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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-525

JUNE TERM, 2007

Lawrence Miller	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Karen Smith	}	
	}	DOCKET NO. 284-4-03 Cndm
		Trial Judge: Geoffrey Crawford

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

Father appeals pro se from the family court's order denying his V.R.C.P. 60(b) motion concerning parent-child contact and other related matters. He argues that the trial court erred by: (1) refusing to enforce an oral stipulation regarding parent-child contact; (2) refusing to require mother to notify him of significant events in the child's life; and (3) ordering him to pay mother's attorney's fees. We affirm.

Many of the relevant facts are set forth in our earlier decision addressing the same parent-child contact issue. See Miller v. Smith, No. 2005-423, slip op. at 1-2 (Vt. June 30, 2006) (unreported mem.). Given the nature of the father's arguments, however, it is necessary to set forth the facts again in some detail. Mother and father were married for two-and-one-half years, and they have one child, now approximately five years old. Both parties were represented by counsel during divorce proceedings. Pursuant to the August 2004 final divorce order, mother was awarded sole legal and physical parental rights and responsibilities for the child, and father was granted parent-child contact of ten overnight stays every four weeks, to be phased in over an eight-month period. The final order included a handwritten addendum that set forth a specific schedule for parent-child contact "until the schedule is up to 10 overnights." The addendum divided the contact period into four-week segments that alternated between the following: week one consisted of father-child contact on Saturday, Sunday, Monday, and Tuesday half-day, and week two consisted of contact on Monday and Tuesday. Pursuant to the addendum, father's contact during week one ran from Saturday at 9:00 a.m. to Monday at 5 p.m., and on Tuesday from 8:30 a.m. to 12:30 p.m.; week two ran from Sunday at 5 p.m. to Tuesday at 5 p.m. Every two months, father would be able to have a three overnight stretch from Saturday at 9:00 a.m to Tuesday at 12:30 p.m.

In July 2005, father moved to enforce and modify the final divorce order. Father asked the court, in relevant part, to allow him to return the child at 5 p.m. on Tuesdays rather than at 12:30 p.m. Mother sought to have the child returned to her by 9 a.m. After a motion hearing, the family court issued an order that required father to return the child to mother by 11 a.m. Father appealed, arguing that the court erred by modifying the parent-child contact order without first holding an evidentiary hearing, finding a substantial change in circumstances, considering the best interests of the child, or making findings or conclusions. Id. at 2. We affirmed the family court's decision on appeal, concluding that the family court had clarified, rather than modified, the final divorce order, and thus no change in circumstances was required. We noted

that the body of the final divorce order did not specify drop-off and pick-up times and the addendum did not clarify what those times would be once father reached his ten-overnight maximum. Id. at 2.

Several months after our decision, in September 2006, father filed a motion seeking relief from the family court's September 2005 order under V.R.C.P. 60(b). Through his motion, father sought, in relevant part, enforcement of the parent-child contact schedule arguably contained in an oral stipulation—that is, that the child would be returned to mother at 5 p.m. on Tuesdays—and an order requiring mother to notify him of significant events in the child's life.

After a hearing, the court denied the motion. It found father's Rule 60(b) motion untimely as to the Tuesday drop-off issue. It also found that this issue had been decided in the court's September 2005 order, and affirmed on appeal, and thus, the debate over when the child should be returned to mother was over. Even if it were to reach the merits of father's argument, the court continued, father's assertion that there was a binding oral agreement on the Tuesday return time was unsupported by the record. The court also declined to order mother to provide father with additional information about the child's school and medical visits, finding that the parties did not have a good record of communicating with one another. The court encouraged mother to keep father informed, and also noted that father could contact the school and medical professionals directly as he had a statutory right to access this information. Finally, the court granted mother's request for $2000 in attorney's fees incurred in resisting father's motion. The court awarded the fees in light of the parties' disparate incomes as well as the extreme lengths to which father had chosen to litigate the dispute over what time to return the child to her custodial parent. The court found the litigation, which included lengthy filings, two hearings before the family court, and a Supreme Court appeal, greatly disproportionate to the issue in dispute. The court thus concluded that it was fair for father to reimburse mother for the costs associated with responding to the instant filing. Father appealed.

On appeal, father reiterates his assertion that he is entitled to return the child to mother at 5 p.m. on Tuesdays. He bases this assertion on mother's agreement at the final divorce hearing that a "day" for purposes of parent-child contact consisted of an eight-hour period between 9:00 a.m. and 5:00 p.m. According to father, the family court approved this oral stipulation, but mother's attorney failed to draft the stipulated schedule consistent with the parties' oral agreement. This required the addition of the hand-written addendum, which father argues applied only up to the point where he obtained ten overnight visits. Because this point has been reached, father contends that the only parent-child contact schedule is the one made on-the-record at the final divorce hearing.

Putting aside procedural concerns associated with father raising this same issue for a second time, we agree with the family court that the record does not show any such oral agreement. Mother's acknowledgment that a "day" for purposes of parent-child contact consisted of an eight-hour period between 9:00 a.m. and 5:00 p.m. simply does not establish that the parties mutually agreed that the child would be returned after overnight visits at 5:00 p.m. Mother's testimony logically applies to the times when father had the child for the "day," rather than for overnights. We reject father's assertion that the final divorce order mistakenly omitted this "stipulation," and we find no error in the trial court's denial of father's Rule 60(b) motion. See Bingham v. Tenney, 154 Vt. 96, 99 (1990) (trial court has discretion in ruling on Rule 60(b) motion and its decision "will stand on review unless the record clearly and affirmatively indicates that such discretion was withheld or otherwise abused").

Father's reliance on Kellner v. Kellner, 2004 VT 1, 176 Vt. 571 (mem.), is misplaced. In Kellner, we concluded that the doctrine of res judicata precluded the family court from refusing to enforce the terms of an unappealed final order. In contrast, the "stipulation" upon which father relies is not part of the final divorce order, nor is it supported by the record. We reject father's assertion that the doctrine of res judicata requires the enforcement of the parties' on-the-record "stipulation."

Because the final divorce order did not specify the Tuesday drop-off time after the ten-night maximum was reached, the family court determined in September 2005 that the order required father to return the child at 11:00 a.m., implicitly finding this time to be in the child's best interests for reasons stated on the record. Cf. Myott v. Myott, 149 Vt. 573, 578 (1988) (family court has broad discretion in determining what level of contact is in a child's best interests). We affirmed this decision on appeal, and there is no basis for relieving father from this judgment under Rule 60(b).

Father's remaining claims of error are equally without merit. The trial court acted well within its discretion in refusing to require mother to inform father of the child's school events and medical appointments. The court found, and the record shows, that the parties cannot communicate with one another, and that such an order would most likely lead to additional friction. It is certainly reasonable for the family court to consider this factor in reaching its conclusion, particularly when father can obtain information about these events on his own without having to interact with mother. The court similarly did not err in awarding attorney's fees to mother. See Willey v. Willey, 2006 VT 106, ¶ 26, 912 A.2d 441 (Supreme Court reviews award of attorney's fees for abuse of discretion). The court based its decision on the parties' disparate incomes and the lengths to which father had litigated the issue of a six hour difference in the Tuesday return time. While father asserts that mother actually has much more income than her salary reflects, the question before the trial court is not "simply whether the requesting party has the bare ability to pay." Id. "Rather, the inquiry is an equitable one." Id. The family court acted within its discretion in concluding that father should pay mother for the costs she incurred in responding to the second round of litigation over this same issue. To the extent that mother seeks to recover her appellate fees and costs, as noted in her brief, we refer her to the provisions of V.R.A.P. 39(f).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice