*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. 2020-146

MARCH TERM, 2021

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| Jennifer Dasler v. Timothy Dasler* | } | APPEALED FROM: |
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| | } | Superior Court, Windsor Unit, |
| | } | Family Division |
| | } | |
| | } | DOCKET NO. 74-6-17 Oedm |
| | | Trial Judge: Michael J. Harris |

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

Husband appeals the family court's denial of his Rule 60(b) motion to set aside the final divorce order in this case. We affirm.

The parties were married for five years and have one minor child. They separated in May 2017 following several incidents that led wife to obtain a relief-from-abuse order against husband and resulted in husband being charged with domestic assault. The family division entered a final divorce order in August 2018 in which it awarded wife primary legal and physical parental rights and responsibilities, established a fifty-fifty parent-child contact schedule, and ordered wife to pay $300 in monthly maintenance to husband for two years. Husband appealed that decision to this Court, and we affirmed in June 2019. Dasler v. Dasler, No. 2018-301, 2019 WL 2359608 (Vt. June 3, 2019), cert. denied, 140 S. Ct. 673 (2019).

In January 2020, husband filed a motion seeking to vacate the divorce order pursuant to Vermont Rule of Civil Procedure 60(b). He argued that wife had perpetrated a fraud upon the court by exaggerating and misrepresenting the facts of the incidents that led to the relief-from-abuse order and his assault charge, causing the court to give temporary custody of the parties' child to wife and resulting in her ultimately being granted primary custody. He claimed that his pending criminal charge prevented him from presenting evidence during the divorce proceeding that would contradict her allegations of abuse. He argued that because he had recently resolved his criminal case by pleading no contest to a charge of disturbing the peace, he could now provide evidence that he was unable to present during the divorce hearing, which would show that wife's accusations of assault and abuse were unfounded. He sought to introduce evidence of prior "bad acts" by wife. Husband further argued that he could provide evidence that would disprove the accusations wife made in connection with her July 2017 motion to suspend visitation and other motions she filed during the divorce proceeding.

The family court denied husband's motion. The court concluded that because the motion was based on fraud or other misconduct by an adverse party as well as evidence that husband had not previously presented to the court, it was untimely, because it was made more than a year after the final divorce order was entered. The court held that husband's appeal of the divorce order did

not toll the running of the Rule 60 limitation period because the appeal did not make substantive changes to the order by remand. The court further concluded that the fraud claimed by husband did not amount to a fraud upon the court justifying relief outside the one-year time limit. Husband moved for reconsideration. While that motion was pending, husband filed this appeal. The court subsequently denied the motion for reconsideration.

On appeal, husband argues that the court should have granted his motion to set aside the divorce order because wife's alleged misconduct constituted a fraud upon the court. Alternatively, he claims that he was entitled to relief under Rule 60(b)(4) because the judgment was void. He also argues that the court should not have referred the motion to the judge who presided over the divorce proceeding because that judge was biased against him.

Under Rule 60(b), the court may, upon motion, relieve a party from a final order for six enumerated reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or otherwise rendered unenforceable; or (6) "any other reason justifying relief from operation of the judgment." V.R.C.P. 60(b); see V.R.F.P. 4.0(a)(2) (listing rules of civil procedure that are applicable to divorce proceedings in family court). A Rule 60(b) motion based on reasons (1), (2), and (3) must be filed "not more than one year after the judgment, order, or proceeding was entered or taken." V.R.C.P. 60(b). "A motion for relief from judgment under V.R.C.P. 60 is addressed to the discretion of the trial court, and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." Waitt v. Waitt, 137 Vt. 374, 375 (1979) (per curiam).

Husband's motion was based on allegations of fraud or misconduct by wife in the divorce proceeding as well as evidence that he did not present at the divorce hearing. The family court therefore properly determined that it was barred by the one-year time limit set forth in Rule 60(b) for motions based on reasons (1)-(3). See Olio v. Olio, 2012 VT 44, ¶ 16, 192 Vt. 41 (affirming family court's denial of wife's motion to set aside divorce judgment based on husband's misrepresentations about his assets because motion was filed more than one year after judgment); Brown v. Tatro, 136 Vt. 409, 411 (1978) (explaining that "[t]he one year bar is an absolute one where it applies"). The court also appropriately declined to grant relief under Rule 60(b)(6) because that rule only permits relief "when a ground justifying relief is not encompassed within any of the first five classes of the rule." Alexander v. Dupuis, 140 Vt. 122, 124 (1981); see Pierce v. Vaughan, 2012 VT 5, ¶ 10, 191 Vt. 607 (mem.) ("If clause (6) were permitted to encompass grounds for relief that fall under clause (1), (2), or (3), then it would supply a backdoor to circumvent the one-year time limit."). Husband does not challenge these conclusions on appeal.

Rather, husband argues that wife's alleged misrepresentations constituted a "fraud upon the court" that would permit the court to grant relief outside the one-year time limit. See Rule 60(b) (stating that rule does not limit power of court to set aside judgment for fraud upon the court). A finding of fraud upon the court is "reserved for only the most egregious misconduct evidencing . . . an unconscionable and calculated design to improperly influence the court," and "must be supported by clear, unequivocal and convincing evidence." Godin v. Godin, 168 Vt. 514, 519 (1998) (quotation omitted). We have emphasized that "the fraud-on-the-court doctrine must be narrowly applied, or it would become indistinguishable from ordinary fraud, and undermine the important policy favoring finality of judgments." Id. at 518. In Godin, we concluded that wife's failure to tell her husband over several years and during the divorce proceeding that the child he had raised as his own was not his biological child, "did not approach the kind of calculated, egregious 'defiling' of the adjudicative process that has traditionally

characterized fraud on the court." Id. at 520. Similarly, in Olio v. Olio, we held that a husband's deliberate effort to hide assets from wife and the court during the divorce proceeding "falls on the 'ordinary fraud' side of the boundary and does not qualify for the narrow exception we recognized in Godin." Olio, 2012 VT 44, ¶ 20. As in Godin and Olio, husband's allegations that wife lied about or exaggerated abuse by husband in an attempt to influence the custody proceeding does not amount to the type of fraud that attempts to "defile the court itself." Godin, 168 Vt. at 519. Rather, wife's alleged misconduct falls squarely within the category of misrepresentation by a party, and as the trial court found, is therefore time-barred.

Husband argues in the alternative that the court should have set aside the divorce order because it is void. See V.R.C.P. 60(b)(4). He claims that he was forced to choose between defending himself against wife's allegations in the divorce proceeding or retaining his right to remain silent in the criminal proceeding, which deprived him of a full and fair opportunity to be heard, thereby rendering the judgment void. "[A] judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." In re C.L.S., 2020 VT 1, ¶ 17 (quotation omitted). Husband does not allege that the court lacked jurisdiction over the divorce proceeding or the parties, and the record does not support his claim that the court acted inconsistently with due process. "[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Brock v. Roadway Express, Inc., 481 U.S. 252, 261 (1987) (quotation omitted). Husband was provided notice of the various hearings in the divorce proceeding, and he appeared and participated with the assistance of counsel. As husband admits in his brief, he could have requested a delay in the family proceeding while he resolved his criminal case or sought immunity to prevent the State from using his testimony in the family proceeding against him in the criminal case. See Groves v. Green, 2016 VT 106, ¶¶ 26-27, 203 Vt. 168 (explaining that court could use procedures outlined in State v. Begins, 147 Vt. 295 (1986), where parent's right against self-incrimination in criminal case is in tension with right to present evidence in custody proceeding). He did neither because he believed a delay would benefit wife. He has therefore failed to show that the court acted in a manner inconsistent with due process such that the divorce judgment is void.

Husband also appears to argue that 15 V.S.A. § 665 violates due process because it authorizes the court to make findings regarding parental abuse, and to issue custody decisions, based on a preponderance of the evidence. "To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994). Because husband failed to properly preserve this argument by raising it below, this Court will not address it for the first time on appeal. Bull v. Pinkham Eng'g Assocs. Inc., 170 Vt. 450, 459 (2000).

Finally, husband argues that it was error for the family court to refer his Rule 60 motion to the judge who heard the divorce proceeding over husband's objection, because the judge was plainly biased against him. Husband did not move for recusal of the judge, and he has not demonstrated that the judge was biased or prejudiced against him. See State v. Davis, 165 Vt. 240, 249 (1996) (explaining that judge's participation in earlier proceedings regarding same case does not ordinarily justify recusal; "[w]e presume the integrity and honesty of judges, and the moving party has the burden to show otherwise"). The judge's statement that husband's appeals to this Court and the U.S. Supreme Court as well as an action he filed in New Hampshire "indicate the lengths [husband] may pursue to avoid the finality of the 2018 final order" does not create a reasonable ground to question the impartiality of the court. We disagree with husband's contention that recusal is required whenever a party complains about a judge. See Ball v. Melsur Corp., 161 Vt. 35, 39 (1993) ("We decline to hold that a per se lack of impartiality, mandating recusal, arises

whenever a judge is the subject of a judicial conduct complaint by an attorney."), overruled on other grounds by Demag v. Better Power Equip., Inc., 2014 VT 78, 197 Vt. 176. We therefore see no reason to disturb the decision below.

Affirmed.

BY THE COURT:

_______________________________________
Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice