed] a fair number of positives,@ including greater proximity to schools and neighbors. The court had broad discretion, however, to weigh this finding against other interestsCnotably the children's need for continuity and stabilityCin reaching its decision. Accordingly, we find no error. Finally in this regard, mother asserts that the court's decision overlooked father's testimony that he had used drugs as a youth and experienced a short period of addiction to a painkiller (codeine), and mother's concern that father had increased his consumption of alcohol when he had experienced stress in the past. Although the court acknowledged mother's concern, it was not persuaded there was evidence father was abusing drugs or alcohol or had done so in the recent past, and we therefore discern no basis to fault the court's decision for failing to weigh this testimony more heavily.

Mother challenges the court's property award in two respects. First, she asserts the court abused its discretion in requiring that she assume a disproportionate amount of the marital debt. The evidence showed that father owed about \$3000 to his credit union for overdraft and debt consolidation loans, and that mother had a credit card debt of about \$10,000. The court ordered the parties to assume their respective debts. Mother asserts that this was inequitable, and was based on the court's unwarranted inference that mother's federal job placed her in a Asomewhat@ better financial position for the future than father. AAs we have often noted, property division is not an exact science, and the trial court has broad discretion in considering the statutory factors and fashioning an appropriate order.@ Cabot v. Cabot, 166 Vt. 485, 500 (1997). The source of the credit card debt was uncertain; mother claimed that the bulk of the debt was for household expenses, and father asserted that it was for mother's vacation and other expenses. Mother introduced no itemized breakdown of the charges to resolve the issue. The court thus explained that, Agiven the lack of probative detail as to what [mother's] \$10,000 credit card debt really consists of, as well as the \$3000 or so in unsecured personal debt [father] will keep, the court is not inclined to require that [father] reimburse [mother] for her credit card debt.@ The court's rationale for assigning the debt to mother was thus supported by the record and well within its discretion, and therefore can not be disturbed.

Finally, mother asserts that the court abused its discretion in valuing the marital home at \$125,000. Mother testified that the house in Westmore had been appraised at \$132,500, but the appraisal was not offered into evidence. Father testified that the

house was worth between \$110,000 and \$120,000. Under the circumstances, there is no basis to conclude that the court abused its discretion in assigning a value between the competing estimates.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice