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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-359

FEBRUARY TERM, 2002

Erica Dana	}	APPEALED FROM:
	}	
v.	}	Windsor Family Court
	}	
Jason Crandell	}	
	}	DOCKET NO. 170-4-99 Wrdm
	}	
	}	Trial Judge: Paul F. Hudson
	}	
	}	

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

Father appeals an award of attorney's fees to mother in this parentage action. We find no abuse of the family court's discretion, and therefore affirm.

Mother commenced this action in April 1999, and the family court issued a final order in the matter on June 17, 1999. The award of attorney's fees at issue in this appeal stems from the parties' post-judgment litigation, the details of which are not essential to the disposition of this matter. Mother's post-judgment attorney entered an appearance in the matter in December 1999. He had originally agreed to handle this matter pro bono, but later, mother and he agreed that he would bill her. To that end, on April 27, 2000, mother requested the court award her $5,000 in attorney's fees because mother was unable to pay her attorney for the time he had already spent assisting her.

On May 10, 2000, father replied to mother's April 27 request stating little more than that the request was "outrageous." Father did not request a hearing or an opportunity to present evidence on mother's request. Mother replied to father's May 10 response providing further explanation in support of her request. On June 9, 2000, mother filed a motion asking for an interim award of $500 in attorney's fees. The motion asserted that father's actions unnecessarily increased the costs of resolving the dispute between the parties and that mother did not have the ability to pay her attorney. It also alleged that father was able to pay a share of the fees, was underemployed, and was receiving financial support from his parents. Father responded to mother's June 9, 2000 motion on April 2, 2001. In his response, father focused on mother's allegations that his conduct increased unnecessarily the costs of the proceeding. He asserted that he had no assets and his wages were insufficient to cover both the costs of his attorney and the cost of mother's. Father argued that an award of attorney's fees was not justified because mother's attorney was acting pro bono. Father conceded he received financial support from his parents, but contended that the record did not support mother's allegations. Father again did not request a hearing or an opportunity to present evidence on mother's motion.

On April 20, 2001, mother renewed her motion for attorney's fees and provided additional documentation. Her renewed motion briefed the financial circumstances of the parties, which was established at a child support hearing before the family court magistrate earlier in the proceedings. She suggested a methodology for the court to use to apportion the fees between the parties. The methodology called for using the parties' earning capacities as determined by the magistrate as a proxy for their ability to pay. Apportioning the fees using that proxy, mother recommended the court require father to pay $18,351 in fees, which was 72% of mother's attorney's fees.

Also on April 20, 2001, father filed a memorandum at the court's request concerning the applicability of 15 V.S.A. § 606(a) to mother's motion for attorney's fees. Father's memorandum also responded to mother's renewed motion for fees. His response took issue with certain allegations regarding the history of the post-judgment proceedings, and described additional facts regarding the parties' respective financial circumstances. Father stated that he disagreed with mother that the court should decide the motion based on the record before the magistrate, but he did not ask for a hearing or an opportunity to present evidence to oppose mother's request. Father did not object to mother's suggested methodology for apportioning fees nor provide an alternative method for the court to consider. On April 24, 2001, mother replied to father's April 20 filing. On May 15, 2001, the court granted mother's motion. Applying a slightly modified version of mother's suggested apportionment methodology, the court directed father to pay $11,000 towards mother's attorney's fees. Father thereafter moved the court to reconsider its decision and alter its judgment, which the court denied. Father then appealed to this Court.

The family court has discretion to award attorney's fees, and we will uphold such an award unless it can be shown that the court abused its discretion. See Bissonette v. Gambrel, 152 Vt. 67, 71 (1989) (court will not disturb award of attorney's fees absent a showing the court abused its discretion); see also Begins v. Begins, 168 Vt. 298, 305 (1998) (family court may award attorney's fees even if no statutory provision or rule exists providing for them). The primary considerations for the court in such cases are the need of the party seeking fees and the financial ability of the party from whom fees are sought to pay them. Harris v. Harris, 168 Vt. 13, 25-26 (1998).

Father contends the court abused its discretion in several respects by requiring him to pay a portion of mother's attorney's fees. He argues that (1) the court erred by relying on the magistrate's findings rather than taking additional evidence during an evidentiary hearing on the parties' respective ability to pay the fees; (2) attorney's fees may not be awarded when the attorney works pro bono absent some showing of wrongdoing by the party against whom the award is sought; (3) the court erroneously shifted the burden to father to prove the fees sought were unreasonable; and (4) the court should have first determined the parties' financial circumstances before addressing the reasonableness of the fees to avoid otherwise unnecessary legal expenses to defend the motion.[(1)] We address each argument in turn.

Father first claims that the court should have held an evidentiary hearing on mother's motion rather than rely on the magistrate's findings. Father did not request a hearing or an opportunity to present evidence on the motion, however, and thereby waived his claim on appeal. Rule 78 of the Vermont Rules of Civil Procedure requires a party wishing a hearing and an opportunity to present evidence in opposition to a motion to make that request with its memorandum in opposition to the motion. V.R.C.P. 78(b)(1). The request to present evidence "shall include a statement of the evidence which the party wishes to offer." V.R.C.P. 78(b)(2). Although father complains now that he was not afforded a hearing, he never asked the court to convene one in any of his responses to mother's motion. Nor did father request an opportunity to present evidence or identify what evidence he would offer during a hearing. Father's omission therefore waived his right to a hearing, as well as any appellate claim that the family court erred by failing to convene one. Bigelow v. Dep't of Taxes, 163 Vt. 33, 38 (1994). Moreover, our precedent allows the court to decide a request for attorney's fees based on the record developed during a hearing on child support so long as it is apparent that the court took that record into account when determining the issue. Harris, 168 Vt. at 26; Bissonette, 152 Vt. at 71-72. The court's order in this case demonstrates that it took the magistrate's findings into account, and fairly weighed the parties' respective financial circumstances to fashion an award. We therefore find no abuse of the court's discretion.

Father's next argument, that attorney's fees may not be awarded when the attorney acts pro bono absent some wrongdoing, is similarly unavailing. Father provides no authority for his assertion that wrongdoing must be shown to justify an award of attorney's fees. Moreover, the bills submitted in support of mother's motion show that mother's attorney was not representing mother for free. Cf. Bissonette, 152 Vt. at 71-72. Those bills support the court's finding that mother's attorney originally agreed to handle the case without charge, but he and mother later agreed that the attorney would bill her for his services. The record supports the court's finding and we will not disturb it on appeal. Begins, 168 Vt. at 301.

Father also claims that the court erroneously required him to show that the fees mother sought were unreasonable, rather than requiring mother to affirmatively establish their reasonableness. The court did not shift the burden as father contends. The court's order reflects father's failure to question the reasonableness of the fees at issue in any of his responses to mother's request. Father generally objected to mother's motion but never alerted the court that the

contribution mother sought from father was unreasonable and why father believed that was so. Father asserts the proposition (without supporting authority) that he is not required to respond to every issue raised in a motion if he objects to the motion in general terms. Father is correct that a party may choose which issues to pursue in litigation. Those issues which the party chooses not to timely raise before the trial court are, however, waived on appeal. Bigelow, 163 Vt. at 38. Father's decision to forego his opportunity before the family court to challenge the fees mother incurred on the grounds that they were unreasonable waived any such argument on appeal.

Father also suggests the court should have bifurcated its analysis and rendered a decision on the parties' financial circumstances before looking at the reasonableness of the fees in question to save father time and expense in reviewing mother's legal bills. Once again, father cites no authority for his novel proposition, which we reject. In any event, father never asked the court to bifurcate its decision on mother's request, and nothing in our precedent requires the court to do so. To protect his interests, father should have advanced all of his arguments opposing mother's motion before the court issued its decision rather than waiting until the court rendered a decision with which he disagreed.

Affirmed.

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

1. We address those issues that are fairly raised in father's otherwise rambling brief. To the extent that he raises other issues in his brief, we cannot discern them and therefore decline to address them. Beyel v. Degan, 142 Vt. 617, 619 (1983) (arguments inadequately briefed will not be addressed on appeal).