

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2020-069

NOVEMBER TERM, 2020

Ashley Nicole Flickinger* v. Kevin Hannon	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 213-10-18 Wmdm
		Trial Judge: Michael R. Kainen

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

Mother appeals the family court’s decisions regarding parental rights and responsibilities and property division in its final divorce order. We affirm.

The family court made the following findings, which are undisputed except where noted. Mother is an experienced nurse and father is a psychiatric nurse practitioner. They began dating in September 2015. Their relationship was passionate but volatile, and they frequently disagreed and yelled at each other. Both parties drank, and father sometimes became aggressive if he drank to excess. Mother had been married once before and experienced two miscarriages, which left her distraught and depressed. Mother wanted to settle down and have a child. Accordingly, despite their volatile relationship, the parties decided to buy a house together in the summer of 2016. Mother wanted to purchase a large house near her parents, who agreed to give her \$52,000 toward the purchase price. Mother and father signed a joint ownership agreement in June 2016 that was intended to protect mother’s share of the equity if they ended their relationship.

In October 2017, the parties married. Mother became pregnant soon afterward. She had planned to work until she gave birth. However, she developed severe nausea and vomiting that caused her to stop working in December 2017. Certain smells could make her violently ill, including alcohol. She stopped drinking and would get sick if father smelled like alcohol. Due to her prior miscarriages, mother was very concerned about losing the baby.

The parties’ relationship was relatively harmonious during mother’s pregnancy. They toured the birth center, went to appointments, and assembled the nursery together. Father was able to take three weeks off after their daughter was born in July 2018. After father returned to work, however, the parties’ relationship deteriorated rapidly. Mother was very possessive of daughter and wanted to hold her most of the time. She spent much of her time at her parents’ home. When father returned from work and wanted to spend time with daughter, mother would refuse to give her up, preferring instead that father make dinner or complete some other task. When father did hold daughter, he would look at his cell phone, which annoyed mother.

One evening in September 2018, father returned home after stopping at a restaurant, where he had one beer. He asked to hold daughter and mother asked him to make dinner instead. He opened a second beer and poured mother a glass of wine at her request. He then asked to hold daughter again. The parties disagreed about what happened next. According to mother, when father asked to hold the baby, she responded, “hold on.” Father said, “when I say give me my daughter you better do it, or we are going to have problems,” and chased her into the bedroom. She was fearful because he had been drinking, so she called the police. According to father, he asked to hold daughter and mother rebuffed him. Mother then began screaming that he was threatening her. Father asked again to hold daughter, more emphatically. Mother continued to scream, locked herself and daughter in the bathroom, and called 911. Father went to the living room and sent mother’s mother a text message stating that he needed help. He stayed there until police arrived, hoping that mother would calm down. The family court found that the September 2018 incident was not as benign as portrayed by father, nor was it as threatening or dramatic as mother described. The court noted several holes in mother’s story and found that prior to the incident, mother had been discussing filing for divorce with her mother, who had contacted an attorney and sent mother names of lawyers.

That night, mother petitioned for and received a temporary relief-from-abuse (RFA) order that prohibited all contact between father and daughter. At the merits hearing, the RFA court dismissed the petition finding mother failed to satisfy her burden of proof. Mother subsequently filed for divorce. Father, on the advice of counsel, decided not to aggressively pursue increased contact with daughter in the hopes of de-escalating the situation. The court found that this strategy, while reasonable, backfired. The parties mediated a temporary agreement under which father was provided with minimal contact, consisting of six hours on Sundays and one hour in the evenings on Tuesdays and Thursdays. The court found father to be credible in his testimony that he wanted to spend more time with his daughter and had accepted what appeared to be the best deal available at the time.

The court found that father was cordial to mother, but mother seemed to look for any opportunity to criticize father. She refused to provide father with any information about daughter’s care or needs when transferring daughter to him for visits, instead limiting her disclosures to a written update on Tuesdays. She was not interested in co-parenting and often did not read father’s messages. Father wanted to be part of daughter’s medical decision-making and appointments. However, mother was unwilling to engage father in medical decisions and would only allow him to bring daughter to appointments during his contact time, which consisted of Sundays and evenings, making it practically impossible for him to do so.

After the parties separated, mother took daughter to a licensed clinical mental-health counselor for therapy.<sup>1</sup> Father questioned the need for daughter to be in therapy. He was concerned that mother’s anxieties could be impacting daughter and that mother might be “pathologizing normal behaviors.” The court found that father needed to have a greater role in the decision regarding whether daughter should be in therapy.

The court assessed the statutory best-interest factors and found that both parents were equally able to provide daughter with love, affection, and guidance and to meet her material and

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<sup>1</sup> In its findings, the court incorrectly referred to the therapist as a “Licensed Clinical Mental Health Worker.” This appears to be a typo, as the court used the correct title when referring to mother’s mother, who holds the same qualifications. We disagree with mother that the error indicates that the family court underestimated the therapist’s level of education and training or improperly minimized the weight of her testimony.

developmental needs. It found that mother was the primary caregiver and that daughter was bonded to her maternal grandmother and her community in New Hampshire, where mother had moved in the summer of 2019. The court found that husband was willing and able to foster a positive relationship between daughter and mother, but mother had actively tried to thwart father's relationship with daughter. It expressed concern that mother could pathologize daughter's behaviors or inaccurately attribute behavior to father, although it did not find that mother had done so. The court also expressed concern about father's judgment if he drank to excess. The court did not find any evidence of abuse.

The court assigned primary physical rights and responsibilities to mother, with father to have contact on a gradually increasing basis. It ordered that mother would have legal rights and responsibilities as to education, dental care, religion, and international travel. However, it held that father would have legal rights and responsibilities regarding medical, mental health, and therapy decisions for daughter.

The court then considered how to distribute the proceeds from the sale of the marital home, which was the sole asset in dispute. The court found that the parties had decided to purchase a home before they were married. Father contributed \$30,000 toward the purchase. Mother's family contributed \$52,000 on the condition that if the relationship ended, the home would be sold and mother would be entitled to the first \$52,000 in equity. The parties signed a joint ownership agreement to this effect. Based on the language of the agreement, the court determined that it was only intended to last until marriage. However, the court found that the \$52,000 was intended as a gift to mother only. It therefore awarded mother the entire proceeds from the sale—\$37,904—and awarded father \$10,000 in refunds from the escrow account and insurance. This appeal followed.

Mother argues that the court abused its discretion in awarding the right to make medical and mental health decisions to father. She further argues that the court erred in concluding that the joint ownership agreement did not govern the distribution of the proceeds from the marital home. We review the family court's determination of parental rights and responsibilities and division of marital property for abuse of discretion. Lee v. Ogilbee, 2018 VT 96, ¶ 9, 208 Vt. 400. We will uphold the court's factual findings unless they are clearly erroneous and will affirm its conclusions if supported by the findings. LeBlanc v. LeBlanc, 2014 VT 65, ¶ 21, 197 Vt. 17.

We first address mother's claim that the court abused its discretion in awarding father the right to make medical and mental health decisions. "Under 15 V.S.A. § 665, the court must be guided by the statutory factors and the best interests of the child when awarding parental rights and responsibilities." Lee, 2018 VT 96, ¶ 21. We have explained that "where parents cannot work together, one parent must be given primary responsibility to make decisions on behalf of the child." Cabot v. Cabot, 166 Vt. 485, 493 n.4 (1997). However, "that requirement does not lead inexorably to the conclusion that one parent must be awarded all rights and responsibilities." Shea v. Metcalf, 167 Vt. 494, 500 (1998). In the appropriate case, the family court may divide legal rights and responsibilities. Id. But "the court must state its reasoning for awarding parental rights and responsibilities in its order, and its reasoning may not be based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Lee, 2018 VT 96, ¶ 21 (quotation omitted).

The court adequately explained its decision for splitting legal rights and responsibilities between mother and father in this case. It found that mother appeared to have exaggerated the events of September 2018 as part of an effort to exclude father from daughter's life, and that this pattern had continued, with mother refusing to communicate with father or give him a reasonable opportunity to participate in medical and mental health decisions for daughter. The court shared father's concern that in seeking therapy for daughter, who was eighteen months old, mother may

have been pathologizing normal behavior or transferring her anxieties to daughter. The court found it was important for father to be involved in making medical and mental health choices for daughter, and that mother was unwilling to let him do so. Accordingly, it assigned father legal rights and responsibilities for these decisions to ensure that father would be a participant in daughter's medical care.

The court's explanation is supported by the record, which shows that father was willing and able to engage in medical decision-making but was prevented from doing so by mother. Father testified that he had repeatedly asked to be included in decisions about choosing and working with medical providers and to attend and receive information from appointments. He testified that mother refused to include him in those decisions despite his requests. She also refused to allow him to attend daughter's medical appointments unless it was during his visitation time, which was outside of normal office hours. Father was able to and did communicate directly with daughters' providers to obtain information. However, he wanted the ability to participate in choosing providers and making other decisions for daughter's care.

The record also supports the court's finding that father was concerned that mother was pathologizing normal behaviors. Mother testified that when daughter was four months old, she seemed agitated after she returned from father's care and would pull her hair and scratch herself. Mother raised these concerns with daughter's pediatrician, who referred her to a therapist whom daughter began seeing on a weekly basis. Father told mother that he did not agree that daughter needed to see a therapist. He agreed that daughter had some tactile issues. Mother had obtained a referral to an occupational therapist for those issues, which father felt was unnecessary because he had worked through them with daughter. He told daughter's pediatrician that he had concerns about mother pathologizing normal behaviors, and that he did not see any of the problems that mother had identified. Father also testified that he was "scared" that mother's anxieties about things going wrong could damage daughter mentally and emotionally.

As the court noted, it was unclear why daughter was receiving therapy. Mother testified that it was because daughter seemed agitated and was pulling at her hair and scratching herself. The therapist testified that mother had sought therapy for daughter because daughter was having some sleep difficulties and mother believed she had an unusually large reaction to sounds. She said mother also had concerns about the impact of the parties' highly conflicted divorce on daughter. Notably, the therapist did not testify that daughter had any particular issues other than that she was nonverbal. The therapist testified that she had begun meeting with daughter two or three months prior to the hearing, when daughter was fourteen or fifteen months old. The therapist testified that she helped mother use body cues to recognize daughter's needs and build a secure attachment. She also testified that mother and daughter appeared to be securely attached. She did not testify that daughter was exhibiting behaviors traceable to the parties' divorce or otherwise. The court found that there was no reason for daughter, who was eighteen months old, to know that her parents were having a difficult divorce, and it was possible that mother was transferring her own anxiety to daughter. Contrary to mother's argument, the family court did not find that there was no reason for daughter to be impacted by the divorce. Rather, the family court's point was that daughter did not need to know that her parents were fighting.

Mother argues that the court improperly treated father as an expert on mother's behaviors and daughter's therapeutic needs because he is a psychiatric nurse practitioner. The record does not support this claim. The family court expressly did not find that mother was, in fact, pathologizing daughter's behaviors or inaccurately attributing behaviors to father. Nor did it conclude whether daughter needed therapy. Rather, the court found that father had reasonable concerns about these matters and that because mother refused to allow him to participate in medical

decisions, it was necessary to give father—who, like mother, had medical training—the legal right to do so. The court’s decision was supported by the record and was not an abuse of discretion. See Shea, 167 Vt. at 501 (affirming order assigning father responsibility for medical care and school decisions where mother’s decisions seemed to reflect “personal whim” or “desire to be different or all-controlling,” and father was more likely to make sound decisions).

Mother also claims that the trial court erred in finding that father had been excluded from daughter’s life through no fault of his own, and in basing its assignment of legal rights and responsibilities in part on this finding. We see no error. The court found that mother had exaggerated the events that led to the temporary RFA, which led to father having no contact with daughter for some time. Then, on his attorney’s advice, father attempted to deescalate the situation by agreeing to a limited contact schedule that seemed to be the best deal he could make at the time. He chose not to litigate the issue of contact because he believed it would take months to reach a resolution. The court found that this initial exclusion had continued, with mother refusing to communicate or include father in important decisions about daughter’s care. These findings are supported by father’s testimony, which the court found to be credible. As the trier of fact, the family court has discretion to weigh the evidence and assess the credibility of witnesses, and it was free to believe husband’s version of events. Payrits v. Payrits, 171 Vt. 50, 54 (2000) (explaining that “credibility of the witnesses, the weight of the evidence, and its persuasive effect are questions for the trier of fact, and its determination must stand if supported by credible evidence”).

We disagree with mother’s claim that it was improper to consider the circumstances of the RFA petition in awarding parental rights and responsibilities. The presence or absence of abuse is one of the statutory factors that the court must consider when awarding custody. 15 V.S.A. § 665(b)(9). While “we do not want to stifle a parent from filing an RFA petition,” we have observed that “the possible stifling effect of the custody decision is limited” where, as here, the family court finds that there was no evidence of abuse and the RFA petition was part of mother’s ongoing efforts to exclude father from daughter’s life. Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 35, 193 Vt. 490. We therefore decline to disturb the court’s decision regarding legal rights and responsibilities relating to daughter’s medical treatment.

Mother’s other main argument on appeal is that the court erred in allocating funds from the sale of the marital home to father because mother was entitled to receive the first \$52,000 in equity under the joint ownership agreement signed by the parties prior to their marriage. Mother argues that the language of the agreement is ambiguous and that it should be interpreted, with the aid of parol evidence, to survive the marriage.

The proper interpretation of a contract is a question of law that we review without deference to the lower court. B & C Mgmt. Vt., Inc. v. John, 2015 VT 61, ¶ 11, 199 Vt. 202. We must assess the meaning of particular contract provisions “in light of the circumstances surrounding the making of the agreement while viewing the agreement in its entirety.” In re Estate of Price, 2006 VT 62, ¶ 10, 180 Vt. 548 (mem.) (quotation omitted). “If a contract, though inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear. Likewise, the fact that a dispute has arisen as to proper interpretation does not automatically render the language ambiguous.” Isbrandtsen v. N. Branch Corp., 150 Vt. 575, 580-81 (1988) (citation and quotation omitted). “If the court determines that a writing is not ambiguous, the plain meaning of the language controls without resort to rules of construction or extrinsic evidence.” Main St. Landing, LLC v. Lake St. Ass’n, Inc., 2006 VT 13, ¶ 7, 179 Vt. 583 (mem.).

Mother and father signed the joint ownership agreement when they purchased the marital home in June 201, over a year before they married. The agreement provided that the parties would hold the property as joint tenants with right of survivorship, and that each would be responsible for fifty percent of the mortgage, taxes, and other costs. Paragraph 4 of the agreement states that “[i]n the event of separation of the two parties prior to their marriage, the down payment in the sum of \$52,000.00 used in connection with the purchase of said property will be owed to [mother].” Paragraph 5 states that “[t]he parties anticipate that if the parties were to separate, then the property would be sold,” with the proceeds to be used first to pay off the mortgage and other costs, and “the balance being paid to [mother] up to the amount of \$52,000, with any additional net proceeds being split evenly between the parties.” Paragraph 6 states that if the proceeds are inadequate to pay mother \$52,000, father will owe mother half of the unpaid portion of the \$52,000.

Mother argues that paragraph 5 is ambiguous because it does not contain the words “before marriage” after “separate,” and therefore arguably applies if the parties separated after marriage. We agree with the family court that paragraph 5 is not ambiguous when viewed in the context of the contract as a whole and the circumstances existing when the parties entered into the agreement. Paragraph 4 states that if the parties separated prior to marriage, mother would be owed the \$52,000 that her family contributed to the purchase of the house. Paragraph 5 provides a procedure for providing that money to mother through sale of the house. Paragraph 6 provides that if the proceeds from the sale amounted to less than \$52,000, father would owe mother half of the difference. Viewed together, paragraphs 4, 5, and 6 plainly apply only if the parties separated prior to marriage. This makes sense because the circumstances of the agreement show that it was an effort to protect mother’s family’s investment if the relationship ended prior to marriage, in which case the laws governing property division upon dissolution of a marriage would not apply. The court therefore did not err in concluding that the joint ownership agreement did not govern the distribution of the proceeds from the property.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice