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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2005-112 & 2005-226

FEBRUARY TERM, 2006

Patricia Coons	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Family Court
	}	
Mark Coons	}	
	}	DOCKET NO. 267-8-02 Frdm

Trial Judge: James R. Crucitti

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

In these consolidated appeals from a final divorce judgment and post-judgment modification ruling, mother contends the family court erroneously: (1) failed to consider her contributions as a homemaker in dividing the marital property; (2) declined to order father to reimburse her for certain attorneys= fees; and (3) awarded joint physical custody of the parties= younger child. Father contends the court abused its discretion in: (1) awarding mother sole legal custody of the younger child; and (2) denying father=s motion to modify parental rights and responsibilities. We affirm.

The material facts may be briefly summarized. The parties separated in July 2002, after a twenty-year marriage. They had two children, who were seventeen and fourteen years old at the time of the final hearing. Both mother and father were well educated and experienced pharmacists, although mother ended her pharmacy work to raise the children when they were young, and later returned to work as a substitute teacher and teaching assistant. Since the separation she had returned to part-time pharmacy work. Father worked full time throughout the marriage, although he had recently reduced his hours to spend more time with the children, and reasonably expected to earn approximately $100,000 annually. The court found, and the parties did not dispute, that the separation and divorce had been highly contentious and exacerbated tensions within the family, particularly between mother and the two children. The court further found that the older child was completely estranged from mother, and that relations between mother and the younger child were strained. The court also found that father had consistently acted to alienate the children from mother.

In its final order and decree, issued in December 2004, the court awarded sole physical and legal rights and responsibilities for the older child to father, and awarded sole legal responsibility for the younger child to mother, requiring shared physical custody with father on alternating weeks and holidays. The court divided the marital property equally, awarding father the marital home and ordering him to pay mother $86,789 to equalize the division of assets. Both parties filed motions to amend the judgment, resulting in certain minor modifications of the original decree. In February 2005, father moved to modify parental rights and responsibilities. Following a hearing in April 2005, the court denied the motion. Both parties have appealed from the final divorce judgment, and father has additionally appealed from the order denying his modification motion. We ordered the appeals consolidated for purposes of review.

Mother first contends that, in dividing the marital property equally, the court erroneously failed to consider her contributions to the marriage as a homemaker, and that this resulted in a $50,000 windfall to father in future social security benefits. The claim is unpersuasive. The family court enjoys broad discretion in dividing marital property, and

this Court will not disturb its decision absent a showing of abuse or withholding of this discretion. Weaver v. Weaver, 173 Vt. 512, 513 (2001) (mem.). The court=s decision here to divide the marital property equally was based on two principal findings. First, the court found that both parties had worked equally hard in contributing to the marriage, mother as the primary care provider for the children when they were young, and father through his role as primary wage earner and his significant contributions to child care. Second, the court found that mother=s training as a pharmacist was equal to father=s, and that her earning capacity and ability to save, given the children=s ages and the custody award to father, was also substantially equal to father=s. The property division was thus reasonably supported by the findings, and therefore cannot be disturbed on appeal. See Dreves v. Dreves, 160 Vt. 330, 333 (1993) (holding that the relative weight to be accorded the statutory factors lies within the court=s discretion); Plante v. Plante, 148 Vt. 234, 237 (1987) (noting that the division of property in a divorce proceeding Ais not an exact science,@ and that one party=s contribution to the marriage as a homemaker Ais only one of numerous factors to be considered in distributing property under 15 V.S.A. ' 751@) (internal quotations omitted).

Nor does the record support mother=s related assertion that the court failed to take account of evidence that father could receive upwards of $50,000 in greater Social Security benefits because of his longer period of time in the workforce. The court found, and the evidence showed, that the exact gap in future anticipated benefits was highly speculative and contingent upon a number of variables. Therefore, the court concluded it would not attempt to divide or set-off future social security benefits. Mother has not shown that the court abused its discretion in this regard, and we thus find no basis to disturb the ruling.

Mother next asserts that the court erred in failing to deduct from father=s half of the 401k account $350 that father previously withdrew from that marital asset to comply with an earlier court order requiring him to pay attorneys= fees incurred in responding to a frivolous motion. The court here expressly declined to order such reimbursement, finding that father had already incurred substantial expenses in spousal maintenance and mortgage payments under the temporary order while mother was voluntarily underemployed. Mother has not shown that the court abused or withheld its discretion in this regard. Therefore, the ruling may not be disturbed.

Finally, mother contends the court erred in awarding parental rights and responsibilities for the parties= younger child. As noted, the court awarded sole legal parental rights and responsibilities to mother, but ordered physical custody to be shared equally. Mother claims that the award of shared physical custody violates 15 V.S.A. ' 665(a), which provides that A[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.@ We have held that ' 665(a) Areflects a legislative judgment that court-imposed joint decision-making is not in the best interests of the child,@ and therefore precludes an award of shared legal custody absent an agreement of the parties. Shea v. Metcalf, 167 Vt. 494, 499 (1998); accord Cabot v. Cabot, 166 Vt. 485, 493-95 (1997) (holding that court erred in awarding joint legal parental rights and responsibilities where parents could not agree to share decision-making responsibility). Shared physical custody, in the sense of each party enjoying roughly equal time with the child, does not contravene this policy. Therefore, we find no error.

Father raises two issues on appeal. First, he contends the award of sole legal custody of the younger child to mother was not supported by the evidence. Father appears to assert that the evidence did not support the court=s finding that father had consistently acted to alienate the children from mother. The record shows, however, that the court=s finding was well supported in the evidence, which included specific instances of father=s interference in the children=s relationship with mother, encouragement of hostility toward mother, and failure to keep mother informed about matters relating to the children. The court also relied on a court-ordered forensic evaluation of the family by Dr. John Donnelly, who concluded that an award of legal custody to father could increase the children=s alienation from mother. We therefore find no basis to disturb the ruling. See Lyddy v Lyddy, 173 Vt. 493, 497 (2001) (mem.) (we will not disturb court=s findings unless clearly erroneous).

Father argues, nevertheless, that the court erred in relying on father=s persistent characterization of an incident involving the older child as Aabuse of his child@ by mother, notwithstanding a finding in a relief-from-abuse proceeding that no abuse had occurred. Father argues that the court erred in inferring an Aulterior motive@ for his filing of the relief-from-abuse petition absent clear evidence to that effect. See Renaud v. Renaud, 168 Vt. 306, 311

(1998) (observing that courts should infer an ulterior motive for filing a relief-from-abuse petition only where the parent knew, or should have known, that the charges were groundless). The court=s reliance here, however, was not on father=s motive for filing the petition, but on his insistenceCafter failing to prove the abuse allegationCon using the incident to malign mother. Accordingly, we find no error.

Father also contends the court erred in failing to rely on Dr. Donnelly=s conclusion that an award of sole legal custody of the younger child to mother could increase tensions between the two. The trial court acknowledged this possibility, but noted that Dr. Donnelly had also expressed concern that an award of legal custody to father could exacerbate the children=s alienation from mother, a concern shared by the trial court. Dr. Donnelly had recommended an award of shared legal custody, but the court correctly noted that this was barred by the parties= inability to agree. See Cabot, 166 Vt. at 493-95 (holding that court may not award shared legal custody where parties cannot agree on decision-making for the child). The court was not only free, but was required, to draw its own independent conclusions concerning parental rights and responsibilities. See Luce v. Cushing, 2004 VT 117, & 10, 177 Vt. 600 (noting that the court is not bound by an expert=s recommendation, but must exercise independent judgment in ruling on the best interests of the child). We thus discern no error.

Finally, father contends the court erred in denying a post-judgment motion to modify parental rights and responsibilities. The motion was based largely on an incident in February 2005, involving a physical altercation between mother and the younger child. Although the court found, in light of the incident, that a substantial change of circumstances had occurred, it concluded that a change of legal custody would not be in the best interests of the child. Father contends that the court=s ruling did not focus on the best interests of the child, but was reached to blame or punish father for his refusal or failure to intervene or assist mother in this episode with the child. The court=s decision reveals, on the contrary, that its focus was solely on the criteria for determining the child=s best interests, and in particular on each parent=s ability to foster a positive relationship with the other, under 15 V.S.A. ' 665(b)(5). The court found that its concernCexpressed several months earlier in the final divorce orderCthat an award of legal custody to father could result in irreparable alienation of the younger child from mother remained a paramount consideration. The court also noted that although the altercation was cause for concern, it had quickly defused, allowing mother and son to relate well the next day. Thus, we find no basis to conclude that the court=s decision was based on improper considerations, unsupported by the evidence, or an abuse of discretion. See Payrits v. Payrits, 171 Vt. 50, 52-53 (2000) (AThe family court has broad discretion in awarding custody, and its findings will not be overturned unless clearly erroneous.@).

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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Brian L. Burgess, Associate Justice