

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2009-440

DECEMBER TERM, 2010

Anne Irish	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Family Court
	}	
	}	
Alan M. Irish	}	DOCKET NO. 166-5-08 Frdm

Trial Judge: Mark Keller

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

Husband appeals a final divorce order. On appeal, husband argues that the family court erred by (1) relying on facts from temporary orders to deny father overnight visits with the parties' minor son, and (2) failing to properly value the marital estate and wife's pension. We affirm.

The parties were married in August 2002 and separated in March 2008. The parties have a son who was six at the time of the final hearing. While the parties agreed that wife should have parental rights, two temporary orders were issued while the divorce was pending to delineate husband's parent-child contact. The first order was issued after a hearing in August 2008. The order explained that due to husband's alcohol problem his overnight contact should take place at his parent's home with their supervision. The order noted that once husband was enrolled in an alcohol treatment program the court would consider permitting unsupervised overnight visits. A second temporary order was issued in October 2008, following husband's motion to modify. The court reiterated that for husband to have unsupervised visitation he must provide (1) a written summary from an alcohol treatment program of his involvement in the program, and (2) a plan for administration of an alcohol detection device before, during and at the end of visits.

The court held a final hearing in October 2009 and issued an order the same month. The court found the following facts. Wife purchased a home prior to the marriage, and the couple lived there throughout the marriage. Wife paid husband, who is a contractor by trade, to make improvements to the home, some of which were not completed. The court found that at the time of the final hearing the home was worth \$166,000 with an outstanding mortgage of \$84,000. The court noted that the house needed \$2000 to finish renovation projects that husband did not complete, and therefore found the equity in the house was \$80,000. Wife worked throughout the marriage, earning between \$30,000 and \$50,000. She has a retirement account through her employment, valued at \$37,000. Husband ran his own contracting business, but made less than \$14,000 a year during the marriage. After the parties' separation, husband moved to California, and the court projected he would earn \$67,000 a year. Based on husband's alcoholism, his limited contribution during the marriage and his greater opportunity to acquire assets, the court awarded him twenty-five percent of the marital estate. The court credited wife for her premarital

equity in the home and ordered wife to pay husband \$16,500. The court ordered wife to pay this amount in monthly installments, contingent on husband's timely payment of child support.

The parties did not dispute parental rights and responsibilities, which were granted to wife. Husband, however, sought increased parent-child contact, specifically unsupervised overnight visits with his son. The court took judicial notice of the two temporary orders described above. Based on the evidence presented at the final hearing, the court found that although husband had not drunk alcoholic beverages for months and had gone to some individual counseling sessions, he had stopped individual counseling and had not found a group support program. Thus, the court concluded that husband "did not demonstrate that he has taken the steps necessary to maintain his sobriety," and denied husband's request to have unsupervised contact with his son in California "until such time that [husband] satisfactory [sic] completes an alcohol group program and demonstrates that he has developed an understanding of his alcohol problem and the ability to maintain a sober lifestyle." Husband appeals.

On appeal, husband argues that the court improperly relied on facts from the temporary orders to limit his overnight visits with his son. We conclude there was no such improper reliance. The court did not base its decision from facts found at the time of the temporary orders; it simply took judicial notice of the content of the temporary orders and the requirements set forth therein related to husband's alcohol addiction. The court did not rely on these facts in its decision, however. The court held a hearing and took evidence on the current status of husband's alcohol treatment. Based on this evidence, the court concluded that husband had not demonstrated sufficient progress to allow unsupervised overnight visits and continued the conditions from the temporary order. This decision was within the court's discretion, and we find no grounds to disturb it on appeal. See Kasper v. Kasper, 2007 VT 2, ¶ 5, 181 Vt. 562 (mem.) (stating that family court has broad discretion in area of child custody).

Next, husband contends that the court erred in valuing the marital home and wife's pension. As to the house, husband argues that the court incorrectly subtracted \$2000 from the house's value for the cost of repairs because, according to husband, the valuation of \$166,000 was an "as is" figure. The trial court has discretion in valuing property, and "we will uphold the court's valuation conclusions as long as they are supported by adequate findings, which are in turn supported by sufficient evidence in the record." Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). Here, the court did not specify that the \$166,000 value was "as is" and had discretion to subtract the cost of completing home improvement from the valuation. Thus, there was no error.

Concerning wife's pension, husband claims that the court erred by valuing this asset by using data from months prior to the final hearing. Husband did not object to the use of this data at trial, and therefore he has failed to preserve the objection for appeal. See Gravel v. Gravel, 2009 VT 77, ¶ 12, 186 Vt. 250 (stating that arguments not raised below are not preserved for appeal).

Related to property distribution, husband also contends that the court improperly calculated wife's premarital equity in the house through extrapolation and erred in allowing a set-off of the equity payment against any arrearage in child support. We conclude that both determinations were within the trial court's discretion and not error. The court found, and the evidence supported, that wife owned the house prior to the marriage and contributed more to its appreciation. The court properly considered these factors in its distribution. 15 V.S.A. § 751(b)(10), (b)(11) (listing statutory factors for property distribution including party through

whom asset acquired and contribution of each spouse to appreciation of marital estate). The court's calculation of wife's portion of the marital home was within its discretion. See Cabot v. Cabot, 166 Vt. 485, 500 (1997) (explaining that court "has broad discretion in considering the statutory factors and fashioning an appropriate order"). As for the set-off, husband fails to explain why the court lacked authority to allow wife to withhold the equity payment if husband fails to pay child support. This portion of the order was based on the court's finding that husband had been unreliable in making child support payments, and was not an abuse of discretion.

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